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UNITED STATES REPORTS

VOLUME 206

CASES ADJUDGED

IN

THE SUPREME COURT

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AT

OCTOBER TERM, 1906

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1907

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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.

JUSTICES

OF THE

SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
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.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1906.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* NORTH CAROLINA CORPORATION COMMISSION.

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

No. 15. Argued February 28 and March 1, 1907.—Decided April 29, 1907.

Railroad companies from the public nature of the business by them carried on, and the interest which the public have in their operation are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end.

The public power to regulate railroads and the private right of ownership of such property coexist and do not the one destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

An order of a state railroad commission requiring a railroad company to so arrange its schedule as to furnish transportation between two points so as to make connections with through trains, *held*, under the circumstances of this case, not to be so arbitrary or unreasonable as to transcend the limits of regulation and to be in effect either a denial of due process of law or a deprivation of the equal protection of the laws, or a taking of property without compensation.

Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the powers delegated to the commission is not a Federal question.

It is within the power of a state railroad commission to compel a railroad company to make reasonable connections with other roads so as to pro-

PROPERTY OF UNITED STATES SUPREME COURT

mote the convenience of the traveling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company.

While the enforcement by a State of a general scheme of maximum rates so unreasonably low as to be unjust and unreasonable may be confiscation and amount to taking property without due process of law, the State has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss. *Smyth* v. *Ames*, 169 U. S. 526, distinguished.

THE facts are stated in the opinion.

Mr. John G. Johnson, with whom *Mr. Warren G. Elliott* and *Mr. Frank P. Prichard* were on the brief, for plaintiff in error:

A State cannot require a railroad company to run a special daily train at a loss for the convenience of a limited number of passengers who wish to make close connection with a particular train on a crossing road, it appearing that it is already running sufficient trains to accommodate the general travel on its lines and has arranged its schedules to best accommodate general travel and connect with all connecting roads, and that its failure to connect with such particular train was due to a change of schedule on the crossing road to which it was impracticable to conform by any change in the schedule of the train which had made the connection under the original schedule.

As to the power of the State to regulate railroads and the constitutional limitations upon the exercise of such power and as to what are unreasonable regulations, see *Wisconsin, &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Smyth* v. *Ames*, 169 U. S. 466–526; *St. Louis & S. F. Ry.* v. *Gill*, 156 U. S. 649; *Chicago, M. & St. P. Ry.* v. *Tompkins*, 176 U. S. 167.

A statute which in effect applied to one corporation only and not to others in like business was unreasonable. Every partial or private law which directly proposes to destroy or affect individual rights or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Lake Shore & Mich. Southern* v. *Smith*, 173 U. S. 684.

In the case at bar the order complained of was not an exercise of the police power of the State. It was not made to protect the health, the morals, or the safety, of the citizens. It was the exercise of a governmental power to regulate, for public convenience, the facilities afforded to the public by a corporation. See *Minneapolis & St. L. R. R.* v. *Minnesota*, 186 U. S. 257. An order which is reasonable, when necessary for the protection of the lives or health of the public, may be very unreasonable if made simply for public convenience.

The order in the present case was a very unusual one.

None of the authorities cited by the court, or counsel in the court below, show any attempt by a state legislature, or a commission, to increase the number of trains on a railroad. *People* v. *St. L., A. & T. H. R. R. Co.*, 176 Illinois, 512, distinguished, and see *Ohio & Miss. Ry.* v. *People*, 120 Illinois, 200.

No case has held that, in the absence of statutory requirements, a railway company may be compelled by mandamus to increase the number of trains on its road or to run daily a particular number of trains, over its road, and there is no common law authority for making such an order.

As to general regulations prescribing a minimum number of daily trains, see *Lake Shore & Mich. South.* v. *Ohio*, 173 U. S. 285.

The cases show no attempted exercise by any State, or commission, of a power to order a particular railroad to put on an additional train between certain points for the sake of affording additional convenience of transportation. Such a power would partake more of the nature of an operation of such particular road than of a general regulation of all roads for the public convenience.

In this case the order compelled the railroad to run an additional train at a pecuniary loss.

This is the appropriation of property without compensation.

There can be no just distinction between taking possession of and using a company's property at its expense and forcing the company to use the property for the benefit of the public at a loss to itself. *Chicago, Mil. &c. Ry.* v. *Tompkins*, 176 U. S. 167–173.

Conceding that it is within the power of the legislature to compel this particular railroad to run this particular additional train over its road, to meet some special public need, it is certainly not within the power of the legislature to compel the railroad to do it for nothing, much less to do it at a loss.

Even if the legislature had the power to direct the running of a special additional train at a loss in order that a comparatively few passengers from a branch line might make convenient connection with a particular train over another road, the order itself was under the circumstances so unreasonable that it must be considered an unwarrantable interference with the property rights of the Atlantic Coast Line Railroad, which was running a sufficient number of trains for all necessary purposes.

There could not have been a more unreasonable and unjustifiable interference with its affairs. It is no answer to this to say that the jury found it was "reasonable, and proper that for the convenience of the traveling public" the connection should be made. The other facts found by the jury, coupled with the omission of either finding or testimony justifying the order, make the question one for the court. The finding resulted from a failure properly to instruct the jury as to the duty and rights of the appellant. It is for the court to say what is the nature of the convenience which justifies such an order and how far, for such convenience, the legislature or commission can interfere with the reasonable exercise by the railroad of its right to operate its own road.

Mr. Robert D. Gilmer, Attorney General of the State of North Carolina, and *Mr. F. A. Woodard*, for defendant in error:

The North Carolina Corporation Commission found as a fact that its order could be carried into effect by the extension of

either the Spring Hope or the Plymouth run, and this finding was affirmed by the Supreme Court of North Carolina.

The highest court of the State having therefore decided against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to maintain the judgment, the judgment of the Supreme Court of North Carolina should be affirmed or the writ of error dismissed without considering the Federal question, assuming that one is presented in the record. *Kennebec & P. R. Co.* v. *Portland & R. R. Co.*, 14 Wall. 23; *Hammond* v. *Johnson*, 142 U. S. 73; *Northern P. R. Co.* v. *Ellis*, 144 U. S. 458; *Delaware City &c.* v. *Reybold*, 142 U. S. 636; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; *Henderson Bridge Co.* v. *Henderson*, 141 U. S. 679; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556; *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Murdock* v. *Memphis*, 20 Wall. 590; *McLaughlin* v. *Fowler*, 154 U. S. 663.

The presumption of law is always in favor of the maintenance of the order of a railroad commission, and the same will not be set aside unless flagrantly in violation of the rights of the railroad company. *Dow* v. *Beidleman*, 125 U. S. 680; *Reagan* v. *Trust Co.*, 154 U. S. 362, 395; *Railroad Co.* v. *Tompkins*, 176 U. S. 167, 173; Brannon on the Fourteenth Amendment, 197.

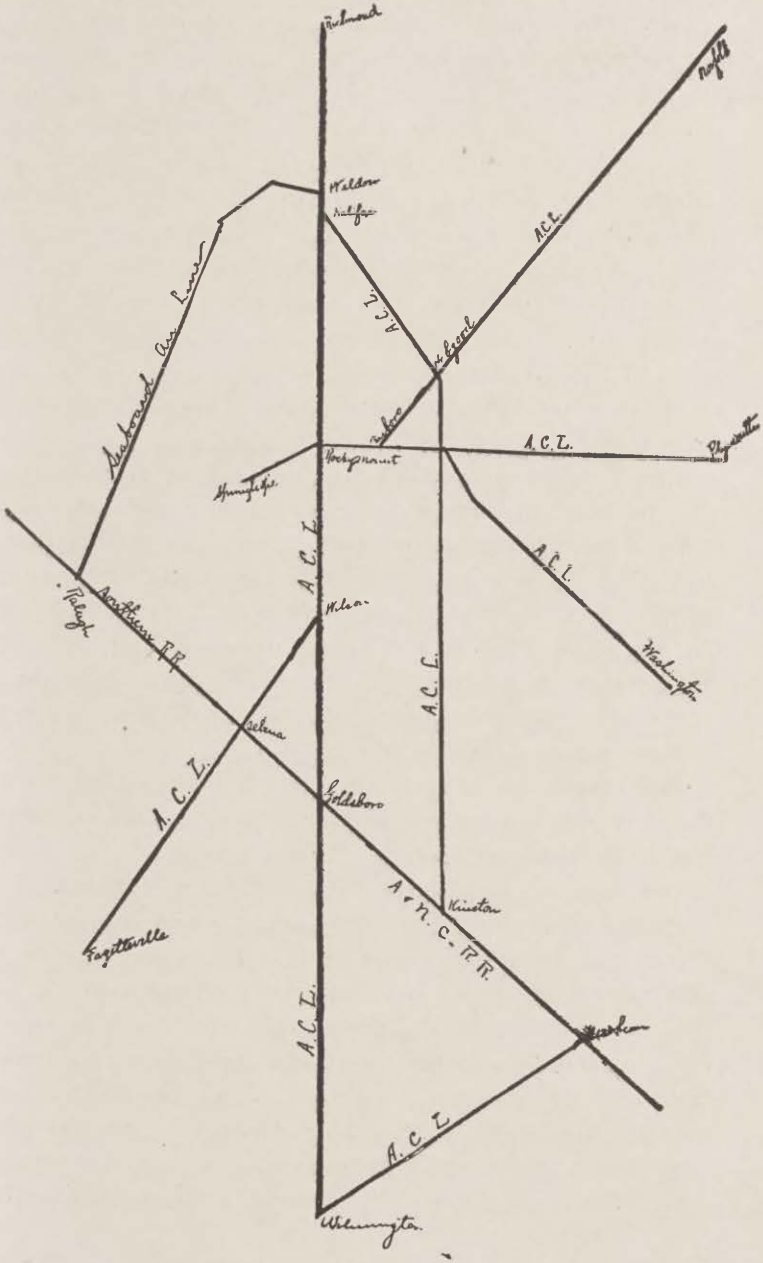
The public safety, interest and convenience are clearly embraced within the legislative power of the State, and the exercise of this power does not deprive the plaintiff in error of its property without due process of law under the constitution of North Carolina or of the United States. *Brass* v. *North Dakota*, 153 U. S. 391; *Budd* v. *New York*, 143 U. S. 517; *Munn* v. *Illinois*, 94 U. S. 113; *Jacobson* v. *Railroad Co.*, 71 Minnesota, 519; *Smyth* v. *Ames*, 169 U. S. 466; *Lake Shore &c. Railway Co.* v. *Smith*, 173 U. S. 684; *Gladson* v. *Minnesota*, 166 U. S. 427; *Railroad Co.* v. *Gibbes*, 142 U. S. 386; *Wisconsin &c. Railroad Co.* v. *Jacobson*, 179 U. S. 287; *Minn. & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53; *Railroad* v. *Railroad Commission*, 109 Louisiana, 247.

The doctrine that if a railroad as an entirety does a business which is compensatory it has no legal right to complain that an order of a railroad commission may deprive it of revenue over a portion of its line, has been affirmed by the highest courts of several States. Among these cases the following are noted: *Railway Co.* v. *Smith*, 60 Arkansas, 221; *Matter of Auburn & W. R. R. Co.*, 37 App. Div. 162; *S. C.* 55 N. Y. Supp. 895; *Morgan's L. & T. R. & S. S. Co.* v. *Railroad Commission*, 109 Louisiana, 247; *Pensacola &c. R. R. Co.* v. *State of Florida*, 25 Florida, 310; *People* v. *St. L., A. & T. H. R. R. Co.*, 176 Illinois, 512; *Union Traction Co.* v. *Chicago*, 199 Illinois, 579.

Mr. Justice White delivered the opinion of the court.

Did the order of the North Carolina Corporation Commission, the enforcement of which was directed by the court below, invade constitutional rights of the Atlantic Coast Line Railroad Company, hereafter spoken of as the Coast Line, is the question which arises on this record for decision. A sketch showing the situation of the railway tracks at and relating to the place with which the controversy is concerned was annexed by the court below to its opinion, and that sketch is reproduced to aid in clearness of statement.

For years prior to October, 1903, the Coast Line operated daily an interstate train from Richmond, Virginia, through North Carolina to Florida. This train, known as No. 39, moved over the main track from Richmond to Wilson, North Carolina, thence by the track designated as the cut-off via Selma and Fayetteville to Florida. The train (No. 39) was scheduled to reach Selma at 2:50 in the afternoon and to leave at 2:55. The Southern Railway owned or controlled a road in North Carolina which crossed the Coast Line main track at Goldsboro and the cut-off track at Selma. On this road there was operated daily a train from Goldsboro via Raleigh to Greensboro, North Carolina, at which point connection was made with the main track of the Southern road. This Southern


Richmond
Weldon
Halifax
A. C. L.
Roanoke Gas Lines
Rocky Mount
A. C. L.
Raleigh
Southern R. R.
A. C. L.
Selma
A. C. L.
Goldsboro
A. C. L.
Kinston
A. & N. C. R. R.
A. C. L.
A. C. L.
Wilmington

train, known as No. 135, left Goldsboro at 2:05 in the afternoon and Selma at 3 o'clock. Thus at Selma it connected with No. 39 of the Coast Line. The Coast Line also operated in North Carolina the branch lines shown on the sketch, which radiated easterly, and served a considerable area of territory. These branches connected with the main track at Rocky Mount, a station forty-two miles nearer Richmond than Selma. At Rocky Mount there also was a connection with a Coast Line road running from Pinners Point, near Norfolk, Virginia. Over this road also the Coast Line operated a train, which left Pinners Point in the morning and connected with the Coast Line train No 39 at Rocky Mount. The departure of the train in question from Pinners Point was so arranged as to enable boats timed to arrive at Norfolk during the night or early morning to make, by ferry to Pinners Point, a morning connection with the train. On the third of October, 1903, the Southern Railway notified the North Carolina Corporation Commission of a contemplated change of schedule on its line from Goldsboro via Raleigh to Greensboro. By the change, which was to go into effect on the 11th of October, Southern train No. 135, instead of leaving Goldsboro at 2:05, would leave at 1:35 in the afternoon, and would leave Selma at 2:25 instead of 3. As a result, the connection at Selma between the Coast Line train No 39 and the Southern train would be broken. The North Carolina Corporation Commission, by letter, on the sixth of October, called the attention of the general manager of the Coast Line to the contemplated change of time by the Southern, and requested that line to advance the time of No. 39 to enable that train to reach Selma at 2:25, thus continuing the connection with the Southern. On the twelfth of October the superintendent of transportation of the Coast Line answered. He stated that the schedule of train No. 39 from Richmond to Selma was already so fast that it was very difficult to make the connection at Selma, and that it would be impossible to advance the time of arrival at Selma as requested. It was besides represented that to do so would require a breaking of

the connection made with the Norfolk train at Rocky Mount and would disarrange the running time of the train south of Selma and disturb connections which that train made with other roads south of that point. However, it was pointed out that as train No. 39 did not originate at Richmond, but was a through train made up at New York, carried from thence to Washington by the Pennsylvania and from Washington to Richmond by the Richmond, Fredericksburg and Potomac, that negotiations would be put on foot with those roads with an endeavor to secure an acceleration of the time of the departure of the train from New York and Washington, so as thereby to enable an earlier departure from Richmond. On the eleventh of October the change of time became operative and the connection at Selma was broken.

A complaint having been lodged with the corporation commission because of the inconvenience to the public thereby occasioned, both the Southern and Coast Line were notified that a hearing would be had concerning the subject on the 29th. On that day the railways, through their officials, appeared. The Southern represented that its change in time was because it was absolutely dangerous to operate its train at the speed required by the previous schedule, and indeed that the lengthened schedule was yet faster than desired. The Coast Line reiterated the impossibility of changing the schedule of train No. 39 from Richmond to Selma unless there was a change between New York and Richmond. It stated that there was to be a meeting in Washington on November 6 of the representatives of various roads in the South, and that it hoped, as the result of that meeting, to so arrange that No. 39 would be scheduled for delivery at Richmond at an earlier hour, thus enabling its time to Selma to be advanced. The commission continued the subject for further consideration. On November 9 the superintendent of the Coast Line advised the corporation commission that at the meeting in Washington it had been impossible to obtain an earlier departure of the train from New York and Washington, but that the Pennsyl-

vania still had the matter under consideration. Finally, in answer to urgent requests from the commission, by a letter of November 13 and telegram of November 14 the Coast Line informed the corporation commission that it regretted it could make no change in its schedule of train No. 39 because the Pennsylvania Railroad had definitively expressed its inability to make any change in the hour of departure of the train from New York, as to do so would be incompatible with the duties which the Pennsylvania Railroad owed to the public, to other roads and to its contracts concerning the transportation of the mail and express matter. Thereupon the corporation commission entered the following order:

"Whereas, the convenience of the traveling public requires that close connection be made between the passenger trains on the Atlantic Coast Line Railroad and the Southern Railway at Selma daily in the afternoon of each day;

"And whereas, it appears that such close connection is practicable:

"It is ordered that the Atlantic Coast Line Railroad arrange its schedule so that the train will arrive at Selma at 2:25 P. M. each day instead of 2:50 P. M., as the schedule now stands.

"It is further ordered that if the Atlantic Coast Line trains have passengers en route for the Southern Railway, and are delayed, notice shall be given to the Southern Railway, and that the Southern Railway shall wait fifteen minutes for such delayed trains upon receipt of such notice.

"This order shall take effect December 20, 1903."

The Southern, on receipt of the order, expressed its intention to comply. The Coast Line addressed to the commission a letter protesting against the order and requesting its withdrawal and asking for a further hearing. The letter making this request reviewed the previous correspondence. It pointed out that the connection at Selma had been a very old one and that its breaking was solely caused by the act of the Southern in changing the time of its train. It declared that the Coast Line at once, on hearing of the intention of the Southern to make

the change, urgently requested that road not to do so. On this subject the letter said:

"On October 6th, I further advised the Southern Railway that if their train was scheduled to leave Selma at two twenty-five P. M. this would break the connection with our No. 39, and stated to them that the connection was a most important one, being the principal outlet for passengers en route from eastern Carolina to Raleigh and other points on their line, and that we hoped that they could see their way clear not to disturb the connection, as it was impossible for us to get No. 39 to Selma at an earlier hour than the present schedule, owing to the inability of northern connections to deliver the train to us at Richmond any sooner."

Proceeding to point out the failure of the negotiations with the Pennsylvania and recapitulating the previous statements concerning the rapidity of the schedule of No. 39 between Richmond and Selma, the exacting nature of its work and connections, the absolute impossibility of making it faster was insisted upon. Indeed, there was annexed to the letter a report of the time of No. 39 at Selma for a period of nearly five months, showing that the train had rarely made its connection at Selma.

The commission, after a hearing afforded officials of the Coast Line, suspended its prior order and fixed a day for a rehearing of the whole subject, both roads being notified to that effect. Upon the new hearing the matter was taken under advisement. On January 16 the commission stated the facts and its conclusions deduced therefrom. As to the operation of the two trains, their connection at Selma, the importance of this connection to the public and the breaking of the connection by the change of schedule, the facts found were identical with those above previously recited. In addition it was found that the Coast Line train No. 39 from Richmond to Selma was not only a through train, but also operated as a local train between Richmond and Selma, making all local stops and daily handling in consequence one or two extra express cars. It was found in accordance with the official time sheets of the running of the

train that it had arrived at Selma on schedule time only twice between August 1, 1903, and January 11, 1904. Considering the branch lines as marked on the sketch and the trains operated thereon and connecting with the main track at Rocky Mount it was found:

a. That a train was operated from Plymouth to Rocky Mount which left in the morning at 7:30 and arrived at Rocky Mount at 10:35, where it remained until 3:55 in the afternoon, when it returned to Plymouth.

b. That the road also operated a train from Spring Hope on the westerly side of the main track to Rocky Mount, leaving Spring Hope at 11:20 in the morning, arriving at Rocky Mount at 12:10 in the afternoon and leaving there at 4, arriving at Spring Hope at 4:45. The commission concluded as follows:

"Assuming that the statements made by the Atlantic Coast Line Railroad Company are true—that it was for the past five months impossible for them to bring No. 39 to Selma by schedule time, to wit, 2:50 P. M., more than twice, and that this train was more than ten minutes late every day except twenty-four —we must conclude that it is impracticable to require them to make a faster schedule and place this train at Selma at 2:25 P. M. instead of 2:50 P. M.; and therefore this much of the former order is revoked and annulled; but the commission is of the opinion that it is practicable and that the convenience of the traveling public requires that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 P. M. and by or before 2:25 P. M. each day; that this can be done by extending the run of the Plymouth train to Selma instead of having it lie over at Rocky Mount as now, or by extending the run of the Spring Hope train to Selma instead of having it lie over at Rocky Mount as now. The distance from Plymouth to Rocky Mount is sixty-nine miles, and from Spring Hope to Rocky Mount is nineteen miles, and from Rocky Mount to Selma forty-two miles; or by providing a separate train for the service.

"And it is therefore ordered that the Atlantic Coast Line

Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 P. M. and by or before 2:25 P. M. each day.

"It is further ordered that the Southern Railway hold its train No. 135 at Selma fifteen minutes if for any reason the Atlantic Coast Line train connecting at that point is delayed.

"It is further ordered that this order take effect on and after the 26th day of January, 1904."

Before the date fixed for the taking effect of this order the Coast Line filed five grounds of exception to its validity and prayed another hearing. The first asserted the impossibility of making the connection from Rocky Mount to Selma between the hours fixed by the commission by an extension of the run of either of the branch trains referred to in the order which the commission had rendered. The reasons principally relied upon to sustain the first exception were the inadequate character of the motive power of the branch road trains for operation on the main track, the speed at which the train would be obliged to travel and the congested condition of the business on the main track during the hours when the train from either of the branch roads would be obliged to use the main track for the purpose of making the connection. The second exception denied the possibility of making the connection by a special train from Rocky Mount to Selma within the time indicated, and besides asserted that such a train could not be operated without an actual loss. The power of the commission to compel the performance of "services without compensation to the company" was denied, and it was alleged that a taking of property without due process of law in violation of the state constitution and the Fourteenth Amendment to the Constitution of the United States would result from enforcing the order. The third exception denied the power of the commission under the state law to order the company to put on an extra train between Rocky Mount and Selma, and the fourth in effect reiterated the same ground. The fifth exception challenged the validity of the order as unreasonable, unjust and arbitrary and

beyond the power of the commission to render, because ample and sufficient accommodations for passengers desiring to connect at Selma with the Southern road were afforded by the Coast Line entirely irrespective of the connection which had formerly existed between train No. 39 of the Coast Line and train No. 135 of the Southern. The trains thus relied upon as showing a wholly adequate service for the purposes stated were eight in number, and, as enumerated in the exception, are stated in the margin.[1]

After a new hearing at which further testimony was taken, the corporation commission in substance adhered to its former view and reiterated its previous ruling. In its findings of fact it pointed out the importance of the connection at Selma, the admissions to that effect made by the railroad and the fact that

[1] 1. The train from Rocky Mount, southbound, in the early morning, makes a close connection at Goldsboro at 6:50 o'clock with the Southern for Raleigh and all points West.

2. The trains from Norfolk and Richmond make close connection at Goldsboro and Selma with the night train on the Southern for Raleigh and all points West.

3. The train from Weldon to Kinston makes close connection at Kinston with the Atlantic and North Carolina train for Goldsboro, which train in turn makes close connection with the Southern at Goldsboro at 9:40 P. M. for Raleigh and all points West.

4. The train No. 39, from Washington to Jacksonville, is due at Selma at 2:50 P. M., and the accommodation train No. 183, on the Southern, from Selma to Releigh and all points West, is scheduled to leave Selma at 3:25 P. M.

5. Train No. —, from Jacksonville to Washington, is due to arrive at Selma at 2:10 o'clock, and makes close connection there with the Southern, which leaves Selma at 2:25 P. M. for Raleigh and all points West.

6. Two trains leave Wilmington for the North, the first at 9:30 A. M., No. 48, and the other, No. 42, at 6:50 P. M. Both of these trains make close connections at Goldsboro with the Southern trains for Raleigh and all points West.

7. No. 34, leaving Smithfield at 7:00 A. M., makes close connection at Selma with the Southern going West for Raleigh and all points beyond, and the same train makes close connection at Weldon with the Seaboard train for Raleigh, and for Seaboard points South and West.

8. No. 102 leaves Goldsboro for Norfolk at 7:30 A. M., and makes close connection at Hobgood with No. 58, the train from Kinston to Weldon, and there with the Seaboard for Raleigh and points West.

that connection afforded the principal means of travel between the eastern and western parts of the State. The grounds relied upon in the exception to show that an extension of the run of either of the local trains from Rocky Mount to Selma as previously ordered was impracticable, were reviewed and found to be without foundation. The trains which it was alleged afforded adequate means for connection between the western and eastern part of the State, irrespective of the connection formerly existing at Selma by train No. 39, were analyzed, and as a matter of fact the service afforded by these trains was held to be wholly inadequate. Thus, for example, whilst it was found that the first train relied upon—the one from Rocky Mount to Goldsboro, arriving there at 6:50 in the morning—made a connection with a Southern Railway train moving from Selma via Raleigh to Greensboro, it was pointed out that it was inadequate because the train had no connection at its point of departure, Rocky Mount, with any incoming train over the large area covered by the branch roads, which area, it was stated, embraced a population of four hundred thousand people. Hence it was found that to use that train any person in the territory covered by the branch roads would be obliged to leave home the day before and pass the night at Rocky Mount. The fourth train relied upon, that is, a connection made by Coast Line No. 39 at Selma under the new schedule with a later train over the Southern road for Raleigh, was found to be but a connection with a Southern freight train, having no passenger car, but only a caboose. The trains under the second, third and sixth headings, connecting at Goldsboro or Selma in the afternoon and night, were found to make a connection only with a slow train over the Southern road, doing a mixed passenger and freight business, and which made no adequate connection beyond Raleigh to the west. The objection to suggested route No. 8, that is, via Weldon, and thence by the Seaboard Air Line to Raleigh and points further west, was decided to be that it was a longer route, more costly, and uncertain as to connections. The remaining suggested

routes were in effect disposed of upon similar considerations to those above adverted to.

Considering the operation of an extra train from Rocky Mount to Selma or the extension of the run of one of the branch trains as directed in the previous order, and the objection that a loss would be entailed in the operating expenses for such train or trains, the commission treated that fact as immaterial, because it found as a matter of fact that the total receipts of the Coast Line in North Carolina, taken from business in that State, were sufficiently remunerative, and therefore that even if the train was operated at a loss, as that loss would not reduce the total earnings below what was an adequate remuneration for the whole business, the order would not take the property of the road without due process of law. Summing up its conclusions, the commission said:

"The commission is of the opinion that the facilities given heretofore by the Atlantic Coast Line Company to the traveling public should not be lessened; that the connection furnished passengers from the Washington branch, the Norfolk and Carolina branch, the Plymouth branch and the Nashville branch with No. 135, Southern Railway passenger train at Selma, and also for all points between Rocky Mount and Selma, for nearly ten years, should be restored; that if this cannot be done by the Atlantic Coast Line train No. 39, as formerly, on account of this train being heavier, containing usually one or more extra express cars, and in all usually ten or more cars, and on account of increase in business between Richmond and Selma, which necessitates longer stops, then other facilities should be furnished by the Atlantic Coast Line Company; that this connection, which was the principal outlet for passengers from eastern Carolina to Selma and other Southern Railway points for the last ten years, instead of being abandoned should be made permanent and certain, and that this result be accomplished by carrying out the order heretofore made in this court. It is ordered, therefore, that the exceptions be, and they are hereby, overruled."

The Coast Line, as authorized by statute, appealed to the Superior Court of Wake County, city of Raleigh, and the case was there tried *de novo* before a court and jury. The jury, under the instructions of the court, considered and responded to the eight questions, which follow:

"1. Is it practicable for train No. 39 of the Atlantic Coast Line Railroad, due to arrive at Selma at 2:50 P. M., to make connection at Selma with train No. 135, westbound, of the Southern Railway, due to leave Selma at 2:25 P. M.?

"Answer. No.

"2. Is it practicable to make said connection by extending the run of the Plymouth train daily from Plymouth to Selma and return, and if so, what would be the additional expense?

"Answer. No.

"3. Is it practicable to make said connection by the use of the Spring Hope train, and if so, what would be the additional expense?

"Answer. No.

"4. In order to make such connection would defendant company have to run an additional train on its main line from Rocky Mount to Selma?

"Answer. Yes.

"5. Is it practicable for said train to safely run the schedule prescribed in plaintiff's order, having due regard to the number of trains and number of stops, on defendant's main line from Rocky Mount to Selma?

"Answer. Yes.

"6. What would be the daily cost of operating such train from Rocky Mount to Selma and return?

"Answer. $40.00.

"7. What would be the probable daily receipts from such train?

"Answer. $25.00.

"8. Is it reasonable and proper that, for convenience of the traveling public, the defendant company should be required to make such connection?

"Answer. Yes."

The answers to the first four questions were the result of peremptory instructions by the court, and the responses to the last four were deduced by the jury from the testimony submitted to its consideration.

The court granted the prayer of the Atlantic Coast Line to that effect and rendered judgment on the verdict in its favor. The corporation commission was held to be without power "to interfere with the right of railway companies to regulate for themselves the time and manner in which passengers and property should be transported," provided only such companies complied with the existing statutory direction "to run one passenger train at least each way over its line every week day." On appeal the Supreme Court of North Carolina reversed the judgment. The facts found by the corporation commission were reiterated, and it was held that error had been committed by the court below in instructing the jury to give a negative response to the first three propositions. Indeed it was declared that the only essential proposition submitted to the jury was the eighth, which required it to be determined whether the connection at Selma was necessary for the public convenience. Treating the facts found by the commission as sustaining the conclusion reached by that body, it was decided that the commission had power to make the order, and that the exercise of the authority was not repugnant either to the Constitution of the United States or of the State. Notwithstanding the finding of facts made concerning the means by which the connection at Selma was to be performed, the court construed the order of the commission as not having been solely based upon the means of performance referred to in the findings and as embracing not only a choice of the methods referred to therein, but any other which the Coast Line might choose to adopt, provided only it accomplished the purpose of the order. But whilst thus from one point of view, treating the order of the commission so as to render it unnecessary to pass upon the particular methods for mak-

ing the connection at Selma referred to in the findings, the court yet reviewed the means of performance therein stated. In doing so it was decided that although to execute the order of the commission it might be imperative for the Coast Line to operate at a pecuniary loss a new train from Rocky Mount to Selma, or the extension with like result of the movement of one or the other of the branch trains from Rocky Mount to Selma, no violation of any right of the Coast Line protected by the Constitution of the United States or of the State would arise. This was based upon the finding by the court that the average net earning of the railroad from its business in North Carolina was of such a character that an adequate remuneration would remain after allowing for any possible loss which might arise from operating either of the trains in question. 137 N. Car. 14.

All the assignments of error challenge the correctness of the decision below on the ground of its repugnancy to the due process or equal protection clauses of the Fourteenth Amendment. The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine.[1] Accepting this

[1] *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & N. W. R. Co.*, 94 U. S. 164; *Chicago, M. & St. P. R. Co.* v. *Ackley*, 94 U. S. 179; *Winona & St. Peter R. Co.* v. *Blake*, 94 U. S. 180; *Stone* v. *Wisconsin*, 94 U. S. 181; *Ruggles* v. *Illinois*, 108 U. S. 536; *Illinois Central R. Co.* v. *Illinois*, 108 U. S. 541; *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307; *Stone* v. *Illinois Central R. Co.*, 116 U. S. 347; *Stone* v. *New Orleans & Northeastern R. Co.*, 116 U. S. 352; *Dow* v. *Beidelman*, 125 U. S. 680; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386; *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339; *Pearsall* v. *Great Northern R. Co.*, 161 U. S. 646, 665; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677, 695; *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287; *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257; *Minnesota & St. L. R. Co.* v. *Minnesota*, 193 U. S. 53;

general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in its character as to transcend the limits of regulation and to be in effect a denial of due process of law or a deprivation of the equal protection of the laws.

As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment.[1] The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted.

In coming to consider the question just stated it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance and effect to exceed regulation, and be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws. We shall not in analyzing the case undertake to review in their order the

Chicago, B. & Q. R. Co. v. *Illinois*, 200 U. S. 561, 584; *Atlantic Coast Line* v. *Florida*, 203 U. S. 256; *Seaboard Air Line* v. *Florida*, 203 U. S. 261.

[1] *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 331; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 455; *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 344; *Reagan* v. *Farmers' Loan & Trust Co.* (*No.* 1), 154 U. S. 362, 399; *St. Louis & San Francisco R. Co.* v. *Gill*, 156 U. S. 649, 657; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241; *Smyth* v. *Ames*, 169 U. S. 466, 512; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 172; *Minneapolis & St. Louis R. Co.* v. *Minnesota*, 186 U. S. 257; *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592.

ten propositions of error found in the record and reproduced in the briefs of counsel, as each proposition, although numbered separately, but reiterate grounds of error to be found in the others. In other words, the various grounds of error are so interblended in the several propositions as to render it impossible to treat one as distinct from the other. All the grounds, however, which the propositions assert as establishing the arbitrary and unreasonable character of the order complained of may be embraced under four general headings, which we proceed to dispose of.

1. *That the order was arbitrary and unreasonable, because beyond the scope of the authority delegated to the corporation commission by the state law.*

As this proposition involves no Federal question and is concluded by the judgment entered below, we put the subject out of view. And, although not cognate to this proposition, to clear the way for the consideration of the substantial issues we also put aside the suggestion made in argument that as the Southern Railway by its change of schedule originally rendered the connection at Selma impossible, therefore that road should have been compelled to restore the connection by a modification of the schedule or schedules of the trains by it operated. We put this suggestion aside because it does not seem to have been seriously urged in the court below, and besides is so directly refuted by the findings that we think it requires no further notice.

2. *The order was arbitrary and unreasonable, because when properly considered it imposed upon the Coast Line a duty foreign to its obligation to furnish adequate facilities for those traveling upon its road.*

This rests upon the assumption that as the order was based not upon the neglect of the Coast Line to afford facilities for travel over its own road, but because of the failure to furnish facilities to those traveling on the Coast Line who desired also to connect with and travel on the Southern road, therefore the order was in no just sense a regulation of the business

of the Coast Line. This reduces itself to the contention that, although the governmental power to regulate exists in the interest of the public, yet it does not extend to securing to the public reasonable facilities for making connection between different carriers. But the proposition destroys itself, since at one and the same time it admits the plenary power to regulate and yet virtually denies the efficiency of that authority. That power, as we have seen, takes its origin from the *quasi*-public nature of the business in which the carrier is engaged, and embraces that business in its entirety, which of course includes the duty to require carriers to make reasonable connections with other roads, so as to promote the convenience of the traveling public. In considering the facts found below as to the connection in question, that is, the population contained in the large territory whose convenience was subserved by the connection, and the admission of the railroad as to the importance of the connection, we conclude that the order in question, considered from the point of view of the requirements of the public interest, was one coming clearly within the scope of the power to enforce just and reasonable regulations.

3. *That the facilities afforded the public by the railroad were of such a character as to demonstrate that the extra burden which would result from the compliance with the order was wholly arbitrary and unreasonable.*

This rests upon the assumption that as there were several existing daily connections between trains of the Coast Line and those of the Southern at Selma, which might be availed of by those desiring to travel from eastern to western North Carolina and beyond, and, as besides, the proof established that another connection operating the same result was afforded by way of Weldon and the Seaboard Air Line to Raleigh and thence further west, therefore it was both arbitrary and unreasonable to superadd an unnecessary connection. Conceding, as must be done, that the nature and extent of the existing facilities furnished by a carrier for the public convenience are

essential to be considered in determining whether an order directing an increase of such facilities is just and reasonable, and that the deficiency of facilities must clearly appear to justify an order directing the furnishing of new and additional facilities, we think the proposition here relied on to be without merit. Its error arises from assuming that adequate facilities were afforded at Selma or via Weldon and the Seaboard without reference to the order complained of. In view of the facts as to the connections at Selma and the Weldon route found by the commission and reiterated by the court, which we have previously stated and which we accept, we cannot escape drawing for ourselves the conclusion deduced both by the commission and the court below that the connections relied on were wholly inadequate for the public convenience, and, therefore, a state of things existed justifying the order.

4. *That, however otherwise just and reasonable the order may have been, it is inherently unjust and unreasonable because of the nature of the burden which it necessarily imposes.*

This proposition is based on the hypothesis that the order, by necessary intendment, directed the Coast Line to operate an additional train, although such train could not be operated without a daily pecuniary loss. The premise upon which this proposition rests would seem to be irrelevant, since the court below in one aspect of its opinion treated the order of the commission as not requiring the operation of an extra train from Rocky Mount to Selma. Yet, as the facts found by the commission and which were affirmed by the court would indicate that it was considered that the operation of such train was the most direct and efficient means for making the ordered connection, and as the court considered and passed upon the duty of the railroad to comply with the order, even if to do so it became necessary to operate the extra train at a loss, we think the proposition relied upon is open and must be decided. The contention is that the fact that some loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the unrea-

sonableness of the order and demonstrates that to give it effect would constitute a taking of property without due process of law in violation of the Fourteenth Amendment. Conclusive support for this contention, it is insisted, is afforded by the doctrine upheld in *Smyth* v. *Ames*, 169 U. S. 466, and the cases which preceded that decision. The cases relied upon, however, only involved whether a general scheme of maximum rates imposed by state authority prevented the railroads from earning a reasonable compensation, taking into view all proper considerations as to the value of the property and the cost of operation, and, if not, whether the enforcement of rates so unreasonably low would be unjust and unreasonable, and, therefore, be confiscation, that is, a taking of property without due process of law in violation of the Constitution of the United States. The principle upon which the cases in question proceeded was thus summed up by Mr. Justice Harlan, delivering the opinion of the court in *Smyth* v. *Ames*, 169 U. S. 526:

"A state enactment or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation, as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States."

But this case does not involve the enforcement by a State of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself dem-

onstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in *St. Louis &c. Ry. Co.* v. *Gill*, 156 U. S. 649, and *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257. But even if the rule applicable to an entire rate scheme were to be here applied, as the findings made below as to the net earnings constrain us to conclude that adequate remuneration would result from the general operation of the rates in force, even allowing for any loss occasioned by the running of the extra train in question, it follows that the order would not be unreasonable, even if tested by the doctrine announced in *Smyth* v. *Ames* and kindred cases.

It is insisted that, although the case be not controlled by the doctrine of *Smyth* v. *Ames*, nevertheless the arbitrary and unreasonable character of the order results from the fact that to execute it would require the operation of a train at a loss, even if the result of the loss so occasioned would not have the effect of reducing the aggregate net earnings below a reasonable profit. The power to fix rates, it is urged, in the nature of things, is restricted to providing for a reasonable and just rate, and not to compelling the performance of a service for such a rate as would mean the sustaining of an actual loss in doing a particular service. To hold to the contrary, it is argued, would be to admit that a regulation might extend to directing the rendering of a service gratuitously or the performance of first one service and then another and still another at a loss, which could be continued in favor of selected interests until the point was reached where by compliance with the last of such multiplied orders the sum total of the revenues of a railroad would be reduced below the point of producing a reasonable and adequate return. But these extreme suggestions have no relation to the case in hand. Let it be conceded that if a scheme of maximum rates was imposed by state authority,

as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment. Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor even if, considering rates as a whole a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth* v. *Ames* or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary

facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance. A similar contention to the one we are considering was adversely passed upon in *Wisconsin &c. Ry. Co.* v. *Jacobson, supra.* That case involved the enforcement of an order of a state railroad commission directing a railroad company to acquire the necessary land and make a track connection for the purpose of affording facilities for the interchange of business with another road. The court, after holding that the order was not so unjust and unreasonable as to be repugnant to the Constitution of the United States, disposed of the contention that the order was void because compliance with it would necessitate the incurring of expense, by saying (179 U. S. 302):

"Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error. *Worcester* v. *Norwich & W. R. Co.*, 109 Massachusetts, 112; *People ex rel. Green* v. *Dutchess & C. R. Co.*, 58 N. Y. 152, 163; *People ex rel. Kimball* v. *Boston & A. R. Co.*, 70 N. Y. 569; *People* v. *New York, L. E. & W. R. Co.*, 104 N. Y. 58, 67."

Affirmed.

HISCOCK *v.* VARICK BANK OF NEW YORK.

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

No. 244. Argued March 15, 1907.—Decided May 13, 1907.

Individual policies on the life of a partner held as collateral security for his individual indebtedness can be sold by the creditor and applied to the payment of such individual debt although the debtor was also liable for partnership debts; and if the policies are fairly sold by the creditor he can prove for the balance of the individual debt and the whole of the partnership debt.

The extent and validity of a pledge are local questions and the decisions of the state court are binding on this court.

Under the law of New York a pledgor may waive strict performance of the common law duties of the pledgee and if so waived a sale may be held without notice, demand or advertisement.

The bankruptcy act does not deprive a lienor of any remedy with which he is vested by the state law.

134 Fed. Rep. 101, affirmed.

GENERAL order in bankruptcy, No. XXXVI, relates to "Appeals," and subdivision 3 thereof provides: "In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The Circuit Court of Appeals, in pursuance thereof, made and filed its finding of the facts and its conclusions of law thereon.

August 18, 1903, a petition in bankruptcy was filed against the firm of Jacob M. Mertens & Company and the individual members thereof. They were adjudicated bankrupts Septem-

ber 15, and on the following fourteenth of October plaintiff in error was elected trustee in bankruptcy of both the copartnership and the individual estates. At the time the petition was filed the firm was indebted to the Varick Bank to the amount of $27,893.85, evidenced by notes made or endorsed or guaranteed by Mertens & Company, five of which aggregating $22,500, four for $5,000 each, and one for $2,500, were collateral notes. These notes were alike in form and contained the following provision:

"On the non-performance of this promise or upon the non-payment of any of the liabilities above mentioned, or upon the failure of the undersigned forthwith, with or without notice, to furnish satisfactory additional securities in case of decline as aforesaid,—then, and in either such case, this note shall forthwith become due and payable, without demand or notice and full power and authority are hereby given to said holder to sell, assign and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the undersigned, for safe keeping or otherwise, at any Broker's Board or at public or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said holder may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to it or him as to it or him shall seem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said holder for any deficiency arising upon such sale or sales. The undersigned do hereby

authorize and empower the said Bank (but no other holder) at its option, at any time, to appropriate and apply to the payment and extinguishment of any obligations or liabilities of the undersigned to it, whether now existing or hereafter contracted any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due."

Endorsed upon the back of each of these notes and signed by J. M. Mertens & Co. and J. M. Mertens appeared the following:

"In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y., its successors, endorsers or assigns, the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guarantee, notwithstanding such changes, surrender or extension."

On the day the petition was filed, Mertens individually was indebted to the bank in the sum of $25,489.62. This indebtedness was upon his guaranty of the five collateral notes, of one of which he was also the maker, the balance being based upon his endorsement of sundry notes of third parties amounting to about $3,000. Mertens individually, to secure the payment of the indebtedness to the bank, pledged to it two policies of insurance upon his life, one for $50,000, No. 417,171, and the other for $10,000, No. 252,314. The $50,000 policy was a free Tontine policy, issued February 15, 1889, payable to Mertens or his estate, the yearly premium was $1,750, and the Tontine dividend period expired Feb-

ruary 15, 1909. The $10,000 policy was issued December 21, 1882, payable to Jennie Mertens, wife of the insured, but in the event of her prior death, to the children of the insured, and the annual premium was $272.50. It was a Tontine savings policy and the Tontine period was completed December 21, 1902, at which time Mertens, as the insured, withdrew in cash the share of the surplus apportioned to the policy, and continued it in force on the ordinary plan. On March 16, 1901, Jennie Mertens and the children of Jacob and Jennie executed an assignment of the $10,000 policy to the bank. On March 25, 1901, J. M. Mertens joined with his wife in executing a further assignment of the same policy to the bank. March 21, 1901, Mertens individually executed an assignment of the $50,000 policy to the bank. These assignments contained no power of sale. In addition the policies were pledged to the bank under the terms of the collateral notes and agreements of pledge. It appeared from the proofs that the claim against Mertens individually was secured by an individual deposit of Mertens of the sum of $6,000 as collateral, in addition to the policies.

Obligations aggregating $1,691.93, endorsed by Mertens, had matured and remained unpaid on August 18, and on September 15, obligations aggregating $13,570.47 had matured and remained unpaid, and in the latter amount were included two of the collateral notes for $5,000 each and some $3,000 of the notes of third persons, endorsed by Mertens individually.

On or before September 14, 1903, the two policies were delivered to a duly licensed auctioneer by the attorneys of the bank with instructions to sell the same at public auction at the New York Real Estate Office salesrooms, to the highest bidder, and they were offered for sale and sold to the highest bidder, an agent of the bank, on September 14, the $50,000 policy for the sum of $7,000 and the $10,000 policy for the sum of $3,250. No notice of the sale was given to any one except the bank. In due time the bank filed with the referee

in bankruptcy two proofs of claim, one against the co-partnership estate aggregating $27,893.85, and another against Mertens for the sum of $9,118.37. Thereafter the claims were amended. Objections to both were filed by the trustee, alleging in substance that the sales of the policies were illegal; that the value of the securities held by the bank had not been ascertained according to the provisions of the bankruptcy act, and that the trustee still owned the equity.

No other evidence than appearing above was offered by the trustee on the hearing before the referee under the objections. The referee held, in substance, that the sale of the policies was null and void, and that the value of the securities had not been ascertained according to the provisions of section 57*h* of the bankruptcy act, and refused to allow either claim against the estate or estates. Counsel for the trustee moved for the referee to direct a method by which the security held by the bank should be liquidated and that in so doing he direct the bank to resell the policies on notice to the trustee. The motion was objected to, but was granted by the referee. The bank petitioned for a review, and the District Court of the United States for the Northern District of New York on such review approved the referee's rulings. 134 Fed. Rep. 101. From the order of the District Court the bank appealed to the United States Circuit Court of Appeals for the Second Circuit. That court, as previously stated, filed its finding of the facts and its conclusions of law, which conclusions of law were as follows;

"1. That the order made by the referee and by the District Court was a rejection of the claims of the Varick Bank.

"2. That the policies in question did not belong to the partnership estate, and that the claim against the partnership should have been allowed in full.

"3. That the sale of the policies under the facts as stipulated was a good and valid sale and passed a good and valid title to said policies to the Varick Bank.

"4. That the value of said policies was properly liquidated

by said sale under the terms of section 57*h* of the Bankruptcy Act and that under said section the referee had no power to make the order directing a resale thereof.

"5. That said Bankruptcy Act did not suspend or enjoin the exercise of said power of sale during the time between the filing of the petition and the adjudication in bankruptcy.

"6. That the claim against the individual estate of Jacob M. Mertens should be allowed in full.

"7. That the burden of proving that said sale was unfair was upon the trustee."

The order of the District Court was reversed and the case remanded with instructions to proceed conformably with the opinion of the Circuit Court of Appeals. 144 Fed. Rep. 818. The case was then brought to this court on appeal.

Mr. Will B. Crowley, with whom *Mr. Ceylon H. Lewis* was on the brief, for appellant:

Between the time of filing the petition and the adjudication, the bankruptcy proceedings themselves were an injunction against any sale of the policies in question. After filing the petition, no sale could be held without leave of the court. *Whitney* v. *Wenman,* 198 U. S. 539; *Bryan* v. *Bernheimer,* 181 U. S. 188; *Mueller* v. *Nugent,* 184 U. S. 1. See also *Lee* v. *Franklin Sav. Inst.,* Fed. Cases, 8188; *Conner* v. *Long,* 104 U. S. 244; *McHenry* v. *La Société Française,* 95 U. S. 60; *Wiswall* v. *Sampson,* 14 How. 66; *State Bank* v. *Cox,* 143 Fed. Rep. 93; *In re Reynolds,* 127 Fed. Rep. 762; *In re Brooks,* 91 Fed. Rep. 509; *In re Antigo,* 123 Fed. Rep. 254; *In re Gutman,* 114 Fed. Rep. 1010; *In re Krinski,* 112 Fed. Rep. 975.

The pretended sale of the insurance policies held as collateral was a sham and was invalid at common law. It constituted no liquidation nor evidence of the value of the policies, which, it appeared, were worth more.

A pledgee cannot become the purchaser of pledged securities except by the express permission of the pledgor; a pledgee

is a trustee for the benefit of the pledgor. *Pauly* v. *State Loan Co.*, 165 U. S. 620. See also: *Easton* v. *German American Bank*, 127 U. S. 537; Perry on Trusts, 4th ed., sec. 602, *o. x.*; *Laclede Bank* v. *Richardson*, 156 Missouri, 275; *Dana* v. *Buckeye Co.*, 38 Ill. App. 371; Jones on Pledges, sec. 648; Story on Bailments, secs. 318–345.

The $6,000 deposit and the value of the policies should also be applied in reduction of the amount of the partnership claim. The express terms of the promissory notes so require. It did not appear that the policies belonged to J. M. Mertens.

In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

If the bank waived the terms of the notes and relied upon its legal rights to offset this deposit, then the time when the set-off was required to be made was at the time of the filing of the petition. Collier on Bankruptcy, 4th ed., 496; *In re City Bank*, Fed. Cases, 2742; *Drake* v. *Rollo*, Fed. Cases, 4066.

No liquidation of securities which is binding upon the bankruptcy court, can be made by a creditor except as directed by the court. The "value" of the securities was not determined and the referee had the right under § 57*d* to refuse to be bound by the alleged sale. *Whitney* v. *Wenman*, 198 U. S. 539; *McHenry* v. *Société Française*, 95 U. S. 60.

Whether the court must direct the manner of liquidation or not, sec. 57*h* provides that before having a claim allowed a secured creditor must deduct "the value of securities" held by him.

The referee had some discretion; he had a conscience to satisfy; he was required to ascertain the value and deduct it, and sec. 57*d*, which provides that the consideration of claims may "be continued for cause by the court upon its own motion," was ample authority for him to require further evidence of the value of the policies before allowing the claims.

This court has recently held that this power can be exercised. *Whitney* v. *Dresser*, 200 U. S. 536.

Mr. Frederick M. Czaki, with whom *Mr. Louis Marshall* was on the brief, for appellee:

The bank was not a secured creditor within the meaning of the term "secured creditor" as defined by the bankrupt act.

That "secured creditor" has a limited meaning in bankruptcy must always be remembered. In effect, no creditor is secured in bankruptcy unless there is a lien held by him, or accruing to his benefit, upon the property of the bankrupt.

The copartnership estate is entirely distinct from that of the individual. The assets must be separately administered, and can in no way be so commingled as to deprive a creditor holding security upon the individual estate of a partner from proving the full amount of his debt against the copartnership estate, irrespective as to whether he has or not filed a claim against the individual estate. *In re Noyes Bros.*, 127 Fed. Rep. 286; *Gorman* v. *Wright*, 136 Fed. Rep. 164; *Swarts* v. *Fourth Natl. Bank of St. Louis*, 117 Fed. Rep. 1; *In re Swift*, 106 Fed. Rep. 65; *In re Heyman*, 95 Fed. Rep. 800; *In re Bingham*, 94 Fed. Rep. 796; *In re Headley*, 97 Fed. Rep. 765–771; *In re Coe, Powers Co.*, 1 Am. Br. Rep. 275; Collier on Bankruptcy, 3d ed., 321; *Madison Sp. Bank* v. *Pierce*, 137 N. Y. 444.

The filing of the verified proof of debt established the appellee's *prima facie* case, and entitled it, in the absence of proof under the objections, to the allowance of the claim. Sec. 57, Sub. Div. G, Act of 1898; *Whitney* v. *Dresser*, 200 U. S. 532.

The appellant's failure to offer any evidence of the facts and circumstances attending the sale, or the value of the policies, affords a presumption that such evidence, if adduced, would operate to the prejudice of his contentions that the sale was fraudulent, and the prices paid inadequate.

The appellant was content to rest his case upon the mutual

concessions made, and therefore his failure to call the witnesses concerned in the transaction raises the presumption, that had he done so, their testimony would have negatived the slightest inference of fraud or bad faith. *Kirby* v. *Tallmadge*, 160 U. S. 379; *Runkle* v. *Burnham*, 153 U. S. 216–225; *Graves* v. *The United States*, 150 U. S. 118, 120; *Clifton* v. *The United States*, 4 How. 242, 244; *Choctaw & M. R. Co.* v. *Newton*, 140 Fed. Rep. 225–238; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 54 Fed. Rep. 481, 483.

The contract of pledge expressly granted to the appellant an absolute power of sale, coupled with an interest, which would have survived the death, and did survive the insolvency of the pledgor. *Dixon* v. *Ewart*, 3 Merivale's Rep. 322; *Corder* v. *Morgan*, 18 Vesey, 344; *Knapp* v. *Alvord*, 10 Paige Ch. Rep. (N. Y.) 205; *Houghtaling* v. *Marvin*, 7 Barb. (N. Y.) 412; *Hutchins* v. *Hebbard*, 34 N. Y. 24, 27; *Weber* v. *Bridgman*, 113 N. Y. 600.

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

The errors assigned question the conclusions of law.

We need spend no time on the objection that the referee's order did not amount to the rejection of the claims. What the referee said was: "As the proof now stands, I shall, therefore, decline to allow either claim as established against the estate or estates."

The District Judge recited the action of the referee as disallowing both claims, and entering "an order prescribing the method for ascertaining the value of such policies," and concluded: "The orders of the referee disallowing the claims are approved and affirmed." 134 Fed. Rep. 102, 104. And entered an order accordingly.

The Circuit Court of Appeals held "that the order appealed from was, in substance and effect, a rejection of the claims," and said: "The bank insisted that its claims were for a definite

amount, the amount stated in its proofs of debt less the sum which it had already derived from the sale of the securities. The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction."

We think it perfectly clear that the policies did not belong to the partnership estate. They insured the life of J. M. Mertens, and were payable, one to him or his legal representatives, and the other to his wife or children, or to him in the event of their death before his. And they had been assigned to the bank by him individually and the members of his family, as early as March, 1901, as collateral security, as well as by the collateral notes before mentioned. The fact that Mertens individually was the owner was in effect conceded, and the objections to the claims raised no issue in regard to it. That the partnership on some occasion may have pledged the policies in conjunction with Mertens' separate individual pledge had no special significance.

The notes provided that the holder might apply the proceeds of a sale to "pay one, or more, or all of the liabilities due it, as it shall deem proper, whether due or not." And it had the right according to the settled rule in equity and in courts of bankruptcy to apply the proceeds of the collateral in extinction of the individual debts. If the sale was a good and valid sale and the value of the policies was properly liquidated thereby, and applied on the individual indebtedness, it follows that the claim against the partnership should have been allowed in full.

And also the claim against the individual estate of Mertens for the balance, after deducting the $10,250 and the $6,000.

The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties were governed by the law of that State. No preference under the bankruptcy act was alleged or proved, nor was there any allegation or proof that the pledge of the securities was in fraud of the rights of the creditors or trustee. The

questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court. *York Manufacturing Company* v. *Cassell*, 201 U. S. 344; *Thompson* v. *Fairbanks*, 196 U. S. 516, 522; *Humphrey* v. *Tatman*, 198 U. S. 91. Here there was an absolute power of sale coupled with an interest. The bank had had both title and possession of the policies for a period of more than two years before the filing of the petition. It had a valid debt against both the copartnership and individual estates, which is not questioned. It could, therefore, make a sale under the power granted, and transfer title in its own name. Numerous decisions of the Court of Appeals of the State of New York sustain contracts of pledge waiving the right of the pledgor to exact strict performance of the common law duties of a pledgee. In the absence of fraud, the pledgee may buy at his own sale held without notice, or demand, or advertisement, when power so to do is expressly granted by the pledgor. *Baker* v. *Drake*, 66 N. Y. 518; *Williams* v. *Trust Company*, 133 N. Y. 660; *Toplitz* v. *Bauer*, 161 N. Y. 325. And see *National Bank* v. *Baker*, 128 Illinois, 533; *McDowell* v. *Chicago Steel Works*, 124 Illinois, 491; *Farmers' National Bank* v. *Venner*, 78 N. E. Rep. 540.

It must be remembered that the Circuit Court of Appeals found that there was no fraud in fact in the sale. In respect of that Judge Wallace, delivering the opinion, said:

"The court below regarded the sale made by the bank as a fraudulent sale. There was no evidence of fraud, unless the facts which have been referred to justify the inference of fraud. We are at a loss to understand how fraudulent conduct can justly be imputed to a pledgee when it appears that whatever was done in executing the power of sale was done in full compliance with the terms of the pledge, and when there is no evidence that any unconscionable advantage was taken of the pledgor or his creditors. Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase

it himself at a valuation so inadequate as to suggest a fraudulent purpose. If the valuation in this case was unfair, the burden was on the trustee to prove the fact."

The trustee did not offer to prove that others were prepared to purchase and might have done so but for want of information, or that the policies had a greater value than was realized at the sale, or that he was prepared to redeem the pledge for the benefit of the estate, nor did he offer to do so. There was nothing in the evidence tending to show a wanton sacrifice or an intention to buy in at so inadequate a price as to justify the inference of a fraudulent purpose.

Counsel for the trustee contends that the policies were worth more than was obtained at the sale, because the bank's agent, after having borrowed on the strength of the policies the exact amount of his bid immediately after the sale, subsequently borrowed thereon $2,622.75; and also that from the terms of the $50,000 policy it appeared that on the completion of the Tontine dividend period, February 15, 1909, the assured had the privilege to withdraw in cash $18,823, and in addition the surplus which might then be apportioned. And counsel called attention in his brief filed herein, February 26, 1907, to the case of *Hiscock, Trustee,* v. *Mertens* then pending in this court as demonstrating that the $50,000 policy was worth more than was realized at the sale. But the $2,622.75 loan covered the next ensuing premiums on the policies with interest; and the $7,000 paid for the $50,000 policy with interest and the premiums of February, 1904, 1905, 1906, 1907 and 1908, with interest, and the last premium, would appear to have aggregated a total cost of $21,346.50; while if resort could be properly had to the record in another case to piece out the evidence in this the opinion in *Hiscock* v. *Mertens,* decided March 25, 205 U. S. 202, states that the evidence showed that this particular policy had a surrender value of $6,574. And as to the $10,000 policy no suggestion was made that the $3,250 was not a full price or even more, nor could there be in reason, for as Ray, J., said, *In re Mertens et al.,* 131 Fed.

Rep. 972, "it had become a simple life policy, payable to the wife of the assured, if living at his death; if not living, to his children, if any; and in default of child or children to the personal representatives of the assured. This policy concededly is so conditioned and incumbered, and the interest of the trustee therein, if any, is so remote and uncertain that it is of no practical value to the estate." Clearly there is nothing on the face of the record to justify a charge of fraud on account of inadequacy.

Section 57*h* provides: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The court was by this subdivision empowered to direct a disposition of the pledge, or the ascertainment of its value, where the parties had failed to do so by their own agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises. Of course where there is fraud or a proceeding contrary to the contract the interposition of the court might properly be invoked.

According to the terms of the bankrupt act, the title of the bankrupt is vested in the trustee by operation of law as of the date of the adjudication. Act of 1898, § 70, *a. e.* By the act of 1867, it was provided that as soon as an assignee was appointed and qualified the judge or register should, by instrument, assign or convey to him all of the property of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to such estate, both real and personal, in the assignee." But § 70*a* of the act of 1898 omits the provision that the trustee's title "shall relate back to the com-

mencement of the proceedings in bankruptcy," and explicitly states that it shall vest "as of the date he was adjudicated a bankrupt." When the petition in the present case was filed the bank had a valid lien upon these policies for the payment of its debt. The contracts under which they were pledged were valid and enforceable under the laws of New York where the debt was incurred and the lien created. The bankruptcy act did not attempt by any of its provisions to deprive a lienor of any remedy which the law of the State vested him with; on the other hand, it provided, § 67*d:* "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Mueller v. *Nugent,* 184 U. S. 1, is not to the contrary, as explained in *York Manufacturing Company* v. *Cassell,* 201 U. S. 344.

Judgment affirmed.

CHAPMAN AND DEWEY LAND COMPANY *v.* BIGELOW.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

No. 262. Argued April 12, 15, 1907.—Decided May 13, 1907.

Writ of error to review decision of the state court, dismissing bill to remove cloud on title to lands under water, dismissed for want of jurisdiction on the findings of the court below and the authority of the cases cited.

The rejection as evidence, by the state court, of a letter written by the Secretary of the Interior to the Commissioner of the Land Office, on the ground that it was *res inter alios,* held, in this case proper and not to present any Federal question.

Writ of error to review 92 S. W. Rep. 534, dismissed.

THE facts are stated in the opinion of the court.

Mr. Henry D. Ashley, with whom *Mr. Sanford B. Ladd*, *Mr. William S. Gilbert*, *Mr. Denton Dunn* and *Mr. Robert S. Rodgers* were on the brief, for plaintiff in error.

Mr. N. W. Norton for defendants in error.

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

This was a bill to remove a cloud from plaintiff in error's alleged title to certain lands described in the complaint, and to that end to have the conveyances under which defendants in error claimed declared void, filed by plaintiff in error in the Chancery Court of Poinsett County, Arkansas, January 29, 1903. The Chancery Court rendered a decree dismissing the bill, and the case was carried to the Supreme Court of the State, where the decree was affirmed. 92 S. W. Rep. 534. Thereupon this writ of error was allowed.

The Supreme Court of the State stated the case in brief thus:

"Plaintiff claims title under an act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September 28, 1850. It alleges that, in pursuance of the provisions of this act, surveyed sections and parts of fractional sections in fractional township 12 north of the base line, in range 6 east of the fifth principal meridian, and in township 12 north of the base line, in range 7 east of the fifth principal meridian, and in Poinsett County, in this State, were duly selected, approved, and patented to the State of Arkansas, as a part of the swamp land-grant; that certain of these lands were conveyed by the State of Arkansas, on the 12th day of June, 1871, to Moses S. Beach, that plaintiff acquired and is the owner of these lands so conveyed to Beach as well as certain other of the lands which were deeded to the State of Arkansas by the United States; that many of the legal subdivisions of sections so acquired by plaintiff were bounded by a large body of non-navigable water called in the official surveys of the United

States and field notes thereof as the 'Sunk Lands,' 'St. Francis River Sunk Lands,' the 'Hatchie Coon Sunk Lands,' and the 'Cut-Off Lake;' that the legal subdivisions so bounding were fractional, and in the survey were meandered along such body of water. The plaintiff thereupon claims the lands lying under this body of water; and these are the lands in controversy in this suit to which it (plaintiff) seeks a decree to quiet its title as against the defendants.

"Plaintiff alleges that these lands are wild, unimproved, and unoccupied; and that the defendants are claiming them under certain deeds; and asks that these be declared void, invalid, and of no force whatever.

"The defendants answered and denied that the so-called 'Sunk Land' was a body of water, or that it is shown to be by the surveys of the United States or the field notes; but that it was sometimes temporarily flooded with water, and was land bearing 'trees and vegetables, willow and cypress;' and that the meandered lines run as alleged by plaintiff were run as boundaries, and not for the purpose of finding the number of acres in the sections or legal subdivisions 'for which purchasers would have to pay when the government might dispose of the land.' "

Defendants' answer and cross-bill asserted that in the year 1893 the State of Arkansas, by an act of its legislature, "created the board of directors of the St. Francis Levee District, the purpose being to erect a levee against the waters of the Mississippi River and protect what is known as the St. Francis Basin from overflow by the Mississippi River; that the lands concerning which plaintiffs bring this suit, and cross complainants file this cross-bill, are a portion of the said St. Francis Basin and are originally and naturally subject to overflow from the Mississippi River. That after creating the board of directors of the St. Francis Levee District, the State of Arkansas, by its legislature, to aid in the erection of said levee, granted to the board of directors of the St. Francis Levee District lands within said district, the title to which was in

the State of Arkansas; that this act of donation by the legislature of the State of Arkansas went into effect on the twenty-ninth day of March, 1893, and thereby the legal title to the unsurveyed lands in township 12 north, range 6 east, and township 12 north, range 7 east, became vested in the board of directors of the St. Francis Levee District;" and that thereafter the said board of directors conveyed to defendants' predecessors in title.

The Supreme Court, among other things, said that appellant claimed "the land in controversy by virtue of the contiguity of certain lands, acquired by it from the United States, through the State of Arkansas and other grantors, to what is called 'Sunk Lands' and 'Cut-Off Lake.' This 'Sunk Lands,' from appellant's land on one side to the St. Francis River, a navigable stream, on the other, is there four and six miles wide. In this area there are over ten thousand acres." That "the official maps show that 'Cut-Off Lake' was the water boundary of fractional sections 35 and 36," which, with sundry other fractional sections, formed "the western boundary of what is called 'Sunk Lands,' in controversy."

The patents to the State of Arkansas conveyed "the whole of fractional township" 12 north, range 6 east; and "the whole of the township except section sixteen," T. 12 N., R. 7 east.

The Supreme Court referred to and quoted from *Horne* v. *Smith*, 159 U. S. 40; *French-Glenn Live Stock Company* v. *Springer*, 185 U. S. 47, and *Niles* v. *Cedar Point Club*, 175 U. S. 300; and ruled that in an action to quiet title to wild and unoccupied lands, which the court found these were, plaintiff must succeed, if at all, on the strength of his own title, and not on the weakness of his adversary's; that swampy lands, checked by bayous, subject to inundation, but reclaimable to some extent for agricultural purposes, lying between the Government meander line and the main channel of a river, were not lands the title to which would pass to the grantee by virtue of riparian rights; that such was the character of the lands in controversy, and that plaintiff had failed to show such

a condition in respect of them as would support its claim to riparian rights; that the evidence showed that the elevation of the swampy land between the meander line of plaintiff's land and the main course of the St. Francis River had not changed since the running of the meander line; and that the meander lines were boundaries.

In view of the decisions of this court in *Horne* v. *Smith*, 159 U. S. 40; *Niles* v. *Cedar Point Club*, 175 U. S. 300; *Calumet Canal and Improvement Company* v. *Kean*, 190 U. S. 452; *Iowa* v. *Rood*, 187 U. S. 87, and other cases, and of the findings of the court below, we are of opinion that the jurisdiction of this court to revise the conclusions of that court cannot be maintained. *Moreland* v. *Page*, 20 How. 522; *Lanfear* v. *Hunley*, 4 Wall. 204; *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Israel* v. *Arthur*, 152 U. S. 355; *Hardin* v. *Shedd*, 190 U. S. 508; *Romie* v. *Casanova*, 91 U. S. 379.

The result is unaffected by the exclusion from the evidence of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, November 17, 1902. It was clearly *res inter alios*, and properly rejected, and the ruling presented no Federal question.

Writ of error dismissed.

KANSAS *v.* COLORADO *et al.* DEFENDANTS, AND THE UNITED STATES, INTERVENOR.

IN EQUITY.

No. 3, Original. Argued December, 17, 18, 19, 20, 1906.—Decided May 13, 1907.

Kansas having brought in this court an original suit to restrain Colorado and certain corporations organized under its laws from diverting the water of the Arkansas River for the irrigation of lands in Colorado, thereby, as alleged, preventing the natural and customary flow of the river into Kansas and through its territory, the United States filed an intervening petition claiming a right to control the waters of the river to aid in the reclamation of arid lands. It was not claimed that the diversion of the waters tended to diminish the navigability of the river. *Held*, that:

The Government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of the powers granted is to be found in the Constitution of the United States, and in that alone; that the manifest purpose of the Tenth Amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and that if in the changes of the years further powers ought to be possessed by Congress they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the Territories and may control the flow of waters in their streams, it has no power to control a like flow within the limits of a State except to preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the State. Hence the intervening petition of the United States is dismissed, without prejudice to any action which it may see fit to take in respect to the use of the water for maintaining or improving the navigability of the river.

The controversy between the parties plaintiff and defendant is one of a justiciable nature. By the Constitution the entire judicial power of the United States is vested in its courts, specifically included therein being a grant to the Supreme Court of jurisdiction over controversies beween two or more States.

In a qualified sense and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law. This court in appropriate cases enforces the principles of that law, and in addition by its decisions of controversies between two or more States is constructing what may not improperly be called a body of interstate law.

In a suit brought by a State which recognizes the right of riparian proprietors to the use of flowing waters for purposes of irrigation, subject to the condition of an equitable apportionment, against a State which affirms a public right in flowing waters, it is not unreasonable to enforce against the plaintiff its own local rule.

While from the testimony it is apparent that the diversion of the waters of the Arkansas River by Colorado for purposes of irrigation does diminish the volume of water flowing into Kansas, yet it does not destroy the entire flow. The benefit to Colorado in the reclamation of arid lands has been great, and ought not lightly to be destroyed.

The detriment to Kansas by the diminution of the flow of the water, while substantial, is not so great as to make the appropriation of the part of the water by Colorado an inequitable apportionment between the two States.

While a right to present relief is not proved and this suit is dismissed, it is dismissed without prejudice to the right of Kansas to initiate new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas River by the defendants, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States.

On May 20, 1901, pursuant to a resolution passed by the legislature of Kansas (Laws Kansas, 1901, chap. 425), and upon leave obtained, the State of Kansas filed its bill in equity in this court against the State of Colorado. To this bill the defendant demurred. After argument on the demurrer this court held that the case ought not to be disposed of on the mere averments of the bill, and, therefore, overruled the demurrer without prejudice to any question defendant might present. Leave was also given to answer. 185 U. S. 125. In delivering the opinion of the court the Chief Justice disclosed in the following words the general character of the controversy, and the conclusions arrived at (p. 145):

"The gravamen of the bill is that the State of Colorado, acting directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas River through its channel on the surface, and through a subterranean course across the State of Kansas; that this is threatened not only by the impounding, and the use of the water at the river's source, but as it flows

after reaching the river. Injury, it is averred, is being, and would be, thereby inflicted on the State of Kansas as an individual owner, and on all the inhabitants of the State, and especially on the inhabitants of that part of the State lying in the Arkansas Valley. The injury is asserted to be threatened, and as being wrought, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado in doing this is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

"The State of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream, and while she concedes that this rule has been modified in the Western States so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other States and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever inperfections a close analysis of the pend-

ing bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River in Kansas; whether what is described in the bill as the 'underflow' is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas River; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof."

On August 17, 1903, Kansas filed an amended bill, naming as defendants Colorado and quite a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas River. Colorado and several of the corporations answered. For reasons which will be apparent from the opinion the defenses of these corporations will not be considered apart from those of Colorado. On March 21, 1904, the United States, upon leave, filed its petition of intervention. The issue between these several parties having been perfected by replications, a commissioner was appointed to take evidence, and after that had been taken and abstracts prepared counsel for the respective parties were heard in argument, and upon the pleadings and testimony the case was submitted.

In order that the issue between the three principal parties, Kansas, Colorado and the United States, may be fully disclosed—although by so doing we prolong considerably this opinion—we quote abstracts of the pleadings and statements thereof made by the respective counsel. Counsel for Kansas say:

"The bill of complaint alleges that the State of Kansas was admitted into the Union on January 29, 1861, that the State of Colorado was admitted on August 1, 1876, and that the other defendants are corporations organized, chartered and doing business in the State of Colorado; that the Arkansas River rises in the Rocky Mountains, in the State of Colorado, and, flowing in a southeasterly direction for a distance of about 280 miles, crosses the boundary into the State of Kansas; that the river then flows in an easterly and southeasterly direction through the State of Kansas for a distance of about 300 miles, then through Oklahoma, Indian Territory and Arkansas, on its way to the sea. Through the State of Kansas the Arkansas Valley is a level plain but a few feet above the normal level of the river, and is from two to twenty-five miles in width. Back to the foot hills on either side there are bottom lands which are saturated and sub-irrigated by the underflow from the river, and are fertile and productive almost beyond comparison. The Arkansas River is a meandered stream through the State of Kansas, and under the laws and departmental rules and regulations of the United States it is a navigable river through the State of Kansas, and was, in fact, navigable and navigated from the city of Wichita south to its mouth; and that the complainant is the owner of the bed of the stream between the meandered lines, in trust for the people of the State; that the complainant is the owner of two tracts of land bordering upon the river, one at Hutchinson and one at Dodge City, upon which state institutions are maintained—one as a reform school and the other as a soldiers' home. That when the State of Kansas was admitted into the Union it became the owner for school purposes of sections 16 and 36 of each Congressional township, of which the complainant still owns many thousand acres, much of which borders on the Arkansas River. That by act of Congress of March 3, 1863, the complainant became the owner of each odd-numbered section of land in the Arkansas Valley, and has since conveyed the whole of this land for the purposes specified. That by the year 1868

the land in the Arkansas Valley began to be taken by actual settlers, and by the year 1875 practically all the bottom lands in the east or lower half of the valley were entered and settled, and title obtained from the United States or the State of Kansas; and by the year 1882 the west or upper half of the valley was so entered and settled and like titles obtained. By the year 1873 a railroad was built through the entire length of the valley, and immediately after their settlement these bottom lands were extensively cultivated, large crops of agricultural products were raised, towns and cities sprang up, population rapidly increased, and by the year 1883 practically all the bottom lands of the Arkansas Valley were in a state of successful and prosperous cultivation; that the waters of the Arkansas River furnished the foundation for this prosperity. These waters furnished a wholesome and ample supply for domestic purposes, for the watering of stock, for power for operating mills and factories, for saturating and sub-irrigating the bottom lands back to the uplands on either side of the river, so that crops thereon were not only bounteous but practically certain, and in the western portion of the valley these waters were appropriated and used for surface irrigation, to supplant the scanty rainfall in that region. That by reason of these uses of the waters of the Arkansas River, and the almost unvarying water level beneath these bottom lands being near the surface, the lands in the Arkansas Valley in the State of Kansas were of great and permanent value to the owners and settlers thereon, and those upon the tax rolls of the State of Kansas yielded a large and increasing revenue to the complainant for state purposes.

"That after the lands in the Arkansas Valley had been settled and raised to a high state of cultivation, all the bottom lands in the valley being riparian lands and directly affected by the presence and flow of the river, and after parts of the flow of the river had been used for manufacturing and milling purposes, and after the riparian lands had been largely and extensively irrigated in the valley of the river in the western portion of

Kansas, and after portions of the land so belonging to the complainant had been sold and conveyed, the State of Colorado and other defendants began systematically appropriating and diverting the waters of the Arkansas River, in the State of Colorado, between Cañon City and the Kansas state line, for the purpose of irrigating dry, barren, arid, non-riparian and non-saturated lands lying on either side of the river, and often many miles therefrom, and by the year 1891 all the natural and normal waters and a large portion of the flood waters of the Arkansas River were so appropriated and diverted and actually applied to these dry, barren, arid, non-riparian and non-saturated lands in the State of Colorado, said diversions increasing from year to year, as their means of diversion became more complete and perfect, so the average flow of the river was greatly and permanently diminished and the normal flow of the river, exclusive of floods, was wholly and permanently destroyed, and navigability of the river where navigable before has been ruined, the power for manufacturing purposes greatly diminished, the surface of the underflow beneath the bottom lands has been lowered about five feet, and the water for the irrigation ditches in the western part of Kansas has been entirely cut off. The loss sustained by the complainant and its citizens has been great and incalculable. The benefits of river navigation are gone; the cheap water power has been replaced by the costly steam power; the productiveness and value of the bottom lands have been greatly diminished; the irrigation ditches are left dry and the lands uncultivated, and the revenues of the State of Kansas and its municipalities have been materially decreased. Against this loss and injury the complainant prays the assistance of this court."

In the brief of counsel for Colorado it is said:

"The contention of the defendant, State of Colorado, as to the facts, may be concisely stated as follows: The Arkansas River, popularly so called, is substantially two rivers, one a perennial stream rising in the mountains of Colorado and flowing down to the plains, and this *Colorado* Arkansas, when the

river was permitted to run as it was accustomed to run, prior to the period of irrigation, poured into the sands of western Kansas, and at times of low water the river as a stream entirely disappeared. Its waters were to some extent evaporated, and as to the residue, were absorbed and swallowed up in the sands. So that from the vicinity of the state line between Kansas and Colorado on eastwardly, as far, at least, as Great Bend, if not farther, at such times of low water there was no flowing Arkansas River. Farther east, however, a new river arose, even at such times of low water, and partly from springs, partly from the drainage of the water table of the country supplied by rainfall, and partly from the surface drainage of an extensive territory, this river gradually again became a perennial stream, so that south of Wichita, and from there on to the mouth of the river, the *Kansas* Arkansas, as a new and separate stream, had a constant flow. Such, as the river was accustomed to flow, was the Arkansas of the period prior to irrigation. It was a 'broken river.' It is true that at all times in early years, and now, the Arkansas River at times of flood, or of what might be called high water, has a continuous flow from its source to its mouth, but a flow, even in times of flood or high water, which diminishes through the sandy waste east of the Colorado state line above described, so that oftentimes even a flood in Colorado would be completely lost before it had passed over this arid stretch of sandy channel, and high water would always be diminished in flow through the same stretch of country. This river is as if it were a current of water passing over a sieve; if the current be slow and the volume not excessive, all of it sinks through the sieve and none passes on beyond; when the current is rapid and the volume is large, still a large amount sinks in the sieve, and the residue passes on beyond.

"Now, the irrigators of Colorado have confined their actions to the *Colorado* Arkansas above described. They have taken the waters of the perennial stream before it reaches this sieve, through which it wasted; they have lifted that stream out of

the sandy channel in which it had flowed and applied it to beneficial uses upon the land; carried the body of it along at a higher level than where it was accustomed to run, and they finally restore it, practically undiminished in volume, so far as regards practical use, at points in the ancient channel farther east than the river at low water was accustomed to flow before the period of irrigation. The effect of the diversion of this water in Colorado, the carrying of it forward on a higher level, the return of waters, partly through seepage and partly through direct delivery at waste gates, and the effect of this process in extending eastward the perennial flow, will be fully discussed in the course of the argument to follow. It is sufficient in this preliminary statement to say that it is admitted by the complainant that in the course of a twelvemonth there is a vast amount of high and flood waters of the Arkansas that are never captured by man, that are of no use, but rather of injury to Kansas riparian proprietors, and, so far as any beneficial use is concerned, are absolutely wasted and lost. Kansas does not claim that she has not abundance of water in times of flood or in times of high water; her complaint is based upon the alleged fact that she does not have what she was accustomed to have in periods of low water, whereas, in fact, as contended by the State of Colorado, the diversion of water in Colorado into ditches and reservoirs, continuing, as it does, throughout the year, in times of flood and in times of high water, has the effect, through seepage and return waters, to give perennial vitality to portions of this stream during what would otherwise be periods of depression or suspension of flow."

The substance of the petition in intervention is thus stated by counsel for the Government:

"The first paragraph of the said petition describes the Arkansas River from its source to its mouth, and alleges that it is not navigable in the States of Colorado and Kansas nor the Territory of Oklahoma, but is navigable in the State of Arkansas and the Indian Territory.

"In the second paragraph it is alleged that the lands located

within the watershed of the river west of the ninety-ninth degree of longitude are arid lands.

"The third paragraph alleges that within said watershed there are 1,000,000 acres of public lands that are uninhabitable and unsalable.

"The fourth paragraph alleges that said lands can only be made habitable, productive, and salable by impounding and storing flood and other waters in said watershed to the end that the said waters may be used to reclaim said land.

"The fifth paragraph alleges that there is not sufficient moisture from rainfall to render the soil capable of producing crops in paying quantities in the watershed so described, and that they can only be made to produce crops by irrigation; that the common law doctrine of riparian rights is not applicable to conditions in the arid region and has been abolished by statute and by usage and custom; that there has been established in its stead in said region a doctrine to the effect that the waters of natural streams and the flood and other waters may be impounded, appropriated, diverted, and used for the purpose of reclaiming and irrigating the arid land therein, and that the prior appropriation of such waters for such purpose gives a prior and superior right to the water of the stream.

"The sixth paragraph alleges that legislation of Congress, decisions of courts, and acts of the executive department have sanctioned and approved the use of water for irrigation purposes in the arid region and that he who is prior in time is prior in right, and that it is recognized that the common-law doctrine of riparian rights is not applicable to the public land owned by the United States in the arid region.

"The seventh paragraph alleges that in accordance with and in reliance upon the doctrine of the use of water for irrigation purposes the inhabitants of the arid portion of the United States have appropriated and used the waters of streams therein to reclaim and make productive and profitable about 10,000,000 acres of land, which now support a population of many millions, and that the inhabitants of Colorado and Kansas

within the watershed of the Arkansas River have by irrigation from said river made productive and profitable about 200,000 acres of land, which provide homes for and support a population of many thousands.

"The eighth paragraph alleges that the common law doctrine of riparian rights is not applicable to riparian lands within the arid region, and that only by the use of waters of natural streams and flood waters for irrigation and other beneficial purposes can the lands in the arid region be made productive, and only by such use can additional areas be reclaimed and rendered productive and salable.

"The ninth paragraph recites the passage of the so-called reclamation act of June 17, 1902.

"The tenth paragraph alleges that about 60,000,000 acres of land belonging to the United States within the arid region can be reclaimed under the provisions of the so-called reclamation act.

"The eleventh paragraph alleges that the amount of land that can be so reclaimed will support a population of many millions.

"The twelfth paragraph alleges that under the operation of the said reclamation act 100,000 acres of public land can be reclaimed within the watershed of the Arkansas River west of the ninety-ninth degree west.

"The thirteenth paragraph alleges that the lands when so reclaimed will support a population of not less than 50,000.

"The fourteenth paragraph alleges that under the operation of the so-called reclamation act about $1,000,000 has been expended in exploring, procuring, and setting apart sites upon which reservoirs and dams contemplated by the act can be constructed and maintained; that contracts have been let for the construction of reservoirs, which, when completed, will cost over two millions and will have a storage capacity to reclaim 500,000 acres of arid land, which land when reclaimed will sustain a population of not less than 250,000; that plans are contemplated for the expenditure of $20,000,000 under

said act, to irrigate about 1,000,000 acres of arid public lands.

"The fifteenth paragraph recites that there are $16,000,000 available under the so-called reclamation act.

"The sixteenth paragraph sets forth the contention of Kansas as seen in its amended bill of complaint, viz., that it is entitled to have the waters of the Arkansas River, which rises in Colorado, flow uninterrupted and unimpeded into Kansas.

"The seventeenth paragraph sets forth the contention of Colorado in respect to its claim of ownership, viz., that under the provisions of its constitution it is the owner of all waters within that State.

"The eighteenth paragraph is as follows:

" 'That neither the contention of the State of Colorado nor the contention of the State of Kansas is correct; nor does either contention accord with the doctrine prevailing in the arid region in respect to the waters of natural streams and of flood and other waters. That either contention, if sustained, would defeat the object, intent, and purpose of the reclamation act, prevent the settlement and sale of the arid lands belonging to the United States, and especially those within the watershed of the Arkansas River west of the ninety-ninth degree west longitude, and would otherwise work great damage to the interests of the United States.' "

Mr. C. C. Coleman, Attorney General of the State of Kansas, *Mr. S. S. Ashbaugh, Mr. N. H. Loomis* and *Mr. F. Dumont Smith* for complainant:

The State of Kansas may maintain this suit, first, by virtue of its own sovereignty; second, as the owner of the bed of the Arkansas River; third, as the owner of riparian lands in the Arkansas Valley; fourth, as *parens patriæ*, guardian, or trustee, for any considerable portion of its territory or citizens affected by any unlawful diversion of the waters of the river; and fifth, because its revenue derived from taxation has been directly

diminished by such diversion. Such cause is justiciable in this court, the defendants are each necessary and proper parties, and this court has jurisdiction and power to grant relief.

The jurisdiction of this court over the cause of action was exhaustively argued upon the demurrer, and was then practically decided. 185 U. S. 125.

The State of Kansas appears in all of its capacities known to the law, and alleges and has proved that its injuries have been brought about directly by the defendants named in the amended bill. One of these defendants is the State of Colorado, and the co-defendants are corporations and citizens of the State of Colorado. Thus, within the language of the Constitution, the court has original jurisdiction of the parties, and, because of the facts alleged and proved, the court has also jurisdiction of the subject-matter of the controversy.

The common law, including the doctrine of riparian rights as therein formulated, embraced the whole territory involved in this controversy down to August 1, 1876, when Colorado became a State. Many of the rights herein claimed became vested in the complainant and in those for whom it sues before that date, and all the rights claimed were prior and vested before the injuries complained of, and all ripened into a rule of property, and could not be changed or divested by subsequent customs or enactments in Colorado without the consent of the vested owners of those rights. *Clark* v. *Allaman,* 80 Pac. Rep. 571.

The court will take judicial notice of the settlement and development of Kansas; and that prior to 1868 its territory had become occupied, its lands had been established, and its institutions had become fixed. It must be also admitted that prior to 1868 the rule of the common law as to riparian rights in Kansas prevailed in all its vigor, and without any qualification whatever.

Kansas is a common law State so far as the doctrine of riparian rights is concerned, but, like the States of California,

Oregon, Washington, North and South Dakota, Nebraska, and Texas, has adopted a rule that will allow the largest development of its territory consistent with the rights of all its citizens.

Riparian ownership does not depend upon geographical lines, nor political subdivisions of land. Riparian lands, according to these authorities, are such as are directly affected by the presence of the river. The level of the underflow corresponds with the level of the water in the river back to the uplands, and, according to this rule every acre of land in the Arkansas Valley is riparian land, bought, sold, cultivated and its value fixed according to the volume of water in the river, and every principle of common law makes these lands riparian to the Arkansas River, and their owners riparian proprietors. Kansas insists upon the preservation of the doctrine of riparian rights within its own territory, but does not insist that the doctrine of riparian rights shall be extended over the territory of any arid State where its presence would not be suitable, and where its existence has been abrogated by the Constitution, the laws, and judicial decisions.

The defendants do not appear in this case, either in their answers or in the evidence adduced by them, as riparian owners along the Arkansas River, having full riparian rights and demanding a reasonable and equal amount of these waters under the common law doctrine. They appear with a different system, under different laws, upon a different basis, using the water for a different purpose, all subsequent to the prior rights of the State of Kansas and its citizens, demanding the right to take the whole of the flow of the river and actually appropriating and using it all. They plead the new system of taking the water out and away from the river and putting it upon dry and arid lands, many miles from the river itself, and on land that never felt the effects of the river before, and on lands of which the waters of the river were never part nor parcel, and all this was done subsequent to the vesting of the prior rights in the State of Kansas and its citizens, and re-

sulting in the injuries hereinbefore enumerated. Thus, the common law rights of Kansas and its citizens have been invaded by a subsequent and different system, framed upon a different theory, and built upon a different basis, and in a different State. These defendants now claim that they should be protected in their different and subsequent systems because they live and operate on the other side of the state line.

The right of the complainant and those for whom it sues is a right to the usual and normal flow of the river "as it was accustomed to run" during ordinary years prior to the unlawful diversion complained of, and exclusive of floods and unusual high waters.

The right of a riparian owner to the flow of the stream "as it is accustomed to run" in our judgment does not include extraordinary high waters, or floods, or times of unusual drought and low water. The words "as it is accustomed to run" mean in our judgment the normal or usual flow of the river from year to year. In the case of the Arkansas River this is not at all difficult to define. Let us illustrate. Before the unlawful diversion by Colorado there was always a season of high water in June, known as the June rise, caused by the melting snows in the mountains and foot-hills of Colorado, which gradually swelled the current until it was about bank full, at which stage it ran from four to six weeks, from whence it gradually subsided to its normal summer flow. This June rise was as regular as the recurrence of the seasons, not only in time but in volume. It was a part, in short, of the normal flow of the river, as distinguished from the extraordinary floods caused by unusual rainfall either in the mountains or uplands of Colorado or along the tributaries of the river in that State. Our contention is that the June rise was part of the normal flow of the river to which the riparian owners in Kansas were entitled. It fulfilled a great purpose in the economy of the Arkansas Valley in Kansas, filling the river from bank to bank, raising the water-level to a point where the pressure of the water was sufficient to bear in every direction.

The underflow of the Arkansas River in Kansas is a well-defined subterranean stream, distinct from underground or percolating waters, the right to which vests in the owner of the surface, and its unlawful diversion, deprivation or diminution is a substantial wrong, for which equity will grant relief.

The use of the water of the river for water power at Arkansas City became a vested right, and as to that right the subsequent diversion of the water by Colorado, decreasing if not wholly destroying such water power, is a continuing wrong which equity will enjoin. The water-power company at Arkansas City used the water of the river for power purposes under the authority of the common law, turning the water back into the Arkansas River after its use. The rights that were built up between the years 1881 and 1890 were property rights under the doctrine of the common law authorizing the diversion of the waters of the stream for these purposes. *Kimberly* v. *Hewitt*, 75 Wisconsin, 374; *Union Water Power Co.* v. *Auburn*, 90 Maine, 65. The right to use water of a river for furnishing power without diminution of its flow is a riparian right which attaches to the land. It vests in the ownership of the land, and as such it cannot be injuriously affected by the upper riparian owner, as has been done in this case by the diversion of the water in Colorado.

The rights of Kansas and those for whom it sues accrued and were vested prior to the existence of Colorado as a State. When, on August 1, 1876, the territory of Colorado was erected into one of the States of the Union and became a political sovereignty, a greater portion of the Arkansas valley had been settled. They had settled upon and bought their lands from the Government and other settlers because of the flow of the Arkansas River, because of the great advantages to be found in this valley, that are set forth in our testimony. They bought under the common law, which attached to all of this territory, and fixed and defined the rights of every landowner from Arkansas City to the Rocky Mountains. These rights so acquired were as sacred to each of these owners as the right

to life or liberty. No court, no State nor the Federal Government, could in any wise impair those rights. 1 Farnham on Waters and Water Rights, p. 29; *Pine* v. *New York*, 112 Fed. Rep. 98; *Holyoke Water Co.* v. *River Co.*, 22 Blatchf. 131; *S. C.*, 20 Fed. Rep. 71; *Ruz* v. *St. Louis*, 7 Fed. Rep. 438; *Howell* v. *Johnson*, 89 Fed. Rep. 556; *Hoge* v. *Eaton*, 135 Fed. Rep. 411; 4 Am. Law Register, 385.

Mr. N. C. Miller, Attorney General of the State of Colorado, *Mr. Joel F. Vaile* and *Mr. Clyde C. Dawson*, with whom *Mr. Charles D. Hayt*, *Mr. Platt Rogers*, *Mr. C. W. Waterman*, *Mr. F. E. Gregg*, *Mr. W. R. Ramsey* and *Mr. I. B. Melville* were on the brief, for the State of Colorado:

The Arkansas River, *ut currere solebat*, has always been an intermittent stream, and, in times of low water, has been a "broken river."

From the earliest times the Arkansas River through Western Kansas has been merely a bed of sand, with practically no flowing water during a large part of the year, and this strip of bare sand bed separates the perennial Arkansas of Southern Kansas from the perennial Arkansas of Colorado during all times of low water, making a "broken river." This fact is so thoroughly established by written history and oral testimony as to preclude any possible refutation.

The diversion and use of the waters of the *Colorado* Arkansas have not diminished the "low water" flow of the river in Kansas.

The diversion and use of the waters of the *Colorado* Arkansas have not diminished the so-called "underflow" in the Arkansas valley in Kansas.

The diversion and use of the waters of the *Colorado* Arkansas have not caused the bed of the stream in Kansas to be narrowed, nor islands to form therein, nor the dangers from flood to increase.

Colorado, relying upon its right to utilize the waters of its natural streams upon adjacent lands, has converted arid and

uninhabited wastes into populous districts, with productive farms and thriving towns and industries.

Colorado is essentially an arid State, and, except in isolated places, irrigation is absolutely necessary to the successful cultivation of the land.

Even if Kansas possesses riparian rights to the full extent claimed by her, yet she has no right of action in the absence of injury, inflicted or threatened.

The evidence has been taken. We respectfully insist that absolutely no injury has been shown. This is not even a case of *damnum absque injuria*, because we may fairly say that no damage has been proved to result in the slightest degree from Colorado irrigation in any of the particulars alleged in the amended bill. See *Missouri* v. *Illinois*, 200 U. S. 496.

The owners of lands bordering on the Arkansas River in Kansas have no vested rights in the Arkansas River which complainant as *parens patriæ* can assert against the defendants. Angell on Watercourses, 7th ed., § 5; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Tomlin* v. *Dubuque, &c. R. R. Co.*, 32 Iowa, 106; *People* v. *Appraisers*, 33 N. Y. 461; *Wood* v. *Fowler*, 26 Kansas, 682; *Crawford* v. *Hathaway*, 93 N. W. Rep. 781.

Under the principles of the common law which have resulted in the doctrine of "riparian rights," the inhabitants of arid lands along the upper reaches of the Arkansas River have a prior right *ex jure naturæ* to the beneficial use of its water to the full extent required for their adequate sustenance and welfare. Riparian rights at common law include the right to irrigate riparian lands. *Clark* v. *Allaman*, 80 Pac. Rep. 571, 584; *Crawford Co.* v. *Hathaway* (Neb.), 93 N. W. Rep. 781; *S. C.*, *Crawford Co.* v. *Hall* (Neb.), 60 L. R. A. 889, 897; *Weston* v. *Alden*, 8 Massachusetts, 135, 136. See also *Anthony* v. *Lapham*, 5 Pick. 175; *Elliott* v. *Fitchburg R. R. Co.*, 10 Cush. 191, 194; *Hazeltine* v. *Case*, 46 Wisconsin, 391, 394; *Evans* v. *Merriweather*, 3 Scam. (Ill.) 492, 496; *Wadsworth* v. *Tillotson*, 15 Connecticut, 366; *Rhodes* v. *Whitehead*, 27 Texas,

304, 310; 30 Am. & Eng. Enc. of Law, 2d ed. (b), 358, and authorities cited in Note 1, 359.

To hold that under given conditions the natural wants of man may justify him in diverting a watercourse for the irrigation of his arid lands is not a departure from the common law. It is a question of the proper application of the principles of the common law. The common law recognizes clearly the right to irrigate as a riparian right. The question of the rank of that right as compared with other uses is a question to be determined by circumstances and conditions, and the necessities of humanity. The common law, by its very nature, and the principles which compose it, looks to these special circumstances to determine the scope and limitation of a general rule when applied to a particular case. Many authorities say that in America we have adopted the common law of England, only so far as it is suited to the conditions and wants of our people, even though the expressed letter of the statutory adoption may be more strongly expressed. All such statements of the rule sustain also the doctrine that in construing the common law as to its application, we should, within the reasonable limits of the general principles involved, be guided by the conditions and wants of the people. *Van Ness* v. *Pacard*, 2 Pet. 137, 144, 145; *Wheaton et al.* v. *Peters et al.*, 8 Pet. 591, 659.

In view of the condition and wants of the people of the arid section of the United States, the use of water in the irrigation of lands takes the rank of a necessary use, affected by the same rules as apply to other necessary uses of humanity as recognized by the common law.

The Solicitor General, Mr. Assistant Attorney General Campbell and *Mr. A. C. Campbell*, with whom *The Attorney General* was on the brief, for the United States:

The United States does not agree with either State. Their powers of internal police are exhausted at the boundary, and yet the effects are claimed to pass beyond. There is a con-

flict which only the national sovereignty is competent to settle.

Assuming that there is power somewhere outside the two States to adjust the dispute, the principle of law to be found and applied will inaugurate a new law of waters on interstate streams—that is, on main streams which actually cross state lines. The strict common law rule of riparian rights cannot control this new law for the arid region. The common law would not be the pervading and permanent institution which it is if it had not contained the seeds of growth and free development; not to break down constitutions and laws, but to adapt them to new times, places and conditions. *Hurtado* v. *California*, 110 U. S. 516, 531; *Woodman* v. *Pitman*, 79 Maine, 456.

Irrigation was always a common law use, and a "new combination" of the common law is taking shape here, because the doctrine of reasonable use is qualifying the unrelieved common law rule. In *Clark* v. *Nash*, 198 U. S. 361, 370, the court approved the idea of an evolution of law to meet the new conditions and necessities of irrigation.

In Wyoming, under a clause in her constitution, similar to the Colorado law, it is not now maintained that the upper State can take all the water of an interstate stream regardless of prior appropriators in the lower State. The claim means in the last analysis the right to make war, which with the right of compact was surrendered by the States. The very fact that the controversy is justiciable here is proof that Colorado cannot do as she sees fit without accountability. She is a sovereign State of this Union, but not a sovereign nation. There is a higher sovereignty. "All the States have transferred the decision of their controversies to this court." *Rhode Island* v. *Massachusetts*, 12 Pet. 743.

The fundamental question is whether power exists anywhere to compose this dispute. This court is a branch of the sovereign power of the Nation. It has taken jurisdiction of such controversies between States under its constitutional

grant of authority, and has acted upon them with conclusive effect. The people rest confidently on the power and competence of the court always to adjust any controversy between States coming within its jurisdiction as defined by the Constitution and statutes. But the court is not a legislature. Beneath the judicial jurisdiction, and controlling it, there appears always the inquiry as to the basis in power and competence for national intervention in any form.

In *Missouri* v. *Illinois*, 200 U. S. 496, the scope of the decision was carefully restricted; nothing was intimated as to Federal power in such a controversy; but it is noted that Congress had not acted on the matter, and an obvious inference is that the sovereign power of Congress as well as the sovereign power of this court might deal with such a controversy.

Commerce is intercourse; the word imports intercourse in the broadest sense. *Gibbons* v. *Ogden*, 9 Wheat. 189. That is the tendency of later decisions of the court following Marshall's definition. The word in its wide signification means all sorts of communications and correspondences, dealings, commingling and interchanges. Commerce is not restricted to trade and traffic, or navigation or transportation; no one can now say definitely what movements and interactions across state lines may not be embraced within its meaning. When to the power over interstate commerce, so regarded, the powers necessary to carry that power into effect are added, it may well be that conflicting irrigation rights between two States on the waters of a stream passing from one State to another involve the power over interstate commerce. Water is sold for irrigation and flows downstream and along ditches to the point of delivery.

But assuming for the purpose of argument, without at all conceding, that this case does not clearly fall within an enumerated power and the implied powers necessary to effectuate it, there is the doctrine of sovereign and inherent power. Advancing that doctrine may seem to challenge great decisions of the court, but it is more than a theory. It is well recognized.

It is indeed established, although its full development is of recent date; and in clear and concrete form it has perhaps only been applied once. And first it must be said that there is no sharp line between implied powers and inherent powers. The expansion of implied powers and the existence of inherent powers lie close together.

"This Government is acknowledged by all to be one of enumerated powers." Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 405. "The Government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." Story in *Martin* v. *Hunter's Lessee*, 1 Wheat. 326. "The Government of the United States is one of delegated, limited, and enumerated powers." *United States* v. *Harris*, 106 U. S. 635. Yet Marshall also said in the same passage: "But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist." And Story said it could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms. *Martin* v. *Hunter*, *supra*. See Marshall, Ch. J., in *Gibbons* v. *Odgen*, 9 Wheat. 195, and Mr. Justice Wilson in his speech at the Pennsylvania Constitutional Convention of 1787, 1 Andrews' "Works of James Wilson," 533. Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power, but which are resulting powers arising from the aggregate powers of the Government. *Second Legal Tender Cases*, 12 Wall. 457, 534; and see also 110 U. S. 421.

There can be no more obvious and necessary occasion for invoking the doctrine of inherent sovereignty and of implied powers (resting on Chief Justice Marshall's reasoning) than

where there is a conflict of law and interest between two or more States. The "resulting powers" of Judge Story would most properly take effect there.

Whatever the particular matter of internal police may be, the respective "rights" or jurisdiction involved, whether Federal or state, should be measured by the test whether they concern only the rights of a State or its citizens within a State, or affect other States and their citizens and the citizens of the United States in general. The power of a State is restricted to its own organism and function as a separate entity of government.

Where state antagonism to another State or the Nation begins, the state sovereignty ends, and that is at just the point where the matters of exclusive regulation within the state boundaries, the things done by or in the State, tend to pass over into the other limited sovereignties, and then the exclusive power, the reserved power, falls, or rather stops. The problem, then, does not involve the taking away prerogatives from a State wholly operating within its own confines, but only involves the taking up these prerogatives at the state lines and supplementing them by national coöperation or control so as to amalgamate or reconcile the separate forces. There is a gap and vacancy of sovereignty somewhere if the sovereign and inherent power of one State is restricted to its own territory (which of course it is), and there is no sovereign and inherent power in the Nation to regulate where the powers of two or more States overlap, and so clash, and injure each other and the aggregate interests. This entails no loss of powers reserved to the States; if it does we are in a vise—both the States and the Nation powerless at the very point where competent power is most essential.

This element of sovereign power was never reserved to the States. In the nature of things it could not have been, being the power to restrain the state authority when by its necessary effect it passed beyond its own borders. This was the very pretension, or the very danger, rather, which all the States

wished to put down in order that one State should not become prepotent. "Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not." *McCulloch* v. *Maryland*, 4 Wheat. 431.

Would Federal administration and control of irrigation on interstate streams, subject to regard for the different state laws as directed by Congress, and always subject to the power and jurisdiction of this court to pass upon interstate controversies, encroach in any respect upon the powers reserved to the States or the people? The powers reserved to the States are powers confined wholly to their respective borders. The powers reserved to the people relate to possible encroachments on their personal and individual rights of life, liberty, and the pursuit of happiness. At least the language of the Tenth Amendment cannot reasonably mean that the underlying sovereignty of the people has thereby withheld from the sovereignty which they have created an essential branch of national power without which the Government is not completely sovereign within its sphere—essential because neither the separate States nor the people at large can deal with it effectively or indeed at all. *McCulloch* v. *Maryland*, 4 Wheat. 406. The function and power of the Government, on the legislative and executive side, in reference to the distribution of the flow of the Arkansas River, are involved in this case.

The decree should embrace in terms or in effect a recognition of the national law and of the Government's right to direct the matter of water distribution on this non-navigable interstate stream.

The great principle here and whenever it is a question of conflict between States or between a State and the Nation is that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. The powers of Congress are not given by the people of a single State; they are given by the people of the United States to a

Government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. *McCulloch* v. *Maryland*, 4 Wheat. 426, 429.

As to the particular facts involved, the petition for intervention alleged, and the evidence shows, that within the watershed of the Arkansas River in Colorado and Kansas there are about one hundred thousand acres of public arid land, which can only be reclaimed and made habitable by the application thereto of the waters of said stream; that in the arid region of the United States from sixty million to one hundred and fifty million acres of public land now valueless and uninhabited may be reclaimed by irrigation and made to sustain a population of one hundred million persons; that within the forty-seven Indian reservations within the arid region, which reservations aggregate forty-eight million acres, there are located about one hundred and sixteen thousand Indians; that to support them it is necessary to irrigate lands within the reservation; and that the Government is assisting the Indians in reclaiming them.

That over ten million acres of land originally arid have already been reclaimed by irrigation at a cost of over two hundred million dollars, and are greater in extent than all the cultivated lands within the New England States. That these lands and improvements are worth not less than five hundred million dollars and support directly and indirectly over five million persons. Of these ten million acres, at least two million are in the State of Colorado, and they are capable of raising crops of the value of over forty million dollars annually. Within the watershed of the Arkansas River in Colorado there are over three hundred thousand acres of irrigated land, and in the same watershed in Kansas, about thirty thousand acres.

The relief sought by complainant would require a decree of the court, the principle of which if enforced would be to prevent the reclamation and cultivation of any of the public lands within the arid belt and have the effect of returning to

their original condition lands which have already been reclaimed. A decree sustaining Colorado's contention to the effect that it has "plenary and exclusive right and power to control and regulate the use of non-navigable streams within its boundaries," whether state or interstate, would have the effect, if the doctrine on which it was based was enforced, of measureably limiting the amount of arid lands which would otherwise be reclaimed. In view of these facts, and the further fact that the Government by the so-called Reclamation Act of June 17, 1902, 32 Stats. 388, had adopted a scheme to reclaim its arid lands by irrigation, its interests will undoubtedly be affected one way or the other by any decree or judgment of the court. Hence it has the right to intervene and be heard "before the judgment is given," although it is not to be recognized as a party to the suit, in a technical sense, or entitled to any decree in its favor. *Florida* v. *Georgia*, 17 How. 478, 495.

As intervenor, the Government admits that the court has jurisdiction of the subject matter of the action. It denies that Kansas owns the bed of the river in said State. It contends that only the shores and beds of navigable waters are reserved to the State by the Federal Constitution, and that within the definition of navigable waters, as set forth in the case of *The Daniel Ball*, 10 Wall. 557, 563, and approved in the cases of *The Montello*, 20 Wall. 430, 439; *Escanaba Company* v. *Chicago*, 107 U. S. 678, 682; *Miller* v. *New York*, 109 U. S. 385, 395; *Packer* v. *Bird*, 137 U. S. 661, 666; *Leovy* v. *United States*, 177 U. S. 621; *Wood* v. *Fowler*, 26 Kansas, 682; and Farnum on Waters, 67; the Arkansas River is not navigable in Kansas, hence the abutting owners on the stream when they obtained title from the Government, also acquired title to its bed. See *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 286, 287; *Whittaker* v. *McBride*, 197 U. S. 510; *Indiana* v. *Milk*, 11 Fed. Rep. 389; *Steinbuchel* v. *Lane*, 59 Kansas, 7; § 2476, Rev. Stats.

The evidence shows that the use of the waters of the stream

in Colorado for irrigation purposes has not interfered with its navigable capacity where navigation is a recognized fact, hence no duty devolves upon the intervenor to aid complainant in securing a decree to enjoin Colorado from using the waters to the end that navigation be protected and preserved. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 709.

It is indispensable to the future growth and prosperity of the Nation that the public arid lands be reclaimed and cultivated. "Man and the Earth," by Shaler, 73, 74, 120; "Water and Water Rights," 3 Farnum, 1895*a*. And public policy, which is but the manifest will of the people of the Nation, and which is seen in public acts, legislative, executive and judicial, and which varies with the habits, capacities, opportunities and needs of the people, recognizes that the arid lands in the largest measure possible should be reclaimed, settled and cultivated. *Wakefield* v. *Van Tassell*, 66 N. E. Rep. 830; *Lux* v. *Haggin*, 10 Pac. Rep. 674, 702; *Giant Powder Company* v. *Oregon &c.*, 42 Fed. Rep. 470, 474; *Jacoby* v. *Denton*, 25 Arkansas, 625, 634; *St. Louis Mining Company* v. *Montana*, 171 U. S. 650, 655. See acts of July 26, 1866, 14 Stats. 253; July 9, 1870, 17 Stats. 218; March 3, 1877, 19 Stats. 377; March 3, 1891, 26 Stats. 1096, 1101; August 4, 1894, 28 Stats. 422, sec. 4; June 17, 1902, 32 Stats. 388; also Executive Messages, Cong. Rec., 57th Cong., 1st sess., vol. 35, pp. 85, 86; 2d sess., vol. 36, p. 11; 58th Congress, 2d sess., vol. 38, p. 7, vol. 39, p. 14; and 59th Cong., vol. 40, p. 100; also *Atchison* v. *Petersen*, 20 Wall. 507, 513; *Basey* v. *Gallagher*, 20 Wall. 670, 681, 682; *Tartar* v. *Spring Creek Co.*, 5 California, 397; *Jennison* v. *Kirk*, 98 U. S. 453, 460; *Broder* v. *Water Company*, 101 U. S. 274, 276; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *United States* v. *Rio Grande Co.*, 174 U. S. 690; *Gutierres* v. *Albuquerque L. & I. Co.*, 188 U. S. 545; *Clark* v. *Nash*, 198 U. S. 361.

Under the strict common law doctrine of riparian rights a riparian owner is entitled to have the stream come to him in its natural state in flow, quantity and quality, and it must go

from his land in like manner, unobstructed in its passage. Col. Law Review, No. 8, p. 505. He has a natural and equal right to the use of the water in the stream adjacent to his land without diminution or alteration. He only can employ or suffer the employment of the waters for any purpose. *Lux* v. *Haggin*, 10 Pac. Rep. 674, 755. The California doctrine permits a reasonable use of the water of a stream to irrigate riparian lands. What is a reasonable use and what are riparian lands have never been clearly defined by the courts which have approved this doctrine. Upon neither question can the decisions of the courts be harmonized or reconciled. See *Lux* v. *Haggin, supra; Gould* v. *Eaton*, 117 California, 539; *Katz* v. *Walkinshaw*, 70 California, 663 and 74 California, 735; *Crawford* v. *Hathaway, supra*, and *Clark* v. *Alleman*, 80 Pac. Rep. 571; Irrigation Institutions (Mead), 322, 323. The common law doctrine of riparian rights does not exist in Colorado. The doctrine which has been established there is that of appropriation of the waters of streams and the application of the same to beneficial use. See Colorado Constitution, art. 16, sec. 5; *Coffin* v. *Left Hand Ditch Co.*, 6 Colorado, 443, 447. A State has the right to change the common law rule in respect to the waters of streams within its boundaries, subject to the following limitations: *First.* That in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial use of the government property. *Second.* That it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. *United States* v. *Rio Grande, &c. Co., supra*, p. 703. In Kansas the California doctrine prevails. *Clark* v. *Allaman, supra.* The doctrine which has been established in Colorado and the doctrine which seems to prevail in Kansas are in conflict with each other and both cannot be enforced in respect to the waters of the Arkansas River.

Stowell v. *Johnson*, 26 Pac. Rep. 290; Works on Irrigation, 17.

The evidence clearly establishes the proposition that the application of either the strict common law doctrine of riparian rights or the so-called California doctrine to the waters of streams in the arid region, state or interstate, would have the result of preventing the reclamation and cultivation of public arid lands and defeat the policy of the Government with respect thereto and would obstruct the administration of the so-called Reclamation Act of June 17, 1902. The evidence further shows that should it be held as contended for by Colorado that a State by reason of its sovereignty has absolute control of and dominion over the waters of an interstate stream while the same are within its boundaries the ultimate effect would be in large measure to prevent the reclamation and cultivation of the public arid lands. But irrespective of the effect of such doctrine the same is untenable as a matter of law. *New Hampshire* v. *Louisiana et al.*, 108 U. S. 76, 90; *Pine* v. *New York City*, 112 Fed. Rep. 98; *S. C.*, 185 U. S. 93; *Howell* v. *Johnson*, 89 Fed. Rep. 556; *Perkins* v. *Groff*, 114 Fed. Rep. 441; *Morris* v. *Bean*, 123 Fed. Rep. 618; *S. C.*, 146 Fed. Rep. 423; *Miller & Lux* v. *Rickey*, 127 Fed. Rep. 573; *Anderson* v. *Bassman*, 140 Fed. Rep. 10; *Willey* v. *Decker*, 73 Pac. Rep. 210.

Each State has certain rights to the waters of an interstate stream. The right of either cannot be destroyed by the other. Manifestly the law of neither State extends beyond its boundaries. Neither Colorado nor any of its citizens can by legal proceedings in Kansas acquire the right to appropriate the waters of a stream in Colorado. *Pine* v. *New York City*, 185 U. S. 105. When, therefore, a dispute arises in respect to the waters of an interstate stream, such as involved in the present proceeding, the question to be determined is, What rule of law shall be applied, and what tribunal has the power to enforce the rule? The Government contends that this court has the power to find, apply and to enforce the

proper rule. That it should find the same outside of the law of either State, not within the common law doctrine of riparian rights, strict or modified, but within the maxim *salus populi est suprema lex*. The rule to be applied should be one capable of enforcement and of uniform application in both States. The rule which meets the requirements is not "water runs; let it run;" but that "water irrigates; let it irrigate." In other words, that such waters may be appropriated and used to irrigate land within the watershed of the stream, "leaving, however, sufficient in or returning sufficient to the beds of the streams for domestic, household and stock purposes," subject, also, to the limitation that priority of time of appropriation determines priority of right, irrespective of state lines. The application and enforcement of such rule will not interfere with any vested right of the State of Kansas or any of its citizens, such as are protected by the Federal Constitution, for the reason that the superior rights of riparian owners to the waters of a stream in the arid region are not the same as in the humid belt (*Clark* v. *Nash*, 198 U. S. 361, 370) and of necessity are limited to the use of such waters for domestic purposes, which include, of course, water sufficient for live stock purposes. The evidence in the case shows that the use of the waters above for irrigation purposes, if confined within the watershed of the stream, returns to the stream by seepage sufficient water for domestic purposes below. This being the effect of irrigation above the superior right to riparian owners below is not affected. While the Constitution prohibits the practical destruction or material impairment of property (*Manigault* v. *Springs*, 199 U. S. 473), yet, generally speaking, the evidence in this case shows that irrigation above neither destroys nor materially impairs riparian lands below.

In respect to the so-called "underflow," the evidence of the government witnesses shows that it is percolating waters and not a subterranean stream; further, that its source is rainfall and not the river.

Sub-surface waters are presumed to be percolating waters,

hence the burden of proof to show that they flow in a well defined channel is upon the party who denies that they are percolating waters. *Barclay* v. *Abraham* (Iowa), 64 L. R. A. 255. Where the common law doctrine of riparian rights prevails, subterranean waters when they flow in a well defined channel are subject to the same rules of law as surface streams. Percolating waters belong to the owner of the land underneath which they are found, and adjacent landowners have no correlative rights to them. *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, 204, 207. In those localities where the doctrine of the appropriation and use of waters for irrigation purposes exists the law in respect to subterranean waters is the same as in respect to surface waters. See "Water Rights in the Western States" by Wiel, §§ 77, 78; *Katz* v. *Walkinshaw*, 64 L. R. A. 236; Long on Irrigation, § 33.

In the State of Kansas subterranean waters may be appropriated and used for irrigation purposes. See General Statutes of Kansas, 1901, §§ 3631, 3632, 3633.

Mr. David C. Beaman, with whom *Mr. Cass E. Herrington* and *Mr. Fred Herrington* were on the brief, for the defendant, The Colorado Fuel & Iron Company:

The averment of the bill is that the defendants are diverting and using the waters of the river for *agricultural* purposes. This defendant is a manufacturer of steel and iron products and not engaged in agriculture, and the bill is, as to it, misconceived.

Kansas claims under the riparian doctrine. The use of water by this defendant is within that doctrine. But this defendant does not by this claim waive its claim to the use of water for beneficial purposes under the laws of Colorado.

The Sugar Loaf reservoir of this defendant, at the head of the Arkansas River, was established by the Government (13 L. D. 93), purchased by this defendant, and the use of water therein by it authorized, under act of Congress (29 Stats. 603) and this court cannot interfere. *Wisconsin* v. *Duluth*, 96 U. S. 387.

Kansas does not in this suit represent the majority of her citizens, but a small faction only, and should be defeated on that ground. *New York* v. *Louisiana*, 108 U. S. 76.

The mountain ranges constitute an effectual barrier to the passage of moisture in the trade winds from the west, this moisture being condensed by the low temperature of these ranges is precipitated thereon as snow and rain, thus depriving the eastern portion of Colorado of its due share of direct precipitation. This eastern portion is now merely taking out by ditches for irrigation and utilizing its share of the precipitation as it melts and runs down, and which, but for this barrier, it would have received direct from the clouds.

The flow of the Arkansas River in the summer season never was constant. Before irrigation began in Colorado, and as early as 1806, and ever since, the river has been dry in the summer season for 200 miles in Colorado and Kansas.

The underflow, which Kansas claims is lessened to her injury, is not wholly dependent on the river, and has been materially lessened by absorption consequent on cultivation in Kansas and Colorado. Its continuance is not in any event a riparian right.

Prior to irrigation in Colorado, Kansas passed laws recognizing irrigation in Western Kansas, and many ditches were there taken out and water used for irrigation, and thus she has aided in producing the result she complains of. *Campbell* v. *Grimes*, 64 Pac. Rep. 62; *Koen* v. *Klein*, 65 Pac. Rep. 684.

Measured, therefore, in her own "half bushel" as this court says she must be, Kansas has no ground of complaint. *Missouri* v. *Illinois*, 200 U. S. 496.

Colorado (as well as every other arid State) is an independent nation in respect to the control and use of things which nature has supplied her within her own territory, in so far as such use is necessary to the development of her resources and the comfort of her people; among these are the waters of her streams.

Self-preservation is the highest right and duty of a Nation and a State. To this end either may use its internal resources for the benefit of its people, even if those of a friendly Nation or State may thereby be the sufferers. This right to the waters lies at the foundation of the existence of the arid States.

Aside from the question of navigation, which is not here involved, this right has never been, in terms or by implication, surrendered. By the Federal compact it was impliedly at least agreed that no State would wantonly injure a sister State, but it was not agreed that any State would deny to her own people that which is necessary for their prosperity and existence, simply because it might be of equal necessity to a sister State. *Texas* v. *White*, 7 Wall. 725; *Escanaba* v. *Chicago*, 107 U. S. 678; *In re Waters of the Rio Grande*, 21 Op. Atty. Gen. 274.

The power of the States to protect the lives, health and prosperity of their citizens, to govern men and things within the limits of their dominion, is a power originally and always belonging to the States, not surrendered by them to the General Government, nor restrained by the Federal Constitution, and is essentially exclusive. *United States* v. *Knight*, 156 U. S. 11.

Analogous to the sovereign right of a State to the water, is the right to the game and fish, which, like the water, are transitory in character, passing from State to State, being the property of that State in which they for the time being are. *Manchester* v. *Massachusetts*, 139 U. S. 240; *Geer* v. *Connecticut*, 161 U. S. 519; *Ward* v. *Racehorse*, 163 U. S. 504; *Manigault* v. *Springs*, 199 U. S. 473.

The contention for Federal control of waters of "interstate streams" is wholly untenable.

All streams in the arid States of the middle west, except a few which sink, are of necessity interstate, unless the fact that a stream bears the same name in two or more States, is the test. This cannot be the test of interstate character.

Therefore the contention must include all the streams of

the middle west, and result in wiping out all state control whatever.

Congress fixes the policy of the Government. In ten or more acts relating to arid and desert lands, beginning with the year 1866, Congress has not only recognized the right of appropriation of water in the arid States for beneficial uses, but has also recognized the right of each State to control the same within its boundaries. The Reclamation Act of June 17, 1902 (32 Stats. 388), not only expressly recognizes state control of the water, but requires the Secretary of the Interior in carrying out the act to proceed under the state laws in respect to such control, and this has been done by the reclamation service in all cases.

The control of irrigation having thus been left to each of the several States by Congress, there has grown up in each State its own system of administration, and it would be impossible now to disturb these administrative regulations without causing endless confusion, even if Congress or this court had the right to do so.

The Reclamation Act can be successfully carried out only under state laws, whereby the rights of users thereunder can be fixed and protected.

The denial of state control would leave the appropriation and use of water without any administrative control whatever, and result in the serious impairment of the value of lands now dependent thereon and acquired under that doctrine as recognized for the last 40 years in the laws and customs of the arid States, while the affirmance of the riparian doctrine would return the arid west to its original desert condition, and result in incalculable injury to millions of people, and also put an end to the reclamation of public lands under the act in reference thereto.

Mr. Platt Rogers, with whom *Mr. John F. Shafroth* and *Mr. Frank E. Gregg* were on the brief, for the defendant, The Arkansas Valley Sugar Beet and Irrigated Land Company.

Mr. C. C. Goodale filed a separate brief on behalf of the defendant, the Graham Ditch Company.

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

While we said in overruling the demurrer that "this court, speaking broadly, has jurisdiction," we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

It is well, therefore, to consider the foundations of our jurisdiction over controversies between States. It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of States. Whatever powers of government were granted to the Nation or reserved to the States (and for the description and limitation of those powers we must always accept the Constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.

The first resolution passed by the convention that framed the Constitution, sitting as a committee of the whole, was: "Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a

supreme legislative, judiciary, and executive." 1 Eliot's Debates, 151.

In *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 404, Chief Justice Marshall said:

"The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

See also *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, opinion by Mr. Justice Story.

In *Dred Scott* v. *Sandford*, 19 How. 393, 441, Chief Justice Taney observed:

"The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations."

And in Miller on the Constitution of the United States, p. 83, referring to the adoption of the Constitution, that learned jurist said: "It was then that a nation was born."

In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article I, Section 1. All legislative powers herein granted shall be vested in a Congress," etc.; and then in Article VIII mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.

In *M'Culloch* v. *State of Maryland, supra,* 405, Chief Justice Marshall said:

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the Nation. Section 2, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to —that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising. Construing this article in the early case of *Chisholm* v. *Georgia,* 2 Dall. 419, the court held that the judicial power of the Supreme Court extended to a suit brought against a State by a citizen of another State. In announcing his opinion in the case, Mr. Justice Wilson said (p. 453):

"This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one, no less radical than this—Do the people of the United States form a nation?"

In reference to this question attention may, however, properly be called to *Hans* v. *Louisiana,* 134 U. S. 1.

The decision in *Chisholm* v. *Georgia* led to the adoption of the Eleventh Amendment to the Constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or citizens or subjects of a foreign state. This Amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another. As said by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 407: "The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States." See also *South Dakota* v. *North Carolina*, 192 U. S. 286.

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the Nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not without its consent subject to the controlling action of any of its instrumentalities or agencies. The creature cannot rule the creator. *Kawananakoa* v. *Polyblank, Trustee, &c.*, 205 U. S. 349. Nor is it inconsistent with the ruling in *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, that an original action cannot be maintained in this court by one State to enforce its penal laws against a citizen of another State. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the State.

These considerations lead to the propositions that when a

legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power.

We may also notice a matter in respect thereto referred to at length in *Missouri* v. *Illinois & Chicago District*, 180 U. S. 208, 220. The ninth article of the Articles of Confederation provided that "the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States, concerning boundary, jurisdiction or any other cause whatever." In the early drafts of the Constitution provision was made giving to the Supreme Court "jurisdiction of controversies between two or more States, except such as shall regard territory or jurisdiction," and also that the Senate should have exclusive power to regulate the manner of deciding the disputes and controversies between the States respecting jurisdiction or territory. As finally adopted, the Constitution omits all provisions for the Senate taking cognizance of disputes between the States and leaves out the exception referred to in the jurisdiction granted to the Supreme Court. That carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the States which are justiciable in their nature. "All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do, settle the controversies between them." *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 743.

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. *United States* v. *Texas*, 143 U. S. 621; *S. C.*, 162 U. S. 1; *United States* v. *Michigan*, 190 U. S. 379.

The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized. *Kansas* v. *United States*, 204 U. S. 331, 341, and cases cited.

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas River into Kansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right is the amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

The primary question is, of course, of national control. For, if the Nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two States in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commence "among the several States," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove

obstructions in the natural waterways and preserve the navigability of those ways. In *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703):

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action."

It follows from this that if in the present case the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the Government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colo-

rado, are large tracts of those lands; that the National Government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

In support of the main proposition it is stated in the brief of its counsel:

"That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the Government in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or nonriparian, and that the priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right."

In other words, the determination of the rights of the two States *inter sese* in regard to the flow of waters in the Arkansas River is subordinate to a superior right on the part of the National Government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the General Government. As heretofore stated, the constant declaration of this court from the beginning is that this Government is one of enumerated powers. "The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Story, J., in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326. "The Government of the United States is one of delegated, limited, and enumerated powers." *United States* v. *Harris*, 106 U. S. 629, 635.

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitu-

tion, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice Marshall in these words: "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional"—a statement which has become the settled rule of construction. From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress.

We must look beyond section 8 for Congressional authority over arid lands, and it is said to be found in the second paragraph of section 3 of Article IV, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging

to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the Government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain

by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we the people of the United States," not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and

liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in *Fairbank* v. *United States*, 181 U. S. 283, 288:

"We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands

which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised.

It does not follow from this that the National Government is entirely powerless in respect to this matter. These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation. As said by Mr. Justice White, delivering the opinion of the court in *Gutierres* v. *Albuquerque Land Company*, 188 U. S. 545, 554, after referring to previous legislation:

"It may be observed that the purport of the previous acts is reflexively illustrated by the Act of June 17, 1902, 32 Stat. 388. That act appropriated the receipts from the sale and disposal of the public lands in certain States and Territories

to the construction of irrigation works for the reclamation of arid lands. The eighth section of the act is as follows:

"'SEC. 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'"

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters. *Martin* v. *Waddell*, 16 Pet. 367; *Pollard* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471; *Barney* v. *Keokuk*, 94 U. S. 324; *St. Louis* v. *Myers*, 113 U. S. 566; *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371; *Kaukauna Water Power Company* v. *Green Bay & Mississippi Canal Company*, 142 U. S. 254; *Shively* v. *Bowlby*, 152 U. S. 1; *Water Power Company* v. *Water Commissioners*, 168 U. S. 349; *Kean* v. *Calumet Canal Company*, 190 U. S. 452. In *Barney* v. *Keokuk*, *supra*, Mr. Justice Bradley said (p. 338):

"And since this court, in the case of *The Genesee Chief*, 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reasons for adhering to the old rule as to the proprietorship of the beds and shores of such

waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

In *Hardin* v. *Jordan, supra,* the same Justice, after stating that the title to the shore and lands under water is in the State, added (pp. 381, 382):

"Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. . . . Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. . . . This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many States expressly recognized as of controlling force in the absence of express statute. As said by Mr.

Justice Gray in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com., 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274."

In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. See also the opinion of the Supreme Court of Kansas in *Clark* v. *Allaman*, 71 Kansas, 206. But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States, *Pollard* v. *Hagan*, *supra*; *Shively* v. *Bowlby*, *supra*; *Hardin* v. *Shedd*, 190 U. S. 508, 519; and Colorado by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation. Now the question arises between two States, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and

determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several States. This contention was made in *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U. S. 92, in which it was asserted that, as Congress having sole jurisdiction over interstate commerce had prescribed no rates for interstate telegraph communications, there was no limit on the power of a telegraph company in respect thereto. After referring to the general contention, we said (pp. 101, 102):

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

What is the common law? Kent says (vol. 1, p. 471):

"The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the deci-

sions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In *The Paquete Habana*, 175 U. S. 677, 700, Mr. Justice Gray declared:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

And in delivering the opinion on the demurrer in this case Chief Justice Fuller said (185 U. S. 146):

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand."

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois*, 180 U. S. 208, the action of one State reaches through the agency of natural laws into the territory of another State,

the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

It will be perceived that Kansas asserts a pecuniary interest as the owner of certain tracts along the banks of the Arkansas and as the owner of the bed of the stream. We need not stop to consider what rights such private ownership of property might give.

In deciding this case on demurrer we said (185 U. S. 142), referring to the opinion in *Missouri* v. *Illinois:*

"As will be perceived, the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriæ*, trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

"In the case before us, the State of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action and not the action of state officers in abuse or excess of their powers."

It is the State of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. *Georgia* v. *Tennessee Copper Co.*, decided this day, *post*, p. 230.

This changes in some respect the scope of our inquiry. It is not limited to the simple matter of whether any portion of the

waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective States and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.

We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two States, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way can be

made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed. Science may not as yet be able to give positive information as to the processes by which the distribution of water over certain territory has operation beyond the mere limits of the area in which the water is distributed, but they who have dwelt in the West know that there are constant changes in the productiveness of different portions of the territory, owing, apparently, to a wider and more constant distribution of water. To illustrate, the early settlers of Kansas territory found that farming was unsuccessful unless confined to its eastern 100 or 120 miles. West of that crops were almost always a failure, but now that region is the home of a large population, with crops as certain as those elsewhere, and yet this change has not been brought about by irrigation. A common belief is that the original sod was largely impervious to water, that when the spring rains came the water, instead of sinking into the ground, filled the watercourses to overflowing and ran off to the Gulf of Mexico. There was no water in the soil to go up in vapor and come down in showers, and the constant heat of summer destroyed the crops; but after the sod had once been turned the water from those rains largely sank into the ground, and then as the summer came on went up in vapor and came down in showers, and so by continued watering prevented the burning up of the growing crops. We do not mean to say that science has demonstrated this to be the operating cause or that other theories are not propounded, but the fact is that, instead of stopping at a distance of 120 miles from the Missouri River, the area of cultivated and

profitably cultivated land has extended 150 to 200 miles further west, and seems to be steadily moving towards the western boundary of the State. Now if there is this change gradually moving westward from the Missouri River, is it altogether an unreasonable expectation that as the arid lands of Colorado are irrigated and become from year to year covered with vegetation, there will move eastward from Colorado an extension of the area of arable lands until, between the Missouri River and the mountains of Colorado, there shall be no land which is not as fully subject to cultivation as lands elsewhere in the country? Will not the productiveness of Kansas as a whole, its capacity to support an increasing population, be increased by the use of the water in Colorado for irrigation? May we not consider some appropriation by Colorado of the waters of the Arkansas to the irrigation and reclamation of its arid lands as a reasonable exercise of its sovereignty and as not unreasonably trespassing upon any rights of Kansas? And here we must notice the local law of Kansas as declared by its Supreme Court, premising that the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two States are as here disclosed. In *Clark* v. *Allaman*, 71 Kansas, 206, is an exhaustive discussion of the question, Mr. Justice Burch delivering the unanimous opinion of the court. In the syllabus, which by statute (Compiled Laws, Kansas, p. 317, sec. 14) is prepared by the justice writing the opinion, and states the law of the case, are these paragraphs:

"The use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements have been subserved, is one of the common law rights of a riparian proprietor.

"The use of water by a riparian proprietor for irrigation purposes must be reasonable under all the circumstances, and the right must be exercised with due regard to the equal right of every other riparian owner along the course of the stream.

"A diminution of the flow of water over riparian land caused

by its use for irrigation purposes by upper riparian proprietors occasions no injury for which damages may be allowed unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the landowner is able to enjoy.

"In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land."

And in the opinion, on pages 242, 243, are quoted these observations of Chief Justice Shaw in the case of *Elliott* v. *Fitchburg Railroad Company*, 10 Cush. 191, 193, 196:

"The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such a character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use, may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes, would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is, therefore, to a considerable extent a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for

his own benefit, for domestic use, and for manufacturing and agricultural purposes. . . .

"That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. . . .

"This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so, each is bound so to use his common right, as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right, by all the proprietors. . . .

"The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie."

As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered

between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation. The Arkansas River, from its source to the eastern end of the Royal Gorge, is a mountain torrent, coming down between rocky banks and over a rocky bed. Along this distance it is of comparatively little use for irrigation purposes. After it debouches from the Royal Gorge it enters a valley, in which it wanders from one side to the other through eastern Colorado, southwestern Kansas and into Oklahoma, with but a slight descent, and presenting but little opportunities for the development of water power through falls or by dams. Its length in Kansas is about three hundred and fifty miles, and the descent is only 2,320 feet, or less than seven feet to a mile. There are substantially no falls, no narrow passageways in which dams can be readily constructed for the development of water power; and while there are some in eastern Colorado, yet they are of little elevation and mainly to assist in the storing of water for purposes of irrigation. So that, if the extreme rule of the common law were enforced, Oklahoma having the same right to insist that there should be no diversion of the stream in Kansas for the purposes of irrigation that Kansas has in respect to Colorado, the result would be that the waters, except for the meagre amount required for domestic purposes, would flow through eastern Colorado and Kansas and be of comparatively little advantage to either State, and both would lose the great benefit which comes from the use of the water for irrigation. The drainage area of the Arkansas River in Colorado is 26,000 square miles; in Kansas, 20,000 square miles; and all this area, unless the stream can be used for purposes of irrigation, would be left to the slow development which comes from the cultivation of the soil.

The testimony in this case is voluminous, amounting to 8,559 typewritten pages, with 122 exhibits, and it would be impossible to make a full statement of facts without an extravagant extension of this opinion, which is already too long,

and yet some facts must be stated to indicate the basis for the conclusion to which we have come. It must also be noted that, as might be expected in such a volume of testimony, coming as it does from three hundred and forty-seven witnesses, there is no little contradiction and a good deal of confusion, and this contradiction is to be found not merely in the testimony of witnesses, but also in the exhibits, among which are reports from the officials of the Government and the two States. We have endeavored to deduce from this volume those matters which seem most clearly proved, and must, as to other matters, be content to generalize and state that which seems to be the tendency of the evidence.

Colorado is divided into five irrigating divisions, each of which is in charge of a division engineer. That which includes the drainage area of the Arkansas is District No. 2, divided into eleven districts. Under the laws of Colorado, irrigating ditches have been established in this district and the amount of water which each may take from the river decreed. In addition some reservoirs have been built for storing the surplus waters which come down in times of flood, and this adds largely to the amount available for irrigation. The storage capacity of six of these reservoirs is shown to be 8,527,673,652 cubic feet. The significance and value of these reservoirs can be appreciated when we remember that the Arkansas, like many other streams, has its origin in the mountain districts of Colorado, and that by the melting of the snows almost every year there is a flood. The amount of water authorized to be taken by the ditches from the river is, as alleged in the bill, 4,200 cubic feet, and from its affluents and tributaries 4,300 feet. (Whenever this term is used in reference to the flow of water it means the number of cubic feet that pass in a second.) The average flow of the river, as it comes out of the Royal Gorge at Cañon City, is as shown by official measurements for a series of years, 750 cubic feet. So that it appears that the irrigating ditches are authorized to take from the Arkansas River much more water than passes in the channel into the valley. It is not clear

what surplus water, if any, comes out of the tributaries. There are some twenty-five of them, the average flow from four of which into the Arkansas is 313 cubic feet. Aside from this surplus water some may be returned through overflow of the ditches or from seepage. What either of these amounts may be is not disclosed. Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something proof of which must necessarily be almost impossible. We may note the fact that a tract, bordering upon land which has been flooded, shows by its increasing vegetation that it has received in some way the benefit of water, and yet the amount of the water passing by seepage may never be definitely known. The underground movement of water will always be a problem of uncertainty. We know that when water is turned upon dry and barren soil the barrenness disappears, vegetation is developed, and that which was a desert becomes a garden. It is the magic of transformation; the wilderness budding and blossoming as the rose. The writer of this opinion recalls a conversation with Bayard Taylor, the celebrated traveler, in which the latter stated that nothing had contributed so much to secure the steady control of the French in Algiers as the fact that after taking possession of that territory they sank artesian wells on the borders of the desert, and thus reclaimed portions of it, for the Arabs believed that people who could reclaim the desert were possessed of a power that could not be withstood.

Further, adjacent barren ground is slowly but surely affected, and itself begins to increase its vegetation. We may not be entirely sure as to the methods by which this change is accomplished, although the result is undoubted. It may be that water percolating under the surface has reached this adjacent ground. Perhaps the vegetation, which we know attracts moisture from the air, may increase the rainfall, and thus affect the adjacent barren regions.

It appears that prior to 1885 there was comparatively little

water taken from the Arkansas for irrigation purposes—certainly not enough to make any perceptible impression on the flow of the river—but about that time certain corporations commenced the work of irrigation on a large scale, with ditches, some of which might well be called canals. Thus, in 1884 work was commenced on ditches capable of carrying off 450 cubic feet; in 1887 others capable of carrying off 1,481 cubic feet, and in 1890 still others carrying 1,705 cubic feet. Most of these were completed within two years after the commencement of the several works. By the year 1902, according to the report of the Census Bureau of the United States, there were 300,115 acres, in 4,557 farms, actually irrigated.

The counties in Colorado, from Cañon City eastward, through which the Arkansas runs are Fremont, Pueblo, Otero, Bent and Prowers. The following tables prepared by the defendants from various census reports show the population, number of acres cultivated and total value of farm products in these several counties for the years 1880, 1890 and 1900:

County.	Population.		
	1880.	1890.	1900.
Fremont	4,735	9,156	15,636
Pueblo	7,617	31,491	34,448
Otero	.....	4,192	11,522
Bent	1,654	1,313	3,049
Prowers	.....	1,969	3,766
Making in the aggregate	14,006	48,121	68,421

County.	No. of acres cultivated.			Value of Farm Products.		
	1880.	1890.	1900.	1880.	1890.	1900.
Fremont..	16,160	52,868	109,488	$ 76,900	$237,980	$ 472,293
Pueblo...	51,984	100,697	478,821	136,184	244,580	691,693
Otero....	.....	61,347	244,594	.....	208,860	1,089,344
Bent	30,921	30,058	118,485	105,621	35,070	670,541
Prowers..	.....	46,447	217,332	.....	60,500	465,688
	98,975	291,417	1,168,720	$318,705	$786,990	$3,389,559

These tables disclose a very marked development in the population, area of land cultivated and amount of agricultural products. Whatever has been effective in bringing about this development is certainly entitled to recognition, and should not be wantonly or unnecessarily destroyed or interfered with. That this development is largely owing to irrigation is something of which from a consideration of the testimony there can be no reasonable doubt. It has been a prime factor in securing this result, and before, at the instance of a sister State, this effective cause of Colorado's development is destroyed or materially interfered with, it should be clear that such sister State has not merely some technical right, but also a right with a corresponding benefit.

It may be asked why cultivation in Colorado without irrigation may not have the same effect that has attended the cultivation in Kansas west of where it was productive when the territory was first settled. It may possibly have such effect to some degree, but it must be remembered that the land in Colorado is many hundred feet in elevation above that in Kansas; that large portions of it are absolutely destitute of sod, and that cultivation would have comparatively little effect upon the retention of water. Add further the fact that the rainfall in Colorado is less than that in Kansas, and it would seem almost certain that reliance upon mere cultivation of the soil would not have anything like the effect in Colo-

rado that it has had in Kansas, and that the barrenness which characterized portions of the territory of Colorado would have continued for an indefinite time unless relieved by irrigation.

Turning to Kansas, the counties along the Arkansas River, commencing from the Colorado line are: Hamilton, Kearney, Finney, Gray, Ford, Edwards, Pawnee, Barton, Rice, Reno, Sedgwick, Sumner, Cowley. Taking the same years as are given for the Colorado counties, the population is shown to be:

County.	Population.		
	1880.	1890.	1900.
Hamilton	168	2,027	1,426
Kearney	159	1,571	1,107
Finney	.....	3,350	3,469
Gray	.....	2,415	1,264
Ford	3,122	5,308	5,497
Edwards	2,409	3,600	3,682
Pawnee	5,396	5,204	5,084
Barton	10,318	13,172	13,784
Rice	9,292	14,451	14,745
Reno	12,826	27,079	29,027
Sedgwick	18,753	43,626	44,037
Sumner	20,812	30,271	25,631
Cowley	21,538	34,478	30,156
	104,793	186,552	178,909

We have been furnished by the United States Census Office with statistics of the corn and wheat crops of those counties from the years 1889 to 1904. Corn, wheat and hay are the leading crops in Kansas. It would unnecessarily prolong this opinion to copy these tables in full, so we give the figures for 1890, 1895, 1900 and 1904:

Acreage and Production of Corn and Wheat in Kansas—13 Counties.

YEAR.	COUNTY.	CORN.		WHEAT.	
		ACRES.	BUSHELS.	ACRES.	BUSHELS.
1890.	Hamilton	80	400	449	6,636
	Kearney	872	8,720	586	10,658
	Finney	2,423	48,460	1,410	24,740
	Gray	493	2,465	3,335	38,724
	Ford	1,558	12,464	7,190	107,295
	Edwards	2,058	20,580	8,876	168,094
	Pawnee	544	2,720	39,464	591,402
	Barton	3,666	25,662	99,738	1,294,639
	Rice	27,460	329,520	52,941	792,345
	Reno	98,972	989,720	35,121	351,210
	Sedgwick	67,685	744,535	52,506	944,804
	Sumner	19,120	267,680	134,352	2,149,116
	Cowley	63,391	887,474	28,073	282,666
	Totals	288,322	3,340,400	464,041	6,762,329
1895.	Hamilton	404	3,232	4,360	12,576
	Kearney	914	5,698	2,917	6,430
	Finney	2,058	20,580	27,428	69,801
	Gray	1,115	11,150	12,297	12,309
	Ford	12,145	194,320	36,626	109,914
	Edwards	21,222	212,220	47,479	94,958
	Pawnee	19,076	152,608	113,980	342,075
	Barton	103,831	778,732	179,761	359,284
	Rice	153,256	3,371,632	127,200	254,394
	Reno	205,745	7,406,820	89,973	314,573
	Sedgwick	190,646	5,147,442	93,351	279,711
	Sumner	181,642	2,179,704	248,115	619,884
	Cowley	133,745	2,674,900	89,866	673,822
	Totals	1,025,799	22,159,038	1,073,353	3,149,731
1900.	Hamilton	266	3,990	155	1,550
	Kearney	538	11,298	506	5,492
	Finney	1,213	18,195	427	4,234
	Gray	2,001	30,015	4,023	59,605
	Ford	11,215	145,795	23,416	444,904
	Edwards	25,032	325,416	43,525	696,400
	Pawnee	16,257	146,313	115,931	1,969,801
	Barton	32,649	261,192	254,130	5,081,352
	Rice	71,151	355,755	148,597	3,120,537
	Reno	199,150	1,991,500	110,404	2,097,276
	Sedgwick	153,635	2,766,430	123,339	2,589,811
	Sumner	102,057	2,143,197	288,133	5,761,260
	Cowley	121,398	2,792,154	79,948	1,439,064
	Totals	736,562	10,991,250	1,192,534	23,271,286

Acreage and Production of Corn and Wheat in Kansas—13 *Counties*—Cont.

YEAR.	COUNTY.	CORN.		WHEAT.	
		ACRES.	BUSHELS.	ACRES.	BUSHELS.
1904.	Hamilton.	120	1,800	271	2,297
	Kearney.	306	6,120	536	6,244
	Finney.	759	7,590	7,012	37,382
	Gray.	1,579	25,264	17,268	69,590
	Ford.	10,631	170,096	72,917	365,299
	Edwards	23,396	584,900	130,313	1,302,834
	Pawnee	13,272	331,800	162,970	1,629,246
	Barton.	26,984	728,568	262,673	3,414,731
	Rice	59,851	1,556,126	160,853	2,251,838
	Reno.	138,899	4,028,071	207,002	3,518,752
	Sedgwick.	132,374	3,441,724	151,635	1,971,255
	Sumner	79,808	1,995,200	294,489	3,828,192
	Cowley.	109,708	2,962,116	68,477	821,652
	Totals.	597,687	15,839,375	1,536,416	19,219,312

Comparing the tables of population it will be perceived that both the counties in Colorado and Kansas made a considerable increase in the years from 1880 to 1890; that while the Colorado counties continued their increase from 1890 to 1900, the Kansas counties lost. As the withdrawal of water in Colorado for irrigating purposes became substantially effective about the year 1890, it might, if nothing else appeared, not unreasonably be concluded that the diminished flow of the river in Kansas, caused by the action of Colorado, had resulted in making the land more unproductive, and hence induced settlers to leave the State. As against this it should be noted, as a matter of history, that in the years preceding 1890, Kansas passed shrough a period of depression, with crops largely a failure in different parts of the State. But, more than that, in 1889 Oklahoma, lying directly south of Kansas, was opened for settlement and immediately there was a large immigration into that territory, coming from all parts of the West, and especially from the State of Kansas, induced by glowing reports of its great possibilities. The population of Oklahoma,

as shown by the United States census, was, in 1890, 61,834, and in 1900, 348,331.

Turning to the tables of the corn and wheat products, they do not disclose any marked injury which can be attributed to a diminution of the flow of the river. While there is a variance in the amount produced in the different counties from year to year, it is a variance no more than that which will be found in other parts of the Union, and although the population from 1890 to 1900 in fact diminished, the amount of both the corn and wheat product largely increased. Not only was the total product increased, but the productiveness per acre seems to have been materially improved. Take the corn crop, and per acre, it was, in 1890, 12 bushels and a fraction; in 1895, 21 and a fraction, in 1900, 15, and in 1904, 28 bushels. Of wheat, the product per acre in 1890 was nearly 15 bushels; in 1895 it was only about 3 bushels. (For some reason, while that was a good year for corn, it seems to have been a bad year for wheat.) But in 1900 the product per acre rose to 19 bushels, and in 1904 it was 12 bushels.

These are official figures taken from the United States census reports, and they tend strongly to show that the withdrawal of the water in Colorado for purposes of irrigation has not proved a source of serious detriment to the Kansas counties along the Arkansas River. It is not strange that the western counties show the least development, for being nearest the irrigation in Colorado, they would be most affected thereby. At one time there were some irrigating ditches in these western counties, which promised to be valuable in supplying water and thus increasing the productiveness of the lands in the vicinity of the stream, and it is true that those ditches have ceased to be of much value, the flow in them having largely diminished.

It cannot be denied in view of all the testimony (for that which we have quoted is but a sample of much more bearing upon the question), that the diminution of the flow of water in the river by the irrigation of Colorado has worked some

detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

Many other matters have been presented and discussed. We have examined and fully considered them, but, as heretofore stated, we shall have to content ourselves with merely general observations respecting them. Evidence has been offered of an alleged underflow of the river as it passes through the State of Kansas, and it seems to be the contention on the part of Kansas that beneath the surface there is, as it were, a second river with the same course as that on the surface, but with a distinct and continuous flow as of a separate stream. We are of the opinion that the testimony does not warrant the finding of such second and subterranean stream. If the bed of a stream is not solid rock, but earth through which water will percolate, and, as alleged in plaintiff's bill, the "valley of the river in the State of Kansas is composed of sand covered with alluvial soil," undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells or other modes of exploring the subsurface. Undoubtedly, too, in many places there may be corresponding to the flow on the surface a current beneath the surface, but the presence of such subsurface water, even though in places of considerable amount and running in the same direction, is something very different from an independent subsurface river flowing continuously from the Colorado line through the State of Kansas. It is not properly denominated a second and subsurface stream. It is rather to be regarded as merely the accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. Naturally, the more abundant the flow of the surface stream and the wider its channel the more of this subsurface water there will be. If

the entire volume of water passing down the surface was taken away the subsurface water would gradually disappear, and in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water, it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the further it will reach in its percolations on either side as well as more distinct will be its movement down the course of the stream. The testimony, therefore, given in reference to this subsurface water, its amount and its flow bears only upon the question of the diminution of the flow from Colorado into Kansas caused by the appropriation in the former State of the waters for the purposes of irrigation.

Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and from springs and branches starting a new stream to flow onward through Kansas and Oklahoma towards the Gulf of Mexico. From time immemorial the existence of a single continuous river has been recognized by geographers, explorers and travelers. That there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows. Thus, from one of complainant's exhibits furnished by the United States Geological Survey, the mean monthly flow at Cañon City at the mouth of the Royal Gorge for the years 1890, 1895 and 1900 is as follows:

Arkansas River—Cañon City. Mean Monthly Discharge in Second Feet.

	1890.	1895.	1900.
January	310	344	*a* 345
February	363	361	*a* 353
March	320	471	*a* 439
April	477	868	736
May	2,090	1,506	2,251
June	2,611	1,900	3,492
July	1,571	1,413	891
August	670	1,095	273
September	519	635	211
October	531	505	241
November	522	499	260
December	502	444	298

a Approximate.

Doubtless the variance at different seasons of the year is more regular and more pronounced than in those streams whose sources are only slightly elevated and the rise and fall of whose waters is mainly owing to rains. Contrasting, for instance, the Hudson with the Missouri, illustrates this. When the June flood comes down the Missouri River it is a mighty torrent. One can stand on the bluffs at Kansas City and see an enormous volume of water, extending in width from two to five miles to the bluffs on the other side of the river, flowing onward with tremendous velocity and force, and yet at other times the entire flow of the Missouri River passes between two piers of the railroad bridge across the river at that point. No such difference between high and low water appears in the Hudson. In the days when navigation west of the Mississippi was largely by steamboats on the Missouri River, it was familiar experience for the flat-bottomed steamboats, drawing but little water, to be aground on sandbars and detained for hours in efforts to cross them. Gen. Doniphan commanded an expedition which marched from Fort Leavenworth in 1846 up the Arkansas Valley and into the Territory of New Mexico. He did not enter the valley again until shortly before his death in 1887, and when asked what he recognized replied that there

were one or two natural objects like Pawnee rock that appeared as they did when he marched up the valley; the river was the same but all else was changed, and the valley instead of being destitute of human occupation was filled with farm houses and farms, villages and cities—something that he had never expected would be seen in his day.

Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes.

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings when

ever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river. Each party will pay its own costs.

In closing, we may say that the parties to this litigation have approached the investigation of the questions in the most honorable spirit, seeking to present fully the facts as they could be ascertained from witnesses and discussing the evidence and questions of law with marked research and ability.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in the result.

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

UNITED STATES *v.* WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY.

WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, APPELLANT, *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 263, 264. Argued April 18, 19, 1907.—Decided May 13, 1907.

In a contract made between a building company and the United States for the construction of a battleship at a cost of over three millions of dollars it was provided that a special reserve of sixty thousand dollars should be held until the vessel had been finally tried and then paid to the company "on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract." The vessel having been built and the final trial had, all moneys were paid on the execution by the company of a stipulation to "remise, release and forever discharge the United States of and from all and all manner of debts, dues, sums and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid." *Held*, that:

In the absence of anything to the contrary, it will be assumed that the release which was executed was the one stipulated for in the original con-

tract and was intended to include all matters which according to its terms were to be released by the company as a condition of final payment.

The words in the release "by reason of" are equivalent to those in the original contract "by virtue of" and include all claims which grew out of the performance of the contract, although not arising from the actual construction of the vessel.

41 C. Cl. 164, reversed.

On November 19, 1890, the William Cramp & Sons Ship & Engine Building Company entered into a contract with the United States to construct what was called "Coast-line battleship No. 1," but afterwards known as the battleship "Indiana," for the sum of $3,020,000, the ship to be completed and ready for delivery to the United States within three years from the date of the contract. As a matter of fact the vessel was not completed and delivered until November 19, 1895, but as the delay was occasioned by the United States no damages were recoverable from the building company on account thereof. On August 10, 1897, the company commenced this action in the Court of Claims to recover the sum of $480,231.90. The elements of its claim are thus stated in its petition:

For time of organization and plant lost in waiting for armor, materials, etc., to be furnished by United States	$144,379.50
For special wharfage, 730 days, at 1 cent per ton per day	74,825.00
For general care and maintenance of vessel, including coal, firemen, engineers, watchman, canvas awnings, wooden covers, keeping clean, removing snow, dust, etc., extra painting, tug hire, moving derrick, etc., 730 days, at $135 per day	98,550.00
Additional cost of insurance	34,462.55
Interest on money borrowed caused by delays of United States which prolonged final settlement	60,499.91
Extra trial trip made necessary by construction and completion of vessel being delayed by United States	17,514.94
For loss due to running the official trial of "Indiana" with a foul bottom, as owing to the delay caused in the completion of the vessel it was impossible to clean and paint the bottom	50,000.00
Total	$480,231.90

On May 10, 1894, as appears from the findings made by the Court of Claims, an agreement was made between the parties

by which moneys not then due by the terms of the original contract were paid, the stipulation in this new agreement being:

"But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part of the amount so paid, upon demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and in consideration of such advance payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract or on account of any delay hitherto occasioned by the action of said party of the second part."

The time intervening between this agreement and the final completion and delivery of the vessel was one year, six months and nine days, and that time was made the basis for the computation of damages, as will appear hereafter.

On May 18, 1896, after the completion and delivery of the vessel, the balance of the money due on the contract was paid, and a release and receipt executed by the building company in the following terms:

"Whereas, by the eleventh clause of the contract dated November 19, 1890, by and between The William Cramp and Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said company, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a seagoing coast-line battleship of about ten thousand tons displacement, which for the purpose of said contract is designated and known as 'Coast-line battleship No. 1,' it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be

held until the vessel shall have been finally tried; provided that such final trial shall take place within five months from and after the date of the preliminary or the conditional acceptance of the vessel; and

"Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

"Whereas the final trial of said vessel was completed on the eleventh day of April, 1896; and

"Whereas all the conditions, covenants and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

"Now, therefore, in consideration of the premises, the sum of forty-one thousand one hundred and thirty-two dollars and eighty-six cents ($41,132.86), the balance of the aforesaid special reserve ($60,000), to which the party of the first is entitled, being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby for itself and its successors and assigns, and its legal representatives, remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid.

"In witness whereof I have hereunto set my hand and

affixed the seal of The William Cramp & Sons Ship and Engine Building Company this eighteenth day of May, A. D. 1896.

[SEAL.] CHAS. H. CRAMP, *President.*

"Attest: JOHN DOUGHERTY, *Secretary.*"

The Court of Claims found for the claimant in the following items and amounts:

The reasonable value for the use of the claimant's yard, machinery and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard chargeable to the "Indiana," $3,000 per month, making.....	$54,887.67
The reasonable cost of the proper care and protection of the vessel during the two years' delay, including expense of cleaning the bottom, furnishing material and painting, temporary awnings and tents over caps left for the introduction of turrets, additional scaling to remove rust before painting, electric lighting, keeping up steam to prevent freezing of valves, wetting down decks, going over machinery, and keeping vessel free from snow, dust, ice, and debris from May 10, 1894....	36,591.78
Wharfage from May 10, 1894, including the dredging of a basin to accommodate the vessel.....	17,808.00
The proportionate expense, for the period from May 10, 1894, of the cost of insurance during the two years' delay.....	26,272.55
	$135,560.00

and rendered judgment against the Government for $135,560. From this judgment both parties appealed.

The Attorney General and *Mr. Assistant Attorney General Van Orsdel,* with whom *Mr. Charles C. Binney* was on the brief, for the United States:

The final release of May 18, 1896, released the United States from every kind of liability to the contractor which could arise in connection with the building of the "Indiana," including liability (if any such existed) for damages on account of delay in furnishing the armor.

The language of the release, though somewhat fuller than that of the contract, must have been intended to cover the precise ground which the contract stated should be covered.

There was no authority to require a more complete release, and the words actually used cover the ground at least as completely as do the words of the contract.

The contract being for the construction of the vessel and for no other purpose, it follows that a release of claims on account of such construction must be a release to the United States "of all claims of any kind or description under or by virtue of this contract." Such a release must cover every kind of lawful claim of the contractor, against the Government, to which anything that was done under the contract gave rise. A claim for damages on account of delay in delivering the armor was certainly a claim "under or by virtue of this contract," because there could have been no such claim had the contract not been made. It was a claim for damages for the failure of the United States to do what it had contracted to do, and had the United States not so contracted there could have been no such claim. The claim, moreover, had fully accrued six months before the release was made, for the claim is for damages to November 19, 1895, the date of preliminary acceptance, while the release was made May 18, 1896.

The release, being required by the contract itself, was obviously given for a valuable consideration. The contract cannot be cut up into separate parts and one of the claimant's obligations declared to be without consideration, as distinguished from other obligations for which a consideration existed. The release itself shows that $41,132.86 was paid at the time the release was executed, but the consideration was not even limited to this payment.

As to the inherent reasonableness of a provision for a release of all claims, including those for damages due to delay, it should not be forgotten that the contract had provided that a failure to deliver the armor at the proper time should not cause any serious delay. The contractor was entitled to complete the vessel without the undelivered armor, and it is manifest that if it had insisted on doing so, no claim on account of the delay could have arisen.

It cannot be contended that this release was given under duress, in order to secure a payment of money to which the claimant was lawfully entitled. The contract may have turned out to be less profitable than the contractor expected, but the time for objecting to its terms was before it was signed. There is no such thing, in the eye of the law, as duress in merely insisting upon the performance of what a man has freely contracted to do.

Mr. John C. Fay and *Mr. Holmes Conrad*, with whom *Mr. Eppa Hunton* was on the brief, for the Cramp Company:

The final receipt was nothing more or less than an acknowledgment of the payment of the balance of the special reserve, and while it was very verbose the multiplicity of words did not change its legal effect.

It was not the result of the adjustment of a disputed or disputable account for every "condition," "covenant," and "provision" of the contract on the part of the Cramp Company had been "performed and fulfilled," and in consideration thereof, and for no other consideration, became entitled to receive the money paid. It is now claimed that this sum of money not only paid this claim, but that it also embraced other distinct claims, to wit, unliquidated damages arising from the breach of the contract on the part of the United States, which were not only not presented or considered, but were of such a character that the Secretary of the Navy had neither the right, authority, or jurisdiction to consider, adjust, or pay. See *Brannan's Case*, 20 C. Cls., 223; *McKees* v. *United States*, 12 C. Cl. 555; *Powers* v. *United States*, 18 C. Cl. 263, 275; *Dunbar* v. *United States*, 19 C. Cl. 493; *McClure* v. *United States* 19 C. Cl. 179; *Dennis* v. *United States*, 20 C. Cl. 119, 121; *Pneumatic Gun Carriage Company* v. *United States*, 36 C. Cl. 71; 4 Ops. Atty. Gen. 327, 367, 6 Ops. 516; Decision of 2d Comptroller, A. D. 1860, §§ 458–464.

The United States has recovered back a payment made

which the accounting officers had no authority or jurisdiction to allow. *McElrath* v. *United States,* 102 U. S. 426.

There was no necessity to protest; a protest would not have had any effect whatever.

The claim for damages here sued for was not a claim "under and by virtue of the contract"; it did not arise by reason of the fulfillment on the part of the Cramp Company of all the conditions, covenants and provisions that it undertook. It arose not under, but by reason of the violation of the contract by the United States.

A receipt even as comprehensive as this does not release such damages as are here claimed, and the general words upon established principles would be limited to the items specified. *Coulter* v. *Board of Education,* 63 N. Y. 365; 1 Edw. Ch. 34; 1 Cowan, 122, and cases there cited.

Here the company was not to receive anything except the balance of the special reserve of the contract price; nothing was to be considered with respect to the final release except for the work provided in the contract, not even the extra work and certainly not the damages for delay. Large amounts of extra work were done, but they were not to be considered or paid for in this accounting.

The second article of the contract provides for extra work and for the ascertainment of its value. Neither the extra work nor the speed premiums were to be embraced in this final receipt; it was a final receipt only for the balance of the contract work, and neither its language nor Article XIX of the contract extends it beyond that. *Fire Insurance Co.* v. *Wickham,* 141 U. S. 577.

A receipt in the exact form of this, and upon a claim arising from delays on the part of the Government in supplying material, was held no bar to the suit in *Pneumatic Gun Carriage Co.* v. *United States,* 36 C. Cl. 71. See also *McLaughlin* v. *United States,* C. Cl.

The case of *Phelan* v. *Mayor,* cited by the United States is not applicable to the case at bar.

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

This case turns on the release executed by the building company on May 18, 1896. It is contended by the claimant that it applies simply to claims springing out of the construction of the vessel, and therefore has no application to the matters for which the judgment was rendered against the Government. The word "construction," the company says, is limited to the mere matter of building; that is, the furnishing of materials, the doing of work, and does not include delays or other matters outside the building of the vessel.

To rightly understand the scope of this release we must consider the conditions of the contract, and especially the clause in it which calls for a release. The contract was a large one, the price to be paid for the work and material being over $3,000,000, and the contract was evidently designed to cover all contingencies. Provision was made for changes in the specifications, for penalties on account of delays of the contractor, deductions in price on certain conditions, approval of the work by the Secretary of the Navy, forfeiture of the contract, with authority to the Secretary to complete the vessel. The last paragraph contains the stipulations as to the amounts and times of payment with authority for increase of the gross amount upon certain conditions. The sixth clause of this paragraph makes special provision for the last payment, to be made "when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part," and "on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract." Evidently the parties contemplated and specially provided by this stipulation that the whole matter of the contract should be ended at the time of the final release and the last payment. That which was to be

released was "all claims of any kind or description under or by virtue of said contract." Manifestly included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the Government. The language is not alone "claims under," but "claims by virtue" of the contract—"claims of any kind or description." All the claims for which allowances were made in the judgment of the Court of Claims come within one or the other of these clauses. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen. Now it having been provided in advance that the contract should be closed by the execution of a release of this scope it cannot be that the company, when it signed the release, understood that some other or lesser release was contemplated. It must have understood that it was the release required by the contract—a release intended to be of all claims of any kind or description under or by virtue of the contract, and that the form of words which the Secretary had approved was used to express that purpose. With that release stipulated for in the contract the company signed the instrument of May 18, 1896, which in terms purported to "remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid." Now whatever limitation may be placed upon the words "for" or "on account of" the construction the provision for the release of all claims and demands whatsoever, "by reason of the construction of the vessel under the contract aforesaid," is a recognition of the contract, and includes claims which arise by reason of the construction of the vessel under it. "By reason of" may well be considered as equivalent to "by virtue of." It is only by reason of the performance of the contract in the construction of the vessel

that these claims arise. But for the contract, and the construction of the vessel under it, there would be no such claims. No payment of extra moneys is necessary to sustain this release. It is under seal, and the contract is itself full consideration. As of significance it must be borne in mind that the release referred specifically to the sixth paragraph of the nineteenth clause of the contract which provided for the character of the release. Indeed the general language of the release itself and the number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract.

Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction. The general language "all and all manner of debts," etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest. Here was a contract involving three millions of dollars, and after the work was done, the vessel delivered and accepted and this release entered, claims are presented amounting to over $500,000. Surely the parties never intended to leave such a bulk of unsettled matters. As bearing upon this matter, it may be noticed that while the release was signed and the contract between the building company and the Government closed on May 18, 1896, this action was not brought until August 10, 1897, nearly a year and a quarter thereafter.

We are of opinion that the parties by the release of May 18, 1896, which was executed in performance of the requirements of the original contract, settled all disputes between the parties as to the claims sued upon.

The judgment of the Court of Claims is reversed and the case remanded with instructions to enter a judgment on the findings for the defendant.

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

ADAMS EXPRESS COMPANY *v.* KENTUCKY.

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

No. 331. Argued April 17, 18, 1907.—Decided May 13, 1907.

A statute of Kentucky, making penal all shipments of liquor "to be paid for on delivery, commonly called C. O. D. shipments," and further providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale and that the carrier and his agents delivering the goods shall be jointly liable with the vendor, is as applied to shipments from one State to another an attempt to regulate interstate commerce and beyond the power of the State.

When, in a prosecution of an express company for a violation of this statute by an interstate shipment, it is averred in the indictment or stipulated by the prosecution that the shipment and delivery were made and done by the express company in the usual course of its business as a carrier, testimony that the consignee did not order the goods or that the goods were held by the agent of the company at the place of delivery for a few days to accommodate the consignee is immaterial.

On February 17, 1904, a grand jury returned into the Circuit Court of Laurel County, Kentucky, an indictment against Joe Newland and the Adams Express Company, charging that "the said Joe Newland and the Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier of packages, goods, wares and merchandise, by the method known as express . . . did in Laurel County, Kentucky, on the seventeenth day of February, 1904, unlawfully and willfully carry for and deliver to George Meece a parcel, package, shipment and quantity of intoxicating, spirituous, vinous and malt liquors . . . to be and which was paid for on delivery at East Bernstadt in said Laurel County, same being at the time a shipment commonly known and called C. O. D. shipments, . . . said shipment and delivery being made and done at the time by said Joe Newland and said Adams Express Company in the usual course of business of said Adams Express Company."

Subsequently the action was dismissed as to Newland, and on a plea of not guilty the case was tried before a jury and resulted in a verdict finding the company guilty and fixing the fine at sixty dollars. The instructions of the court were as follows:

"Gentlemen of the Jury: 1. If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, Adams Express Company, is a copartnership, formed of persons whose names and number were unknown to the grand jury that found this indictment, and who lived out of the State of Kentucky, but are doing business in the State of Kentucky and in Laurel County, Kentucky, and under the firm name and style of 'Adams Express Company,' and that the said Adams Express Company, in this county and within twelve months next before the finding of the indictment herein, knowingly delivered to the witness, George Meece, spirituous, vinous or malt liquors in quantities of less than five gallons at the time mentioned by the witness and received the pay therefor, and that said company received any pay whatever for its service in that behalf, then you should find the defendant guilty and fix its punishment at any fine not less than $60.00 nor more than $100.00, in your discretion, according to proof.

"2. The court says to the jury that if they shall believe from the evidence, beyond a reasonable doubt, that the agent or agents of the defendant's company that accepted, received, transported or delivered the package mentioned in evidence by the witness Meece, knew, or might, by the exercise of such care as persons of ordinary prudence are accustomed to use in the ordinary transactions of life, have known the contents of the package delivered to the witness, then the defendant company is chargeable with such knowledge, and should be held to know the contents of such package."

Judgment was entered on the verdict, which was affirmed by the Court of Appeals of the State, 87 S. W. Rep. 1111, 27 Ky. Law Reporter, 1096, and from that court the case was

brought here on writ of error. The act under which the prosecution was had is subsection 4 of section 2557*b*, Kentucky Statutes, 1903, commonly called the "C. O. D." law, which is part of the general local option law as amended in 1902, and which reads:

"All the shipments of spirituous, vinous or malt liquors, to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where this act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

Mr. Lawrence Maxwell, Jr., and *Mr. Edmund F. Trabue*, with whom *Mr. Joseph S. Graydon* was on the brief, for plaintiffs in error, in this case and in No. 332 argued simultaneously herewith:[1]

The statute makes it an offense to deliver any C. O. D. shipment of liquor, whether ordered by the consignee or not, and its constitutionality must be determined on that basis.

That was the very purpose of the statute. It was passed to meet the decision of the Court of Appeals in *James* v. *Commonwealth*, 102 Kentucky, 108, where it was held that if whiskey ordered by letter is shipped from one county to another by express C. O. D., the sale takes place in the county in which the whiskey is delivered to the carrier, and is not a violation of a prohibitory liquor law in force in the county to which it is shipped. It is wholly immaterial, therefore, under the statute whether the liquor has been ordered by the consignee or not, and the court must determine its validity on that basis.

The court cannot amend the statute so as to limit it to C. O. D. shipments of liquor that have not been contracted for by the consignee. The plaintiff in error has been indicted and convicted under the statute as passed, and if it is repug-

[1] See p. 138, *post*.

nant to the Constitution of the United States the conviction is unwarranted and should be reversed. *Trade Mark Cases*, 100 U. S. 82, 98; *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127, 142; *Ills. Central R. R.* v. *McKendree*, 203 U. S. 514; *Allen* v. *Louisiana*, 103 U. S. 80; *United States* v. *Harris*, 106 U. S. 629, 641; *Poindexter* v. *Greenhow*, 114 U. S. 270, 305; *Spraigue* v. *Thompson*, 118 U. S. 90, 94; *Baldwin* v. *Franks*, 120 U. S. 678, 685; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *United States* v. *Ju Toy*, 198 U. S. 253, 262.

As to the rule strictly construing criminal statutes see *Wynehamer* v. *The People*, 13 N. Y. 378, 424, 441.

The plaintiff in error, in making and performing the contract of shipment in good faith and in the regular course of business, was engaged in interstate commerce, whether there was an antecedent contract of purchase and sale between the shipper and the consignee, or not.

The business of transporting merchandise from one State to another, and contracts by a carrier for such transportation are interstate commerce, in and of themselves. *Hanley* v. *Kansas City Southern Railway*, 187 U. S. 617, 619; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557.

Whiskey, as the court has decided, is an article of commerce which carriers engaged in interstate traffic are bound to carry. *Leisy* v. *Hardin*, 135 U. S. 100, 110.

The transaction did not cease to be interstate commerce because the plaintiff in error, at the request of the consignee, held the whiskey at East Bernstadt for a week before delivering it. *Heyman* v. *Southern Railway Co.*, 203 U. S. 270.

As applied to interstate traffic, the statute is an unconstitutional regulation of the business, even if it be limited to cases in which the liquor has not been ordered by the consignee.

The state legislature cannot regulate the business of interstate carriers by forbidding the transportation of whiskey from another State, or by requiring them to ascertain, at their peril, whether goods offered to them for transportation in

another State have been contracted for by the consignee, and by imposing a fine if it turns out that the package contains whiskey which was not ordered. A carrier is under no such obligation at common law, and has no means of compelling the shipper to disclose his contractual relations with the consignee. *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U. S. 92, 102; *Hall* v. *De Cuir*, 95 U. S. 485, 490; *Brennan* v. *Titusville*, 153 U. S. 289, 302; *Bowman* v. *C. & N. W. Ry.*, 125 U. S. 465; *Rhodes* v. *Iowa*, 170 U. S. 412.

Mr. Napoleon B. Hays, Attorney General of the State of Kentucky, with whom *Mr. Charles H. Morris* was on the brief, for defendant in error, in this case and in Nos. 332 and 583 argued simultaneously herewith:[1]

The state court's construction of this statute is not subject to review unless that construction presents a Federal question. The state court says that the statute in question was not intended to apply, and does not apply, to interstate commerce. *Rippey* v. *Texas*, 193 U. S. 502 (48–767).

If the State has absolute power over the subject, then it has the power to provide that the acceptance by an express company of the pay for a C. O. D. package of whiskey, which is known to be such, whether interstate commerce or intrastate commerce, shall constitute a sale at the place where the whiskey is paid for.

The power of the state legislature of Kentucky to enact this law, and to prohibit the acceptance of the pay for such packages as appears by the terms of said statute, or as it is made to read by the construction placed upon it by the Supreme Court in Kentucky, is not in conflict with the commerce clause of the Federal Constitution. *Noble* v. *Mitchell*, 164 U. S. 367; *Miller* v. *Cornwall Railroad Co.*, 168 U. S. 128; *Carstairs* v. *Cochran*, 193 U. S. 11.

The legislature has the power to determine whether or not

[1] See pp. 138 and 139, *post*.

the sale of whiskey is detrimental to the peace, morals and welfare of the people.

Neither the Federal Constitution nor the Fourteenth Amendment took from the States those powers of police to protect the lives, liberty and property of its citizens, and to promote their health, morals, education, peace and welfare. *Mugler* v. *Kansas*, 123 U. S. 678.

The statute in question is a legitimate exercise of the police power of the State, not inconsistent with the regulation of commerce by Congress.

The Court of Appeals of Kentucky upheld the local option statute in question upon the ground, not only because, by the construction placed on it by said court, it did not apply to interstate commerce, but because it was a legitimate exercise of the police power of the State, not inconsistent with the power of Congress to regulate interstate commerce.

This is nothing more than a trick, device and an evasion of the law by the plaintiff in error, and it knew, or could have known that it was such, by the exercise of ordinary diligence.

There comes a time when the act of transportation from one State to another ceases to be interstate commerce. The carrier cannot indefinitely hold in its warehouse the articles transported, and without notifying the consignee or consignor, thus prevent the articles mentioned in the Wilson Act from becoming subject to the laws of the State enacted in pursuance of its reserved powers for the protection of the health and welfare of its people.

When the transportation of such articles has reached its termination, and the articles have been tendered to the consignee, or they have been held for such reasonable time in the usual course of business as would permit a delivery, the act of transportation ceases to be interstate commerce; and if the common carrier then stores them and afterwards delivers them, or accepts C. O. D. charges, it is subject to the state law.

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

The testimony showed that the package, containing a gallon of whiskey, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the Court of Appeals, and is beyond dispute under the decisions of this court.

In *Vance* v. *Vandercook Company* (No. 1), 170 U. S. 438, 444, Mr. Justice White, delivering the opinion of the court, said:

"Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

In *Rhodes* v. *Iowa*, 170 U. S. 412, 426, it was held that the Wilson Act "was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

The Court of Appeals sustained the judgment upon these facts: Meece testified that he had not ordered the whiskey; that he was not expecting any from Cincinnati, but, on going with his brother to the company's office at East Bernstadt, was told that it was there awaiting him; that he requested the agent to hold it until the succeeding Saturday, when he would come, pay for and take it away; and that on that day he did so, paying $3.85 for the whiskey, the express charges

having been prepaid at Cincinnati. The court held that, by reason of the retention of the package by the agent, the company ceased to hold it as carrier, and had become a mere bailee or warehouseman; that, therefore, the statute, as applied to the transaction, was not a regulation of commerce; and, further, that as Meece had not ordered the whiskey there was no contract for the sale of it in Cincinnati, but only by the company at East Bernstadt, in Kentucky; that while there was no testimony showing that the company's agent at Cincinnati knew that the whiskey had not been ordered by Meece, yet its agent in Kentucky was so informed, and, therefore, the company was possessed, through its agent, of knowledge that there was no interstate transaction, and with that knowledge sold the whiskey to Meece. But that the agent consented to hold the whiskey until Saturday did not destroy the character of the transaction as one of interstate commerce is settled by the recent case of *Heyman* v. *Southern Railway Company*, 203 U. S. 270. In that case whiskey had been forwarded to a party in Charleston, South Carolina, and after its arrival at Charleston was placed in the warehouse of the railroad company by its agent and there seized by constables, asserting their right so to do under the dispensary law of South Carolina. The point was made and sustained by the Supreme Court of the State of Georgia, in which State an action had been brought against the company for the value of the goods, that when the goods were placed in the warehouse the carrier was thenceforward liable only as a warehouseman. In passing upon this contention we said (p. 276):

"As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the State power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular State, the

liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several States concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority."

With reference to the testimony as to the knowledge by the company of the fact that the whiskey had not been ordered by the consignee, it is sufficient to say that the averment in the indictment is that the express company was engaged in the business of a common carrier of packages, etc., and that the shipment and delivery were made and done in the usual course of its business. This excludes necessarily the assumption that the transaction was one of sale by the express company at East Bernstadt, and of course the company was under no obligation to offer testimony in support of that which the State admitted to be the fact.

We do not mean to intimate that an express company may not also be engaged in selling liquor in a State contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order by the consignee

may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question.

Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a State we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HARLAN dissented in this case and in the two succeeding cases. See p. 141, *post.*

ADAMS EXPRESS COMPANY *v.* KENTUCKY.

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

No. 332. Argued April 17, 18, 1907.—Decided May 13, 1907.

Decided on authority of *Adams Express Company* v. *Kentucky*, *ante*, p. 129.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell Jr., and *Mr. Edmund F. Trabue*, with whom *Mr. Joseph S. Graydon* was on the brief, for plaintiffs in error.[1]

Mr. Napoleon B. Hays, Attorney General of the State of Kentucky, with whom *Mr. Charles H. Morris* was on the brief, for defendant in error.[1]

MR. JUSTICE BREWER delivered the opinion of the court.

This case differs from the preceding in the fact that it was tried by the court without a jury. In all other respects it is

[1] For abstracts of arguments see *ante*, p. 131 *et seq.*

substantially the same. There was the same averment in the indictment; and more than that, there was an express stipulation made between counsel pending the trial in these words:

"It is further agreed at this point that the whiskey about which the witness testified was delivered by the Adams Express Company and received by it in its office in Cincinnati in the usual course of business as a common carrier, and carried by it to Barbourville, Kentucky, by the method commonly known as C. O. D."

There is nothing, therefore, to distinguish this case in principle from the preceding, and the same judgment will be entered in this as in that.

MR. JUSTICE HARLAN dissented. See p. 141, *post.*

AMERICAN EXPRESS COMPANY OF NEW YORK *v.* KENTUCKY.

No. 583. Argued April 17, 18, 1907.—Decided May 13, 1907.

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

Decided on authority of *Adams Express Company* v. *Kentucky*, *ante*, p. 129.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, Jr., and *Mr. Edmund F. Trabue*, with whom *Mr. Joseph S. Graydon* was on the brief, for plaintiffs in error.[1]

Mr. Napoleon B. Hays, Attorney General of the State of Kentucky, with whom *Mr. Charles H. Morris* was on the brief, for defendant in error.[1]

[1] For abstracts of arguments see *ante*, p. 131 *et seq.*

MR. JUSTICE BREWER delivered the opinion of the court.

This case, like the two preceding, was a prosecution of the express company for a violation of the Kentucky statute in respect to "C. O. D." shipments. It was tried in the Circuit Court before a jury, which returned a verdict of guilty and fixed the penalty at one hundred dollars fine, which verdict was sustained and judgment entered thereon by the Circuit Court. The company appealed to the Court of Appeals, which affirmed the judgment, 97 S. W. Rep. 807, 30 Ky. Law Reporter, 207, and thereupon the case was brought here on writ of error.

The consignee testified that he did not give an order for the shipment, while there was testimony on behalf of the consignor that such an order was filed with it in the name of the consignee and the shipment made upon that order. The brief of the Attorney General in the Court of Appeals, after referring to the testimony of a witness on behalf of the company, said:

"It will appear from his evidence that he resides in Cincinnati, Ohio, and is manager for a wholesale liquor firm located in said city; that on March 21st, 1905, he received an order filed as an Exhibit 'X' from Richard Graham of Hodgensville, Ky., for an order of whiskey to be sent C. O. D., for the delivery of which the warrant herein was issued against the appellant company; that upon this order the whiskey in question was shipped to said Graham at Hodgensville, Ky., and delivered to him and the charges therefor paid to the appellant company, who returned the same to the said house or firm in Cincinnati, Ohio. There is no proof to show that the express company had any knowledge or information as to the contents of said package so delivered, and there is nothing to show any notice to it whatever of the contents of said package.

* * * * * * * *

"We, however, desire the court to pass upon the question,

in order that the many complications growing out of transactions similar to this may be simplified, and the multitude of litigations growing out of the same lessened, whether or not a company similar to the appellant can legally accept the price for whiskey shipped into a local option district contrary to law, thus constitute itself a collecting agency for one who is under the shield of interstate commerce protected and permitted to ship whiskey into such districts. We are of opinion that an express company has no inherent right under the laws of this State or under the protection of interstate commerce to assume a duty not required of it, as a common carrier, and to do that which is in violation of the laws of this State. Because we believe that this record in its present shape does not show that the appeal from the police court to the Circuit Court of Larue County was properly and legally taken, and for the further reason that the express company has no right, in violation of law, to accept the price in a local option district of whiskey shipped C. O. D., we ask that the judgment be affirmed."

In view of the concession and contention of the Attorney General we are of the opinion that there is nothing to substantially distinguish this case from the preceding. The same judgment, therefore, will be rendered in this case as in those.

MR. JUSTICE HARLAN, dissenting.

I do not think that these are cases of legitimate interstate commerce. They show only devices or tricks by the express company to evade or defeat the laws of Kentucky relating to the sale of spirituous, vinous or malt liquors. I dissent from the opinion and judgment in each case.

CINCINNATI, HAMILTON AND DAYTON RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

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

No. 201. Argued January 31, February 1, 1907.—Decided May 13, 1907.

The Interstate Commerce Commission, in making an investigation on the complaint of a shipper has, in the public interest, the power disembarrassed by any supposed admissions contained in the statement of the complaint to consider the whole subject and the operation of the new classification complained of in the entire territory; also how far its going into effect would be just and reasonable and would create preferences or engender discriminations and whether it is in conformity with the requirements of the act to regulate commerce. And if it finds that the new classification disturbs the rate relations thereupon existing in the official classification territory and creates preferences and engenders discriminations it may, in order to prevent such result, prohibit the further enforcement of the changed classification, and an order to that effect is within the power conferred by Congress on the Commission; and so held as to an order of the Commission directing carriers from further enforcing throughout official classification territory a changed classification in regard to common soap in less than carload lots.

146 Fed. Rep. 559, affirmed.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, Jr., and *Mr. Edward Colston* for appellants.

Mr. L. A. Shaver and *Mr. P. J. Farrell* for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

Official Classification territory embraces that portion of the United States lying between Canada on the north, the Atlantic

Ocean on the east, the Potomac and Ohio Rivers on the south and the Mississippi River on the west. This territory includes what is known as Central Freight Association territory and Trunk Line territory, both being governed by the Official Classification. The Central Freight Association territory comprises the area west of Pittsburg and Buffalo, including the lower peninsula of Michigan and east of a line from Chicago to St. Louis, the Mississippi River from St. Louis to Cairo and north of the Ohio River. Trunk Line territory lies north of the Potomac River and east of Pittsburg and Buffalo. Whilst Official Classification governed throughout the whole of Official Classification territory, the rates throughout the whole of the Official Classification territory were not uniform because of a difference of rates prevailing in the subdivision, that is, in the Central Freight and Trunk Line territory. Thus although on shipments from points in the Central Freight Association territory to points in the Trunk Line territory or *vice versa* rates were the same for similar distances, yet on shipments between termini wholly within one or the other of these territories the rates varied because of the different rules governing rates which prevailed as to traffic exclusively moving in that particular territory.

The first classification adopted by the railroads to control in the territory above described as Official Classification territory was made contemporaneously with the going into effect of the act to regulate commerce, presumably to comply with that act, and took effect on April 1, 1887. From that date, until January 1, 1900, nineteen general classifications of freight, numbered from 1 to 19, were at various times adopted to govern in Official Classification territory. The articles embraced in these classifications were divided into classes, numbered from 1 to 6, the rate increasing as the number of the class decreased. From the beginning, until June 1, 1891, common soap in boxes in carloads was rated as fifth class, and fourth class for less than carloads. On the last-named date, in consequence of an order entered by the Commission on a complaint, as to the

classification of common soap in carloads, made by Procter & Gamble, soap manufacturers of Cincinnati, Ohio, soap in carloads was reduced to sixth class. This classification continued to govern until January 1, 1900, when a new classification, known as Official Classification No. 20, went into effect, by virtue of which soap in carloads was advanced from sixth to fifth class and soap in less than carloads was advanced from fourth to third class.

After the going into effect of Classification No. 20, the Procter & Gamble Company, successor of the firm of Procter & Gamble, complained to the Interstate Commerce Commission in respect to the alterations made in the classification of common soap. The petition recited the prior complaint by the firm of Procter & Gamble, and the making in 1890 of the order which led to the reduction from fifth to sixth class, heretofore referred to.

It was charged in the petition that in Official Classification No. 20 there had been an inequitable selection of particular articles and an increase in the rates upon such articles alone by the device of changing them from a lower to a higher class, for the sole purpose of increasing revenues to cover an alleged increase of cost of operation of the railroads, and that "by such course defendants have subjected and do thereby subject the said traffic in the articles changed, including common soap in carloads and less than carload lots, to an undue and unreasonable prejudice and disadvantage with respect to the traffic in all of the articles whose classification was not changed in Official Classification No. 20." It was further alleged as follows:

"If there are any qualities and conditions which, though not considered by defendants at the time of the adoption of said Classification No. 20, justify, nevertheless, the making of any or part of said changes, the same, at any rate, do not apply to common soap in carloads or less than carload lots. The same should, at least, have remained in sixth class in carload lots, as ordered by this Commission as aforesaid, and in fourth class

in less than carload lots, so as to maintain the proper relation and difference of rates between carload and less than carload lots. The changing of particular articles as aforesaid from lower to higher classes for the sole purpose of increasing the revenues of the railroads interested therein, is not a condition or circumstance justifying the said change of classification in common soap."

It was prayed that an order might be entered requiring the Cincinnati, Hamilton and Dayton Railroad Company and seven other named railroad companies, forming various connecting and joint lines of railroad in the territory governed by Official Classification No. 20, to "cease and desist from refusing to carry common soap in carload lots at sixth-class rates, and from refusing to carry common soap in less than carload lots at fourth-class rates." After the filing of the petition and before answer, Official Classification No. 20, was, in part, changed by making a new class, intermediate classes three and four for soap in less than carload lots and on some other articles, this class being determined by giving the articles in question the benefit of a reduction on the third-class rate of 20 per cent, provided the application of the 20 per cent reduction did not reduce the charge below the fourth-class rate, in which event the 20 per cent reduction should not be fully applied, but would only be applied to the extent necessary to make the rate not less than fourth class. The classification thus operating is spoken of as 20 per cent less than third class, but not less than fourth class, and we shall speak of it hereafter in this way.

In the answers filed the defendants in substance denied that common soap was improperly classified in Official Classification No. 20, originally or as modified, or that an unreasonable or unlawful rate was exacted for the carriage of soap, or that the defendants subjected the soap traffic to any undue or unreasonable prejudice, disadvantage or discrimination.

The taking of testimony was ended on September 26, 1900, and the report and opinion of the Commission was filed about

two and a half years thereafter, viz., on April 10, 1903. 9 I. C. C. Rep. 440. As respects putting carload soap in the fifth class, the Commission refrained both from deciding that the classification was unreasonable *per se* or that its reasonableness had been affirmatively established. It said:

"We regard the primary and controlling question in this case as a question of classification; that is, of *relative rates*, and dispose of it accordingly. In that view it is sufficient to hold that carload soap is not improperly placed in the fifth class, and that fifth-class rates therefore are not shown to be unlawful. So long as most articles entitled to as low rates as carload soap are put in the fifth class and required to pay fifth-class rates, we are not warranted, on the evidence before us, in condemning the same rating for that commodity. This disposition of the case, however, will not authorize the retention of carload soap in fifth class if the classification of other articles with which soap is compared should be reduced, nor will anything now decided preclude the Commission from holding, in an appropriate proceeding, that fifth-class rates in this territory are excessive."

In regard to the less than carload classification of common soap, after directing attention to the fact that such traffic had always been fourth class until January 1, 1900, the Commission said:

"A presumption that such rates are reasonable arises from the voluntary action of the carriers in keeping those rates in effect during such a long period, and that presumption has not been overcome, in our judgment, by the evidence presented in this case."

It was also found that certain rules set out in the findings governing carloads of mixed freight, permitting the carriage of the same at carload rates, coupled with the increase in the long standing less than carload rates on soap, operated a strong discrimination in favor of meat packers who manufactured soap, against manufacturers who were mainly engaged in manufacturing and selling soap. So also the Commission held

that the change as to the classification of soap in less than carload lots, besides involving the payment of higher rates for less than carload shipments, had brought about rate relations different from those previously existing between shippers of soap in Official Classification territory. Thus it was found that as a result of the new method of classification a shipper located at New York City could ship therefrom to practically all points in New England and a large number of points in New York State without paying higher than fourth-class rates, while a shipper located at Cincinnati could not ship northerly or northwesterly therefrom, more than about sixty miles, without paying an advance over fourth-class rates. The Commission expressly declared that "the difference of fifteen cents between fifth class and third class, which was in effect as between carload and less than carload shipments from January 1, to March 10, 1900," the time during which Official Classification No. 20 prevailed, before it was modified by the percentage reduction as to soap in less than carload lots "would plainly be excessive," and that the change operated by the percentage modification in question occasions a difference "which varies according to a given per cent, as applied to different scales of rates, appears to be inequitable and unjust, and the fact is so found."

In the order, as entered, the Commission dismissed so much of the complaint as referred to the classification of common or laundry soaps in carloads, and the defendants were "notified and required to cease and desist, on or before the 15th day of June, 1903, from charging, demanding, collecting or receiving for the transportation of common or laundry soap in less than carload quantities charges or rates per one hundred pounds, equal to twenty per cent less than rates fixed by them for the transportation of articles, designated as third class in their established freight classification, called and known as the 'Official Classification,' which said twenty per cent less than third-class rates for the transportation of common or laundry soap in less than carloads are found and determined in and

by said report and opinion of the Commission to be in violation of the act to regulate commerce."

The railway companies not having complied with the order, this proceeding was commenced by the Commission in the Circuit Court of the United States for the Southern District of Ohio, under the direction of the Attorney General of the United States, to enforce compliance therewith. As respects the alleged unlawful character of the change in the classification of soap in less than carload quantities, it was charged in the petition as follows:

"And the petitioner charges that the action of the defendants in raising the classification of common or laundry soap in less than carload quantities, on December 29, 1899, from fourth class to third class, and subsequently, on March 10, 1900, changing the classification of common or laundry soap in less than carload quantities to twenty per cent below third-class rates, the same being more than fourth-class rates, was in violation of the act to regulate commerce; and petitioner further charges that the rates charged by the defendants since December 29, 1899, for the transportation of common or laundry soap in less than carload quantities are in violation of section 1 of the act to regulate commerce, in that they are unreasonable and unjust; and said rates are and have been in violation of section 3 of said act, in that said rates, based upon the classification aforesaid, give an undue and unreasonable preference or advantage to other descriptions of traffic, and subject common or laundry soap in less than carloads to an undue prejudice and disadvantage. The petitioner further charges that the change in classification by the defendants, made effective about December 29, 1899, whereby common or laundry soap in less than carload quantities was changed from fourth to third class, and the change in classification by the defendants, made effective March 10, 1900, whereby common or laundry soap in less than carload quantities was charged more than fourth-class rates, to wit, twenty per cent below third-class rates, were in violation of said act to regulate commerce, in

that said changes were unreasonable and unjust, and result in unlawful discrimination and prejudice against common or laundry soap in less than carload quantities, and against localities in Official Classification territory, wherein commodities are produced and transported, and against producers, shippers, dealers and consumers in said territory."

In the various answers filed issue was taken upon these averments without any intimation that any of the issues so tendered were improper to be raised.

The case was heard in the Circuit Court on the evidence before the Commission and on additional evidence taken by the defendants, principally directed to showing the extra cost incident to handling and transporting freight in general in less than carload lots. The complainant took no additional testimony. The Circuit Court decided in favor of the Commission (146 Fed. Rep. 559), holding that the evidence not only failed to justify the change of classification complained of, but established that the advance in rates caused by the increase in the classification of soap in less than carload quantities was not only unreasonsable and unjust, but also resulted in an unlawful discrimination and preference between shippers. The case was then appealed to this court.

Before considering the fundamental question upon which the order of the Commission and the decree of the court enforcing it rest, we dispose of certain propositions relied upon by the railway companies, because to do so we think will clear the way for an analysis of the final question arising, stripped of confusing and irrelevant considerations. We think the Commission in making an investigation on the complaint filed by the Procter & Gamble Company had the power, in the public interest, disembarrassed by any supposed admissions contained in the statement of complaint to consider the whole subject and the operation of the new classification in the entire territory, as also how far its going into effect would be just and reasonable, would create preferences or engender discriminations; in other words, its conformity to the require-

ments of the act to regulate commerce. And that such was the view taken as well by the railway companies as by the Commission during the course of the investigation before that body, is, we think, beyond doubt. Thus, on the examination of the very first witness called for the complainant before the Commission, counsel for the railway companies stated that in his opinion the pending investigation had "no significance except as preliminary to a judicial proceeding." And when at the threshold a question was raised in the examination of the same witness as to the competency of evidence on a subject not directly expressed in the complaint, but bearing upon the effect of the new classification, the Commission declared it was competent to show the general effect of such classification in the territory through which it operated. Our assent to this view of the power of the Commission conclusively, of course, also disposes of the contention that the court was without authority to determine the validity of the order of the Commission by the scope of the act to regulate commerce, because of an admission asserted to exist in the complaint originally filed before the Commission. It is needless, moreover, to say that the course of the proceeding before the Commission which we have stated, strips the case of any element of surprise or possible prejudice.

The Commission, as we have seen, did not find that the rate promulgated in Official Classification No. 20, as to soap in carloads, was unreasonable, preferential or discriminatory. From this it is elaborately argued that the order rendered by the Commission demonstrates its own error. This proceeds upon the following theory: For a number of years prior to 1891 soap in less than carloads was in the fourth class, and soap in carloads in the fifth class. By the order of the Commission, rendered in 1891, as we have seen, soap in carloads was put in the sixth class. By Official Classification No. 20 soap in carloads was moved up to fifth and soap in less than carloads from fourth to third class. The change made by the new classification destroyed the previous relation since the

difference between the rates governing third and fifth classes made by the new was greater than the difference between the fourth and sixth classes as obtaining in the prior classification. And this was one of the complaints made by the Procter & Gamble Company concerning the new Classification No. 20. The carriers, it is said, to meet this objection, adopted, after the complaint was filed, the modified classification of 20 per cent less than third class but not less than fourth class. The effect of this reduction, it is declared, was to cause soap in less than carloads to occupy just the same relative position to soap in carloads as it had occupied in the classification existing prior to the going into effect of Official Classification No. 20. And as the order of the Commission did not change the classification as applied to soap in carloads made by Official Classification No. 20, the proposition is that that body in holding the modified classification of 20 per cent less than third class and not less than fourth class to be illegal, destroyed the relation which the Commission had created by its former order, and which it was the purpose of the complaint of the Procter & Gamble Company to restore. But the argument takes for granted the very question for decision, that is, whether the modified classification of 20 per cent less than third class, but not less than fourth class, operated to continue the relation between soap in carloads and soap in less than carloads, which prevailed throughout Official Classification territory before the making of Official Classification No. 20. That the proposition thus begs the whole question, is demonstrated by the mere statement that both the Commission and the court below decided that Official Classification No. 20, as modified as to soap in less than carloads by the percentage order, was unreasonable, discriminatory, and by its effect created preferences among manufacturers and shippers of soap which had not existed prior to the new classification. When the real significance of the proposition is thus seen it amounts to this, that we must assume that both the court below and the Commission erroneously decided the controversy, and upon this mere assumption

proceed to reverse their action. But our duty, not to assume but to decide the case, cannot be thus obscured.

Laying aside, however, the questions of unreasonableness, of discrimination, and of preference and the consequent destruction, if these effects exist, by the new classification of the prior relation between soap in carloads and less than carload quantities, let us briefly consider the intrinsic merit of the proposition relied upon. It is that prior to Official Classification No. 20 there was a just relation between soap in carloads in class 6 and soap in less than carloads in class 4. Of course this admits that such just relation was destroyed by Official Classification No. 20 as originally put in force, since thereby soap in carload lots was placed in class 5 and soap in less than carloads in class 3, between which classes there was a greater difference relatively in rates than theretofore existed between the two commodities in the prior classification. This inequality the carriers declare was obviated after the complaint was filed, by the modified classification as to soap in less than carload lots of twenty per cent less than third class but not less than fourth class. By this means it is insisted the relation previously existing was recreated, and any disturbance engendered by Official Classification No. 20 was cured. Now, on the surface of things, the contradiction of the position is manifest. The modified rate on its face did not propose to put soap in less than carloads throughout the whole territory in a uniform class, but in the class which might result from the operation of a percentage basis controlled by whether or not the application of the percentage might or might not take soap out of one class and into another. In other words, it clearly contemplated that by the varying rates to which the percentage would be applied, soap in less than carloads would be left in portions of the territory in the fourth class and in a higher class in other portions. How, in view of this, it can be in reason conceived that the admitted uniform classification prevailing prior to the percentage rule could possible continue under a classification inherently wanting in uniformity, we fail to understand.

But put the foregoing considerations aside. The complaint as to the order of the Commission is that it disturbed the previous relations between soap in carloads and less than carloads. What was the order? In effect it condemned and directed the carrier to desist from enforcing the modified percentage classification. At the worst view for the carrier the order complained of can only be taken as persuasively indicating—and such was the view intimated in the opinion of the Commission—the duty of the carriers to return soap in less than carloads to class 4, in which it had been uniformly placed prior to the going into effect of Official Classification No. 20. The real grievance which the railway companies must have reduces itself to this, that the order may lead to the putting of soap in less than carloads in class 4. But the very percentage basis which the carriers adopted contemplated that in some portions of the territory and somewhere the effect of the modification by a percentage reduction might be to put soap in less than carloads in the fourth class, else why the limitation, "but not less than fourth class contained in the modified classification.

We are thus brought to the fundamental question, which is, did the percentage classification lead to rates which were unreasonable, unjustly discriminatory or unduly preferential? If either was the result, the order directing the carriers to desist from enforcing the classification in question was proper.

We take up the related questions of discrimination and preference because the arising of such consequences from the classification more saliently appear, and because the demonstration of such results is in a measure elucidated by what we have previously said. Concerning the discrimination the Commission said:

"Whatever the effect of a percentage less than third class for less than carload shipments of other commodities, taking that rating under the classification, may be, it plainly works discrimination against complainant and other western shippers

of soap in less than carload lots, in favor of their competitors in the East, when the present situation is compared with that which existed under the old fourth-class rating, . . . "

And this finding was expressly concurred in by the Circuit Court. In pointing out the mode by which the modified classification operated, the result in question, the Commission said:

"These differences are due to variations in the scales of rates prevailing in the different sections. The twenty per cent less than third-class rating for less than carloads applies to all shippers of less than carload lots of soap throughout the entire territory, but it increases some rates more than others, and leaves some as they were before it was adopted. When, for example, under the application of that rule, the rate from Cincinnati to Boston is increased four cents, and the rate from New York to Boston remains the same, as compared with the fourth-class rates formerly in effect, it is plain that this method of determining rates upon a percentage basis operates unequally upon the different shippers of less than carload quantities in that territory."

The statute gives *prima facie* effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court, we think they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed. See *Cin., N. O. & Tex. Pac. Railway* v. *Int. Com. Com.*, 162 U. S. 184, 194; *Louisville, &c. Railroad Co.* v. *Behlmer*, 175 U. S. 648, 672.

It is insisted that this is a case of that character. How, in reason, it is urged, can it be said that discrimination or preference, which did not before exist, was or could be produced from the mere application to the prior rates of a uniform percentage reduction? This, however, obscures the fact that the 20 per cent reduction was not uniform, but was that percentage less than third class, with the qualification "but not less than fourth class." In other words, the modified percentage reduction was not a fixed percentage, but was one which might

vary, depending upon the result which would be brought about by applying the rule. Putting, however, entirely aside this view, let us consider only the result of the working of the rule on the basis of 20 per cent less than third class. The factors to be considered are these: *a*, the relation existing prior to the going into effect of Official Classification No. 20; *b*, the operation of that classification over the whole of Official Classification territory; *c*, the percentage modification of 20 per cent less than third class as to soap in less than carloads, and also its operation over the whole territory; and, *d*, the varying rates of charges in the separate spheres into which the Official Classification territory was divided, viz., Central Freight Association territory and the Trunk Line territory. Now, testing the matter by these criteria, does it appear, as contended, that the findings of the Commission and the court, as to resulting preferences and discrimination, are so contradictory and erroneous that we should disregard them? The proposition that they were must rest upon the assumption that the application of a fixed percentage reduction to existing rates whilst it might vary them could not possibly change their relation. But this assumes that the variation which existed between rates in the different spheres of Official Classification territory was only a difference in the sum of the rate prevailing in one territory from that which prevailed in the other as to the same class. But this is a mistake, since there was also a difference in the two separate spheres of territory as to the margin of difference between the different classes of rates governing in the two territories. Thus there was in Central Freight Association territory not only a higher rate for commodities in the third class than prevailed in Trunk Line territory for the same class, but there was also in the Central Freight Association territory a wider difference between the rates governing commodities in the third class and those controlling commodities in the fourth class. It follows from this that where in any given case the 20 per cent reduction was applied to the increased rate which had arisen from having placed less than

carload soap in the third class, if the application of the full 20 per cent reduction was not sufficient to reduce the amount to the fourth class, the commodity would pay more than fourth class. In other words, although the commodity in the case stated would get the full benefit of the 20 per cent reduction from the third-class rate, as giving it that benefit did not reduce to the fourth-class rate the commodity would yet pay higher than fourth-class rate. It also follows that if in any case where the 20 per cent reduction was applied, if the result of applying it because of the narrowness of the difference between third and fourth class in that territory operated to reduce the same to the fourth class, the commodity would be left exactly in the class in which it stood before, that is, fourth class. By this it indubitably resulted that in a large degree in one of the subdivisions of the same classification territory soap in less than carloads remained in fourth class, and in the other took a higher class. And this illustrates the correctness of the findings of the Commission and of the court as to the preference resulting from applying to a territory governed by one classification a rule of percentage which, while assuming unity, produced diversity, and which, while asserting equality of class, engendered inequality. Of course, we confine our decision to the case before us.

And the views heretofore expressed serve also to dispose of the contention that, although it be conceded that discrimination and preference were created, yet the carrier should not have been ordered to desist from enforcing the modified percentage classification, because the discrimination and preference, if any, were not the result of the operation of that classification, and, moreover, were not repugnant to the act to regulate commerce, because they were simply the consequence of natural competitive advantages enjoyed by shippers in the sphere of the Trunk Line territory, which were not possessed by shippers in that other portion of Official Classification territory, known as Central Freight Association territory. But this simply involves a restatement of the misconception which we have

already pointed out. The discriminations and preferences which the Commission and the court below found to exist were results arising from the application to the conditions prevailing in Official Classification territory of the modified percentage classification. In other words, the order forbidding the enforcement of the modified percentage classification was based on the finding that that classification disturbed the rate relations theretofore existing in Official Classification territory and created preferences and discriminations which would disappear if the further enforcement of the changed classification was prevented.

This brings us to the final contention made on behalf of the railway companies, viz., that the order of the Commission was not lawful, because not within the power conferred by the act of Congress. This is, we think, largely disposed of by what we have previously said as to the nature and scope of the investigation which the Commission was authorized to make and the redress which it was empowered to give irrespective of the particular character of the complaint by which its power may have been previously invoked. Whatever might be the rule by which to determine whether an order of the Commission was too general where the case with which the order dealt involved simply a discrimination as against an individual or a discrimination or preference in favor of or against an individual or a specific commodity or commodities or localities, or as applied to territory subject to different classifications, and we think it is clear that the order made in this case was within the competency of the Commission, in view of the nature and character of the wrong found to have been committed and the redress which that wrong necessitated. Finding, as the Commission did, that the classification by percentage of common soap in less than carload lots operating throughout Official Classification territory, brought about a general disturbance of the relations previously existing in that territory, and created discriminations and preferences among manufacturers and shippers of the commodity and between localities in such

territory, we think the Commission was clearly within the authority conferred by the act to regulate commerce in directing the carriers to cease and desist from further enforcing the classification operating such results.

Affirmed.

YATES *v.* JONES NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 230. Argued March 8, 11, 1907.—Decided May 13, 1907.

If one of the plaintiffs in error does not furnish a cost bond, appear by counsel, or file any brief in this court, he will be presumed to have abandoned the prosecution of the writ and it will be dismissed as to him.

Where in the trial and appellate courts an immunity was claimed under § 5239, Rev. Stat., as to the rule of liability to be applied to directors of a national bank and such immunity was denied, this court has jurisdiction to review the judgment under § 709, Rev. Stat., even if in other respects it might not have jurisdiction.

Where a statute creates a duty and prescribes a penalty for its non-performance the rule prescribed by the statute is the exclusive test of liability.

The National Banking Act as embodied in § 5239, Rev. Stat., affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act; and that liability cannot be measured by a higher standard than that imposed by the act.

Where by a statute a responsibility is made to arise from its violation knowingly, proof of something more than negligence is required and that the violation was in effect intentional.

105 N. W. Rep. 287, reversed.

THE facts are stated in the opinion.

Mr. Halleck F. Rose and *Mr. J. W. Deweese*, with whom *Mr. Frank E. Bishop* was on the brief, for plaintiffs in error in this case and in Nos. 231, 232 and 233 argued simultaneously herewith:[1]

[1] See p. 181, *post.*

If defendants acting in their official capacity as directors of the Capital National Bank mismanaged the bank and wasted its assets by reason of their neglect so that thereby the bank became insolvent, the damage resulting was an asset of the bank, and could not be recovered by the individual depositors who lost money in the failure of the bank, but only by the bank or its receiver. *Conway* v. *Halsey*, 44 N. J. Law, 463, 464; *Kennedy* v. *Gibson*, 8 Wall. 506; *Cockerell* v. *Cooper*, 86 Fed. Rep. 13; *Horner* v. *Henning*, 93 U. S. 228.

If otherwise, then every other creditor as well as every stockholder of the bank could, for the same reasons, recover from these defendants, so that (*Smith* v. *Hurd*, 12 Metcalf, 371) there might be as many actions and recoveries as there were creditors or shareholders for one and the same default of the directors. This would defeat the policy of the national banking act, providing for a ratable distribution of all of the assets among the various creditors, and the assets in the nature of such damage would be wasted in fruitless and expensive litigation.

In the passage of the national banking act Congress provided for one complete system for the government, control and management of national banks.

No state legislature, nor any state court, can in any manner interfere with the system adopted, nor the purposes for which national banks are organized, nor divert or change the distribution of the assets of a national bank in a manner that would conflict with the provisions of the national banking act. That which is beyond the plane of state jurisdiction by direct legislation cannot be brought within such plane by indirection, and therefore the directors of a national bank cannot be held by a state court responsible for acts done in their official capacity, so as to enforce a different liability from that imposed upon them by the National Banking Act. If that were permitted it would be possible to control or nullify a United States law and prevent the enforcement of its provisions. *In re Waite*, 81 Fed. Rep. 371; *Cook County National*

Bank v. *United States*, 107 U. S. 448; *Leisy* v. *Hardin*, 135 U. S. 100; *Bank* v. *Dearing*, 91 U. S. 29.

If the judgment can be sustained on account of fraud and deceit in the making and publishing of the reports, the directors who attested the reports cannot be deprived of the protection given to them as directors of a national bank by § 5239 of the national banking act, which grounds their liability upon guilty knowledge of acts done in violation of said law.

The reports were made and attested as required by § 5211, Rev. Stat., being a part of the act governing national banks for the purpose of showing the condition of the bank. It was made the duty of the managing officers of the bank who prepared the reports to verify the same by their oaths, and the law required that when thus made and verified, they should then be attested by three directors.

These actions are personal actions against the individual directors for damages growing out of their alleged violation of their duties under the law and the by-laws of a national bank.

By § 5239, the directors were made personally liable for damages sustained by the bank, or any other person where they "knowingly violated, or knowingly permitted" the officers to violate any of the provisions of the national banking act.

The protection of the law governing the liability of the defendants for acts done in their official capacity is a substantial right, and the courts should be astute not to permit devices to become successful which are used for the very purpose of destroying that right. *Arapahoe Co.* v. *Railroad Co.*, 4 Dill. 277.

The state courts are as firmly bound by the laws of Congress as are the Federal courts.

The Constitution and laws of the United States are as much a part of the law of each State and as binding upon its authorities and people, as its own local constitution and laws. *Farmer's National Bank* v. *Dearing*, 91 U. S. 29.

Mr. Lionel C. Burr and *Mr. John J. Thomas*, with whom *Mr. Charles L. Burr*, *Mr. Richard S. Norval* and *Mr. William B. C. Brown* were on the brief, for defendants in error in this case and in Nos. 231, 232 and 233 argued simultaneously herewith:[1]

An action for deceit may be maintained against the directors of a bank by depositors induced to become such by false representations or statements of the bank's condition made by such directors.

The directors of a bank who publish false statements of its condition thereby represent that the matters of fact therein stated are within their personal knowledge, and, if they have no such knowledge, the statement is knowingly false.

While there must be scienter, this does not mean actual knowledge, and where the representation is of a fact, made by one in position to know, whose duty it is to know, or where it would constitute gross negligence not to know, such knowledge will be conclusively presumed. *Prescott* v. *Haughey*, 65 Fed. Rep. 653; *Gerner* v. *Thompson*, 74 Fed. Rep. 125; *Bank of Hillsboro* v. *Thomas*, 28 W. L. B. (Ohio) 164; *Solomon* v. *Bates*, 118 N. Car. 312; *Bartholomew* v. *Bentley*, 15 Ohio, 659; 45 Am. Dec. 596, 598.

As to the duty of the directors to know, see: *Auten* v. *Bank*, 174 U. S. 147; *Briggs* v. *Spaulding*, 141 U. S. 141; *McClure* v. *People*, 27 Colorado, 371; *Hall* v. *Henderson*, 126 Alabama, 495.

Section 5239, Rev. Stat. U. S., neither abrogates nor modifies the common law action of deceit.

Sutherland on Stat. Const., § 399, 1st ed., or § 572, 2d ed. Sedgwick on Construction of Stat. and Constl. Law, 323.

Where the statute creates the right and the remedy, the statutory remedy must be followed, but, where the right existed at common law and an additional statutory remedy is given, the latter is regarded as cumulative. *People* v. *Craycroft*, 2 California, 243.

[1] See p. 181, *post*.

Remedies are cumulative where the statute gives a remedy with a penalty, a previous common law remedy existing. *Dygert* v. *Schenck*, 23 Wend. 445; *Swarthout* v. *N. J. Steamboat Co.*, 48 N. Y. 209.

Where the legislature fails to provide a remedy for an injury occasioned by public use, the injured party will be remitted to his common law remedy. *Hooker* v. *New Haven, &c. Co.*, 14 Connecticut, 146.

Where a statute gives a right and provides no remedy, the party may pursue any remedy of the common law adapted to the nature of the wrong or injury. *Maple* v. *John*, 42 W. Va. 30.

Although the petitions should state matters which would constitute a cause of action under the national banking act (which we deny) they clearly state a common law action of deceit, which, being supported by the evidence, is sufficient to sustain the judgments.

Assuming that the petitions do contain a cause of action for negligence, they then contain two causes of action, of one of which the state court has exclusive jurisdiction; the other raises a Federal question. If defendants desired to have these causes separately stated and numbered they should have filed a motion to that effect, and having failed to do so they will be deemed to have waived it. *Exeter National Bank* v. *Orchard*, 43 Nebraska, 581.

If a petition states facts sufficient to constitute an action for deceit, and is therein sustained by the evidence, the judgment will be sustained, although the petition also contains a Federal question. *Hammond et al.* v. *Johnston et al.*, 142 U. S. 73; *Nav. Co.* v. *Raybold*, 142 U. S. 636; *Cook County* v. *Calumet, &c. Co.*, 138 U. S. 157; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300.

Mr. Justice White delivered the opinion of the court.

This writ of error is prosecuted to secure the reversal of a judgment of the Supreme Court of the State of Nebraska

affirming one entered by a court of Seward County, in that State, upon a verdict of a jury awarding damages against the defendants below, plaintiffs in error here, because of certain acts charged to have been done by them as officers and directors of the Capital National Bank of Lincoln, Nebraska.

We briefly summarize a statement contained in the opinion of the court below concerning a prior action between the same parties. That action, and three others of like character, brought by different plaintiffs, were begun in a county different from that in which the present one was commenced, and recovery was sought, with one exception, from those who were defendants below in this case, of the sum of a loss occasioned by the insolvency and suspension of the Capital National Bank, a corporation organized under the national bank act. The actions referred to were removed into a Circuit Court of the United States, and in each a motion to remand was overruled, and in one of the cases (brought by Thomas Bailey) the Circuit Court sustained a demurrer to the petition and dismissed the cause, and the judgment so doing was affirmed by the Circuit Court of Appeals. 63 Fed. Rep. 488. The plaintiffs in the other cases thereupon dismissed their actions and commenced new ones, as also did Bailey, in Seward County, of which the case before us is one. The same persons, who were impleaded in the prior actions, were made defendants, and in two of the actions one Thompson, a director of the bank, who had not been previously sued, was joined as a defendant. The defendants were sought to be made liable for acts done as officers and directors of the Capital National Bank, although it was not expressly alleged that the bank was organized under the national bank act. Reliance in each action was placed upon alleged untrue written and oral statements and representations of the financial condition of the bank alleged to have been made and published by the defendants, which were fully set out in various forms of expression, but in none of the averments was it specifically asserted that the acts in question were done in consequence of and in com-

pliance with the provisions of the national bank act, although the exhibits attached to the petition disclosed the character of the written reports, which were in part relied upon. The state court overruled an application to remove, and a transcript of the record having been filed in the Circuit Court, on motion the action was, by that court, remanded to the state court, upon the ground that the petition was "clearly based, not upon the provisions of the national banking act, but upon the liability claimed to arise under the principles of the common law." See *Bailey* v. *Mosher*, 74 Fed. Rep. 15.

An amended petition was filed, changing somewhat the averments originally made, and supplementing the same by new allegations. After a considerable lapse of time a second amended petition was filed. This latter enumerated many acts of negligence and mismanagement in the conduct of the affairs of the failed bank charged to have caused its insolvency, in addition to the averments which had been made in the original petition. The defendants demurred on the ground of want of jurisdiction, because the result of the pleading as amended was to demonstrate that the whole cause of action relied upon was based upon the violation by the defendants of provisions of the national bank act, and because under that act no cause of action in favor of the plaintiff was stated. The day the demurrer was filed the action was removed by the defendants into the Circuit Court of the United States. That court overruled a motion to remand, (see *Bailey* v. *Mosher*, 95 Fed. Rep. 223,) and subsequently the court sustained the demurrer and dismissed the action. Reviewing the action of the Circuit Court, however, the Circuit Court of Appeals held that in any event the removal had been made too late, "and that the judgment of the lower court dismissing the plaintiff's case was rendered without lawful jurisdiction over the case." 107 Fed. Rep. 561. As a result the case went back to the state court, and in that court the demurrer to the second amended petition was argued and overruled.

There was judgment against Stuart, one of the defendants,

for failure to answer the original petition, and this judgment was affirmed by the Supreme Court of Nebraska. *Stuart* v. *Bank of Staplehurst*, 57 Nebraska, 570. A separate answer to the second amended petition was filed on behalf of the defendant Thompson and a joint answer on behalf of the defendants Yates and Hamer. In the answer of Thompson it was averred that while a stockholder he was not a director of the Capital National Bank at the time the plaintiff made its various deposits; it was denied that any of the reports set out and referred to in the petition were signed or attested by Thompson, and specifically for himself he denied "all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition."

The following paragraph was also set up in the answer:

"This defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constitute a violation by this defendant as a director or stockholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant there is necessarily involved the construction of said national banking act relating to the duties of directors and stockholders of national banks. That a Federal question is involved in determining the liability of this defendant by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of this defendant."

Matter alleged to constitute an estoppel against the further prosecution of the action and to operate as a bar to recovery

was set up in special defenses, which need not, however, be further noticed.

The answers of Yates and Hamer were similar in effect to that of Thompson, except as to the allegation that Thompson was not a director when the plaintiff made his deposits.

The cause was put at issue. Before the trial three of the defendants—Walsh, Hamer and Phillips—died, and the action was revived against the administrators of Walsh and Hamer, but was not prosecuted further against the estate of Phillips. The companion actions brought by different plaintiffs were tried with the case at bar by a jury, and there was verdict against all the defendants then before the court, upon which judgment was entered except as to the administrator of Walsh, in whose favor judgment was entered by the court upon special findings as to him made by the jury. After the correction of an error in the amount of the judgment the case was taken to the Supreme Court of Nebraska, where the judgment was affirmed. 105 N. W. Rep. 287. This writ of error was then sued out apparently on behalf of all the defendants. We assume, however, that Charles W. Mosher and R. C. Outcalt, two of the defendants below, have abandoned the prosecution of the writ. We so assume because no cost bond appears to have been furnished by either; because neither have appeared at the bar by counsel and no brief in their behalf has been filed, and on the contrary—in the brief of the defendants in error it is stated that the persons named did not prosecute error, which we take to mean that the parties referred to have abandoned in this court the prosecution of the writ of error which was sued out in their names, and because the bill of exceptions does not contain the answers of those defendants nor the evidence relating to their case, which would be pertinent to consider if we were called upon to determine whether prejudicial error was committed as to them. None of the remaining plaintiffs in error were officers of the bank and they were sued simply for acts done as directors thereof.

A motion to dismiss first requires attention. The asserted want of jurisdiction in this court is based upon the contention that no Federal question was raised in or decided by the state court. But, as will hereafter appear, the record plainly shows that both in the trial and appellate courts an immunity was claimed under section 5239 of the Revised Statutes, at least in respect to the rule of liability applied below, and such immunity was expressly denied by the state court, and there is, therefore, jurisdiction, even if in other respects jurisdiction might not be exercised, as to which we are not called upon to decide. *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1; *Tullock* v. *Mulvane*, 184 U. S. 497; *Metropolitan National Bank* v. *Claggett*, 141 U. S. 520; *Logan County National Bank* v. *Townsend*, 139 U. S. 67.

To dispose of the controversy presented by the record before us we need only consider the following assignments of error:

"7. The court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any or them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of section 5239 of the Revised Statutes of the United States, which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the national banking act, and participated in or assented to such violation.

"8. The court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the national banking act as essential elements

of the cause of action as required by section 5239 of the Revised Statutes of the United States."

The basis for these assignments is found, not only in instructions given by the trial court, but in refusals to give instructions asked by the defendants. The instructions given, which are pertinent to the assignments and which were duly excepted to below, read as follows:

"Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue.

"The director of a bank who publishes or participates in the publication of a report of its condition by such act asserts that the statements contained in such report are substantially true, and he cannot rely upon his ignorance of the true condition of the bank as a defense to an action when he in such published reports represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless or its liabilities so much greater than its assets as to render the bank insolvent.

"A director or executive of a national bank is responsible for the making and publication of a false report of its financial condition, though he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a national bank is presumed to know its true condition and that the law requires a true statement of its affairs to be made and published by the bank from time to time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence.

"The jury are instructed that inasmuch as the law required that all reports made by a national bank to the Comptroller of the Currency shall be published at the expense of the bank, in a newspaper at the place where the bank is established, you have a right to consider such published reports as have been introduced in evidence in this action purporting to have been signed and whose names appear in such published reports as having been authorized by such defendants so appearing to have signed the same."

Of the instructions refused, to which exception was taken, we need only quote the following:

"The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the national banking act under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

Concerning the cause of action and the proof required to justify a recovery, the Supreme Court of Nebraska said:

"The petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegation may be contained in the petitions, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the deceit or imposition was practiced by the officers of a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of

action does not rest on the Federal statutes but the common law, is no longer an open question.

* * * * * * * *

"It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled to their injury. As to the first proposition, the evidence shows that none of the statements were actually made by all of the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated in making but one of them. That is a mistake; the evidence is conclusive that he signed and participated in making at least four of them, the first being that made and published December 28, 1886, the last that made and published July 9, 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged that at divers other times and dates, between the 28th day of December, 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank which were relied upon by the plaintiff. The defendants appear to take the position that the plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion."

It is not to be doubted that, although the plaintiff alleged the making of false verbal and written statements, there was no attempt to establish any verbal misrepresentations. It is

also certain, even if it be conceded, *arguendo*, that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the Comptroller of the Currency, and published in conformity to the national bank act, that such latter statements were counted upon in the amended petition and were, if not exclusively, certainly principally, the grounds of the alleged false representations covered by the proof. Under this state of the record, irrespective of the nature and extent of the proof required to maintain an action of deceit at common law, the question is: Did the Supreme Court of Nebraska rightfully decide that the plaintiff was entitled to recover against the defendant directors upon proof merely of the following facts: "(1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled to their injury"? And the exact import of the propositions which were thus stated by the court below and were made the test of the right of the plaintiff to recover is plainly shown by an opinion of the Nebraska court cited in its opinion in this case, viz., *Gerner* v. *Mosher*, 58 Nebraska, 135, which involved the liability of the directors of the very same national bank with whose failure this record is concerned. The court said:

"The defendants in the present suit, who, as directors, attested the reports made by the Capital National Bank to the Comptroller of the Currency, by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct, so far as the directors knew or had been advised by the proper performance of their duties as directors. The means of information, this record shows, were accessible to them. It was their duty to know whether the reports were correct or not.

* * * * * * * *

"In our view, whether the attesting directors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank, or who purchased stock of the corporation, in reliance upon the truthfulness of the contents of those reports, were as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false. That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a scienter is not necessary to a recovery. This court has frequently asserted that, to maintain an action for false representation, it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly no case has come under our observation which has made an exception in their favor."

The proper solution of the question above propounded necessitates a consideration of the legislation of Congress respecting national banks.

By section 24 of the national bank act of February 25, 1863, ch. 58, 12 Stat. 665, 671, each association was required to make and forward to the Comptroller of the Currency quarterly reports, "containing a true statement of the condition of the association making such report," in respect to enumerated items, and it was provided that such report "shall be verified by the oath or affirmation of the president and cashier, and all willful false swearing in respect to such report shall be perjury, and subject to the punishment prescribed by law for such offense." It was made the duty of the Comptroller to publish full abstracts of such reports, as to specified items, in newspapers printed in the cities of Washington and New York, "and a separate report of each association" was required to be published, at the expense of the association, in a newspaper

published in the place where such association was established. Associations located in a number of the leading cities were also required to publish, in a newspaper published where the association was located, a statement, under the oath of the president or cashier, of the condition of the association, showing the average amount of loans and discounts, specie, deposits, and circulation. By section 45 the cashier of each association was required after each dividend to make, under oath, "a full, clear, and accurate statement of the condition of the association," enumerating specified particulars, which statement was to be forthwith transmitted to the Comptroller of the Currency. The national bank act of June 3, 1864, ch. 106, 13 Stat. 109, substantially reënacted, in a much condensed form, the requirements as to quarterly reports of the financial condition of each association. The abstract of such reports was required, however, to be published by the Comptroller only in the city of Washington, and *every* association was required to make a monthly statement of its condition under the oath of the president or cashier. For each day after five days' delay in making a report each bank was made liable to a penalty of one hundred dollars. The act of 1864 did not contain a requirement for the making and transmittal to the Comptroller of a statement following the declaration of a dividend.

By an act approved March 3, 1869, ch. 130, 15 Stat. 326, in lieu of the reports required by the national bank act of 1864, it was made the duty of each association, on the requisition of the Comptroller, to make not less than five reports in each year. These reports were not only required to be verified "by the oath or affirmation of the president or cashier of such association," but to be "attested by the signature of at least three of the directors." Publication of such reports was required to be made in a newspaper published in the place where the association was established, and a penalty of one hundred dollars for each day's delay after a specified time in making and transmitting the report was authorized to be retained by the Treasurer of the United States out of interest due the associa-

tion. Each association was also required to make a report, attested by the oath of its president or cashier, within ten days after the declaration of a dividend, stating the amount of each dividend and the amount of net earnings in excess of such dividends.

As embodied in the Revised Statutes the provision became section 5211, and is copied in the margin.[1]

By section 39 of the act of 1863, as well as by section 9 of the act of 1864, a director of a national bank was required, *inter alia*, as he is now required by section 5147, Rev. Stat., to "take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title." In the acts of 1863 and 1864 the concluding word used was not "Title," but "act."

Sections 50 and 52 of the act of 1863, 12 Stat. 679, 680, were practically identical, and sections 53 and 55 of the act of 1864, 13 Stat. 116, were also substantially alike, and by those sections civil and criminal liabilities were authorized to be assessed against and imposed upon directors of banking associations in certain contingencies. Section 52 of the act of 1863

[1] SEC. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him and in the same form in which it is made to the Comptroller, shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

and section 55 of the act of 1864—as supplemented by the act of April 6, 1869, ch. 11, 16 Stat. 7, construed in the act of July 8, 1880, ch. 126, 16 Stat. 195, making it an offense to aid or abet an officer or agent of any association in doing the acts prohibited in section 55 of the act of 1864, with intent to defraud or deceive—became section 5209 of the Revised Statute. It is copied in the margin.[1]

Section 50 of the act of 1863 and section 53 of the act of 1864 became section 5239 of the Revised Statutes, reading as follows:

"SEC. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

[1] SEC. 5209. Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

As in the early acts relating to the national banks, so in the sections of the Revised Statutes on the same subject there are many provisions specifically enjoining the doing or not doing of certain acts by the association or its officers. Thus by section 5137, Rev. Stat. (formerly section 28 of the act of 1864), a national bank is prohibited from acquiring real estate for purposes other than those specified in the act, and is forbidden to hold real estate, under certain contingencies, more than a specified length of time; by section 5200, Rev. Stat. (formerly section 29 of the act of 1864), it is prohibited to loan to any person or corporation in excess of one-tenth of the capital stock of a bank; by section 5201, Rev. Stat. (formerly section 35 of the act of 1864), banking associations are forbidden to loan or purchase their own stock; by section 5202, Rev. Stat. (formerly section 36 of the act of 1864), associations are forbidden to become indebted or become in any way liable exceeding the amount of their capital stock except on account of specified demands; by section 5203, Rev. Stat. (formerly section 37 of the act of 1864), a restriction is imposed upon the use of circulating notes; by section 5204, Rev. Stat. (formerly section 38 of the act of 1864), the withdrawal of the capital of an association while continuing its operations is forbidden either in the form of dividends or otherwise; and section 5206, Rev. Stat. (formerly section 39 of the act of 1864), embodies a restriction upon the use of notes of other banks. In addition to these sections of course may be considered the various sections enjoining the making and publishing of periodical reports of the association, to which we have heretofore referred.

It thus becomes obvious that the national bank act imposes upon directors duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank and the publication thereof. Although the statutory provisions subsequent to the act of 1863, relating to the making and publishing of such reports, do not, as did

the act of 1863, expressly require that the report when made should contain a "true" statement of the condition of the association, yet, by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited.

Considering the text of the national bank act, as now embodied in the Revised Statutes, including section 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. By the first sentence of the section mentioned a forfeiture of the charter is entailed "if the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title. . . ." And the last sentence ordains the rule by which civil liability is to be determined, by providing that "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them. That the words "shall knowingly violate, or knowingly permit," etc., found in the first sentence of section 5239, Rev. Stat., were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions

of the Title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he swears "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title." Mark the contrast between the general common law duty to "diligently and honestly administer the affairs of the association" and the distinct emphasis embodied in the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this Title." In other words, as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this Title."

And general consideration as to the spirit and intent of the national bank act (*Easton* v. *Iowa*, 188 U. S. 220; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275) also render necessary the conclusion that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is in the nature of things exclusively governed by the specific provisions on the subject contained in that act. Thus, a contrary conclusion would lead to a varying measure of responsibility, in the several States in which the question of liability might arise, depending upon the conceptions of the state courts of last resort as to the meaning of the act of Congress imposing the duty. Hence, it would follow that the same provision of the statute might mean one thing in one State and a different thing in another. The confusion which would result is aptly illustrated by a review made by the Supreme Court of Ohio in the recent case of *Mason* v. *Moore*, 73 Ohio St. 275, of the conflicting state adjudications as to the

proper rule to be applied to fix the liability of bank directors to third persons in an action of deceit at common law. The frustration of the public policy embodied in the national bank system, by the crippling of the usefulness of such institutions, which would result from holding that directors in performing the duties imposed upon them by the national bank act might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate.

The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability. *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 35, and cases cited. The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability. The doctrine, as we have seen, upon which the court below rested its judgment was that directors of a national bank who merely negligently participated in or assented to the making and publishing of an untrue official report of the condition of the bank were civilly liable to anyone deceived to his injury by such report. Indeed, in one aspect, the ruling below went further than this, since it was, in substance, decided that despite the exercise of diligence by the director, if he attested an untrue report he was civilly liable because he did so at his risk, since it was his duty to know or to refrain from acting. That this imposed a

higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this court, pointing out that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional. *McDonald* v. *Williams*, 174 U. S. 397; *Potter* v. *United States*, 155 U. S. 438, 446, and cases cited. See, also, *Utley* v. *Hill*, 155 Missouri, 232, 264 *et seq.* and cases cited.

Of course in what has been said we have confined ourselves to the precise question arising for decision, and therefore must not be understood as expressing an opinion as to whether and to what extent directors of national banks may be civilly liable by the principles of the common law for purely voluntary statements made to individuals or the public, embodying false representations as to the financial condition of the bank, by which one who has rightfully relied upon such representation has been damaged. And because we have applied in this case to the duty expressly imposed by the statute the standard of conduct established therein we must not be considered as expressing an opinion upon the correctness of the views enunciated by the court below concerning the standard which should be applied solely under the principles of the common law, to fix the civil liabilities of directors in an action of deceit. See *Briggs* v. *Spaulding*, 141 U. S. 132.

There is a suggestion that the subject matter of this controversy is so inherently Federal that, although the judgments of the Circuit Court and of the Circuit Court of Appeals remanding the cause to the state court may not be reëxamined (25 Stat. 435), nevertheless it should now be decided that the state court was wholly devoid of jurisdiction. This claim is predicated upon the provision of section 5239, Rev. Stat., conferring exclusive jurisdiction on courts of the United States to declare a forfeiture of the charter of a national bank as the result of wrongs committed by the directors, and the contention that a declaration of such forfeiture is a prerequisite to

an action to enforce the civil liability of directors, and that such action could only be brought in the courts of the United States after a forfeiture has been adjudged. We content ourselves with saying that we think these contentions are without merit.

It follows from what has been said that, as to Mosher and Outcalt, two of the persons named as plaintiffs in error in the writ and citation, the writ of error is dismissed for want of prosecution; as to the other plaintiffs in error, the judgment below is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

YATES *v.* UTICA BANK.

SAME *v.* BAILEY.

SAME *v.* BANK OF STAPLEHURST.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Nos. 231, 232, 233. Argued March 8, 11, 1907.—Decided May 13, 1907.

Yates v. *Jones National Bank*, *ante*, p. 158, followed; and *held* further:

That a judgment was rendered upon demurrer does not affect its cogency if it is otherwise efficacious to bring into play the presumption of the thing adjudged.

A judgment of dismissal based on the ground that plaintiff in an action against the directors of a national bank had not set up any individual wrong suffered by him but solely an injury sustained in common with all other creditors of the bank, is not *res adjudicata* of a right of action

between the same parties to recover for individual loss suffered as distinct from the right of the bank.

THE facts are stated in the opinion.

Mr. Halleck F. Rose and *Mr. J. W. Deweese*, with whom *Mr. Frank E. Bishop* was on the brief, for plaintiff in error.[1]

Mr. Lionel C. Burr and *Mr. John J. Thomas*, with whom *Mr. Charles L. Burr*, *Mr. Richard S. Norvall* and *Mr. William B. C. Brown* were on the brief, for defendants in error.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

These are the actions referred to in the opinion just announced in No. 230, *Yates* v. *Jones National Bank*, as companion actions with that case and as having been tried with it. The issues raised below and the questions of law which here arise for decision, are, therefore, the same as in No. 230, and the reasons given in the opinion in that case require a reversal of the judgments in these.

In the *Bailey case* (No. 232), however, there is a question not presented in the others, which, if determined in favor of the plaintiffs in error in that case, will finally settle that particular controversy. Referring, therefore, to the opinion in the *Jones National Bank case* for the general grounds of reversal in the three cases, we come to consider the particular ground which is additionally relied upon in the *Bailey case* as establishing that the decree of reversal in that case should be made conclusive of the entire controversy.

By a "second defense," the defendants pleaded as *res adjudicata* a judgment asserted to have been rendered in their favor in an action brought by the same plaintiff in Lancaster County, Nebraska, which was removed into the Circuit Court

[1] For abstracts of arguments see *ante*, p. 158.

of the United States where, upon the sustaining of a demurrer to the petition, a judgment of dismissal was entered which was by the Circuit Court of Appeals affirmed. 63 Fed. Rep. 488.

Despite the introduction in evidence of the judgment roll in the case just referred to, which for convenience we term the Lancaster County action, the jury in this case, over the objection and exception of the defendants, were in effect instructed that the judgment in the former action did not operate as a bar to a recovery in the present case. Each defendant, in a motion for a new trial, alleged the commission of error by the court in "failing to give full faith and credit" to the judgment of the Circuit Court of Appeals in the Lancaster County action. The Supreme Court of Nebraska considered the subject, and as its conclusion was that the judgment of the Circuit Court of Appeals was not *res adjudicata* of the issues in this cause it therefore decided that in refusing to give effect of *res adjudicata* to such judgment, the trial court had not wrongfully denied the validity of an authority exercised under the United States. The correctness of this conclusion is the particular question to be considered which as we have said distinguishes this case from the others.

Whilst the court below found that the Lancaster County action was between the same parties and in its opinion was based substantially upon the same facts as in the present action, it based its ruling denying the effect of *res adjudicata* to the prior judgment upon the conclusion that taking into view both the pleadings and the opinion in the previous action it must be considered as certain that the case involved a different cause of action from the one presented here. In so concluding we think the court was right.

The judgment relied upon was rendered upon a demurrer. This fact, however, does not affect the cogency of the judgment if otherwise efficacious to bring into play the presumption of the thing adjudged. *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122, 133, and authorities there cited. To determine whether the judgment in the former case was conclusive in

this, in view of its uncertainty, we must address ourselves to the pleadings in that case and consider the opinion of the court for the purpose of ascertaining precisely what was concluded by the judgment upon the demurrer. *Nat. F'dry &c.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234, and cases cited. Coming to do so, we find that the demurrer was sustained on the ground that no cause of action in favor of the plaintiff was stated in the petition, because the Circuit Court of Appeals was of the opinion that the petition only stated a right to recover for violations of the national bank act, causing damage to the bank as such, the right to recover for which was an asset of the bank, enforceable only by its receiver. In so deciding the court expressly held that the averments in the petition relative to the fraud and deceit claimed to have been practiced upon the plaintiff through reports to the Comptroller of the Currency were mere matter of inducement or surplusage and did not constitute averments of a substantive cause of action. In other words, the previous case was decided exclusively upon the ground that as the plaintiff had not set up any individual wrong suffered by him, but solely an injury sustained in common with all other creditors of the bank, the resulting damage was only recoverable by the receiver. As adopting the construction given in the *Jones National Bank case* to a petition like unto the one in this case, we hold that the petition in this case sets up a right to recover for the individual loss suffered as distinct from the right of the bank, it follows, if we accept the construction given by the Circuit Court of Appeals to the pleadings in the case wherein the judgment relied upon was rendered, that case and this involve different causes of action. But it is insisted that if a correct analysis be made of the facts set out in the previous case the result will be to demonstrate that that case and this are identical, and, therefore, the judgment in the previous case is controlling here. This, however, is but to assert that the previous judgment was wrong, and, therefore, in determining its effect as *res adjudicata* we must treat it as embracing matters which it did not include. To

give full force and effect to the judgment we must necessarily exclude those things which the judgment excluded. To hold to the contrary would be to decide that the former judgment must be accepted as correct, and yet it must be extended to controversies which are beyond its reach, because the judgment was wrongfully rendered.

The same judgment must therefore be ordered in each of these cases as was directed to be entered in the *Jones National Bank case*, viz., as to Mosher and Outcalt, two of the persons named as plaintiffs in the writ of error and citation, the writ of error in each action is dismissed for want of prosecution; as to the other plaintiffs in error, the judgment below in each action is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

STEWART v. UNITED STATES AND THE OSAGE NATION.

APPEAL FROM THE COURT OF CLAIMS.

No. 256. Argued April 12, 1907.—Decided May 13, 1907.

Under the Osage Indian treaty of September 29, 1865 and §§ 2237–2241, Rev. Stat., a register of the United States Land Office is not entitled to any additional compensation beyond the maximum of $2,500 per annum for services in connection with sales of land provided for by treaty.

Section 13 of the Act of Congress of May 3, 1903, 32 Stat. 1010, permitting registers and receivers to bring suit in the Court of Claims for commissions and compensation for sales of Osage Indian lands simply provided for presentation of the claims and for a decision on the merits without any admission that any sum was due or assumption that the claims were meritorious. 39 C. Cl. 321, affirmed.

THE appellant herein filed his petition in the Court of Claims to obtain compensation for services performed by him while a register of the United States land office at Humboldt, in

the State of Kansas, during the time from May 12, 1869, until November 20, 1871.

His petition to recover for such services was filed in the Court of Claims pursuant to the provisions of section 13 of the Indian Appropriation Act (chapter 994), approved May 3, 1903 (32 Stat. 1010, 1011). The section reads as follows:

"SEC. 13. That any one or more of the registers and receivers of the United States land offices in the State of Kansas upon whom was imposed the responsibility of making sale and disposal of the Osage ceded, Osage trust and Osage diminished reserve land in said State under the treaty of September twenty-ninth, eighteen hundred and sixty-five, between the United States and the Osage Indians, and the acts of Congress for carrying said treaty into effect, may bring suit in the Court of Claims against the Osage Nation and the United States to determine the claim of the plaintiff or plaintiffs for commissions or compensation for the sale of said lands or any service or duty connected therewith. And the said court shall have jurisdiction to hear and determine said cause and to render judgment thereon on the merits; and the Attorney General shall appear on behalf of the United States and the Osage Nation, and either party feeling aggrieved at the decision of the Court of Claims may appeal to the Supreme Court of the United States, and the final judgment in such case shall determine the rights of all such registers and receivers similarly situated. Said Osage Nation may also appear in said suit by an attorney employed with the authority of said Nation. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy."

The petition was dismissed on its merits by the Court of Claims (39 C. Cl. 321), and from such dismissal the appellant was allowed an appeal to this court. The following facts were found by the court:

The United States and the Great and Little Osage Indians

entered into a treaty September 29, 1865, which was proclaimed January 21, 1867. 14 Stat. 687. In the first article it was stated that the tribe of the Great and Little Osage Indians, having more land than was necessary for their occupation, and all payments by the Government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus land, they therefore granted and sold to the United States the lands described in that article, and in consideration of the grant and sale to them of such lands the United States agreed to pay the Indians the sum of three hundred thousand dollars, which sum was to be placed to the credit of such Indians and interest thereon paid. The lands were to be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, and after reimbursing the United States for the cost of such survey and sale and the said sum of three hundred thousand dollars advanced to the Indians the remaining proceeds of sales were to be placed in the Treasury of the United States to the credit of the "civilization fund," to be used under the direction of the Secretary of the Interior.

By article 2 of the treaty the Indians also ceded to the United States the tract of land therein described, in trust for the Indians, to be surveyed and sold for their benefit by the Secretary of the Interior under such rules and regulations as he might from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold. Provision was then made in the article for the proceeds arising from the sale.

By article 16 it was provided that if the Indians should remove from the State of Kansas and settle upon lands to be provided for them by the United States in the Indian Territory, on terms to be agreed upon, then the diminished reservation should be disposed of by the United States in the same manner and for the same purposes as thereinbefore provided in

relation to said trust lands, with exceptions not material to be noticed. (The Indians did subsequently remove from Kansas.)

It was also provided by the thirteenth article that, as the Indians had no annuities from which the expenses for carrying the treaty into effect could be taken, the United States should appropriate twenty thousand dollars, or so much thereof as might be necessary, for the purpose of surveying and selling the land thereby ceded in trust, which amount so expended was to be reimbursed to the Treasury of the United States from the proceeds of the first sales of the lands.

On the twenty-third of November and again on the nineteenth of December, 1867, the Commissioner of the General Land Office, by authority of the Secretary of the Interior, issued instructions to the registers and receivers in the State of Kansas for the rendition of services in the sale of land ceded to the United States by article 1 of the treaty above mentioned, and the lands agreed to be held in trust by the United States and surveyed and sold for the benefit of the said Indians by article 2 of that treaty. Among other instructions, under date of December 19, 1867, it was provided that the registers and receivers were to be "allowed a commission of one per cent. each on the proceeds of the sales of these lands, with limitations, as a matter of course, to the legal maximum of $2,500, inclusive of commissions and fees, etc., on the disposal of the public lands, the payment of which is to be made by the receiver, in his capacity of disbursing agent, and to be debited in a special account, together with such other expenses incident to the sale of the lands alluded to as may be authorized by law and instructions."

On the twenty-eighth of March, 1871, further instructions were given in regard to the performance of services, in which was the further statement that "nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum of $2,500 per annum, now allowed by law, and the receiver in adjusting his accounts will take care to first ascertain how much short of the maximum

the receipt from public lands, including the fees received from declaratory statements on the Osage lands, will bring their fees and commissions, and will then charge to the Indian fund only so much commissions as will bring their compensation to the maximum." In accordance with these instructions claimant performed services in the sale of lands ceded by the Osage Indians under article 1, and of lands held in trust by the United States under article 2 of the treaty, and of lands included within the diminished reservation of the Indians under article 16 of the treaty.

The claimant was paid for each year of his service the full maximum amount due him, in accordance with the instructions from the General Land Office. This full maximum would not in some cases have been reached without resort to the sales of land under the treaty. This suit has been brought by claimant to recover a commission of one per cent. on the amount of the sales of the land, and the filing fees on the lands mentioned in the treaty and now in the Treasury, as a reasonable compensation for his services in the sale of these lands as outside of and in addition to his regular official duties in the sale of public lands.

The total amount received on the sale of Osage ceded lands was $1,055,162.01; and the total amount received on sale of Osage trust and diminished reserve lands was $9,608,156.27; and the total amount of money held in trust by the Government for said Osage Indians under said treaty of September 29, 1865, is $8,327,439.07, on which interest at five per cent. is paid by the United States, amounting annually to $416,371.95.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. R. V. Belt* were on the brief, for appellant:

The right of registers and receivers to a reasonable compensation for the sale of Indian lands under treaties similar to that of 1865 with the Great and Little Osage Indians has been settled and adjudicated by this court upon the basis that these additional services were performed for the benefit of the In-

dians and the statute implied the payment of a reasonable compensation for such services. *United States* v. *Brindle*, 110 U. S. 688, and see *United States* v. *Saunders*, 120 U. S. 126, 130. See also *Meigs* v. *United States*, 19 C. Cl. 497, 503, 504; *United States* v. *Rogers*, 81 Fed. Rep. 941.

The *Brindle case* has also been made a basis of action by Congress in legislation for the payment of claims of similar officers making sales of lands of Indians. See 27 Stat. 768, and 28 Stat. 580.

The instructions of the Secretary of the Interior so far as they related to the question of compensation contained not a proposal to the claimant to enter into a contract, but an official ruling and an erroneous one at that. Where officers of the Government in good faith comply with such rulings of their superior officers, they lose no rights by so doing. *United States* v. *Lawson*, and *United States* v. *Ellsworth*, 101 U. S. 164, 170; *Swift Co.* v. *United States*, 111 U. S. 22, 29; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23; *United States* v. *Mosby*, 133 U. S. 273, 279; *United States* v. *Post*, 148 U. S. 124, 133; *Glavey* v. *United States*, 182 U. S. 595.

The duties of a register of a land office refer exclusively to disposing of the public lands of the United States. Nothing in any statute required him to assist in disposing of private lands prior to the act of January 27, 1898.

Every presumption must be in favor of the payment of the officers performing this additional work out of the funds of the Indians for whose benefit the work was performed. It is not to be presumed that the treaty-making power, while inserting in the treaty a provision for payment of the expenses of the sale, intended that the treaty funds should escape the payment of all such expenses through the operation of a provision for the payment into the Treasury of the excess of the emoluments earned by the land officers in the performance of the regular duties of their offices. Such a provision was intended to operate under very different circumstances from those of the present case. Its purpose was to save the money

of the Government itself, not trust funds. *United States* v. *Bassett*, 2 Story, 389; *S. C.*, Fed. Cas., No. 14,539.

Mr. Assistant Attorney General Van Orsdel for the United States.

Mr. Lorenzo A. Bailey for the Osage Nation.

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

Except for the treaty between the United States and the Osage Indians, relative to the lands in question, and the passage of appropriate legislation by the United States, the lands would never have been sold, as they were not public lands of the United States for the sale of which Congress had already provided under its general legislation. The treaty, however, provided that the lands described in article 1 were to be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws; and under article 2 the lands were to be sold for the benefit of the Indians by the Secretary of the Interior, under such rules and regulations as he might from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold; and under article 16, in case of the removal of the Indians, the diminished reserve was to be disposed of by the United States in the same manner and for the same purposes as provided in relation to the so-called trust lands. Thus power was given to the Secretary of the Interior, acting through the Commissioner of Public Lands, to make the same rules and regulations for the sale of the treaty lands as applied to the survey and sale of "public lands," and to that end he had power to provide for their sale by the various receivers and registers of the land office in the

State of Kansas, in whose jurisdiction such lands lay. Although the treaty provided the sum of $20,000 to pay the expense of carrying out its provisions, yet it is evident that the purpose of the treaty was that these lands should be sold at the least expense to the Indians in their sale, and we think that the Secretary of the Interior, acting through the Commissioner of the General Land Office, had the right to provide, as was done in this case, that the various registers and receivers should sell the lands and should not receive more than the maximum compensation for their services per annum otherwise allowed by law. In cases where the maximum amount would not be received without resorting to the treaty fund, such resort was permitted, and the fund was in fact resorted to in this case in order to reach the maximum for the fractional years of claimant's service. The Secretary of the Interior having made this rule, and the instructions of December 19, 1867, being in existence when the claimant herein received his appointment as register, he took it subject to the provision that his maximum compensation for all services rendered should not exceed the sum named by law. See sections 2237, 2238, 2240 and 2241, Rev. Stat., prescribing among other things, the compensation of registers and receivers. This compensation the claimant was paid thirty years since, without objection or protest from him that he was entitled to any further payment on account of services in the sales of these treaty lands.

The case of *United States* v. *Brindle,* 110 U. S. 688, does not aid claimant. In that case Brindle was, on the twenty-eighth day of October, 1856, "duly appointed special receiver and superintendent to assist the special commissioner to dispose of the Delaware Indian trust lands at Fort Leavenworth, in the Territory of Kansas, under the treaty with the Delaware tribe of Indians. On the eighteenth of February, 1857, he was appointed and commissioned for four years as receiver of public moneys for the district of lands subject to sale at Lecompton, Kansas, and on the fifteenth day of May, 1857, he was duly

appointed as special receiver and superintendent to assist the special commissioner to dispose of the trust lands of the Kaskaskia and Peoria, Piankeshaw and Wea Indians, confederated tribes of Indians at Paoli, Kansas Territory." Brindle was thus appointed special receiver and superintendent of the Delaware Indian trust lands before he was made receiver of public money, and while he was receiver of public money he was duly appointed as special receiver of the other Indian tribes, as above stated. The duties of the positions (special receiver, etc., and receiver of the public moneys) were thus kept separate and apart. As receiver he was to receive public moneys for land subject to sale at Lecompton, Kansas, while his duties in regard to the other positions to which he had been specially appointed referred to the disposition of the Indian lands, in one case at Fort Leavenworth and in the other case at Paoli, both in the Territory of Kansas. This court held that when subsequent to his appointment as receiver of the public moneys Brindle was appointed special receiver and superintendent to assist the special commissioner "in disposing of the trust lands he was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. *No new duty was imposed upon him as receiver of the Land Office.* The President was, both by the treaties and the act of 1855, charged with the duty of selling the lands, and under his instructions Brindle was employed to assist in the work. By express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds. This clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect."

In the case at bar the duty had already, prior to claimant's appointment, been imposed on the various receivers and registers as such, of attending to the sale of these lands within their various districts, and express provision had been made that in no case was their compensation to exceed the maximum sum already provided by law. When such provision had been

made in regard to compensation there is no room for any implication of a promise to pay an additional reasonable compensation for the services of such registers and receivers in the sale of those lands. Such implication was specially negatived before the claimant took office. He received his pay under the provision of law already stated, without any protest or claim on his part that he was entitled to anything further or other than the amount he from time to time received. More than thirty years after the last payment, Congress passed the act of March 3, 1903, the thirteenth section of which is contained in the foregoing statement of facts. The passage of the act did not imply any admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, without assuming to say that he had any claim of a meritorious nature.

We agree with the Court of Claims that the claimant has failed to make out a case, and the judgment dismissing his petition is

Affirmed.

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

GOAT AND SHEEPSKIN IMPORT COMPANY *v.* UNITED STATES.

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

No. 261. Submitted April 17, 1907.—Decided May 13, 1907.

The commercial designation of an article, which designation was known at the time of the passage of a tariff act, is the name by which the article should be classified for the payment of duty without regard to the scientific designation and material of which it may be made or the use to which it may be put.

The word "wool" in paragraph 360 of the tariff act of July 24, 1897, 30 Stat. 151, 183, does not include a substance which, while the growth upon a sheepskin is, nevertheless, commercially known, designated, and dealt in, as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool.

THIS case comes here by virtue of a writ of certiorari issued from this court to the United States Circuit Court of Appeals for the Second Circuit, for the purpose of reviewing the action of the courts and of the customs authorities in relation to an assessment of duty on certain importations made by the petitioner, appellant, at the port of New York.

The merchandise on which duty was assessed was a growth upon certain skins of the Mocha sheep, imported from Hodeida, Arabia, which growth was classified by the collector as wool on the skin of the third class and assessed for duty at three cents per pound, under the provisions of paragraph 360 of the tariff act of July 24, 1897 (30 Stat., pages 151, 183). The importer duly protested against the classification and insisted that the merchandise was entitled to entry free of duty under paragraph 571, 30 Stat., *supra*, page 198, or under paragraph 664 of such act. (Page 201.) Paragraphs 351, 358, 360, under which the Government claims duty, and paragraphs 571 and 664, under which the importer claims free entry, are set forth in the margin.[1]

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[1](Paragraphs from Tariff Act of 1897, under which the Government claims. 30 Stat. 151, 183.)

351. Class three, that is to say, Donskoi, native South American, Cordova, Valparaiso, native Smyrna, Russian camels' hair and all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Syria and elsewhere, excepting improved wools hereinafter provided for.

358. On wools of the third class and on camels' hair of the third class, the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound.

360. The duty on wools on the skin shall be one cent less per pound than is imposed in this schedule on other wools of the same class and condition, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe.

Petitioner claims under following paragraphs:

571. Hair of horse, cattle and other animals, cleaned or uncleaned, drawn

The collector having returned the merchandise in question as wool of the third class, under paragraph 360, the importer appealed to the Board of General Appraisers, where the ruling of the collector was sustained, and the importer then appealed to the Circuit Court and then to the Circuit Court of Appeals, each of which courts sustained the ruling of the Board of General Appraisers and the collector.

Before the Board of General Appraisers the importer produced six witnesses, who testified as to the character, use and commercial designation of the merchandise. On the appeal to the Circuit Court a referee was there appointed, and the importer offered further evidence to sustain his claim that the merchandise was entitled to free entry.

No testimony was offered by the Government. It is not claimed by the Government that the merchandise in question comes under paragraph 351 as wool of the third class (except as it may be wool of like character), as it is not Donskoi, native South American, Cordova, Valparaiso, native Smyrna or Russian camel's hair, but it is asserted that the growth on the skins was wool on the skin under paragraph 360, or was a wool of like character as that above enumerated in paragraph 351.

The evidence shows that the hair or wool (whichever it is called), grows on the Mocha white sheep, imported from Hodeida, Arabia. The growth to be found on this breed of sheep is not bought or sold in this country as wool, but as hair. It would not be accepted as a delivery of wool of any grade by those dealing in that article. Although there might have been a very small proportion of what might possibly be termed very inferior wool on these skins (not more than ten per centum in any case, and frequently less), yet there was no substantial use of any portion of the growth on the skins for purposes for

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or undrawn, but unmanufactured, not specially provided for in this act, and human hair, raw, uncleaned and not drawn.

664. Skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this act.

which wool is generally used. To some extent, but very little, it had been tried in mills to spin, and it might be used sometimes by carpet manufacturers in a small way, and efforts had been made to use it, mixed with wool, in spinning, but it was not practically successful, nor was it practicable to use it for other purposes for which wool is used. The chief, or predominant, and almost sole use of the substance is as hair for stuffing, and for the saddlery trade, and by bed manufacturers for stuffing purposes. It is bought and sold all over the country as Mocha hair. The skin upon which the substance grows is the thing that is valuable. A large part of the skins imported into this country is used in the manufacture of glove leather. One witness testified that his firm so used from seventy-five to ninety per cent. of the skins imported, and the growth thereon was bought and sold as Mocha hair. It costs more to remove the growth from the skin than it sells for after its removal. It cannot be used for spinning purposes, because it would not hold together. It might be carded, but there would not be much left after carding. The price of the skins on which this growth is found is not influenced by the quantity of the growth on them. The more of a growth there is, the less the skin will bring, or, as is said, the more hair, the poorer the skin. The skins are sold by the importers to tanners of gloves and shoe leather, just as they arrive. After the growth is washed and removed from the skin it may be sold for from three to five cents per pound, which is less than the cost of removing it. In buying the skins no notice is taken of the growth, the only consideration being the value of the pelt, and the pelts are worth no more with long hair on than short hair. The growth has never been accepted or sold as wool, but, on the contrary, prior to July 24, 1897, when the tariff act was passed, it was uniformly regarded and bought and sold in the United States as hair. "Mocha hair" was the trade nomenclature prior to 1899, and as such the trade name was definite and uniform throughout the United States, and dealers in it never knew it to be called anything else than Mocha hair. It has not the appearance of

wool, does not feel like wool and has none of the qualities of wool. It is bought from tanners after it has been taken from the skin by them, and it is thus sold and bought as Mocha hair, and the skins are used for leather by the tanners.

One of the witnesses called on behalf of the importers was an examiner of wool fibres and skins at the port of New York, which position he had held for about fifteen years. He said that when he first went into the government employ such skins as those in question were returned free, the hair as well as the skin, but that practice has since been changed. The witness further said, that if the growth in question were found on a goat he would return it as hair of a goat, and entitled to free entry; that wool could be run down, or deteriorate, to such a condition as the growth in question, but that it was, in fact, mostly "what they call dead hair or kemp;" that although it could possibly be carded, it was not commercially suitable, and there would not be much left after they got through carding it. On cross-examination the witness said that he would return the article in question as Mocha sheepskin with the wool on. On such a skin as the one in question the witness said there was a substance which he would call wool, which was about ten per cent. only of the growth; that he examines such skins as the ones in question and throws out those he considers dutiable when there is enough wool to call it dutiable, and lets the skins go not dutiable when you could not make anything out of the growth in any way, although some use might possibly be made of it.

The cross-examination of other witnesses was to the effect that this growth had been tried in mills for the purpose of spinning, but very little, being used with other stock to make into yarn, but it has not been successfully used for that purpose; it might be used sometimes by carpet manufacturers in a small way, and while it could not be used or spun alone, it might be carded. It was also said on cross-examination of one of the witnesses that if such growth ran pretty white it is sometimes used in those low grade carpet yarns where they put in such stuff as jute packing is made of and some hair like the growth

in question. The evidence is, however, overwhelming and the witnesses substantially unanimous that this substance is not known as wool, and is neither bought nor sold as such, and is commercially known as Mocha hair and is not used as wool.

Mr. J. Stuart Tompkins, with whom *Mr. Edward S. Hatch* was on the brief, for petitioner:

The growth of the skins must be classified according to its commercial designation. *Hedden* v. *Richards,* 149 U. S. 346, 348, 349; *American Net and Twine Co.* v. *Worthington,* 141 U. S. 468, 471; *Arthur* v. *Morrison,* 96 U. S. 108; *Two Hundred Chests of Tea,* 9 Wheat. 430, 438; *In re Wise,* 73 Fed. Rep. 183, 188, and cases cited.

The evidence in this case is wholly uncontroverted that the substance of these Mocha whitehead sheepskins, according to the general and uniform trade understanding, is not wool, but, on the contrary, is hair, and it follows that the collector's classification of the substance as wool of Class 3 was erroneous.

The article has always been generally and uniformly bought and sold only under the name of "Mocha hair," and is so known and recognized not only in commerce, but also according to common understanding; it is used for purposes other than those to which wool is applied—and this Mocha hair would not be accepted as a good delivery under an order for even low-grade wool.

Under this general and uniform commercial understanding and usage, excluding this article from the category of merchandise regarded in trade as "wool," and including it in that known as "hair," it was improperly classified by the collector under paragraph 358 of the tariff law of 1897, as "wool." *Chew Hing Lung* v. *Wise,* 176 U. S. 156, 161; *Arthur* v. *Morrison,* 96 U. S. 108, 110; *Elliott* v. *Swartout,* 10 Peters, 137, 151; *Hedden* v. *Richard,* 149 U. S. 346, 349.

It is not material that it is physically possible to use the article for some of the purposes for which wool is used, or that it occasionally may be used for such purpose. An occasional

or possible use is not sufficient to affect the classification of an article for tariff purposes. *Chew Hing Lung* v. *Wise*, 176 U. S. 156, 162; *Magone* v. *Wiederer*, 159 U. S. 555; *Hartranft* v. *Langfeld*, 125 U. S. 128.

The evidence establishes the fact that the growth on the skins is hair, and not wool. The substance is commercially known as hair and dealt in under that designation, and never as wool.

The commercial designation is in accordance with the actual character of the article, because it has none of the characteristics of wool and it is not used as wool and is not suitable for the uses to which wool is put.

Mr. Assistant Attorney General Sanford for respondent:

Under the wool paragraphs of the tariff act the word "wool" is manifestly used in a generic sense to describe the fleece of the sheep, as distinguished from the word "hair," which is used to describe the coat of the camel and other like animals, and not in a technical and commercial sense as referring only to that portion of the fleece of the sheep which possesses the specific qualities of wool as distinguished from those of hair.

The rule of commercial designation is not applicable to the classification of wool.

Where it appears from the statute itself that words in a tariff act are not used in a technical sense as a commercial designation or trade term, their meaning is not to be controlled by their commercial usage. *Maillard* v. *Lawrence*, 16 How. 250; *Greenleaf* v. *Goodrich*, 101 U. S. 278; *Barber* v. *Schell*, 107 U. S. 617; *Newman* v. *Arthur*, 109 U. S. 132; *Reimer* v. *Schell*, 4 Blatchf. 328; *Roosevelt* v. *Maxwell*, 3 Blatchf. 391; *Carson* v. *Nixon*, 90 Fed. Rep. 409; *Patton* v. *United States*, 159 U. S. 500; *Cadwalader* v. *Zeh*, 151 U. S. 171; *United States* v. *Klumpp*, 169 U. S. 209.

General words of similitude, such as "goods of a similar description," are not words of commercial designation whose meaning can be controlled by proof that goods which are in fact

of similar description have a different commercial classification.

The proof of commercial designation in the present case is in any event insufficient, for the reason that where an importer claims that certain specific articles are excluded by their commercial designation from a class mentioned in a tariff act, it is not sufficient for such purpose, even in those cases where the test of commercial designation is applicable, to show negatively that these specific articles were commercially known by another name and were not commercially known by the name used in the act, but it must be affirmatively proven that the words used in the act had at the time of its passage a definite and uniform meaning which excluded the specific articles in question. In other words, the proof of commercial meaning must not be addressed simply to the commercial designation of the particular article in question, as was done in the case at bar, but to the commercial meaning of the term used in the act. *Greenleaf* v. *Goodrich,* 101 U. S. 278; *Schmieder* v. *Barney,* 113 U. S. 645; *Claflin* v. *Robertson,* 38 Fed. Rep. 92; *Carson* v. *Nixon,* 90 Fed. Rep. 409 (C. C. A.); *Field* v. *United States,* 90 Fed. Rep. 412 (C. C. A.).

The testimony offered by the importer in reference to the general character of these fleeces and their commercial use is insufficient to overthrow the presumption in favor of a correct classification.

As the test of classification under the statute is likeness of character to Donskoi and other enumerated wools of the third class, to be determined by the standard samples of wool of the third class deposited in the custom house, the importer's testimony as to the qualities of this fleece and its commercial use, which is entirely of an abstract and general character and not directed either to the point of its likeness to Donskoi and other enumerated wools or of conformity to the standard samples, is in any event immaterial.

It is well settled that where a wool or hair is of a species coming within a particular class of the wool schedule its es-

pecial quality and commercial use is immaterial and will not take it out of such class. *Cooper* v. *Dobson*, 157 U. S. 148.

There was, furthermore, material evidence tending to show that the fleece in question in fact has the qualities and is adapted to the uses of a low-grade third-class wool, and hence, under the settled rule of practice, the concurrent finding of the Board of General Appraisers, the Circuit Court, and the Circuit Court of Appeals that it is a wool of this class, is now conclusive.

In the Circuit Court of Appeals the judgment below was affirmed on the opinion of the Circuit Court.

The case therefore calls for the application of "the settled doctrine of this court . . . that the concurring decision of two courts on a question of fact will be followed unless shown to be clearly erroneous." *Dravo* v. *Fabel*, 132 U. S. 487; *Compania La Flecha* v. *Brauer*, 168 U. S. 104; *Stuart* v. *Hayden*, 169 U. S. 1; *Baker* v. *Cummings*, 169 U. S. 189, 198; *Wupperman* v. *The Carib Prince*, 170 U. S. 655; *Workman* v. *New York City*, 179 U. S. 552, 555; *Brainerd* v. *Buck*, 184 U. S. 99; *Beyer* v. *Le Fevre*, 186 U. S. 114; *Shappirio* v. *Goldberg*, 192 U. S. 232.

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

The evidence in this case, taken before the board of appraisers and also before the Circuit Court, is uncontradicted. It shows that the substance in question is not wool, has none of its characteristics and is not put to any of its uses and does not appear like wool. On the contrary, it is composed mostly of dead hair or kemp and cannot be remuneratively carded, nor is it commercially suited for carding, nor for spinning. Its commercial designation is Mocha hair, and it is not known or regarded or recognized as wool in any of the markets of the country.

It is not denied that the commercial designation of an article, which designation was known at the time of the passage of a tariff act, is the name by which the article should be classified

for the payment of duty, and, as is stated, "without regard to their scientific designation and material of which they may be made or the use to which they may be applied." *Two Hundred Chests of Tea*, 9 Wheat. 430, 438; *Arthur* v. *Morrison*, 96 U. S. 108; *American Net and Twine Co.* v. *Worthington*, 141 U. S. 468; *Hedden* v. *Richard*, 149 U. S. 346, 348. As was said by Mr. Justice Story in *Two Hundred Chests of Tea, supra*, Congress did not "suppose our merchants to be naturalists or geologists or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic." And in *Hedden* v. *Richard, supra*, it was said: "The language of commerce . . . must be construed, . . . particularly when employed in the denomination of articles, according to the commercial understanding of the terms used." The commercial designation should prevail, unless Congress has clearly manifested a contrary intention. *Cadwalader* v. *Zeh*, 151 U. S. 171, 176.

We are of opinion that the use of the word "wool" in the tariff act, excluded a substance which, while it was a growth upon a sheepskin, was nevertheless, commercially known, designated and dealt in as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool.

In this case the evidence is uncontradicted that the growth on these skins was commercially known as Mocha hair, and that it was not used in the way wool is used, or as a substitute for wool. It ought not, simply for the reason that the skin upon which it grows is the skin of a sheep, to be classified as wool, under paragraph 360 of the tariff act, and thereby be subjected to a duty as high as the value of the substance itself.

Although it has been so classified, and that classification has been affirmed all through, yet the question is not presented to this court as if it were a question of fact decided upon contradictory evidence, and concluding this court for that reason. There is, in truth, no contradictory evidence in the case. It is one, where in our opinion, the courts below have given undue

weight to the evidence elicited on cross-examination of witnesses called on the part of the importer, which showed that there possibly was, in some cases, a very little inferior wool found on these skins, while the courts ignored the other facts, as testified to by the same witnesses and already mentioned, which showed beyond the possibility of successful contradiction that the substance was erroneously classified as wool.

Upon the facts, the substance ought not to have been so classified. The growth being still on the skin should have been regarded as part of such skin, and classified under paragraph 664, in the free list, and not as a sheepskin with the wool on.

We do not agree that the word "wool" in this act is used in a generic sense so far as this particular point is concerned. The word does not necessarily include all growth upon the coat of a sheep, even though the substance is like that in question here.

Counsel for the Government cites from the Encyclopædia Britannica, where, in speaking of the difficulty in determining the dividing line between hair and wool, it is said: "At what point indeed it can be said that an animal fiber ceases to be hair and becomes wool it is impossible to determine, because in every characteristic the one class by imperceptible gradations merges into the other, so that a continuous chain can be formed from the finest and softest merino to the rigid bristles of the wild boar."

It may be difficult in some cases to define the line between "wool" and "hair" as a growth upon skins, but we do not regard that difficulty as an argument for the construction contended for by counsel for the Government. That argument leads to the classification of a substance like that in question, as wool, when in fact it bears no resemblance to it, is not used as wool, and has none of its characteristics, and is known commercially as Mocha hair and is so bought and sold over the whole country. The case is one of degree, and because in some few cases the points may closely approach each other and there may be in such cases some difficulty in telling wool from hair,

yet that fact furnishes no reason for refusing to adopt the general test which in most cases is easily applied, fitness, identity of use, commercial designation. To adopt the claim of counsel eliminates all inquiry as to whether an article is wool or hair, and leaves simply the question whether it is to be found on what may be called the wool bearing animals or on the alpaca or other like hair coated animals. Some sheep are wool bearing animals, therefore the hair on the skin of the Mocha sheep is wool and must be classified as such. We do not agree with this claim. If an article does not, to a dealer, look like wool, cannot be used as wool, is not commercially known as wool, but, on the contrary, is bought and sold throughout the country as Mocha hair and is so designated commercially by those dealing in it, it ought not to be classified as wool or made to pay duty as such, simply because it grows on a sheep.

We have looked over the various authorities cited by counsel for the Government, but we see nothing in any of them tending to the conclusion that upon the facts in this case the growth on the skin of the Mocha sheep was properly classified as wool.

Taking all the evidence in this case, uncontradicted as it is, we feel compelled to the conclusion that the classification in this case, adopted by the courts below and by the appraisers and collector was wrong, and that the merchandise in question was entitled to free entry.

The judgments of the courts below are reversed and the case remanded to the Circuit Court with instructions to take such further proceedings as may be necessary, not inconsistent with this opinion.

Reversed.

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

LOWREY *v.* HAWAII.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 195. Argued March 20, 1907.—Decided May 13, 1907.

A foreign mission board maintaining a school in Hawaii in 1849 turned the school over to the government under an agreement, expressed in correspondence that the government should maintain it as an institution for the cultivation of sound literature and solid science, that no religious tenet or doctrine contrary to those inculcated by the mission, a summary of which was transmitted in the correspondence, should be taught, and that in case the government did not so maintain it, it should pay to the mission $15,000. After maintaining the school for many years as it had been maintained under the mission, the government converted it into an agricultural college and religion ceased to be a part of the curriculum. Meanwhile the constitution of Hawaii of 1894 prohibited the appropriation of any money for sectarian institutions. *Held*, in an action brought by the Mission to recover the $15,000, that,

Extrinsic evidence, as to what the parties did and the nature of the course of instruction when the agreement was made, and thereafter as continued by the government, was admissible to prove the intent of the parties as to what was meant by sound literature and solid science, and that under all the circumstances the agreement was that religious instruction was to be continued and on the failure of the government to continue such instruction the Mission was entitled to recover the $15,000.

The government of Hawaii was not relieved from its contract obligation by reason of the adoption of the constitutional prohibition against appropriation for sectarian institutions.

THIS action was brought in the Supreme Court of the Territory of Hawaii to recover from the Territory the sum of $15,000 as the alternative of the reconveyance of certain property conveyed by the American Board of Commissioners of Foreign Missions in 1849 to the Hawaiian government, for the nonfulfillment of the conditions upon which the property was con-

veyed. A demurrer was sustained to the petition and thereupon this appeal was taken.

The following is an outline of the principal facts alleged:

The American Board of Commissioners for Foreign Missions, hereinafter called the American Board, for many years prior to 1850 had conducted and maintained a Protestant Mission in the Hawaiian Islands, and as an essential part of its missionary work carried on many schools. Its most notable educational work was centered in a school established in 1831 at Lahainaluna, on the Island of Maui, where it possessed a large tract of land. This school and the premises occupied by it were set off by the chiefs to the Protestant Mission in 1835. On the buildings and other improvements many thousands of dollars were expended, and the school had, in 1850, become a most important factor in the life and progress of the Hawaiian people, and was recognized as the leading educational institution in the kingdom.

The course of instruction comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrines represented by the Mission.[1]

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[1] Laws of the High School, as Amended and Adopted by the Mission June, 1835.

Chapter I.

Design of the School.

The design of the High School is,

1. To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus Christ, with all its accompanying blessings, civil, literary and religious.

4. Another object still more definite and of equal or greater importance, is, to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellow men.

Chapter VII.

Of the Studies of the School.

4. The whole school shall meet between daylight and sunrise each week

These facts were established before the board of commissioners to quiet land titles to which the claim of the American Board to Lahainaluna, as an established part of its system, was duly presented and recognized, and the board of commissioners adjudged as follows: "Lahainaluna, part 5, section 2, claim relinquished before the land commission in consequence of an after-arrangement having been entered into with the Hawaiian government by the Mission. Vol. 3 L. C. Award, p. 143 *et seq.*, upon the final confirmation which was duly made to the said A. B. C. F. M. all the lands claimed were awarded, 'with the exception of section 2, Lahainaluna, which had been withdrawn.' "

The "after-arrangement" referred to in the records of the land commission was as follows:

"Because of financial stress, and also feeling that the school, which had really become a national institution, should be conducted by the government at its own expense, in April, 1849, the Mission, at its general mission held at Honolulu, voted as follows: 'To make over this seminary to the government, it being understood that it is to be conducted on the same principles as heretofore.'

"An offer was thereupon made to the government in pursuance to this vote of the Mission to make over the school to the government on condition that it should be continued at its expense as an institution for the cultivation of sound literature and solid science, and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, a summary of which will be found in the confession of faith herewith enclosed,

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day for prayer, at which one of the instructors shall preside; the roll shall be called, absentees marked and called to an account at least once a week.

6. On the afternoons of Tuesdays and Thursdays each week, or at other times equivalent, the whole school shall meet for biblical instruction, embracing the interpretation of Scripture, evidence of Christianity, archeology and sacred geography. And Friday afternoon of each week or time equivalent shall be spent in exhibiting and correcting compositions in the Hawaiian language and in elocution.

and that in case of the non-fulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions of improvements, should revert to the said Mission."

This offer as made was not accepted by the government, but it instead submitted a counter offer to the Mission, by which it offered to take over the school on the conditions made in the Mission's original offer, but "provided that in case of the non-fulfillment on the part of this government of the conditions specified in the letter of the above-named gentlemen, it shall be optional with this government to allow the institution, with all additions and improvements which may have been made upon the premises and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions, or to pay the sum of $15,000; provided also that in case this government shall find it expedient to divert this establishment to other purposes than those of education it shall be at liberty to do so, on condition that it sustain an institution of like character and on similar principles in some other place on the island or pay the sum of $15,000 to said Mission in behalf of the Mission Board in Boston."

A more definite form of the "confession of faith" was substituted and accepted by the government, and the whole arrangement ratified by the Hawaiian legislature, Law of 1850 (F. C. 1850), 158, sec. 1 of Civil Code (1859), sec. 783, and by the prudential committee of the American Board.

The letter of the Mission to the Minister of Public Instruction is inserted in the margin.[1]

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[1] Exhibit A.

HONOLULU, April 25, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of the Hawaiian Islands.

Sir: The undersigned, a committee of the general meeting of the Mission of the A. B. C. F. M., at the Sandwich Islands, appointed in reference to the Mission Seminary at Lahainaluna, Maui, beg leave through your Excellency

The Hawaiian government at once took possession of the Lahainaluna Seminary and carried on the school exactly as it had been conducted by the Mission, both in religious instruction and the inculcation of sound literature and solid science.

For many years after the government had taken over the school the principals of the school continued their relations as missionaries of the American Board in their work in the school, and continued to make reports of their educational and religious

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to offer a few remarks respecting that institution, and make some proposals in reference to it to His Majesty's Government for its consideration.

It is well known to His Majesty and also to most of the members of his government that in the year 1831 the mission commenced the establishment of the institution now known as the Mission Seminary at Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the islands.

From that period to the present time this institution has been unceasingly and anxiously watched over, cherished and cared for by the Mission. No expense or pains coming within its appropriate means or power have been spared to promote its usefulness and secure the objects of its establishment.

Three missionaries have for a large portion of the time been devoted to its interests, and two at all times since the two or three first years of its existence. About $77,000.00 have been expended for its benefit, including the support of the teachers and the dwellings erected for their accommodation.

We need not point you to the fruits of this cherished institution, scattered throughout the islands, filling various posts of honor, responsibility and usefulness, both in and out of the government. They are well known to His Majesty, and the officers of his government, and to none better than yourself.

The institution has been planted and sustained to the present time by the American Board of Commissioners of Foreign Missions, from donations given by the American churches for the spread of the gospel in heathen lands. That board, as we learn by recent intelligence, was at the close of its last financial year embarrassed by a debt of $60,000.00, incurred in the prosecution of its labors of benevolence and mercy.

As a consequence of its indebtedness, it has been obliged to curtail its expenditures by diminishing its grants to each one of the missions under its care, and this Mission, in common with others, has shared in the general reduction.

For this reason the Mission will be unable to carry forward its operations with the vigor to be desired in all of its departments of labor. Some must almost inevitably suffer for want of pecuniary means.

In view of these facts, and believing that under present circumstances the transfer of this institution to the fostering care and patronage of Government will promote the highest interests of the Hawaiian people, we beg leave

work and instruction in the school to the general meetings of the Mission.

In 1862 the seminary buildings were burned down. Other buildings were built. The principal, in his report for that year, 1862–1863, reviewing the history of the school, says: "The Hawaiian government has always been a liberal friend and benefactor. . . . Never in any way have they interfered with our manner of instruction, or in the course of instructions

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through your Excellency to submit to His Majesty's government for its consideration the following proposals, viz:

That the Mission of the A. B. C. F. M. at the Sandwich Islands, acting for and in behalf of the said American Board of Commissioners of Foreign Missions, having its headquarters in Boston, State of Massachusetts, in the United States of America, relinquish all of their right, title and interest to and in the seminary buildings located at Lahainaluna on the island of Maui, and known as the Mission Seminary, together with all of the dwelling houses at that station erected by the Mission at the expense of the said A. B. C. F. M., for the use of the teachers in the said Mission Seminary; also the building erected by the mission as a printing office and bindery; also all lands pertaining to and granted for the use of the Missionary Seminary, and also all philosophical and other apparatus procured for the use of the said seminary, also the public library of the said institution, and to transfer the same to the Hawaiian Government for its use, benefit and behoof to have and to hold the same forever.

Providing, however, and this transfer is made upon the express condition that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science; and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government by the said Island Mission shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions.

These proposals, if accepted, by the Hawaiian Government, shall not have binding force until they shall have received the sanction of the Prudential Committee of the American Board Commissioners of Foreign Missions in Boston, and further, should the said Hawaiian Government accept the proposals here presented, and enter forthwith upon the fulfillment of the condi-

pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who, under the religious instruction at the school, became ministers, he says: "While six who were connected with it since it has been under the care of the Hawaiian government have been ordained to the same office."

Prior to the establishment of the Anglican Church in Hawaii the board of education appointed as instructors such persons as were acceptable to the Mission, generally selecting those nominated by the Mission. When the Anglican Mission was established it was proposed that the forms and probably the substance of religious instruction should be changed, and advice was asked of the Attorney General. His reply reviewed the whole arrangement upon which the government received the seminary, and concluded as follows: "Should the government not be willing to keep the conditions as far as I have shown, then the property and improvements must be restored to the A. B. C. F. M."

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tions, and should the said transfer not meet the approbation of the Prudential Committee, the Mission, on its part, pledges itself to refund to the said Government any necessary expenses it may have incurred in carrying on the institution whilst the parties were awaiting the ratification or rejection of this transfer by the said Prudential Committee. Provided, however, that moneys shall not have been expended in enlargement or improvements, other than what may have been actually necessary to keep the buildings in repair and carry on the institution.

In case of disagreement of the parties as to the amount proper to be refunded, in case of the non-ratification of this conveyance by the Prudential Committee, the sum shall be determined by two arbitrators, one of which shall be chosen by each of the respective parties, and which arbitrators in case of disagreement shall elect a third to decide upon the award.

The foregoing remarks and proposals are respectfully submitted for the consideration of His Majesty's Government, and I feel greatly obliged by an early answer.

We have the honor to be,

Very respectfully, your ex. friends and most obedient servants,

W. P. Alexander,
C. B. Andrews,
S. N. Castle, *Com.*,
By S. N. Castle.

In 1865 the Hawaiian Gazette, the official mouthpiece of the government, declared that the government had resolved that its support should be given to schools irrespective of their religious teaching, but pointed out that the board of education might be chargeable with partiality for supporting a state church, inasmuch as it paid large sums to defray the expenses of Lahainaluna, where the principles and theology of one particular sect were exclusively taught, although opposed to the belief of all in communion with Roman Catholic and Episcopal churches.

In the following years, upon the suggestion by the Mission of certain instructors, a correspondence arose between the board of education and the Mission, in which the board of education said that it was understood that the institution was to be continued so as to aid instead of to defeat the purpose for which it had been founded, and that nothing had been done to justify the intimation that the board had any desire to defeat such purpose, and admitted "that a full compliance with agreement consists in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian Churches of the United States." And further: "The board are fully aware that if they do not see fit to carry on the institution according to the terms of the contract, they have to reconvey it, or pay the sum of $15,000."

After 1865 the seminary continued to be conducted on the same lines as prior thereto.

In 1894, in the constitution of the Republic of Hawaii, it was provided that ". . . No public money shall be appropriated . . . for the support of (or?) benefit of any sectarian, denominational or private school." This provision is continued and remains in full force as a part of section 55 of the organic act.

Religious instruction ceased to be a part of the curriculum at Lahainaluna, as provided in the agreement, on or about September 1, 1903, at which date the religious tenets and doctrines, in accordance with the creed and articles of faith

of the Mission, ceased to be taught, and are no longer taught. The "cultivation of sound literature and solid science" has also ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

The Territory maintains no other institution of like character and on similar principles in any other place on the island. The appellants are the successors of the American Board of Commissioners for Foreign Missions.

Upon these facts, it is alleged, that appellants have become entitled to a return of the property conveyed or to the payment of $15,000; that the Territory has refused to do either, but has elected to retain the property, which election is evidenced by its refusal to pay the said sum, and the further fact that it is proceeding to erect expensive buildings thereon and expend large sums of money to fitting the property and the school to become a technical school, namely, an agricultural college.

The petition was demurred to upon grounds substantially as follows:

1. That the court had no jurisdiction of the subject matter of the claim. 2. That the United States was a necessary party, the property described in the petition having been transferred and ceded to the United States by the treaty of annexation of July 7, 1898. 3. That the petition did not set out facts sufficient to constitute a cause of action in that, (*a*) it did not appear that the agreement set forth in the petition was ratified by the legislature; (*b*) that the right of action accrued more than two years prior to the commencement of the action; (*c*) it did not appear that there had been a breach of the conditions of the agreement; (*d*) or if so, that it occurred in compliance with law and statutes which rendered the fulfillment of the conditions impossible. 4. That the petition was indefinite and uncertain, in that the allegations as to breach of conditions pleaded were conclusions of law, it nowhere appearing in the petition in what respect the conditions had been broken. The Supreme Court overruled the first, second

and fourth grounds, and divisions *a* and *b* of the third ground of demurrer.

Mr. David L. Withington, with whom *Mr. William R. Castle*, *Mr. W. O. Smith*, *Mr. A. Lewis, Jr.*, and *Mr. C. H. Olsen* were on the brief, for appellants:

The central purpose of the agreement was to "continue" an established institution, the keystone of a system with defined and well-known aims, the chief being the promotion of religion by instruction in definite religious truth.

The agreement was not one which the parties looked upon as setting forth *in haec verba* the final form of the agreement. The resolutions of the Mission were directed to be transmitted to the government.

Both parties contemplated that the language used was not a definite and final expression such as is contained in that class of documents from which the rule of interpretation of written documents arose, namely, engrossed writings, and all the more this Court should look for the spirit of the agreement, the situation of the parties, their motives, their conduct, their after-construction of the agreement, and putting itself in their place construe it as the parties construed it.

Parol evidence is necessary in order to apply the contract, for it was undoubtedly a part of the contract that an existing institution should be continued, and it is a matter of fact to be determined by parol evidence what that existing institution was.

This evidence shows that the promotion of religion by the inculcation of a definite system of doctrine was the central purpose of the Mission and of the seminary.

In resorting to parol evidence to determine the character of the institution to be continued, it is necessary to examine into its source, the purpose of its establishment, its aims, its methods, which inquiries reveal that the Mission from which it sprung believed in a system of theology, and believed absolutely and conscientiously that that system could be applied to the gov-

ernment of a state and was the only perfect rule of guidance, particularly for a savage nation in its rudimentary development to civilization and Christianity. Therefore, they purposed to found in Hawaii a theocracy in which the Scriptures as interpreted by their creed should be the fundamental law, to inculcate which they established a system of schools in which the study of the Scripture and of religious truth was the primary purpose, of which system the Lahainaluna Seminary, from which preachers and teachers of that truth should go forth, was the keystone.

This is consistent with the conduct of the parties at the time, their declarations in the correspondence and the construction which has been put upon the agreement in after years. Can it be, when the Mission has been lulled into security by the assurance of the Hawaiian government as late as 1865 that there was no misunderstanding as to the construction of the contract, that after forty years longer adherence it can now be repudiated?

A term can be read into a contract from the surrounding circumstances. *Bradley* v. *Packet Co.*, 13 Pet. 89.

Extrinsic evidence is admissible, of all the circumstances surrounding the author of an instrument, to explain the sense in which he understood it. *Reed* v. *Merchants' Mut. Ins. Co.*, 95 U. S. 23.

Even if there is no provision in the contract, evidence of the circumstances may be offered to show that such was a part of the contract. *Field* v. *Munson*, 47 N. Y. 221; *Shouse* v. *Doan*, 39 Florida, 95; *Savings Bank* v. *Fraze*, 9 Ind. App. 161; *Staples* v. *Lumber Co.*, 56 Minnesota, 16; *O'Dea* v. *City of Winona*, 41 Minnesota, 424; *Jennings* v. *Whitehead Co.*, 138 Massachusetts, 594; *Erskine* v. *Adeane*, L. R. 8 Ch. 756; *Katz* v. *Bedford*, 77 California, 319; *Gas Co.* v. *Braddock Wire Co.*, 155 Pa. St. 22; *Cleburne Water Co.* v. *Cleburne*, 138 Tex. Civ. App. 141; *Nilson* v. *Morse*, 52 Wisconsin, 240. And see 6 Eng. Ruling Cas. 169.

The instruments construed as a whole make it a necessary

inference that the maintenance of religious instruction and training in the doctrines of the mission were a part of the contract, and this term will be read in. 2 Page on Contracts, 1740, § 1118.

Courts have even gone so far as to hold that where the contract speaks of one, the plural can be inferred. *Halt* v. *First National Bank*, 133 Illinois, 234. So a conveyance for use as a burial place for a member of the Roman Catholic church in consecrated ground would restrict the lot holder from interring therein any person not recognized by the church authorities as a Catholic, although no such clause was in the agreement. *Dwenger* v. *Geary*, 113 Indiana, 106.

Mr. Lorrin Andrews, *Mr. E. C. Peters* and *Mr. M. F. Prosser*, for appellee, submitted:

Such conditions as were attached to the transfer of Lahainaluna Seminary were conditions subsequent.

Conditions subsequent are not favored in law and are strictly construed as against the grantor and nothing will be taken by way of intendment in favor of the grantor. 4 Kent's Com. 138; *Woodworth* v. *Payne*, 74 N. Y. Rep. 196–199.

It does not appear by the record that any of the conditions of the transfer have been broken.

The condition that "it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the Confession of Faith herewith enclosed" certainly is not shown to be broken by the pleadings; it would require an allegation that religious doctrines contrary to the adopted creed were taught. In no other way could a breach of the foregoing condition be shown.

This leaves the question whether the agreement to teach sound literature and solid science was broken by failure to teach those branches of learning otherwise than they would require to be taught in a technical school and school of agriculture.

An agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the literature relating to the science. It is not apparent why such literature, so taught, is not as sound or as valuable as are literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science.

When the performance of conditions subsequent is prevented by the act of God or becomes contrary to law by reason of the transfer of the territory or change of government, failure to fulfill such conditions will not work a forfeiture of the estate. *United States* v. *Arredondo*, 6 Pet. 745; *Scoville* v. *McMahon*, 62 Connecticut, 378; *Wheeler* v. *Moody*, 9 Texas, 371–376.

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

The contentions of the parties are sharply in opposition as to the agreement and the necessity and competency of extrinsic evidence to explain it. Appellee contends that we are confined to the letter of the agreement, and so confined its conditions have been fulfilled. In other words, that "sound literature and solid science" are still cultivated, and that no religious tenet or doctrine contrary to those heretofore inculcated by the Mission is taught. Or, to express the contention in language other than that of the agreement, that a school devoted to one subject of secular science and which excludes all religious teaching was contemplated by or is permitted by the agreement. Opposing these views, appellants contend that a mere technical school does not fulfill the agreement; that the terms of the agreement require the "inculcation of general learning and knowledge," accompanied with religious instruction in accordance with the confession of faith submitted to the Hawaiian government. And, it is insisted, that if there is any-

thing doubtful in the agreement, it may be interpreted by the circumstances which preceded it and the immediate and long-continued practice under it. If we may resort to those circumstances and that practice there cannot be a shade of doubt as to the intention of the parties. It is insisted, however, by the appellee that the agreement is clear and unambiguous and that it does not present a case for the resort to extrinsic evidence. We cannot concur with this view. There is quite a range of meaning in the words "sound literature and solid science." To interpret or specialize them and make definite application of them would certainly receive aid from the practice of the parties. It is contended by appellant that there was a close connection between them and the "definite system of doctrine" which was the "central purpose of the Mission." We, however, need not dwell further upon this contention, though a plausible argument has been advanced to sustain it, and we pass to the next controverted contention. The words of the agreement are that the government "shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, a summary of which will be found in the confession of faith herewith enclosed . . . " Were these words all there was of prohibition and purpose as to religion? May we believe that it became suddenly the purpose to change an institution which had had its impulse and foundation in religious zeal to convert the Hawaiians to Christianity and to educate young men to be "teachers of religion," to one simply literary and scientific and nonsectarian? Had the belief of the Mission in its form of Christian faith become so indifferent that it would transfer a seminary instituted for the propagation of that faith with no other condition than that contrary tenets should not be taught? There is not a syllable in this record to justify such assumptions. It must be remembered that we are considering a transaction which occurred in the Hawaiian Islands in 1849, and by the conditions of that time were the acts of the parties induced. Besides, the agreement is not in a formally executed

paper. It is found in a correspondence, and is constituted and explained by the whole of the correspondence. And taking the whole of it, there is very little aid from extrinsic evidence needed to demonstrate its meaning and purpose.

The Mission reminds the Minister of Public Instruction that the seminary was established in 1831, "to promote the diffusion of enlightened literature and Christianity throughout the islands," and that it had been unceasingly watched over, cherished and cared for by the Mission, and that $77,000 had been expended for its benefit. It was stated that in consequence of debts incurred "in the prosecution of its labors of benevolence and mercy" the American Board of Commissioners of Foreign Missions was compelled to diminish its grants to each of the missions under its care, including the Hawaiian mission, and that the latter for that reason would be "unable to carry forward its operations with the vigor to be desired in all of its departments of labor." In view of these facts, it was stated and believed that under the circumstances the transfer of the institution "to the fostering care and patronage of the government" would "promote the highest interest of the Hawaiian people." An offer was then made to transfer the seminary with the conditions which we have referred to. A confession of faith was enclosed. The government modified the proposal by reserving the right to pay $15,000, as an alternative to the reversion of the property to the Mission if the government should not fulfill the conditions of the grant. The modification was accepted, and in a subsequent communication a new confession of faith was substituted to that originally proposed. The following are the reasons which were given:

"The reasons for requesting the substitution are, that the previously presented confession, although according in all its specified doctrines with our belief and with that also of the churches by whom that institution has been founded and sustained, is yet not so distinctive, as to present a barrier to the introduction there, of other deleterious doctrine not speci-

fied in said confession. It will admit, also, of teachings of this Mission and of the churches sustaining it, such as we feel to be entirely subversive of evangelical Christianity. Not doubting, but that these reasons will commend themselves to the members of His Majesty's Government, we beg leave to express in presenting them the high consideration with which we remain."

The correspondence concerned the transfer of a school established in 1835, the design of which was to perpetuate the Christian religion, and with an object described to be "still more definite and of equal or greater importance," that is, "to educate young men to be Christian ministers." A religious instruction was prescribed. All this the government was informed of when the proposition was made to transfer the school to its "fostering care and patronage." And the government accepted the grant, accepted as it was tendered, and necessarily for the purpose it was tendered.

Even if we stopped here, conviction of the justness of that conclusion is almost indisputable. It becomes indisputable if extrinsic evidence be considered, and we have no doubt that it may be. In *Bradley* v. *W. A. & G. Packet Co.*, 13 Pet. 89, a contract expressed in a correspondence between the parties for the hire of a steamboat, an exception was engrafted which was not expressed, upon evidence that the owner of the boat knew the service for which it was intended, and that when navigation was obstructed by ice another mode of transportation was resorted to. The court said, as to extrinsic evidence, it was applied in some cases "to ascertain the identity of the subject; in others its extent. In some, to ascertain the meaning of a term, where it had acquired by use a broad meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all the purpose was the same. To ascertain by this medium of proof the intention of the parties, where without the aid of such evidence that could not be done, so as to give a just interpretation to the contract." And it was expressed "as the just result" of the cases,

"that in giving effect to a written contract, by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made; whenever without the aid of such evidence, such application could not be made in the particular case." In *Brooklyn Life Insurance Co.* v. *Dutcher*, 95 U. S. 269, it was said: "There is no surer way to find out what parties meant than to see what they have done." So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires. See, for further illustration, the following: *Reid* v. *Merchants' Mutual Insurance Co.*, 95 U. S. 23; *District of Columbia* v. *Gallagher*, 124 U. S. 505; *Topliff* v. *Topliff*, 122 U. S. 121; *Paige* v. *Banks*, 13 Wall. 608; *Philadelphia R. R. Co.* v. *Trimble*. 10 Wall. 367; *Chicago* v. *Sheldon*, 9 Wall. 50; *Carazoo* v. *Travano*, 6 Wall. 733; *Simpson* v. *United States*, 198 U. S. 397, 399; *Chicago Great Western Railway Co.* v. *Northern Pacific Railway Co.*, 101 Fed. Rep. 792. And many state cases could be cited.

The design of studies for the school we have detailed. The government recognized and continued both without question or change in any way. The seminary buildings were burned down in 1862. The government rebuilt them and continued the school. The petition alleges that the principal of the school in 1862–1863 in his report said: "The Hawaiian government has always been a liberal friend and benefactor . . .

Never in any way have they interfered with our manner of instruction or in the course of instruction pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who, under the religious instruction at the school, became ministers, he says: "While six who were connected with it since it has been under the care of the Hawaiian government have been ordained to the same office."

In 1864 new interests appeared and a change in the purpose of the school commenced to be urged. It was met by an adverse opinion of the Attorney General, who pointed out the conditions of the transfer and the condition of their nonfulfillment to be the restoration of the property to the A. B. C. F. M. And, again, in 1865 the board of education, while denying the right of the Mission to nominate instructors, conceded the obligation to continue the institution, "so as to aid, instead of defeating, the purpose for which it was founded," and the alternative to be the surrender of the property or the payment of $15,000. "Religious instruction," it is alleged, "upon the lines formerly pursued by the Mission and subsequently by the government, in accordance with the agreement, was continued up to or about September 1, 1903." We hence see that not only the immediate practice of the government construed the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning —proclaimed it without question and against a suggestion and agitation to reject it. It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties and that the only criterion can be a precise and isolated form of words which, at the end of half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward.

It is no defense that the government's policy has changed. It cannot so release itself from its engagements. The provision for the teaching of "sound literature and solid science" might be considered of "expansive character," to use the

description of Lieber, and change with the progress of both. The provision for religious teaching is unchanging. It is as definite and absolute to-day as it was when it was written. The alternative of it the agreement has made the return of the property conveyed, or the payment of $15,000.

Judgment reversed and case remanded, with directions to proceed in conformity with this opinion.

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

HENRY E. FRANKENBERG COMPANY *v.* UNITED STATES.

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

No. 257. Argued April 12, 1907.—Decided May 13, 1907.

In construing a tariff act the court cannot disregard the condition upon which the law makes the duty depend. Under paragraph 408 of the tariff act of 1897, 30 Stat. 151, 189, metal beads strung on cotton cords or strings, although only temporarily strung to facilitate transportation, are subject to the higher duty of forty-five per cent. and not to the lower duty of thirty-five per cent. as beads "not threaded or strung."

146 Fed. Rep. 63, affirmed.

THE facts are stated in the opinion.

Mr. Frederick W. Brooks for petitioner.

Mr. Assistant Attorney General Sanford for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question involved in this case is whether certain importations of metal beads are dutiable under paragraph 408 of the

tariff act of July 24, 1897, at thirty-five per cent. ad valorem, or at forty-five per cent. ad valorem under paragraph 193.

The collector assessed them at the latter rate. The petitioner protested. Upon submission of the protest to the board of general appraisers that board sustained the collector. Its decision was successively affirmed by the Circuit Court and the Circuit Court of Appeals. 146 Fed. Rep. 63.

The applicable paragraphs are respectively as follows: 408, "Beads of all kinds not threaded or strung, thirty-five per centum ad valorem;" 193, "Articles or wares not specially provided for in this act, composed wholly or in part of metal, and whether wholly or partly manufactured, forty-five per cent. ad valorem." There is no dispute about the character of the articles. They are metal beads strung on cotton cords or strings. They cannot, therefore, be said to be beads "not threaded or strung," which paragraph 408 makes dutiable at thirty-five per cent., if the words of that paragraph be taken literally. But it is contended that the construction of that paragraph is dependent upon the use to which the beads are put and the purpose on account of which they are strung. It is contended, and the contention is supported by the testimony, that the beads are used in the manufacture of purses, for the embroidery of cushions and dresses, never for personal adornment, and that they are strung or threaded in bunches for the purpose of facilitating transportation, and hence, in contemplation of the statute, loose beads. To this argument the Circuit Court of Appeals of the Seventh Circuit yielded. *United States* v. *Beuttner*, 133 Fed. Rep. 163. It did not prevail, however, with the Circuit Court of Appeals of the Second Circuit in the case at bar nor in a prior case. *In re Steiner*, 79 Fed. Rep. 1003. Notwithstanding this conflict in the Circuit Courts of Appeal, the case is in such narrow compass that an extended discussion is not necessary. It may be that the stringing of the beads has but a temporary purpose. We, however, are not at liberty to disregard the condition upon which the law makes the duty depend. Indeed, the considerations expressed by the board of appraisers

makes it certain that the language of paragraph 408 was deliberately used to apply only to beads actually loose. This view is supported by the testimony as well. It was testified that prior to 1897 the terms threaded and strung beads were familiar in the importing trade, and that beads strung on "threads for temporary use were commercially known at that time as strung beads." And it was further testified that there was an increase in value over unstrung beads from fifteen to twenty per cent. on account of the labor attached to stringing.

Judgment affirmed.

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

UNITED STATES *v.* FARENHOLT.

APPEAL FROM THE COURT OF CLAIMS.

No. 277. Argued April 25, 1907.—Decided May 13, 1907.

A court is not always confined to the written words of a statute; construction is to be exercised as well as interpretation and a statute will not be construed as giving higher pay to the inferior officer. Under the Navy Personnel Act of March 3, 1898, 30 Stat. 1007, and § 1466, Rev. Stat., passed assistant surgeons of the navy, as well as assistant surgeons, rank with captains in the army and are entitled to the pay of a captain mounted.
41 C. Cl. 577, affirmed.

THE facts are stated in the opinion.

Mr. John Q. Thompson, Special Attorney, with whom *Mr. Assistant Attorney General Van Orsdel* was on the brief, for appellant.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellee filed a petition in the Court of Claims to recover from the United States the sum of $282.66 for the difference, he alleged, he was entitled to as a passed assistant surgeon in the Navy, with the rank of lieutenant, for mounted pay from December 26, 1900 to July 27, 1901, with ten per cent. increase for service outside of the limits of the United States. He was given judgment for $141.33. The ten per cent. increase was not allowed.

A statement of the case is well expressed in the findings and conclusion of the court, as follows:

"The claimant, Ammen Farenholt, entered the naval service as an assistant surgeon May 29, 1894, and was promoted to the grade of passed assistant surgeon May 29, 1897. He attained the rank of lieutenant on December 26, 1900, and was a passed assistant surgeon in the Navy with the rank of lieutenant during all of the time covered by this petition.

"From December 26, 1900 to April 12, 1901, he was on sea duty attached to the U. S. S. 'Concord.' From April 12, 1901 to July 27, 1901, he was on sea duty attached to the U. S. S. 'Oregon.'

"The claimant has already received pay at mounted rates for the periods before December 26, 1900, and after July 27, 1901, under the decisions of the Court of Claims in *Richardson* v. *United States*, 38 C. Cl. 182, as applied by the Comptroller of the Treasury in *Brownell's Case*, 9 Comp. Dec. 676, but the Treasury Department declines to allow him mounted pay between these dates only because it considers that it is deprived of jurisdiction over the claim therefor by reason of a prior allowance and settlement of pay for the same period.

"If entitled to army pay at mounted rates for this period the amount due would be as follows:

Pay of a lieutenant of the Navy, which corresponds in rank with a captain in the Army, mounted, from December 26, 1900, to July 27, 1901, with in-

creased pay for length of service, 7 months and 2 days, at $2,400.00 per annum $1,413.33
Less amount received for same period, at $2,160.00 per annum 1,272.00

Difference $141.33

"Before the date of the decision of this court in the case of *Richardson* v. *United States*, 38 C. Cl. 182, January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army 'not mounted.' By that decision it was held that they are entitled to the pay of such an officer 'mounted.' This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

"All officers of the Medical Corps in grades for which there is in the Army pay table a distinction between 'mounted' and 'not mounted' pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time.

Conclusion of Law.

"Upon the foregoing findings of fact, the court decides as a conclusion of law, on the authority of *Richardson* v. *United States*, 38 C. Cl. 182, that the claimant is entitled to recover against the United States the sum one hundred and forty-one dollars and thirty-three cents ($141.33).

"By a majority of the court."

Section 13 of the act of March 3, 1898, 30 Stat. 1007, called the Navy Personnel Act, provides "that after June 30, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Section 1466, Revised Statutes, assimilates in rank lieutenants in the Navy with captains in the Army. And Section 1261

fixes the pay of a captain mounted at $2,000 a year and a captain not mounted at $1,800 a year. Section 1262 gives ten per cent. increase for each term of five years' service. .

The appellee is a lieutenant in the Navy; he ranks with a captain in the Army, but the question is, Of which class, mounted or not mounted?

The Government contends, with captains not mounted. Its argument is that the extra pay that mounted officers receive is not compensation, but reimbursement for expenses incurred, and to give it to a naval officer who does not bear such expenses would produce the inequality that the Navy Personnel Act was passed to prevent. *United States* v. *Crosley,* 196 U. S. 332. Counsel, however, concedes that *Richardson* v. *United States,* 38 C. Cl. 182, was correctly decided, and that the rule has been extended by the Comptroller of the Treasury to passed assistant surgeons, but attacks the practice of the Comptroller and rejects the application of the *Richardson case* upon the distinction between an *assistant* surgeon, which Richardson was, and a passed assistant surgeon, which appellee is.

The act of June 7, 1900, 31 Stat. 697, provides that "the active list of surgeons shall hereafter consist of fifty-five and that all passed assistant and assistant surgeons of one hundred and ten. *Assistant* surgeons shall rank with assistant surgeons in the Army." Commenting on this statute the Government says: "Assistant surgeons in the Army being mounted the court very justly granted mounted pay to Richardson, who ranked with assistant surgeons in the Army." In other words, the Government contends it was the purpose of Congress to give the inferior officer the better pay. The Assistant Attorney General ventures on no explanation of this anomaly, but insists upon the written word. A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in the spirit, though not within

the letter of the text." Lieber, 56. The application of this rule is clear. Consideration of the provisions relative to the rank and pay of officers of the Army and Navy make it evident that Congress used the words "assistant surgeon" as descriptive of the whole class of assistant surgeons, passed as well as those not passed.

Judgment affirmed.

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

GEORGIA *v.* TENNESSEE COPPER COMPANY.

BILL IN EQUITY.

No. 5, Original. Argued February 25, 26, 1907.—Decided May 13, 1907.

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They retained the right to make reasonable demands on the grounds of their still remaining quasi-sovereign interests, and the alternative to force a suit in this court.

This court has jurisdiction to, and at the suit of a State will, enjoin a corporation, citizen of another State, from discharging over its territory noxious fumes from works in another State where it appears that those fumes cause and threaten damage on a considerable scale to the forests and vegetable life, if not to health, within the plaintiff's State.

A suit brought by a State to enjoin a corporation having its works in another State from discharging noxious gases over its territory is not the same as one between private parties, and although the elements which would form the basis of relief between private parties are wanting, the State can maintain the suit for injury in a capacity as quasi-sovereign, in which capacity it has an interest independent of and behind its citizens in all the earth and air within its domain; and whether insisting upon bringing such a suit results in more harm than good to its citizens, many of whom may profit through the maintenance of the works causing the nuisance, is for the State itself to determine.

THE facts are stated in the opinion.

Mr. John C. Hart, Attorney General of the State of Georgia, and *Mr. Ligon Johnson* for the State of Georgia:

A public nuisance, merely as such, is not abatable or actionable at the direct instance of an individual. Where the public nuisance is at the same time working some special injury to the citizens, by reason of this special injury the individual may seek to abate same, but the right of action is with relation to the particular and private injury and not the public nuisance. The mere fact that the subject matter of the controversy is a public nuisance affords no right of action in the premises to any private person. Not only is this a general rule of law but it is also incorporated in the statute law of the State of Georgia. Citizens of Georgia, by reason of the statutes denying them right of action in the premises, would have been powerless, the right of redress in such matters being reserved solely to the State.

Sections 3858 and 4761 of the Code of Georgia of 1895 are practically nothing more than the codification of the law as it existed. The general rule is stated in *In re Debs*, 158 U. S. 587. And see *Attorney General* v. *Tudor Ice Co.*, 104 Massachusetts, 239; *Attorney General* v. *Jamaica Pond Corporation*, 133 Massachusetts, 361; *State* v. *Goodnight*, 70 Texas, 682.

That the State is a proper party and that the controversy is justiciable in this court was decided in *Missouri* v. *Illinois*, 180 U. S. 241.

For other authorities in point see Eden on Injunction, 267; Story, Eq. Juris., § 921; Daniels, Chan. Pl. and Pr., 4th ed., 1636; *Penn* v. *Wheeling Bridge Co.*, 13 How. 518; *Irwin* v. *Dixon*, 9 How. 27; *Phalen* v. *Virginia*, 8 How. 168; *Smith* v. *Richter*, 159 U. S. 398; *Attorney General* v. *Forbes*, 2 Myl. & Cr. 123.

Georgia appeals to the court to protect her and her sovereignty and her enforcement of her laws within and with relation to the section and community injured. The maintenance of a public nuisance is a crime by common law and by the statute law of both Tennessee and Georgia. The offender is

in the State of Tennessee. The criminal act, so far as Georgia is concerned, is within the State of Georgia. The offender is without the jurisdiction and beyond the reach of the laws of Georgia, while the acts have been, and are being, committed and threatened in Georgia. In consequence, Georgia, without the aid of this court, is not only unable to punish constantly recurring criminal and injurious acts within her territory and upon her soil and citizens, but is also unable to enforce her laws, civil or criminal, and to maintain her sovereignty within her dominion.

Every State possesses sole and exclusive jurisdiction over her own territory, not only with reference to her soil, but of acts committed thereon, as well as of the citizens and inhabitants thereof. *Hoyt* v. *Sprague*, 103 U. S. 630; *Pennoyer* v. *Neff*, 95 U. S. 44; *Simpson* v. *State*, 92 Georgia, 42; 1 Bishop, Crim. Proceed. 53; Bishop, Crim. Law, § 110; *Commonwealth* v. *Macloon et al.*, 101 Massachusetts, 1; Rorer on International Law, 2d ed., 323; Minor, Conflict of Laws, 499.

As to the preservation of the sovereignty of a State see *United States* v. *Texas*, 143 U. S. 621; *Fowler* v. *Lindsay*, 3 Dall. 411.

The offender in this case is a corporation. Its corpus is in Tennessee, but this, without the consent of Congress, could not be surrendered to Georgia, even if Tennessee desired. Its chief officers are non-residents of Tennessee. The offense being merely a misdemeanor is not such that Tennessee would recognize by extradition.

The State in its suit, as will be seen, is not seeking a mere injunction in equity against the commission of a crime. It appeals to this court to protect it in its sovereign attributes.

Unless this cause may be maintained in this court the means of the Federal Government cannot be said to be adequate to its ends, and a State can maintain its sovereignty only through the mere tolerance of her sister States.

The police power, the right and power of the State to protect the public safety, health and welfare, as well as the welfare,

health, safety and comfort of each citizen, resides in the States and was never surrendered to the general government, and such right now rests in the State of Georgia, and was and is called into action by the resolution of its legislature as in the bill set forth.

The highest and most binding duties of the sovereign are often enforcible only through the police power. *Fertilizer Co.* v. *Hyde Park*, 97 U. S. 659; *Beer Co.* v. *Massachusetts*, 97 U. S. 33; *Holden* v. *Hardy*, 169 U. S. 392; *Lawton* v. *Steele*, 152 U. S. 133; *New York* v. *Miln*, 11 Pet. 103.

The Constitution of the United States guarantees protection to the State of Georgia against any invasion whatever, whether such invasion be by force of arms or other means, by another State or its citizens, or by a foreign government. It is sufficient that the means be hostile or harmful and be such that Georgia cannot prevent or protect herself against without the use of force upon foreign territory.

In the case at bar Georgia has exhausted all amicable or other powers left in her by the Constitution. She has applied to Tennessee to prevent and abate the further commission of the acts complained of, acts which, in their effect, are not only criminal in the State of Georgia, but which result in laying the territory of the State in waste more surely and completely than could be accomplished by any invading army bent upon its destruction. Tennessee has refused to restrain her citizens in the commission of such acts, declines to take any steps in the premises, and shields the defendants in the continuation of a most effective and harmful invasion.

Georgia has used every friendly office, has sought through every means open to her to protect her territory and her citizens. She is denied by the Constitution the right of invasion or other aggressive action, and under such denial is powerless in the premises without the aid of this honorable court and the enforcement of the constitutional guarantee of protection through this court, substituted in the place of the right of a State to take direct or hostile action in an endeavor to main-

tain her sovereignty and her rights and to preserve the life, health and comfort of her citizens. Constitution of the U. S., Art. IV, Sec. 4; Federalist, LXXX; *Missouri* v. *Illinois*, 180 U. S. 208; *Debs, Petitioner*, 158 U. S. 564; *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Hans* v. *Louisiana*, 134 U. S. 1; *Kansas* v. *Colorado*, 185 U. S. 125.

Mr. Howard Cornick, with whom *Mr. John H. Frantz*, *Mr. James B. Wright* and *Mr. Martin H. Vogel* were on the brief, for the defendant the Tennessee Copper Company:

The bill and the proof wholly fail to establish such a condition as would give this court jurisdiction of the subject matter of this litigation.

The State of Georgia has not made out in her bill nor in her proof, such a state of facts showing such direct interest in this controversy as entitles her under the Constitution of the United States to maintain this action to redress supposed wrongs done to her domain.

The State of Georgia, in her bill and in her proof, shows no such state of facts as to entitle her to maintain this suit in her sovereign capacity as *parens patriæ*, trustee, guardian or representative of her citizens.

The threatened reduction of taxable values does not create a direct interest in the controversy, but at most a remote interest. The proof does not support the allegations of the bill.

The power of taxation is an incident of sovereignty and not a property right. Cooley on Taxation, 3d ed., 7; *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *Bank* v. *Billings*, 4 Pet. 514; *Case of Freight Tax*, 15 Wall. 278.

It appears from the proof that there has been absolutely no injury whatever to the streams of the territory under discussion; that with the exception of one small one all the streams of this territory drain into and through the State of Tennessee, and that none of these streams are navigable. *Kansas* v. *Colorado*, 185 U. S. 125, distinguished. Of these species of property according to the law of nature and of nations

there is and can be no private ownership, but ownership is in the State as representative of the public. 3 Kent's Com. 445.

The bill alleges injury to the health of the citizens, though the proof of the plaintiff utterly fails to support this allegation. *Missouri* v. *Illinois*, 180 U. S. 208, distinguished.

Neither the bill nor the proof shows such injury to the property of citizens as to entitle the State to maintain this suit on behalf of citizens.

All of the proof of plaintiff, where injury is shown to have occurred, demonstrates clearly that the citizens could be fully compensated in damages for injury, if any, which they may have sustained; and that if their injuries could not be estimated and their compensation fixed in damages, no reason is shown why they would not be entitled to the same relief which is being sought in their behalf by the State.

In order to prosecute an original suit in the Supreme Court, a State must show just such interest in the controversy in question as an individual must show in order to maintain a suit in a proper jurisdiction, and it is the dignity of the State rather than the character of the controversy which entitles it to come into this court by original proceeding. *New Hampshire* v. *Louisiana*, 108 U. S. 76 *et seq.; Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 289; *Louisiana* v. *Texas*, 176 U. S. 1; *California* v. *Southern Pac. Co.*, 157 U. S. 261.

The proof as to the injury alleged by the bill is not only doubtful, but preponderates in favor of defendants.

An injunction to restrain a nuisance will issue only in a case where the fact of the nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting and the injury be doubtful, that conflict and doubt will be ground for withholding the injunction. 1 Wood on Nuisance, 3d ed., 732; 1 High on Injunctions, 4th ed., § 870.

Irrespective of the millions of dollars invested in the operations of these defendants and of their vested rights in their properties, the State of Georgia is estopped from seeking the

injunctive relief prayed in the bill on account of the injurious effect which such an injunction would have upon the communities established by these operations. Not only have the acquiescence and laches of the State of Georgia permitted the defendants in this case to make their investments, depending upon the inference that no complaint having heretofore been made by the State of Georgia, no complaint would be made; but the State of Georgia, by sleeping upon her rights, if any rights she may have had, has allowed the community to become built up; has allowed prosperous and thriving towns and cities to be created; has allowed thousands of people to acquire their homes and make their investments and establish their family and social ties with the feeling of security against complaint by the State of Georgia as to these operations.

Mr. James G. Parks for the Ducktown Sulphur, Copper and Iron Company.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity filed in this court by the State of Georgia, in pursuance of a resolution of the legislature and by direction of the Governor of the State, to enjoin the defendant Copper Companies from discharging noxious gas from their works in Tennessee over the plaintiff's territory. It alleges that in consequence of such a discharge a wholesale destruction of forests, orchards and crops is going on, and other injuries are done and threatened in five counties of the State. It alleges also a vain application to the State of Tennessee for relief. A preliminary injunction was denied, but, as there was ground to fear that great and irreparable damage might be done, an early day was fixed for the final hearing and the parties were given leave, if so minded, to try the case on affidavits. This has been done without objection, and, although the method would be unsatisfactory if our decision turned on any nice question of fact, in the view that we take we think it unlikely that either party has suffered harm.

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.

The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri* v. *Illinois*, 200 U. S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 U. S. 208, 241.

Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up *quasi*-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink

to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

The proof requires but a few words. It is not denied that the defendants generate in their works near the Georgia line large quantities of sulphur dioxid which becomes sulphurous acid by its mixture with the air. It hardly is denied and cannot be denied with success that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute. Without any attempt to go into details immaterial to the suit, it is proper to add that we are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so consider-

able a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri* v. *Illinois*, 200 U. S. 496. Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

It is argued that the State has been guilty of laches. We deem it unnecessary to consider how far such a defense would be available in a suit of this sort, since, in our opinion, due diligence has been shown. The conditions have been different until recent years. After the evil had grown greater in 1904 the State brought a bill in this court. The defendants, however, already were abandoning the old method of roasting ore in open heaps and it was hoped that the change would stop the trouble. They were ready to agree not to return to that method, and upon such an agreement being made the bill was dismissed without prejudice. But the plaintiff now finds, or thinks that it finds, that the tall chimneys in present use cause the poisonous gases to be carried to greater distances than ever before and that the evil has not been helped.

If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making, to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next.

Injunction to issue.

MR. JUSTICE HARLAN, concurring.

The State of Georgia is, in my opinion, entitled to the general relief sought by its bill, and, therefore, I concur in the result. With some things, however, contained in the opinion, or to be implied from its language, I do not concur. When the Constitution gave this court original jurisdiction in cases

"in which a State shall be a party," it was not intended, I think, to authorize the court to apply in its behalf, any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties. If this was a suit between private parties, and if under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a State possessing some powers of sovereignty. Georgia is entitled to the relief sought, not because it is a State, but because it is a *party* which has established its right to such relief by proof. The opinion, if I do not mistake its scope, proceeds largely upon the ground that this court, sitting in this case as a court of equity, owes some special duty to Georgia as a State, although it is a party, while under the same facts, it would not owe any such duty to the plaintiff, if an individual.

UNITED STATES *v.* BROWN.
BROWN *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 283, 284. Submitted April 25, 1907.—Decided May 13, 1907.

The prohibition in the 77th Article of War against officers of the regular army serving on courts-martial to try soldiers and officers of other forces is peremptory, and, notwithstanding the contrary construction of former articles on the same subject, an officer of the regular army, although on indefinite leave of absence, to enable him to accept a volunteer commission, is not competent to sit on a court-martial to try a volunteer officer; and if without him there would have been an insufficient number there is no court and the sentence of dismissal is void, and in this case an officer so

sentenced and dismissed was entitled to his pay until the organization to which he belonged was mustered out.

The refusal to grant an officer so discharged an honorable discharge did not under the circumstances amount to his active retention in the service and entitle him to pay after the organization to which he belonged had been discharged.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Van Orsdel and *Mr. Franklin W. Collins*, for the United States, submitted:

In the case at bar the officer, having been duly commissioned as an officer of a regiment of United States Volunteers, is *prima facie* a volunteer officer, and as such is eligible to sit at the trial of an officer or enlisted man of the volunteer forces.

The language used in the statute is clear, and that used in the permissive enactments of 1861 and 1898, authorizing officers of the Army to accept appointments in the volunteer forces, is equally clear.

It must be assumed that Congress was familiar with the long-established administrative practice of the War Department in the execution of the 97th article of the code of 1806 and in the similar execution which was given to the 64th, 77th and 78th articles of the code of 1878. In the absence of restrictive language, the language used in the permissive act of May 28, 1898, should be given its ordinary meaning and the officers serving in volunteer regiments should be regarded as having the same rights and privileges and as being charged with the same duties and obligations as other officers of the volunteer forces raised by Congress for the prosecution of the war with Spain.

In this case the officer who sat as a member of the court-martial held a volunteer commission, and therefore conformed to the requirements of the statute in that regard.

In this case there has been long-continued departmental construction of the statute in question, and under it the rights of a large number of officers who have been tried by courts-

martial similarly constituted have been determined, and the construction placed upon this statute by the War Department, continuing as it has for a period of nearly half a century, has acquired the force of law, and this construction should not be lightly overturned by the court unless the strongest and most cogent reasons are shown therefor. *Rogers* v. *Goodwin*, 2 Massachusetts, 476; *Brown* v. *United States*, 113 U. S. 568, 571; *Edwards* v. *Darby*, 12 Wheat. 206; *United States* v. *Hill*, 120 U. S. 169, 182; *United States* v. *Philbrick*, 120 U. S. 52–59; *United States* v. *Johnson*, 124 U. S. 237; *Robertson* v. *Downing*, 127 U. S. 607–613.

If the decision of the Court of Claims is permitted to stand, it will invalidate a vast number of sentences imposed by courts-martial similarly constituted, during both the Civil War and the war with Spain, thus involving the unsettling of matters of the most far-reaching importance, which up to this time have been regarded by the Government and all parties concerned as fully and finally adjudicated and settled. It will be productive of unspeakable confusion and chaos, and serve no good purpose.

Mr. Lorenzo A. Bailey, *Mr. W. W. Dudley* and *Mr. L. T. Michener*, for Lewis E. Brown, submitted:

Under the 77th Article of War the court-martial was wholly without jurisdiction to try the claimant, and its sentence, and all its proceedings in his case, are utterly null and void.

The failure of the claimant to object to Colonel Grubbs was not a waiver of the right to object nor was it an implied consent. Consent will not be implied as against one who is ignorant of the facts, and, furthermore, consent will not give validity to what is contrary to law.

In *McClaughry* v. *Deming*, 186 U. S. 49, the dismissal was held void under Article 77, although the accused expressly stated to the court-martial that he had no objection to being tried by any member thereof, he well knowing at that time that each member of the court was a regular army officer, and he thereafter pleaded guilty to the charges against him.

Article 77 is prohibitive. The prohibition cannot be evaded by means of volunteer commissions carried by those who are thus in most positive terms declared to be incompetent to sit on a court for the trial of volunteers.

A conclusive argument for the application of Article 77 to the present case and against the Government's contention is found in the reason for the enactment of Article 77, as stated in *McClaughry* v. *Deming*, 186 U. S. 49; *S. C.*, 113 Fed. Rep. 639.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for pay as first lieutenant of United States Volunteers after February 17, 1899, on which date by the sentence of a court-martial the claimant was dismissed from the service. The court-martial consisted of five members, the minimum number by the 75th and 79th Articles of War, Rev. Stats. § 1342, and the president of the court was an officer in the Regular Army. By Article 77 "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78." (Article 78 has no bearing on the case.) On this ground it is contended that the proceedings were void. Even if the presence of an incompetent person as a member would not have made the proceedings invalid in any event, in this case without him there would have been no court. It has been decided that a sentence against a volunteer officer by a court composed wholly of regular officers is void, and this principle is thought to govern the present case. *McClaughry* v. *Deming*, 186 U. S. 49. On this ground the Court of Claims decided that the claimant was entitled to recover up to the time of the final muster out of his regiment on May 25, 1899, including two months' extra pay under the Act of January 12, 1899, c. 46, 30 Stat. 784; 41 C. Cl. 275; ibid. 575. There are cross appeals to this court.

The answer of the United States to the foregoing argument

is that the regular officer had been granted an indefinite leave of absence from the Regular Army in order to enable him to accept a commission as Lieutenant Colonel, Second United States Volunteer Infantry, and that he was serving in the latter capacity when he sat upon the court. It is argued that it always has been understood that under such circumstances the position in the volunteer service alone is to be regarded, that much harm will be done if a contrary construction should be adopted now, and that the leave given to appoint regular officers to the volunteer service should be construed to carry with an appointment the same consequences that would attach to a commission if held by anyone else. Act of April 22, 1898, c. 187, § 13, 30 Stat. 363; Act of May 28, 1898, c. 367, § 2, 30 Stat. 421.

This argument would have great force when it was required, as formerly, only that courts-martial for the trial of militia officers "Should be composed entirely of militia officers." Act of April 10, 1806, c. 20, art. 97, 2 Stat. 359, 371. If there was a settled practice of treating these words as satisfied if the members of the court were militia officers, whether they also held commissions in the Regular Army or not, we well might hesitate to overthrow it. But when the express prohibition contained in Article 77 was adopted by the Revised Statutes, it made the former construction no longer possible. The words of the statute are peremptory and must be obeyed. We do not apprehend any serious consequences, in view of the date of the change. But whatever the consequences we must accept the plain meaning of plain words. It follows that the proceedings of the court were void, and that it is not necessary to mention or consider other objections that were urged.

We are of opinion that the Court of Claims was right also in the allowances made to the claimant. In 1900 the claimant applied for an honorable discharge as of May 25, 1899, the date when his regiment was mustered out, but was refused. Of course the refusal of a certificate of honorable discharge on the ground that the applicant already has been dishonorably dis-

charged is not an active retention of the officer in the service. The Act of March 2, 1899, c. 352, § 15, 30 Stat. 977, 981, provided that the officers and men of the Volunteer Army should be mustered out, and under the Act of January 12, 1899, c. 46, 30 Stat. 784, "as far as practicable," the discharge of officers and men was to take effect at the muster out of the organization to which they belonged. It would be monstrous to hold that it had been determined not to be practicable to discharge the claimant when his regiment was mustered out, or that the circumstances of his case, notwithstanding his technical success, afford a ground for a later claim. The claimant was allowed two months' extra pay for service outside the United States. He was not entitled to one month's extra pay for service within the United States. See Act of May 26, 1900, c. 586, 31 Stat. 205, 217. Of course, the claim for travel under the same act (31 Stat. 210) must fail. The claimant was discharged before that act was passed.

Judgment affirmed.

MR. JUSTICE MOODY did not sit and took no part in the decision.

ELLIS *v.* UNITED STATES.
EASTERN DREDGING COMPANY *v.* UNITED STATES.
SAME *v.* SAME.
SAME *v.* SAME.
BAY STATE DREDGING COMPANY *v.* UNITED STATES.
SAME *v.* SAME.
SAME *v.* SAME.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 567, 664, 665, 666, 667, 668, 669. Argued April 23, 24, 1907.—Decided May 13, 1907.

The provisions in the act of August 1, 1892, 27 Stat. 340, limiting the hours of laborers and mechanics employed by the United States or any contractor or subcontractor upon any of the public works of the United States to eight hours per day except in cases of extraordinary emergency, and imposing penalties for the violation thereof, are constitutional and within the powers of Congress. In this respect Congress has the same power as a State has over the construction of its public works. *Atkin* v. *Kansas*, 191 U. S. 207.

An act of Congress otherwise valid is not unconstitutional because the motive in enacting it was to secure certain advantages for conditions of labor not subject to the general control of Congress.

Although, in the absence of special laws, the Government, purely as a contractor, may stand like a private person, it does not, by making a contract, waive its sovereignty or give up its power to make laws which render criminal a breach of the contract.

The disappointment of a contractor with regard to obtaining some of his materials did not, under the circumstances of this case, amount to an extraordinary emergency within the meaning of the statute and justify him in having laborers work more than eight hours.

One who intentionally adopts certain conduct in certain circumstances known to him, which conduct is unlawful, intentionally breaks the law.

Persons employed on dredges and scows, in dredging a channel in a harbor are not within the meaning of the act of August 1, 1892, laborers or mechanics employed on any of the public works of the United States.

THE facts are stated in the opinion.

Mr. D. T. Watson, for plaintiff in error Ellis, submitted:

The right of the individual to dispose of his labor upon such terms as he deems best, is undoubted, and admitted in *Atkin*

v. *Kansas*, 191 U. S. 223. If he may dispose of it at all, then the extent of the disposition is a matter optional with himself. The men who worked on the pier did so voluntarily. The sole crime of Ellis was that he did not forcibly restrain them from the work.

The great weight, if not the universal voice of authority, is to the effect that an adult may, if he sees fit, engage for what time he sees fit in ordinary employments not dangerous, hazardous or injurious to life, limb or health, and he has that right, as part of his liberty. Under the Preamble of the Federal Constitution, and Article V of the Amendments the power delegated by the people to the Congress does not include the power to deprive him of his liberty. *Lochner* v. *New York*, 198 U. S. 53.

The laborer can work nowhere unless employed. He works under contract. To take from him one of the places where he may work over eight hours, public work, even if the contractor is willing to employ him, deprives him of part of his liberty and is unconstitutional. *People* v. *Orange Co.*, 175 N. Y. 84; Articles in Central Law Journal, No. 11, pp. 147, 163, 181, 198; No. 58, 361; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591; *Holden* v. *Hardy*, 169 U. S. 366, 391; *Williams* v. *Fears*, 179 U. S. 270, 274; *Butchers' Union* v. *Crescent City*, 111 U. S. 746–757.

There is no pretense in the present case that the kind of work done was hazardous—or unhealthy—or in any way dangerous to life or limb. It was not of a class with such cases as *Holden* v. *Hardy*, 169 U. S. 366.

It is one thing to hold that a State or municipality may by contract restrict the hours of labor, for by entering into the contract each person waives his right to the constitutional protection. It is entirely another thing to make it a crime for a man to insist on his constitutional right to labor more than eight hours a day.

The Act of 1892 is constitutional in so far as it prohibits the Departments from contracting for more than eight hours' labor per day on public works, but it is unconstitutional in so far as it makes it a crime for one who has come into contractual rela-

tions with the Government for that public work to permit some other man to work more than eight hours per day.

In this case Ellis simply permitted two men to work more than eight hours a day. He did not force them to work more than eight hours a day; he owed no duty to the Government to enforce its laws as a police officer or a sheriff. His relation to the Government was only and solely contractual so far as the pier was concerned; his contract did not contain any covenant that he was to oversee and prevent men from working on the pier more than eight hours a day, or if it did, if it be said that the Act of 1892 is read into Ellis's contract with the Government and made part of it, and Ellis agrees to enforce the act so far as the pier is concerned, still his relations with the Government are contractual and contractual only.

Mr. Edward E. Blodgett, with whom *Mr. G. Philip Wardner* was on the brief, for the Eastern Dredging Company:

Men engaged in dredging a channel in Boston Harbor cannot be said to be employed upon any of the public works of the United States or of the District of Columbia. As to what are "public works" see Century Dictionary, p. 4830. *Ellis* v. *Common Council of Grand Rapids,* 123 Michigan, 567; *Winters* v. *Duluth,* 82 Minnesota, 127; Am. & Eng. Ency. of Law, 2d ed., Vol. 23, p. 459.

The performance by the United States Government of any of its governmental functions may be said to be public work; but no one can be said to be employed on the public works of the United States unless he is employed upon some physical, tangible structure actually made or erected by the hand of man, and the property of the United States Government.

The place where the dredging was being done was not owned by and had never been ceded to the Government of the United States, and was not under its control, except so far as the navigable waters of Boston Harbor were under its control.

The persons alleged in the informations to have been employed in violation of law were not laborers or mechanics.

The tug, the dredge and the scow were clearly vessels within the admiralty jurisdiction of the United States.

As concerns the tug, there can of course be no dispute.

Nor is there room for any doubt in relation to the dredge and scow.

The word vessel includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water. Rev. Stat., § 3. By § 4612, Rev. Stat. it is provided that in the construction of Title 53 of the Revised Statutes relating to merchant seamen "The term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this Title may be applicable."

In reality the dredge and the scows are to be regarded as one plant or instrument for dredging and transporting mud. But even if they be regarded separately, it still appears that the scows were used for transporting mud, and that the dredge was used for transporting her crew and the dredging equipment necessary to dig up the mud and put it into the scows, and therefore are both vessels as known to the law. *The General Cass*, Brown, Adm., 334; s. c. Fed. Cas. No. 5307 (Scow); *Endner* v. *Greco*, 3 Fed. Rep. 411 (Scows); *The Alabama*, 19 Fed. Rep. 544, aff'd. 22 Fed. Rep. 449 (Dredge and Scows); *The Pioneer*, 30 Fed. Rep. 206 (Dredge); *Disbrow* v. *Walsh Bros.*, 36 Fed. Rep. 607 (Barge); *The Atlantic*, 53 Fed. Rep. 607 (Dredge); *The Starbuck*, 61 Fed. Rep. 502 (Dredge); *The International*, 83 Fed. Rep. 840 (Dredge and Scows); *Lawrence* v. *Flat-boat*, 84 Fed. Rep. 200 (Flat-boat with pile-driver); *McRae* v. *Bowers Dredging Co.*, 86 Fed. Rep. 344 (Dredge); *Steam Dredge No.* 1, 87 Fed. Rep. 760 (Dredge); *McMaster* v. *One Dredge*, 95 Fed. Rep. 832 (Dredge); *Bowers Hydraulic Dredging Co.* v. *Federal Contracting Co.*, 148 Fed. Rep. 290 (Dredge).

If the tug, the dredge and the scows were vessels, then the men employed to operate them were seamen.

There will, of course, be no dispute about the master and mate of the tug. Curtis' Merchant Seamen, p. 5; Benedict

Adm. Pract., 3d. ed, § 278; Hughes on Adm., p. 21. The law is equally clear as to the engineer and fireman on the tug. *Wilson* v. *The Ohio*, Gilpin, 505; *Gurney* v. *Crockett*, Abbott's Adm. 490.

The others—namely, the master, fireman, cranesman, and deck hands on the dredge, and the scowman—are seamen, for the reason that they were each of them one of the crew of the vessel on which they were employed, and they each of them co-operated in the operation, maintenance, and navigation of these vessels.

Mr. W. Orison Underwood, with whom *Mr. Henry F. Knight* was on the brief, for Bay State Dredging Company.

The Solicitor General, *the Attorney General* and *Mr. Otis J. Carlton*, Special Assistant to the Attorney General, for the United States:

1. The Act of August 1, 1892, chapter 352 (27 Stat. 340), known as the eight-hour law, is constitutional.

The first eight-hour law, act of June 25, 1868, chapter 72 (15 Stat. 77) was twice before this court, but in neither case was it necessary to pass on its validity. *United States* v. *Martin*, 94 U. S. 400; *United States* v. *Driscoll*, 96 U. S. 421. In those cases the statute was considered as in the nature of a direction from a principal to his agent that eight hours is the proper length of time for a day's work: contracts fixing a different length of time are legal (*Martin's case, supra*); and the statute does not apply to the employés of independent contractors (*Driscoll's case, supra*). The act of 1892 was passed because of the interpretation given to the act of 1868 in those cases and the absence of a penal provision, preserving the principle of the prior statute, to insure its effective execution. The validity of neither act has ever been questioned. *United States* v. *Ollinger*, 55 Fed. Rep. 959; *United States* v. *Jefferson*, 60 Fed. Rep. 736; *United States* v. *John Kelso Company*, 86 Fed. Rep. 304; *United States* v. *San Francisco Bridge Company*, 88 Fed. Rep. 891; Opin. A. G. 530; 13 *ib.* 29, 424; 14 *ib.* 37, 128; 16 *ib.*

58; 17 *ib.* 341; 18 *ib.* 389; 20 *ib.* 445, 454, 459, 487, 500; 21 *ib.* 32; 25 *ib.* 441, 465; 26 *ib.* 1, 30, 36, 64. In 25 Opin. A. G. 441, 444, the theory upon which this law was passed is well stated—that the Government, as an employer of labor, may dictate the terms upon which its work shall be conducted. Cases like *Lochner* v. *New York*, 198 U. S. 53, may be distinguished because the act of 1892 does not interfere with the conduct of private business; it merely prescribes the terms upon which the Government will permit labor to be employed upon its public works. Section 3 expressly limits the operation of the act to contracts entered into after its passage. *Atkin* v. *Kansas*, 191 U. S. 207, holding valid a state eight-hour law precisely similar to act of 1892 under the Fourteenth Amendment, which is like the Fifth Amendment, upon which appellants rely, is absolutely controlling.

2. Deepening a channel is "public works of the United States." The very work upon which the dredging companies were engaged was authorized by statutes defining the work, in their titles and enacting clauses, as public works. Act June 13, 1902, chapter 1079 (32 Stat. 331, 332), act March 3, 1905, chapter 1482 (33 Stat. 1118). Ellis's work was authorized in an appropriation act under subhead, "Public Works." 33 Stat. 1092, 1101. Before and since 1892 works of a character like those upon which each of the appellants was engaged have been denominated public works by Congress. 20 Stat. 152, 363; 21 Stat. 8, 180, 468; 22 Stat. 191; 24 Stat. 310, 581, 584; 25 Stat. 400, 462, 813; 26 Stat. 193, 426, 803; 27 Stat. 88, 240, 721; 28 Stat. 130, 831; 29 Stat. 202, 367, 654; 30 Stat. 377, 1030, 1121; 31 Stat. 692, 1116; 32 Stat. 331; 33 Stat. 333, 1101, 1117. Congress, even by later enactments, may define terms of other acts. *Johnson* v. *The Southern Pacific Company*, 196 U. S. 1, 21, and cases cited. In *United States* v. *Jefferson*, 60 Fed. Rep. 736, removing obstructions to navigation was held to be public works. That dredging is public work, see 26 Opin. A. G. 30, 34; 23 *ib.* 174, 176. It is immaterial that a State has political jurisdiction over the place where the works are being con-

structed. *United States* v. *San Francisco Bridge Company*, 88 Fed. Rep. 304.

3. The exception "in case of extraordinary emergency" only applies to sudden, unexpected happenings not of the customary, usual, or regular kind, demanding prompt action to avert imminent danger to life, limb, health or property; urgent situations which can be foreseen in time to avoid the necessity of overtime work must be guarded against solely by putting additional shifts at work; and possibility of pecuniary loss is not enough to justify continuously working men overtime. See definitions of "emergency" and "extraordinary" in Century Dictionary, Standard, Webster, Worcester. Debates, Cong. Rec., vol. 23, pages 5724, 5728, 5729; vol. 23, Appendix, pages 452 *et seq.*; and the Senate and House Reports accompanying H. R. 8537. Debates and reports of committees which will be examined to find the situation as it existed at the time the act of 1892 was under consideration and was pressed upon the attention of Congress. *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *United States* v. *Laws*, 163 U. S. 258; *American Net and Twine Company* v. *Worthington*, 141 U. S. 468; *Dunlap* v. *United States*, 173 U. S. 65, show that the purpose of Congress was to secure better citizens by promoting the educational, social and moral elevation of the industrial classes. The exception to the law will not be construed so as to defeat the purposes of Congress. *People* v. *Waring*, 64 N. Y. Suppl. 865; 52 App. Div. N. Y. 36, may be distinguished.

4. The application of the term "laborers and mechanics" to employés engaged in ordinary dredging operations upon the ordinary non-seagoing dredge and attendant tugs and scows.

a. The term applies to all who come within the ordinary meaning of the words, irrespective of the manner in which they are paid. 12 Opin. A. G. 530, 533; 25 Opin. A. G. 465. See, also, 18 Opin. A. G. 389, 391. 14 Opin. A. G. 128, stating that act of 1868 is limited to employés paid a day's wages for a day's work, and *Billinsley* v. *Marshall County*, 5 Kan. App. 435,

where there is a similar intimation, will not be followed, for to construe the act of 1892 as limited to employés paid by the day would enable the purpose of the act to be defeated by paying weekly or monthly wages.

b. The ordinary meaning of the term includes employés on the dredge and the scowman. Deck hands, while engaged upon the work of removing obstructions to navigation, are laborers within act of 1892. *United States* v. *Jefferson*, 60 Fed. Rep. 736. Fireman on land (*United States* v. *Martin*, 94 U. S. 400) and on board ship (*Wilson* v. *Zulueta*, 14 Q. B. 405) are laborers. See, also, 26 Opin. A. G. 64. Locomotive engineers are mechanics. *Sanner* v. *Shivers*, 76 Georgia, 335; *State ex rel. I. X. L. Grocery Company* v. *Land*, 108 Louisiana, 512. Application of the act of 1892 to Government Printing Office (25 Stat. 57; 28 Stat. 607) shows that word "mechanics" applies to those engaged in operating and tending machines.

c. Employés named are not seamen. If their employment can be said to be so peculiar as to take them out of the act it is only while the dredge is being towed from port to port. A dredge fixed in position and operating upon an excavation under water is like a land steam shovel operating on land. Cases holding dredges and scows to be vessels (*The International*, 89 Fed. Rep. 484) rest upon definition of "vessel." Rev. Stats. § 3. Properly speaking, they are not vessels. *United States* v. *The Ohio*, 27 Fed. Cas. No. 15,915; *United States* v. *The Pennsylvania Canal Boat*, 27 Fed. Cas. No. 16,027.

d. These views are supported by considering evils designed to be remedied by the statute. Committee reports and debates show that, during the thirty years preceding 1892, there had been so many mechanical inventions brought into use that the labor market had become congested and there was not sufficient remunerative employment for all who wished to work. By its definitions of "public works" it is clear that Congress intended the act of 1892 to apply to dredging operations; and in view of the evil which the statute was designed to cure, none of those upon the labor-saving device known as a dredge, who come

within the ordinary meaning of "laborers and mechanics" can be worked overtime lawfully, upon ordinary occasions.

e. Executive interpretation of act of 1892 cannot control because meaning of the statute is plain and unambiguous. *Houghton* v. *Payne*, 194 U. S. 88, 100. The action of the War Department, which down to July, 1906, did not consider that the act of 1892 applied to employés on government dredges, is now abandoned as to deck hands and some others, and it was founded upon a misconception of an opinion by Attorney General Miller (20 Opin. A. G. 459). His opinion that the act of 1892 does not apply to "sailors or others on shipboard" does not refer to dredges; the question before him related only to those on "vessels;" dredges are not properly classed as vessels nor are their employés to be regarded as sailors during the performance of an ordinary dredging operation. The action of the War Department is now partly abandoned and is no longer insisted on. See, orders, memoranda, letters, etc., in appendix to brief, showing fully the past and present attitude of the War Department. Since passage of the act of August 13, 1894 (28 Stat. 278), requiring contractors upon the public works to give bonds for the protection of persons furnishing materials and labor, contractors upon dredging works have been required to give bonds.

Mr. Justice Holmes delivered the opinion of the court.

These are an indictment and informations under the Act of August 1, 1892, c. 352, 27 Stat. 340, "Relating to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia." They all bring up the question of the constitutionality of the act, and they severally present some subordinate matters, which will be considered under the respective cases.

The act limits the service and employment of all laborers and mechanics employed by the United States, by the District

of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or the District, to eight hours in any one calendar day, and makes it unlawful "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." By § 2 "any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." The plaintiffs in error were contractors within the scope of the act, were found guilty and were fined. They all requested rulings that the act was unconstitutional, excepted to the refusal so to rule, and on that ground brought their cases to this court.

The contention that the act is unconstitutional is not frivolous, since it may be argued that there are relevant distinctions between the power of the United States and that of a State. But the arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions, and are answered, so far as a State is concerned, by *Atkin* v. *Kansas*, 191 U. S. 207. In that case a contractor for work upon a municipal boulevard was sentenced to a fine under a similar law of Kansas, and the statute was upheld. We see no reason to deny to the United States the power thus established for the States. Like the States, it may sanction the requirements made of contractors employed upon its public works by penalties in case those requirements are not fulfilled. It would be a strong thing to say that a legislature that had power to forbid or to authorize and enforce a contract had not also the power to

make a breach of it criminal, but however that may be, Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the States, and it may be true that the object of this law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded, however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes.

One other argument is put forward, but it hardly needs an answer. A ruling was asked in Ellis's case, and is attempted to be sustained, to the effect that the Government waived its sovereignty by making a contract, and that even if the Act of 1892 were read into the contract, a breach of its requirements would be only a breach of contract and could not be made a crime. This is a mere confusion of ideas. The Government purely as contractor, in the absence of special laws, may stand like a private person, but by making a contract it does not give up its power to make a law, and it may make a law like the present for the reasons that we have stated. We are of opinion that the act is not contrary to the Constitution of the United States.

We pass to the subordinate matters not common to all the cases. In Ellis's case the plaintiff in error agreed to construct and complete pier No. 2 at the Boston Navy Yard, within six months, according to certain specifications and at a certain price. He found more difficulty than he expected, although he expected some trouble, in getting certain oak and pine piles called for by the contract, and, having been delayed by that cause, he permitted his associate in the business to employ men for nine hours, in the hurry to get the work done. The

judge instructed the jury that the evidence did not show an "extraordinary emergency" within the meaning of the act. The judge was right in ruling upon the matter. Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end. The ruling was correct. It needs no argument to show that the disappointment of a contractor with regard to obtaining some of his materials, a matter which he knew involved some difficulty of which he took the risk, does not create such an emergency as is contemplated in the exception to the law. Again, the construction of the pier was desirable for the more convenient repair of warships, but it was not essential. Vessels had been docked without it since 1835 or 1836, so that there was no hot haste on that account, if under any circumstances that kind of need would have been enough.

There is only one other question raised in Ellis's case. It is admitted that he was a contractor within the meaning of the act and that the workmen permitted to work more than eight hours a day were employed upon "public works," and it is not denied that these workmen were "mechanics." The jury were instructed, subject to exception, that if the defendant intended to permit the men to work over eight hours on the calendar day named he intended to violate the statute. The argument against the instruction is that the word "intentionally" in the statute requires knowledge of the law, or at least that to be convicted Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent. The judgment in this case must be affirmed.

The three cases against the Eastern Dredging Company were informations for employing certain men, alleged to be laborers or mechanics, more than eight hours a day upon what was alleged to be one of the public works of the United States, viz., dredging a portion of the thirty-five foot channel, so called, in Boston Harbor. The cases against the Bay State Dredging Company were similar, except that the place was Chelsea Creek in Boston Harbor. Of the former, No. 664 was in three counts for employing two deck hands and an assistant craneman and deck hand upon a dredge; No. 665 was for employing the master, craneman and fireman of the dredge; and No. 666 was for employing the captain, mate, engineer, and foreman of a tug that towed a scow, etc., and a man in charge of the scow. Of the Bay State Dredging Company cases, No. 667 was for employing the captain, mate and fireman of a dredge; No. 668 was for employing a craneman and deck hand on the dredge; and No. 669 was for employing a scowman and the captain and engineer of a tug. The offenses were admitted or proved subject to the questions that already have been considered, and to the further questions whether the dredging was upon one of the public works of the United States and whether the persons employed were laborers or mechanics within the meaning of the act, with one or two lesser points that will not need to be discussed.

Both of the phrases to be construed admit a broad enough interpretation to cover these cases, but the question is whether that interpretation is reasonable, and, in a penal statute, fair. Certainly they may be read in a narrower sense with at least equal ease. The statute says, "laborers and mechanics . . . employed . . . upon any of the public works." It does not say, and no one supposes it to mean, "any public work." The words "upon" and "any of the," and the plural "works" import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes. The fact that the persons mentioned as employed upon them are laborers and

mechanics, words admitted not to include seamen, points in the direction of structures and away from the sea. The very great difficulty, if not impossibility, of dredging in the ocean, if such a law is to govern it, is a reason for giving the defendants the benefit of a doubt; and the fact that until last year the Government worked dredging crews more than eight hours is a practical construction not without its weight. A change seems to have been made simply for the sake of consistency between the different departments of the Government, as is stated in an order of the Secretary of War. A different conclusion is sought to be drawn from some appropriation acts, but they simply refer to the improvement of harbors in general terms among the public works for which appropriations are made. The improvement of a harbor may consist in the erection of structures as well as in the widening of a channel, or the explosion of a rock. It is unnecessary to lay special stress on the title to the soil in which the channels were dug, but it may be noticed that it was not in the United States. The language of the acts is "public works of the United States." As the works are things upon which the labor is expended, the most natural meaning of "of the United States" is belonging to the United States.

The words laborers and mechanics are admitted not to apply to seamen as that name commonly is used. Therefore it was contended but faintly that the masters of the tugs could not be employed more than eight hours. But the argument does not stop with masters of tugs, or even with mates, engineers and firemen of the same. *Wilson* v. *The Ohio*, Gilpin, 505; *Holt* v. *Cummings*, 102 Pa. St. 212. The scows and floating dredges were vessels. Rev. Stat. §§ 3, 4612. They were within the admiralty jurisdiction of the United States. *The Robert W. Parsons*, 191 U. S. 17. (A number of cases as to dredges in the Circuit and District Courts are referred to in *Brown Hydraulic Dredging Co.* v. *Federal Contracting Co.*, 148 Fed. Rep. 290.) Therefore all of the hands mentioned in the informations were seamen within the definition in an earlier statute of the

United States. Rev. Stat. § 4612; *Saylor* v. *Taylor*, 77 Fed. Rep. 476; *S. C.*, 23 C. C. A. 343. See also Act of March 3, 1875, c. 156, § 3; 18 Stat. 485; *Bean* v. *Stupart*, 1 Dougl. 11; *Disbrow* v. *The Walsh Brothers*, 36 Fed. Rep. 607. They all require something of the training and are liable to be called upon for more or less of the services required of ordinary seamen. The reasons which exclude the latter from the statute apply, although perhaps in a less degree, to them. Whatever the nature of their work it is incident to their employment on the dredges and scows as in the case of an engineer or coal shoveller on board ship. Without further elaboration of details we are of opinion that the persons employed by the two defendant companies were not laborers or mechanics and were not employed upon any of the public works of the United States within the meaning of the act. As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn.

Judgment in 567 *affirmed.*
Judgments in 664, 665, 666, 667, 668 and 669 *reversed.*

Mr. Justice Moody took no part in the decision of 567.

. Mr. Justice McKenna is of opinion that the work upon the dredging of Chelsea Creek was within the act. In other particulars he agrees with the judgment of the court.

Mr. Justice Moody dissenting in Nos. 664, 665, 666, 667, 668 and 669.

I am unable to agree with the opinion of the court, so far as it relates to the employment for more than eight hours a day of the men engaged in work on the dredges and scows. The cases are of such general importance that I am unwilling to allow the reasons for my disagreement to remain undisclosed.

The first question is whether the men named in the informations were employed by the defendants "upon any of the public works of the United States" within the meaning of those words as Congress used them. Let it be conceded, as I think it should be, that "any of the public works" is a narrower expression than "any public work" would be; that public works must "have some kind of permanent existence and structural unity and be severally capable of being regarded as complete wholes," and still the works here in question fall within the description. The dredging of channels in our waterways is not mere digging. It has for its purpose the creation of something with as visible a form as a cellar to a house, a sunken road, a well, a tidal basin or a sea-level canal. Surely all these are "works," and if constructed by the Government, "public works." Artificial waterways may not be so easily read out of the statute by any definition, and I cannot resist the belief that the definition accepted in the opinion of the court does not accomplish it.

Let us consider the history of one of these artificial approaches from the sea, such as the channel in Boston Harbor, and see whether, when it is completed, it ought not to be regarded as a complete whole, having a permanent existence and structural unity. When a work of this kind is proposed the engineers of the Army, first obtaining the authority from Congress, survey the region, consider the commercial reasons which support the project and make plans for it and estimates of its cost. Upon consideration of the engineers' report, Congress, if it approves the project, makes an appropriation for its construction, designating it expressly as of the "public works" of the United States. For example, the appropriation for one of the works in question in these cases is in the following terms: "The following sums of money . . . are hereby appropriated . . . for the construction . . . of the public works hereinafter named; . . . For improving said harbor in accordance with the report submitted in House Document, number one hundred and nineteen,

Fifty-sixth Congress, Second Session, by providing channels thirty-five feet deep, . . . six hundred thousand dollars." That is to say, at the very threshold of the inquiry we find that the Congress which had forbidden a longer day's work than eight hours upon "the public works of the United States" had, upon undertaking this very work, deliberately called it a "public work." The cogency of the argument arising from the use of the same words in the eight-hour law, as in the appropriation law, cannot be met by the suggestion that it is easy to read the words in the eight-hour law in a narrower sense than they were used in the appropriation law. The question here is not how the words may be interpreted, but how they ought to be interpreted. There is no necessity to explore the possibilities of escape from the intention which Congress has made sufficiently plain.

In the Digest of Appropriations, made and published under the direction of Congress, these constructions are constantly denominated as "works," and of course they are "public." After the channel is completed, it is buoyed and lighted by the Government, and frequently defended by land fortifications constructed for that purpose. Sometimes breakwaters or jetties are constructed for the purpose of preserving it from impairment. The General Appropriation Act of September 19, 1890, 26 Stat. 426, contains some provisions of permanent law, which are material here. It begins by appropriating "for the construction, completion, repair and preservation of the public works hereinafter named." Then follow many specific appropriations for the improvement of rivers and harbors. Section 3717 of the Revised Statutes was as follows: "Whenever the Secretary of War invites proposals for any *works*, or for any material or labor for any *works*, there shall be separate proposals and separate contracts for each *work*, and also for each class of material or labor for each work." Section 2 of this act provided that that section of the Revised Statutes should not be construed to prohibit "the cumulation of two or more *works* of river and harbor improvements in

the same proposal and contract, where such *works* are situated in the same region and of the same kind or character." Of course the works here referred to are public works. Section 6 prohibits the deposit of material in harbors, navigable rivers or waters of the United States. Section 7, as amended by section 3 of the Act of July 13, 1892, 27 Stat. 88, 110, makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War." The Act of March 3, 1899, 30 Stat. 1151, makes additional safeguard against the obstruction of navigable channels. Thus Congress, which has created these artificial channels keeps them under the constant repair, supervision, control and protection of the Government. When the work is done the Government, through the Navy Department and the Coast and Geodetic Survey, makes, publishes and issues charts which show their length, depth and width in the minutest detail, and the buoys and lights which enable the mariner to use them with safety. He, like Congress, enters upon the channels regarding them as completed wholes, as having a permanent existence, and, if he strays beyond their limits, he will quickly discover that they have a tangible form and structural unity. Doubtless they are subject to alteration by the action of the elements, but so is a building, and, given the constant repair and care which all structures need in order to prevent their disintegration, they are as permanent as the Capitol building itself. Quotations from acts of Congress might be multipled indefinitely showing that with respect to channels Congress had appropriated for them as "works" and for their repair and maintenance as "works;" but if the acts already referred to will not show that Congress regarded such waterways as public works, no number of others will do it. I suppose it would be conceded that breakwaters or jetties were public works. Is it to be supposed that Congress

intended that men who work on them should work only eight hours a day, while those who work near by on the channel itself should be exempted from this restriction? I conclude, therefore, that the labor performed was upon "the public works of the United States."

The eight-hour day is prescribed by the statute, only for laborers and mechanics. These words of description have never been supposed to include and would not include all those who do work of any kind. Although the extent of these words is somewhat vague, nevertheless they were used in a technical sense to describe classes of employés. The second question is whether the men named in the information were laborers or mechancis.

Seamen, whether employed in the Navy or other marine service of the United States or by contractors with the United States, are not laborers or mechanics. They, while laboring as seamen, could no more be brought within the limits of an eight-hour day than a physician, a lawyer, or a clergyman. They have always been regarded with special favor by all governments, and a series of laws specially applicable to them control and affect their conditions of labor. The men employed on the seagoing tug, from the master down, were seamen, and their work was the work of seamen, and the conviction with respect to them was, I agree, erroneous. Those who are employed upon the dredges and scows were not, in respect of the work they were actually doing, in any proper sense, seamen. The master and engineer of the dredge were not licensed, and the men employed upon it seemed not to have entered into any contract of shipment. They were employed usually from those who had served in the merchant marine. They had doubtless acquired the skill and aptitude which especially fitted them for work upon the dredges, which required some handling of lines and some other minor things in which sailors become expert. But because a man has acquired in one occupation skill which fits him for another it does not follow that, when he passes from one occupation to the other, the work

which he does in the new employment entitles him rightfully to be called by the old name. The sailor who is appointed the keeper of a lighthouse may have received his appointment because he was once a sailor, but nevertheless when he enters into the new service he is a lighthouse keeper and not a sailor. The occupation of dredging is not the only one for which life on the sea educates a man. There is a constant demand, for instance, for those who have an honorable discharge from the Navy for employment in civil life. The qualities of obedience, of daring, of fidelity, of the capacity for quick adaptation of insufficient means to the end which may be desired, all the result of training upon the sea, are qualities which are needed in many stations of civil life, but when men have reached those stations by reason of qualities developed in them while seamen they are no longer sailors. The work of the dredgemen and scowmen may be described in a sentence. They were digging a channel and emptying the material excavated in the sea. All those who were engaged in the work may fairly be described as either laborers or mechanics. They had nothing whatever to do with navigation. Neither the dredges nor the scows had steering gear, sails or other methods of self-propulsion. They were towed to the place where the work was to be done and there left to do it.

It does not seem to be important that for some purposes the scows and dredges were vessels, or those employed upon them for some purposes are deemed seamen. The question here is what were the men when they were engaged in the work of excavation? Were the men at that time employed as seamen, doing the work of seamen, or as laborers and mechanics, doing the work of laborers and mechanics? I think they then were laborers or mechanics, and employed as such, and that their occupation is determined, not by what they have done in the past, or by what their employers chose to call them, but by what they were doing when the Government invoked the law for their benefit. If they were then doing the work of laborers and mechanics, whatever they may have done in the past,

which constitutes a motive for their employment, or by whatever name they were employed, they were, or rather their labor was, within the restrictions as to hours prescribed by the law. Nor was their work in dredging incident to their employment on the dredges, but quite the reverse. They never would have been employed at all except for dredging. They never would have set foot on the dredge save to use it as a platform on which to do the work of laborers and mechanics. It should not be forgotten that the object of this statute, in which is embodied an expression of a great public policy, is to regulate labor of the kind named, and the men concerned are in or out of its prohibitions solely by reason of the kind of labor they perform. How can it be material here whether the dredge is or is not a vessel within the admiralty jurisdiction or that in the construction of two specifically named statutes all those upon it are deemed to be seaman? There is no artificial statutory construction prescribed for this act, and what the men on it are is left, under this act, to be determined according to the truth and fact, and the test to be applied is the nature of the labor they actually perform. They were employed to do the work of laborers and mechanics, in the main they actually did that work, and whatever they did which was of the nature of seamen's work was a mere incident to the fact that they labored upon a floating platform instead of upon the dry land.

It is conceded in the opinion of the court that the statute admits of an interpretation which brings these cases within it. May not more be said? Are not these cases fairly within the plain words of the act? If this be so, then the rule of strict interpretation, applicable to penal laws, a rule which has lost all of its ancient rigor, if indeed it is now more than a lifeless form (*United States* v. *Lacher*, 134 U. S . 624, 628), cannot be used to take them out. When the intention of the legislature is reasonably clear, the courts have no duty except to carry it out. The rule for the construction of penal statutes is satisfied if the words are not enlarged beyond their natural mean-

ing, and it does not require that they shall be restricted to less than that.

The impossibility or difficulty of applying this law to the operations of dredging, which upon the evidence, I think, amounts to no more than that it would result in an inconvenience, which the defendants may readily avoid by refusing to contract with the Government, is a consideration fit to be addressed to Congress rather than to this court.

I am authorized to say that MR. JUSTICE HARLAN and MR. JUSTICE DAY concur in this dissent.

STONE v. SOUTHERN ILLINOIS AND MISSOURI BRIDGE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 253. Argued March 24, 25, 1907.—Decided May 13, 1907.

Whether the statutes of a State authorize the incorporation of a bridge company to construct a bridge over a navigable river separating it from another State; whether such statutes confer the right of eminent domain on a corporation of another State, and whether such a corporation can exercise therein powers other than those conferred by the State of its creation, are all questions of state law, involving no Federal questions, and the rulings of the highest court of the State are final and conclusive upon this court.

The act of January 26, 1901, 31 Stat. 741, having authorized the construction by an Illinois corporation of a bridge and approaches across the Mississippi River, it is within the power of one of the States within which the bridge was constructed to authorize extensions thereof and connections therewith necessary and proper to make it available for the use contemplated by the statute, and although such extensions and connections were not within the plans and specifications of the bridge itself and its approaches as approved by the Secretary of War, the condemnation of land necessary for the bridge company to construct them is not in contravention of § 9 of the act of March 3, 1899, 30 Stat. 1151, making it unlawful to deviate in the construction of any bridge over navigable waters from the plans approved by the Secretary of War.

194 Missouri, 175, affirmed.

THE facts are stated in the opinion.

Mr. Shepard Barclay, with whom *Mr. Madison R. Smith* and *Mr. Thomas T. Fauntleroy* were on the brief, for plaintiffs in error:

The laws of Congress governing the location and limits of the bridge and approach in question are paramount.

The defendant in error has no power to condemn that part of the land lying west of the 720-foot approach, as fixed by the Secretary of War, for the purpose of constructing and operating "terminal yards" and railroad terminals, or as part of the bridge.

To be a lawful structure the bridge must be built in accordance with the plans as recommended by said board of engineers and the Secretary of War and all requirements of the act observed.

The drawing which defendant in error offered to the Federal engineers, and which the Secretary of War approved, defines the western approach at 720 feet from the western pier as shown on the map. When defendant in error submitted its map and secured its approval as an accurate delineation of the western approach to the bridge, it became bound by its own act until, at least, the Federal supervising authority approved a change. *Lake Shore &c. Co.* v. *Balt. & Ohio Co.*, 149 Illinois, 272; 30 Stat. 1151, § 9.

The legislation of Congress on this subject necessarily prohibits the operation of any local statute not in harmony therewith.

The entire approach to every such interstate bridge is considered by the legislation of Congress as subject to the supervisory control of the Federal authority. Where the bridge is once located and defined, the same cannot be changed without express authority. *In re Bridge Co.*, 108 N. Y. 483.

The acts of Congress, authorizing the construction of this bridge, operate as limitations on the area of the structure (and its approaches mentioned therein as a part thereof).

The Federal act authorizing this bridge does not grant the right of condemnation of land for the purposes of the bridge. It mentions the defendant in error, the bridge company, as "a corporation created and organized under and by virtue of the laws of the State of Illinois" (sec. 1).

Those laws do not confer on a bridge company the right of eminent domain, even in Illinois. Rev. Stats., Illinois, 1899, ch. 32, § 1, p. 433; *Illinois State Trust Co.* v. *Railroad Co.*, 208 Illinois, 420.

Mr. Martin L. Clardy, with whom *Mr. Alexander G. Cochran* was on the brief, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

On March 3, 1899, Congress passed an act providing, among other things:

"That it shall not be lawful to construct or commence the construction of any bridge, etc., . . . over . . . any . . . navigable river . . . of the United States until the consent of Congress to the building of such structures shall have been obtained, and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War."

The act further provided:

"That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure, unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War." 30 Stat. 1151, sec. 9.

On January 26, 1901, Congress passed an act (31 Stat. 741) authorizing the Southern Illinois and Missouri Bridge Company (defendant in error), a corporation of the State of Illinois, to erect, construct, maintain and operate a bridge and ap-

proaches thereto over the Mississippi River from a point on the Mississippi River in Alexander County, in the State of Illinois, opposite the terminus of the St. Louis Southwestern Railway, at or near Grays Point, in Scott County, in the State of Missouri, or from some other convenient point on said river in said Alexander County, Illinois, to some opposite point on said river in the State of Missouri, within the distance of three miles above or below the terminus of said railway.

The bridge was to be constructed for the passage of railway trains and, at the option of the corporation, might be so constructed as to provide for the use thereof by wagons, vehicles, and the transit of foot passengers and animals at such reasonable tolls as might be approved by the Secretary of War.

It was also provided that the bridge constructed under the act and subject to its limitations should be a lawful structure and recognized and known as a post route of the United States.

Section 5 provides:

"That the approaches to the bridge built under this act shall be so designed and constructed as not to interfere with the free discharge of the river in seasons of flood; and any encroachment on the high-water cross sections by piers, solid embankments, or otherwise, which might result in unduly accelerating the high-water current at the site of the bridge, shall not be allowed."

Section 7 provides for the submission to the Secretary of War of the drawings of the bridge, piers, approaches and accessory works and a map of the location, giving, for the space of at least two miles above and one mile below the proposed site, the topography of the banks of the river and the shore lines at high and low water. The maps and drawings are to be referred to the board of officers of the Corps of Engineers, United States Army, for examination and report.

Provision is made for hearing objections to the construction of the bridge, and it is provided that the proposed bridge shall be a lawful structure only when built in accordance with the plans recommended by the Board of Engineers and approved

by the Chief of Engineers, and by the Secretary of War, and while so managed and kept in repair as to offer at all times reasonable and proper means for the passage of rafts, steamboats and other water craft under the said bridge and while said requirements are observed.

Section 10 provides for alterations and changes as may be required by the Secretary of War, in accordance with existing law, in the bridge constructed under the provisions of the act, so as to preserve free and convenient navigation. Such changes were to be made, under the direction of the Secretary of War, at the expense of the persons, companies, or corporations owning, controlling and operating the bridge.

Section 11 provides that the bridge shall be constructed under the general supervision of the Secretary of War, and no changes or alterations in the plan shall be made during the construction of said bridge or after its completion, unless recommended by the Chief of Engineers and approved by the Secretary of War.

The act makes provision for the preservation of the navigable channel during the construction of the bridge.

Section 12 provides that whenever Congress shall decide that the public interests require it, the right to order the removal of the bridge at the expense of the owners is expressly reserved, without liability for damages on the part of the United States.

Section 13 provides that if the bridge is not commenced within one year and completed within three years from the date of the approval of the act, the same shall be null and void, and the rights thereby conferred cease and determine.

The Southern Illinois and Missouri Bridge Company, in pursuance of this act, submitted its drawings and plans and the same were duly approved as required by law.

The bridge company, on the twenty-fourth day of April, 1902, filed its petition in the Circuit Court of Scott County, Missouri, for the appropriation of a strip of land containing 20.3 acres, said to be approximately 4,000 feet long and 200 feet wide, alleging that it is necessary to have a right of way

for the railway tracks, bridge and terminal yards of the company, and for the purpose of carrying out its charter privileges it is necessary to hold and own the described tract.

On trial in the Circuit Court that court held that the bridge company had no right to make the appropriation under the laws of Missouri.

From this adjudication an appeal was taken to the Supreme Court of Missouri and that court reversed the judgment of the Circuit Court, and remanded the case with directions to the lower court to appoint three disinterested commissioners to assess the damages which the defendants would sustain by the appropriation of the strip of land. 174 Missouri, 1.

Such proceedings were had, and ten thousand dollars was assessed as damages in favor of the plaintiffs in error, defendants below, and a second appeal was prosecuted to the Supreme Court of Missouri, where judgment below was affirmed. 194 Missouri, 175.

To that judgment this writ of error is prosecuted.

Many of the assignments of error involve only questions of state law, the rulings concerning which, in the Supreme Court of the State, are conclusive, and involve no substantial Federal question.

Among these may be named:

The contention that the statutes of Missouri do not authorize the incorporation of a bridge company to build a bridge across the Mississippi River;

That the laws of Missouri do not confer the right of eminent domain on a corporation of another State;

That a corporation of Illinois can only exercise in Missouri such powers as are conferred upon it by the State of its creation.

These questions involve the powers of corporations under the laws of Missouri, which are concluded by the adjudication of the state Supreme Court;

There is no contention that the statutes conferring the right of eminent domain passed by the legislature of the State of Missouri, and which its courts have decided authorize this

appropriation by the defendant in error, do not make ample provision for assessment of damages to the landowner by due process of law. Whether a given corporation comes within the law of the State, and is entitled to assert its power, presents only a question of state law.

Nor is error shown in the contention that the erection of the bridge was not begun within the year, as provided by the act, of Congress. The evidence shows that the bridge has been constructed without complaint by the Federal authorities, and, indeed, Congress has extended the time for the completion of the bridge by an act passed January 18, 1904. 33 Stat., Part 1, p. 6. It cannot prejudice any Federal right secured to the plaintiffs in error that the right of eminent domain is authorized by the State, notwithstanding the bridge was not begun within the time which Congress might have insisted upon as a condition of enjoyment of the privileges conferred.

If the record presents any Federal question at all, it rests in the contention that the appropriation in controversy is in contravention of the act of Congress, because it is an unauthorized extension of the approaches to the bridge upon the Missouri side, not included in the drawings and plans as submitted to the Secretary of War and which met with his approval as already recited.

The copy of the approved drawings in the record shows that the approach to the bridge upon the west side was shown in a series of arches extending from the river bank to a distance of 720 feet. And it is the contention of the plaintiffs in error that, in view of the act of Congress, the approach must be limited to the extent and construction shown in the plans and drawings thus approved by the Secretary of War. Indeed, it is contended that this plan, after its approval, became a limitation upon the power of the State to extend the bridge by authorizing further approaches and connections.

But we think this contention wholly untenable. The act of Congress and the powers given the Secretary of War thereunder are the result of the exertion of the constitutional power

conferred upon Congress to regulate commerce between the States. Federal control of bridges constructed over navigable waters is maintained because of the right to prevent obstructions to navigation and preserve such public highways as rivers for free and unobstructed use in the interest of commerce. *Bridge Company* v. *United States*, 105 U. S. 470–475, and cases therein cited.

An examination of the act of Congress under which the bridge company was authorized to construct this bridge manifests the purpose to prevent its becoming an obstruction or interference with free navigation of the river, and when the matter of approaches is specifically spoken of it is provided that they shall be so designed and constructed as not to interfere with the free discharge of the river in seasons of flood.

It is evident that the purpose of requiring the submission of plans, and their approval by the Secretary of War, was to preserve, as far as may be, the unobstructed passage of the river in the uses of navigation. To the extent that it was necessary to protect such interests, the law provides that the structure shall be unalterable and that its approaches shall be approved by the Secretary and remain unchanged without his sanction, but it certainly never was designed to destroy the usefulness of the bridge by limiting the power of the State to authorize the corporation constructing and owning it, by proper connections and other facilities, to make the bridge available for the purposes for which it was intended. The bridge and approaches as approved by the Secretary of War have not been altered. The connecting approaches and tracks are additional means of making the bridge available for the purposes intended.

As was pertinently observed by the Chief Justice, in delivering the opinion of the court in *Union Pacific Ry. Co.* v. *Chicago &c. Ry. Co.*, 163 U. S. 588, "A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots and other facilities for the public accommodation."

If the State was deprived of its power to authorize extensions and connections which should make this bridge available for the common use of railroads for which it was intended, it would have been a vain thing to provide for a bridge abruptly terminating at a height and point where, without further approaches and connecting facilities, its usefulness would have been destroyed.

This record shows that the point 720 feet to the west, where the approach required by the War Department ends, is at a height of some 60 feet from the ground. The structure was thence extended some distance to the crest of a bluff, thence over the lands of the plaintiffs in error to a point where the terminal yards of the bridge company are situated.

We cannot find it within the purpose of Congress, if it had the power so to do, by the terms of this act to limit the State in its right to authorize these necessary terminals and connecting facilities, because the plans and specifications, which fully subserved the purpose of showing the extent to which navigation would be affected had been specifically approved by the Secretary of War and are not to be altered without his consent.

In our view no Federal right was taken from the plaintiffs in error by the action complained of under the state laws as interpreted by the Supreme Court of the State of Missouri, and if it may be said that the contention fairly represents a Federal question, we are unable to find merit in it.

Judgment of the Supreme Court of Missouri is

Affirmed.

SMITH, RECEIVER, *v.* JENNINGS, TREASURER OF THE STATE OF SOUTH CAROLINA.

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

No. 104. Argued April 24, 25, 1907.—Decided May 13, 1907.

Whether the proceedings in the enactment of a state statute conform with the state constitution is to be determined by the state court and its judgment is final.

A state statute directing the state treasurer to write certain bonds off the books in his office and no longer to carry them as a debt of the State does not impair any existing obligation of the State to pay the bonds nor affect the remedy to recover upon them; and where the state court has so construed the act, in refusing to enjoin the treasurer from making the entries required thereby, at the suit of one claiming to own the bonds, no Federal right of the plaintiff is denied, obstructed, impaired or affected and the writ of error will be dismissed.

THE facts are stated in the opinion.

Mr. T. W. Bacot, with whom *Mr. A. M. Lee* and *Mr. Julian Mitchell, Jr.*, were on the brief, for plaintiff in error.

Mr. Charles A. Douglas, with whom *Mr. E. B. Sherrill* was on the brief, for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

The plaintiff in error is the receiver of a state bank of South Carolina, which has been many years in liquidation. The defendant in error is the treasurer of the State of South Carolina. The receiver brought in the Supreme Court of the State a petition for an injunction to restrain the Treasurer from obeying the requirements of an act (presently to be stated) of the legislature of the State. The Supreme Court of the State dismissed the petition, and the case is here on writ of error.

The State of South Carolina issued, in 1859, bonds due in twenty years in aid of the Blue Ridge Railroad Company. The bank came to be the owner of one hundred of these bonds, each of the par value of one thousand dollars. In 1865 the assets of the bank, including the hundred bonds, were seized and carried away by soldiers of the Federal Army. Sixty-three of the bonds have been recovered by the bank from time to time and have been paid or funded by the State. Thirty-seven of the bonds are still outstanding, and nothing is known of them. In 1896 the general assembly of the State passed an act directing that no coupon bond of the State payable to bearer should be funded or paid by the state treasurer after the expiration of twenty years from the date of maturity. In 1903 the general assembly passed the following act:

"*A Joint Resolution to authorize and require the State Treasurer to write off the books in his office certain bonds entered on said books as Old Bonds, not Fundable* (*Act of* 1896), *Blue Ridge Railroad Bonds*, $37,000.

"*Be it resolved* by the General Assembly of the State of South Carolina:

"SECTION 1. That whereas, by the Act of the Legislature of 1896, the Treasurer of this State is forbidden to pay, consolidate or fund any coupon bond of the State after the expiration of twenty years from the date of maturity of such bonds, and certain bonds entered on the books of the State treasurer as 'Old bonds not fundable, act of 1896, Blue Ridge Railroad Bonds, $37,000,' are still carried on the books of the State treasurer. Therefore, be it resolved: That the State treasurer be, and he is hereby, authorized and required to write said bonds off of the books in his office, and no longer carry said bonds on the books as a debt of the State."

Thereupon the receiver brought this petition alleging that the act last stated, if valid, impaired the obligation of the contract made by the bonds, and that the act was not passed in conformity with the constitution of the State, and was, therefore, void. The prayer of the petition was that the respondent

be restrained by injunction "from writing the said $37,000 of the state bonds off the books in his office, and no longer carrying said bonds on the books as a debt of the State." The Supreme Court of the State decided against both these contentions, and they are brought here as Federal questions. But the conformity with the state constitution of the proceedings in the enactment of the law is a question for the determination of the state court, and its judgment is final. *Burt* v. *Smith*, 203 U. S. 129, 135; *Haire* v. *Rice*, 204 U. S. 291. Nor did the law complained of impair the obligation of the State to pay the bonds therein mentioned, or the remedy to recover upon them. The obligation and the remedy remained precisely the same after the enactment of the law as before. Neither one was in the slightest degree diminished or affected. The law merely directed a change of entries in the books of the state treasurer, and could by no possibility, in any respect whatever, deny, obstruct, impair or affect the rights of the plaintiff in error. This was the view expressed by the court below, and the statute thus interpreted raises no Federal question.

Writ of error dismissed.

WYOMING *ex rel.* WYOMING AGRICULTURAL COLLEGE *v.* IRVINE, TREASURER OF THE STATE OF WYOMING.

ERROR TO THE SUPREME COURT OF THE STATE OF WYOMING.

No. 272. Argued April 19, 22, 1907.—Decided May 13, 1907.

The land grants made for establishment of agricultural colleges by the act of July 2, 1862, 12 Stat. 503, as amended by the act of March 3, 1883, 22 Stat. 484, and the permanent appropriations for the support of such institutions under the act of August 30, 1890, 26 Stat. 415, were made to the States themselves, and not to any of the institutions established by the States, *Haire* v. *Rice*, 204 U. S. 291, and the disposition of the interest on the land grant fund and the appropriation is wholly within the power of each State acting through its legislature in accordance with

the trust imposed upon it by the acts of Congress, and an institution, although established by the State for agricultural education, cannot compel the payment of any part thereof to it.

THE plaintiff in error, the State of Wyoming, on the relation of the Wyoming Agricultural College and its officers, filed a petition in the Supreme Court of that State for a writ of mandamus against the defendant in error, the state treasurer. The object of the proceeding was to compel the state treasurer to pay to the treasurer of the college certain funds in his hands, being the proceeds of land grants and the amount of appropriations made by Congress for the promotion of education in agricultural and mechanical arts. An alternative writ issued, and the respondent appeared and demurred to the petition. The cause was then heard by the Supreme Court of Wyoming, and by that court the demurrer, which was regarded by court and counsel as sufficiently raising the merits of the controversy, was sustained and judgment rendered for the respondent. The case comes here upon writ of error, with allegations of violations of Federal rights, which, so far as material to the decision, are stated in the opinion.

Mr. Porter B. Coolidge, with whom *Mr. Fenimore Chatterton*, *Mr. Samuel T. Corn* and *Mr. A. E. L. Leckie* were on the brief, for plaintiffs in error:

The act of the legislature of Wyoming in 1905 repealing the charter of the Wyoming Agricultural College is in contravention of the compact and agreement entered into between said State and the United States, in the act admitting said State into the Union.

That act being the solemn compact between the State and the Government, its terms are of controlling force in construing any dubious provisions of the constitution of Wyoming. Section 10 provides that 90,000 acres of land are hereby granted to said State, as provided in the acts of Congress, making donations of land for such purpose.

Section 11 provides that the following grants of land are

hereby made for state, charitable, educational, penal and reformatory institutions to the State of Wyoming, 260,000 acres.

Section 8 provides as to university lands that "the schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college or university."

Thus Congress expressly recognizes the university and grants donations for university purposes and expressly recognizes the agricultural college to be thereafter established in this State and grants to the State 90,000 acres of land for the use and support of same. The congressional mind at this time recognized an agricultural college in Wyoming separate and distinct from the university and evinced a fatherly interest in its welfare; and the State of Wyoming in accepting the grant for the use and support of an agricultural college, solemnly obligated itself to establish an agricultural college, which when established could not be destroyed by the legislature.

The State of Wyoming further ratified and reiterated its solemn pledge and obligation contained in the Act of Admission by § 1 of Art. 18 of its constitution, in which it agrees to accept the grants of lands heretofore made, or that may be hereafter made by the United States to the State for educational purposes, for public buildings and institutions and for other objects and donations of money, with the conditions and limitations that may be imposed by the act or acts of Congress, making such grants or donations.

Mr. Timothy F. Burke, with whom *Mr. W. E. Mullen,* Attorney General of the State of Wyoming, *Mr. Nellis Corthell, Mr. Charles W. Burdick* and *Mr. John W. Lacey* were on the brief, for defendant in error:

If the State, by accepting the donations under the Morrill

and other acts, entered into a contract as to their disposition, it is for the United States to complain of the breach if there be any. The relators are not parties to the contract and are in no position to invoke its protection. Again, the appropriation of the funds so donated rests solely in the good faith of the State. Its discretion in disposing of them is not controlled by the conditions prescribed in the acts, as neither a contract nor a trust following the lands or funds was thereby created.

The plaintiff is not a party to the contract, and it is no position to invoke its protection. But, in the second place, the appropriation of the proceeds rests solely in the good faith of the State. Its discretion in disposing of them is not controlled by that condition, as neither a contract nor a trust following the lands was thereby created. *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701, 912; *Mills County* v. *Railroad Companies*, 107 U. S. 557, 566; *Cook County* v. *Calumet &c. Co.*, 138 U. S. 635, 655.

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

The Wyoming Agricultural College was established by an act of the legislature of that State. Chap. 92, S. L. Wyo. 1890–91. It was declared to be "a state public educational institution," with the object of giving to men and women, without regard to color, "a liberal education and a thorough knowledge of such arts and sciences as will aid in the prosecution of agricultural pursuits, with their varied applications."

The University of Wyoming was established by the Territory with the declared object of providing education for both sexes in "the different branches of literature, the arts and sciences, with their varied applications." The constitution of the State of Wyoming confirmed the establishment of the university and declared it to be the University of the State of Wyoming. The first session of the state legislature enacted a law declaring more fully the objects of the university, which

provided, among other things, that it should be open to both sexes, regardless of race or color, and should "embrace colleges or departments of letters, of science and of the arts. . . . The college, or the department of the arts, shall embrace courses of instruction in the practical and fine arts, especially in the application of science to the arts of mining and metallurgy, mechanics, engineering, architecture, agriculture and commerce, together with instruction in military tactics."

Land grants and appropriations, which presently will be described in detail, have been made by Congress for the support of education in the State, and the State, acting through its legislature, has accepted the appropriations under the conditions prescribed in the acts of Congress, and has appropriated these national bounties to the support of the university. The agricultural college claimed that under the acts of Congress bestowing these gifts it is entitled to them, and the denial of the Supreme Court of the State of this claim raises the Federal question first to be considered.

By the act of July 2, 1862 (12 Stat. 503), amended by act of March 3, 1883 (22 Stat. 484), Congress "granted to the several States, for the purposes hereinafter mentioned, "certain quantities of the public lands, or, under certain conditions, in lieu thereof land scrip. The entire proceeds of the sale of the land or of the land scrip were directed to be safely invested by the States as a perpetual fund, whose interest should be "inviolably appropriated by each State, which may take and claim the benefit of this act, to the endowment, support and maintenance of at least one college, where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agricultural and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." The act further provided that "if any portion of the fund invested is lost, it shall be replaced by the State to which

it belongs;" and that "no State while in a condition of rebellion or insurrection against the Government of the United States shall be entitled to the benefits of this act, and no State shall be entitled to the benefit of this act unless it shall express its acceptance thereof by its legislature."

The grant made in this statute is clearly to the State and not to any institution established by the State. *Haire* v. *Rice*, 204 U. S. 291.

By the act of August 30, 1890 (26 Stat. 417), Congress made permanent annual appropriations of a certain sum of money "to each State and Territory for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts, now established, or which may be hereafter established, in accordance with an act of Congress approved July second, eighteen hundred and sixty-two, . . . to be applied only to instruction in agriculture, the mechanic arts, the English language, and the various branches of mathematical, physical, natural and economic science, with special reference to their applications in the industries of life, and to the facilities for such instruction." It is so obvious that these appropriations are made to the State and not to any institutions within the State, and that the States, acting through their legislatures, are to expend the appropriations in accordance with the trust imposed upon them, that it is unnecessary to quote the numerous expressions in this act which support that view. By the act of March 2, 1887 (24 Stat. 440), Congress directed that a certain sum should be annually appropriated "to each State" for the support of agricultural experiment stations at the institutions established under the act of 1862. The law provides that the appropriation shall be paid to the treasurer of the institution where the agricultural experiment station is established, and no money has come or will come into the hands of the state treasurer. It is, therefore, unnecessary to consider further the provisions of this act. There is in the hands of the state treasurer the permanent fund established under the act of 1862, and one of the annual

appropriations paid to him under the act of 1890. The interest on the fund and the annual appropriation the state treasurer is about to pay to the University of Wyoming in obedience to the laws of the State. The agricultural college claims that it is entitled under those statutes to receive this money. If this claim fails it is the end of the case. But, as has been shown, both the fund and its interest and the annual appropriations are the property of the State and not of any institution within it. The agricultural college shows no title or right to this money under these statutes. The whole case of the plaintiff in error fails at the threshold, and it is unnecessary to determine whether the State has complied with its trust in bestowing the Government bounty upon the University of Wyoming or has violated the obligation of a contract by repealing, as it has, the act establishing the agricultural college. These questions were discussed with learning and ability in the court below, and we do not intend to intimate any disagreement with the conclusions of that court. But as the plaintiff in error must fail in the attempt to compel the payment to it of the money in the hands of the defendant for the reasons already given, there is no need to go further in this court, and the judgment of the Supreme Court of Wyoming is therefore

Affirmed.

KESSLER v. ELDRED.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 196. Submitted April 17, 1907.—Decided May 13, 1907.

Rights between litigants once established by the final judgment of a court of competent jurisdiction must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound thereby.

The defeated party in an infringement suit will be restrained by a court of equity from interfering with the business of the successful defendant by bringing infringement suits based on the same patents against the customers of the latter.

THIS case comes to this court from the Circuit Court of Appeals for the Seventh Circuit upon a certificate of that court of questions of law concerning which it desires instructions. Accompanying the certificate is a statement of facts. The statement of the facts and the certificate of the questions of law are as follows:

Kessler, a citizen of Indiana, prior to 1898 had built up an extensive business in the manufacture and sale of electric cigar lighters, and had customers throughout the United States. Eldred, a citizen of Illinois, and an inhabitant of the Northern District, was the owner of patent No. 492,913, issued to Chambers on March 7, 1893, for an electric lamp lighter. Eldred was a competitor of Kessler's and manufactured a similar form of lighter (entirely dissimilar from that described in the Chambers patent), so that it was not a matter of much importance to customers which lighter they bought. In 1898 Eldred began a suit against Kessler in the District of Indiana for the infringement of the Chambers patent. The bill alleged that Kessler's manufacture and sale of the Kessler lighter infringed all the claims. The answer denied that Kessler's lighter infringed any of the Chambers claims. On final hearing the Circuit Court found for Kessler on the issue of non-infringe-

ment and dismissed the bill. That decree was affirmed in 1900 by the Circuit Court of Appeals for the Seventh Circuit. *Eldred* v. *Kessler*, 106 Fed. Rep. 509.

Subsequently, Eldred brought suit on the same patent in the Northern District of New York against Kirkland, who was selling a similar lighter, but not of Kessler's make. The Circuit Court found for Kirkland on the issue of non-infringement and dismissed the bill. The Circuit Court of Appeals for the Second Circuit reversed that decree and held the Kirkland lighter to be an infringement. *Eldred* v. *Kirkland*, 130 Fed. Rep. 342.

In June, 1904, Eldred filed a bill for infringement of the same patent in the Western District of New York against Breitwieser, user of Kessler lighters, which were identical with those held in *Eldred* v. *Kessler*, to be no infringement of the Chambers patent. Many of Kessler's customers were intimidated by the Breitwieser suit, so that they ceased to send in further orders for lighters and refused to pay their accounts for lighters already sold and delivered to them. Kessler assumed the defense of the Breitwieser suit, and will be compelled in the proper discharge of his duty to his customers to assume the burden and expense of all suits which may be brought by Eldred against other customers. In this state of affairs Kessler, a citizen of Indiana, in July, 1904, filed a bill against Eldred in the Circuit Court for the Northern District of Illinois, the State and district of Eldred's citizenship and residence, to enjoin Eldred from prosecuting any suit in any court of the United States against anyone for alleged infringement of the Chambers patent by purchase, use or sale of any electric cigar lighter manufactured by Kessler and identical with the lighter in evidence before the Circuit Court for the District of Indiana and the Circuit Court of Appeals for the Seventh Circuit in the trial and adjudication of the suit of Eldred against Kessler. From an adverse decree by the Circuit Court Kessler perfected an appeal to this court.

Upon the foregoing facts the questions of law concerning

which this court desires the instruction and advice of the Supreme Court are these:

First. Did the decree in Kessler's favor, rendered by the Circuit Court for the District of Indiana in the suit of Eldred against Kessler, have the effect of entitling Kessler to continue the business of manufacturing and selling throughout the United States the same lighter he had theretofore been manufacturing and selling, without molestation by Eldred through the Chamber patent?

Second. Did the decree mentioned in the first question have the effect of making a suit by Eldred against any customer of Kessler's for alleged infringement of the Chambers patent by use or sale of Kessler's lighters a wrongful interference by Eldred with Kessler's business?

Third. Did Kessler's assumption of the defense of Eldred's suit against Breitwieser deprive Kessler of the right, if that right would otherwise exist, of proceeding against Eldred in the State and district of his citizenship and residence for wrongfully interfering with Kessler's business?

Fourth. If Eldred's acts were wrongful, had Kessler an adequate remedy at law?

Mr. Robert S. Taylor and *Mr. Elwin M. Hulse* for Kessler.

Mr. Charles C. Linthicum and *Mr. Louis K. Gillson* for Eldred.

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

The industry of counsel has not discovered any decision on the exact questions presented by the certificate, and they agree that those questions are not settled by controlling authority. The decision of the case turns upon the effect of the judgment in the suit which Eldred brought against Kessler. Both manufactured and sold electric cigar lighters. Eldred, being

the owner of a patent issued to one Chambers for an electric lamp lighter, brought a suit against Kessler, in which it was alleged by the plaintiff and denied by the defendant that the cigar lighters manufactured by Kessler infringed each and all of the claims of the Chambers patent. On the issue thus joined there was final judgment for Kessler. This judgment, whether it proceeds upon good reasons or upon bad reasons, whether it was right or wrong, settled finally and everywhere, and so far as Eldred, by virtue of his ownership of the Chambers patent, was concerned, that Kessler had the right to manufacture, use and sell the electric cigar lighter before the court. The court, having before it the respective rights and duties on the matter in question of the parties to the litigation, conclusively decreed the right of Kessler to manufacture and sell his manufactures free from all interference from Eldred by virtue of the Chambers patent, and the corresponding duty of Eldred to recognize and yield to that right everywhere and always. After this conclusive determination of the respective rights and duties of the parties, Eldred filed a bill for an infringement of the same patent against Breitwieser, on account of his use of the same kind of Kessler cigar lighter which had been passed on in the previous case, and Kessler has assumed the defense of that suit. Whether the judgment between Kessler and Eldred is a bar to the suit of *Eldred* v. *Breitwieser*, either because Breitwieser was a privy to the original judgment, or because the articles themselves were by that judgment freed from the control of that patent, we deem it unnecessary to inquire. We need not stop to consider whether the judgment in the case of *Eldred* v. *Kessler* had any other effect than to fix unalterably the rights and duties of the immediate parties to it, for the reason that only the rights and duties of those parties are necessarily in question here. It may be that the judgment in *Kessler* v. *Eldred* will not afford Breitwieser, a customer of Kessler, a defense to Eldred's suit against him. Upon that question we express no opinion. Neither it nor the case in which it is raised are before us. But the question here

is whether, by bringing a suit against one of Kessler's customers, Eldred has violated the right of Kessler. The effect which may reasonably be anticipated of harassing the purchasers of Kessler's manufactures by claims for damages on account of the use of them, would be to diminish Kessler's opportunities for sale. No one wishes to buy anything, if with it he must buy a law suit. That the effect to be anticipated was the actual effect of the Breitwieser suit is shown by the statement of facts. Kessler's customers ceased to send orders for lighters, and even refused to pay for those which had already been delivered. Any action which has such results is manifestly in violation of the obligation of Eldred, and the corresponding right of Kessler, established by the judgment. Leaving entirely out of view any rights which Kessler's customers have or may have, it is Kessler's right that those customers should, in respect of the articles before the court in the previous judgment, be let alone by Eldred, and it is Eldred's duty to let them alone. The judgment in the previous case fails of the full effect which the law attaches to it if this is not so. If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it. Having then by virtue of the judgment the right to sell his wares freely without hindrance from Eldred, must Kessler stand by and see that right violated, and then bring an action at law for the resulting damage, or may he prevent the infliction of the unlawful injury by proceedings *in personam* in equity? If Eldred succeeds in his suit against one of Kessler's customers, he will naturally bring suits against others. He may bring suits against others, whether he succeeds in one suit or not. There may be and there is likely to be a multiplicity of suits. It is certain that such suits if unsuccessful would at the same time tend to diminish Kessler's sales and to impose upon him the expense of defending many suits in order to maintain the right which by a judgment has already been declared to exist. If the suits are

successful the result will be practically to destroy Kessler's judgment right. Moreover, though the impairment or destruction of Kessler's right would certainly follow from the course of conduct which Eldred has begun, it would be difficult to prove in an action at law the extent of the damage inflicted. An action at law would be entirely inadequate to protect fully Kessler's unquestioned right, and under these circumstances, though there may be no exact precedent, we think that the jurisdiction in equity exists. Nor do we see any good reason why Kessler's interposition for the defense in the suit of *Eldred* v. *Breitwieser* debars him from his remedy in equity.

It follows from the foregoing reasoning that the first and second questions certified should be answered in the affirmative, and the third and fourth in the negative, and

It is so ordered.

COMMONWEALTH OF VIRGINIA *v.* STATE OF WEST VIRGINIA.

IN EQUITY.

No. 7, Original. Argued March 11, 12, 1907.—Decided May 27, 1907.

This court has original jurisdiction of a suit by the State of Virginia against the State of West Virginia for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts to adjudicate and determine the amount, if any, due the former by the latter.

Consent to be sued in this court by another State is given by a State, by, and at the time of, its admission into the Union. It will be presumed that the legislature of a State will provide for the satisfaction of any judgment that may be rendered against it, and the jurisdiction and power of this court is not affected by the question of how it will be enforced. If a State should repudiate its obligation to satisfy judgment rendered against it, this court will after the event consider the means by which it may be enforced.

The court having jurisdiction of the controversy, the effect of the provisions in the constitution of West Virginia, as well as the several statutes enacted

by that State and by Virginia on the liability of West Virginia, for a part of the public debt of Virginia, and the relations of Virginia to the holders of bonds will not be determined on demurrer, but postponed to the merits.

THIS is a bill filed, on leave, February 26, 1906, by the Commonwealth of Virginia against the State of West Virginia.

The bill averred that—

"On the first day of January, 1861, complainant was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose; but a portion of her liabilities though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

"In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the State, as created under her laws amounting, the former to $1,462,993.00, and the latter to $1,543,669.05 as of the same date.

"The official reports and records showing the exact character and amounts of the public debt thus contracted and how the same was created, are referred to, and will be produced upon a hearing of the case.

"(2) That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture, and to some extent to grazing and manufacturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well

nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio River, that the Commonwealth of Virginia, in the first quarter of the Nineteenth Century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed East of the Appalachian range, as leading up to the undeveloped territory West thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed West of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio River, since the first day of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines East of said range been first constructed; and your oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedness to be contracted was a small amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

"(3) The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvement, in a very large measure for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropriations. Indeed it appears from those records that a great majority of the acts of the legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been a fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

"(4.) The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been

constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local purposes. As early as the year 1816 a Board of Public Works was created by law for the State, the members of which were elected by the voters of the State at large, and this Board had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this Board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by a examination of the numerous entries in the records of this Board extending through a number of years and showing such expenditures as made from time to time.

"(5.) On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was intended to withdraw Virginia from the union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the 'Restored State of Virginia,' and will be hereafter referred to in this bill as the 'Restored State.'

"(6.) On the 20th day of August, 1861, the 'Restored State of Virginia,' in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to 'provide for the formation of a new State out of the portion of the territory of this State;' section 9 of which ordinance was as follows, to-wit:

"'9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted, and deducting therefrom the moneys paid into the Treasury of the

Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.'

"(7.) On the 31st day of December, 1862, an act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein; and it was provided by this act of Congress that whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operation on the date last named.

"(8.) Pending the admission of the State of West Virginia into the Union the General Assembly of the 'Restored State of Virginia' passed February 3, 1863, the following act:

"'That all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any

other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this State, or in the president and directors of the Literary Fund, or the Board of Public Works thereof, or in any person or persons for the use of this State, to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said Board of Public Works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said Board of Public Works, or of any person or persons, for the use of this State.

"'That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government.'"

Complainant charged "that the property which was by the operation of this act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted, in the aggregate, to several millions of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury from the sale thereof about six hundred thousand dollars; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861.

"(9.) And by a further act of the General Assembly of the 'Restored State of Virginia' passed on the next day, February 4th, 1863, it was enacted:

"'1. That the sum of one hundred and fifty thousand dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

"'2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State.'

"And this last named sum of one hundred and fifty thousand dollars together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

"(10.) The constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union, contained the following provisions:

"By Section 5 of Article VIII, of said constitution it was provided:

"'5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous

liability to the State, to suppress insurrection, repel invasion or defend the State in time of war.'

"And by Section 7 of Article VIII it was provided:

"'7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.'

"And by Section 8 of Article VIII it was provided:

"'8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.'

"At the time the constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any 'public debt' or 'previous liability,' except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the acts of the General Assembly of the 'Restored State of Virginia' above set forth. By the provisions of section 8 of Article VIII, above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By section 5 of the same Article VIII, above set forth, her constitution forbade the creation of any debt 'except to meet casual deficits in the revenue, to redeem a previous liability of the State,' &c., and there was not and could not have been any such 'previous liability,' except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the acts of the General Assembly of the 'Restored State.' And section 7 of the same article of her constitution, above cited,

authorized a sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks, except those acquired, as above stated, from the original State. This section of her constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

"(11.) After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settlement of any kind was ever had between the two States in regard to this debt.

"(12.) The efforts looking to a settlement by the concurrent action of the two States having proved abortive, and your oratrix being anxious to adjust the portion of the common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

"The first of these was made by the General Assembly which was chosen at the close of the period of 'destruction and reconstruction,' which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

"The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay to the utmost every dollar which her most exacting creditor could demand of her, was expressed in the act of her General Assembly, approved March 30, 1871.

"By the terms of settlement embodied in this act, your oratrix undertook to give her obligations bearing 6% interest for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest, which accrued interest to the extent of nearly $8,000,000, had been funded after the war in new bonds of Virginia, thus capitalizing at 6% not only the interest, but interest upon that interest.

"It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the state debt were attempted by the acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the act of February 20, 1892. Your oratrix will file copies of each of the acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

"(13.) As further indicating the great burden which your oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your honors that, since January 1st, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over seventy-one million dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as 'Exhibit Number 7.'

"It is proper in this connection to call attention to the fact that, while your oratrix has made this large contribution toward the settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a num-

ber of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your oratrix in reference thereto.

"It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several acts above recited.

"A question may be raised as to whether such was the effect of the language used in the act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the act of March 30, 1871, which it was the purpose of your oratrix that it should have.

"(14.) By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her.

"Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obliga-

tions of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

"Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your oratrix and to all of her people.

"(15.) All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph 1 of this bill, except a comparatively insignificant sum, not amounting to one per cent. of the aggregate of those liabilities, have been taken up and are now actually held by your oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto. They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your oratrix, will, when it shall be proper to do so, be exhibited to the master, who shall take the accounts hereinafter prayed for.

"(16.) Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of $25,000,000, by far the greater part of it being now, of course, on account of the interest computed thereon, at the rate of 6% per annum, the then legal rate in both States.

"For all of these obligations taken up and payments made on account of the common debt, your oratrix has in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

"(17.) In addition to the above bonds there were outstanding on the first day of January, 1861, certain obligations of the State of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereinafter prayed for to be taken between the two States; and in such accounts your oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend throughout a period of so many years' duration that it is impossible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your oratrix thereon ascertained, under the supervision of a court of equity.

"(18.) Your oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

"First. The area of the territory now known as the State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume

therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

"Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

"Third. The State of West Virginia has further, by the repeated enactments and joint resolution of her legislature, recognized her liability for a just proportion of this debt.

"Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon express condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

"Fifth. While the transfer of this property, real and personal, and also of certain moneys of the Commonwealth of Virginia, purport to have been made to the State of West Virginia by the act of 'The Restored Government of Virginia,' there were in fact represented in said 'Restored Government' and in the legislature thereof no other people and no other territory than that which then, as now, constitute the State of West Virginia.

"(19.) The General Assembly of Virginia being anxious to effect a settlement of the portion of the common debt of the undivided State which remained unadjusted, and if possible to bring this about with the friendly coöperation and con-

currence of West Virginia, adopted: 'A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of West Virginia to the payment of those found to be entitled to the same,' approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

"Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

"The efforts made by this commission, acting under the above resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the commission, with the active coöperation of the Honorable Charles T. O'Ferral, the then Governor of the Commonwealth, made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the act approved March 6, 1900, entitled 'An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises,' the purpose of which act is sufficiently set forth in its title, and a copy of the act will also be hereinafter shown as one of the exhibits herewith filed.

"(20.) The commission acting under said last mentioned act made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this honorable court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said commission, and in strict conformity with the provisions of the said act of March 6, 1900, all of which will be more fully and completely

shown by the report of the said commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this bill."

"(21)." Enumerates exhibits attached to the bill and prayed to be regarded as part thereof.

"(22.)" The bill prayed: "Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same; that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet."

Attached to the bill were the numerous exhibits referred to.

The State of West Virginia demurred and assigned special causes as follows:

"First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

"Second. That this court has no jurisdiction of either the parties to or the subject matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

"Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

"Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

"Fifth. That it does not appear by said bill that the Attorney General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and

benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

"Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

"Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

"Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

Hearing on the demurrer was had March 11, 12, 1907.

Mr. William A. Anderson, Attorney General of the State of Virginia, and *Mr. Holmes Conrad*, for complainant:

The definitions of misjoinder under English chancery practice, as well as the practice in this country, show that there is no such vice in the bill, while want of interest by a co-plaintiff in the subject matter is ground of demurrer. Story's Eq. Pl., §§ 231, 232, 508, 509; Mitf. Pl. 160, 161. Plaintiffs who have no common interest, but assert distinct and several claims against one and the same defendant, cannot be joined. Story's Eq. Pl. § 279. On the other hand, where there is a community of interests among co-plaintiffs desiring the same relief against a common defendant, they may be joined. *Ware* v. *Duke of Northumberland*, 2 Anstruther's Rep. 469; *Brickenhoff* v. *Browns*, 6 Johns. Ch. 139, 151, 152.

It is impossible that there can be any misjoinder of parties plaintiff, because there is only one party plaintiff. Virginia, in her corporate capacity, is the only plaintiff in the suit. She does not sue in any representative capacity, though the bill discloses the fact that, by reason of the arrangements which she has made with the great mass of the holders of the

bonds of the old State, she does hold in her possession nearly all of those bonds as a depository, and *quoad* the custody thereof that she holds them in a fiduciary capacity; but she does not sue as trustee, but sues in her own name, for the purpose of obtaining the equitable relief to which the bill shows that she is fairly entitled.

One interest is that she shall be exonerated, at least to the extent of West Virginia's liability therefor, from any obligation to pay the bonds.

To obtain such just exoneration she has invoked the equitable jurisdiction of this court.

West Virginia is justly liable on many grounds for a just proportion of the public debt of her parent State, Virginia; West Virginia has not only repudiated and openly disavowed all such liability, but she has appropriated to her own use a large amount in value of the public property of Virginia, which Virginia might properly have applied as part of her public assets, to the payment of her public debt; and now, when by this bill in equity Virginia calls on West Virginia to account for the property which she has appropriated and applied to her own uses, and to come in before this court and have her proportion of the public debt ascertained, West Virginia, by her demurrer, protests that the part of the public debt which she owes and the part of the public assets which she has appropriated to her own use are two subjects of complaint so distinct and unconnected as should relieve her from making answer to the bill. This case is entirely different from *New York* v. *Louisiana* and *New Hampshire* v. *Louisiana*, 108 U. S. 78, where neither State had any direct or personal interest in the bonds of Louisiana or in the subject matters of controversy in those suits, but were mere volunteers, self-constituted trustees, without sustaining any relation, or interest, or obligation, or liability in regard to the bonds, or to any question presented in those causes.

While it may be true that, as to the custody of some of these unsatisfied bonds, Virginia sustains the relation of

trustee, she has an enormous interest as to those bonds—an interest as substantial and as real, if not in fact as great, as if she had actually paid these bonds in full.

The ground of demurrer that this court has no jurisdiction of either the parties to or the subject matter of this action, because the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon, is untenable. *Chisholm* v. *Georgia*, 2 Dall. 419; *Hans* v. *Louisana*, 134 U. S. 1; *Cohens* v. *Virginia*, 6 Wheat. 364, 375, 440; *Kansas* v. *Colorado*, 185 U. S. 125; *Missouri* v. *Illinois*, 180 U. S. 240.

This question has been directly passed upon by this court and its jurisdiction over controversies arising upon pecuniary demands has been sustained in *Georgia* v. *Brailsford*, 2 Dall. 402; *Texas* v. *White*, 7 Wall. 700; *Florida* v. *Anderson*, 91 U. S. 667; *Alabama* v. *Burr et al.*, 115 U. S. 413; and even more emphatically and conclusively in *United States* v. *North Carolina*, 136 U. S. 211; *United States* v. *Texas*, 143 U. S. 621; and *United States* v. *Michigan*, 190 U. S. 379, 396, 406.

Mr. John G. Carlisle and *Mr. Charles E. Hogg*, with whom *Mr. C. W. May*, Attorney General of the State of West Virginia, *Mr. W. Mollohan*, *Mr. George W. McClintic* and *Mr. W. G. Mathews* were on the brief, for defendant:

To create a controversy between two States, it seems to us that there must be an assertion of a substantial right of one State as such which is denied or repudiated by the other, and which relates to the interests of each as States, and that the determination of the isssue thus raised will promote or secure some substantial right of the one or the other of these States as States. *New Jersey* v. *New York*, 5 Pet. 285; *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Florida* v. *Georgia*, 11 How. 293; *Virginia* v. *West Virginia*, 11 Wall. 39, were cases in equity and all involved state boundaries. *Pennsylvania* v. *Wheeling*

Bridge Company, 9 How. 657; *S. C.*, 11 How. 528; *S. C.*, 13 How. 518; *S. C.*, 18 How. 429, was a case in equity involving the free and unobstructed navigation of the Ohio River which caused a special damage to the plaintiff State for which there was no adequate remedy at law.

The Commonwealth of Virginia has no such interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her any standing in a court of equity in relation thereto.

The right of Virginia to maintain a suit as sole plaintiff therein, must be determined by the well settled rules of equity practice as recognized and enforced by the English Court of Chancery, and as understood and applied by this court.

Virginia has no interest in these certificates, nor can her interests be in any manner affected by a decree in relation to these certificates.

If she has any connection with this part of the suit it is as its mere promoter, by virtue of her promise to the holders of the certificates—an agent for them—only an instrumentality for the institution of this suit.

This is not such interest as to support a suit in equity. The plaintiff's interest must be as substantial and certain as that of the defendant. *Smith* v. *Hollenbeck*, 46 Illinois, 252; *Smith* v. *Brittenham*, 109 Illinois, 540; *Ashby* v. *Ashby*, 39 La. Ann. 105; *S. C.*, 1 So. Rep. 282; *Field* v. *Maghee*, 5 Paige, 539; *Rogers* v. *Traders' Ins. Co.*, 6 Paige, 583; *Sedgwick* v. *Cleveland*, 7 Paige, 267.

The real owners of the deferred certificates have such a substantial interest and right of ownership therein as to make them indispensable parties, whose presence would oust the court of its jurisdiction.

The practice in this court in cases in equity is regulated by the former practice of the courts of chancery in England. And in cases of original jurisdiction it will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and follow the general rules

of those courts in conducting a cause to a finality. *California* v. *Southern Pacific Railroad*, 157 U. S. 229, 249.

The only instance wherein the court will deviate from or refuse to follow this practice is when it impairs the case by unnecessary technicalities, or defeats the purpose of justice. *California* v. *Southern Pacific Ry. Co., supra;* citing *Florida* v. *Georgia*, 17 How. 478; *Caldwell* v. *Taggart*, 4 Pet. 190; *Barney* v. *Baltimore*, 6 Wall. 280.

In the case before the court the holders of the deferred certificates, who own both the legal and equitable title thereto, are not made parties. The only plaintiff seeking relief is the State of Virginia, who has brought the suit in her own name without any title to this part of the subject matter of the suit, and without any direct or substantial interest in the result thereof. The purpose of this suit is to settle the liability of West Virginia on these deferred certificates to the owners and holders thereof, and any decree which is rendered in this case must relate solely to their rights. The court cannot enter any decree with reference to these certificates which must not necessarily affect the interests of these outstanding owners and holders, who are not before the court either as plaintiffs or defendants.

The purpose of the bill is not only to fix a liability on the State of West Virginia for the payment of these certificates, but also for an accounting to determine the extent of this liability. So it is clearly and at once perceivable that the holders of these certificates are vitally interested as to both of these purposes of the suit.

The fact that the commissioners of the Sinking Fund and Literary Fund of Virginia have in their possession comparatively small portions of the said certificates issued by the plaintiff does not give the plaintiff any cause of action against the defendant.

The plaintiff cannot assert the claim which she sets forth in her bill in a court of equity.

The prosecution of this suit by Virginia is solely in the

interests of the owners and holders of the deferred certificates issued by Virginia herself without recourse upon her, and set apart as a liability of West Virginia to the holders of the old obligations, which have been surrendered to the State of Virginia and by her cancelled in accordance with her own acts of legislation.

She therefore cannot come into a court of equity to assert a right of contribution against West Virginia; the decree which she seeks to obtain cannot inure to her benefit, but only to that of the holders of the deferred certificates; she must have paid everything for which she and the new State were jointly liable so as to relieve the new State from all liability before she can seek contribution from her joint obligor.

That this is the principle upon which rests the equitable right of contribution is the recognized and well settled doctrine of the courts. *Springer* v. *Foster*, 21 Ind. App. 15; *S. C.*, 60 N. E. Rep. 720; *Kirkpatrick* v. *Murphy*, 3 N. J. Law, 506; *Grove* v. *O'Brien*, 1 Maryland, 438; *Rooker* v. *Benson*, 83 Indiana, 250, 256; *Zook* v. *Clemmer*, 44 Indiana, 15; *Pegram* v. *Riley*, 88 Alabama, 399; *S. C.*, 6 So. Rep. 753; *Screven* v. *Joiner*, 1 Hill Ch. 252; *S. C.*, 26 Am. Dec. 199.

The party seeking contribution must have paid more than his share in order to maintain a suit for contribution. 9 Cyc. 699; 3 Am. & Eng. Dec. in Eq. 163.

The demand made by Virginia which she claims arises out of the acts of her General Assembly, passed February 3d and 4th, respectively, in the year 1863, whereby she transferred certain real and personal property belonging to her to be used by the new State when created and organized, if it has any validity, which is not conceded here, is purely a legal demand and one which cannot be asserted under any circumstances in a court of equity.

If it be an equitable demand, upon what principle or doctrine of equity does it rest? It is not secured by any lien; it is not in the nature of a trust; it rests upon no equities to be asserted in order to enter a decree or to make the claim

available. It is simply a money demand for the value of property which the plaintiff claims was used and appropriated by the defendant for which payment should be made.

In the Federal courts the right of trial by jury under the Seventh Amendment cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in a legal action may be preserved intact. *Scott* v. *Neely*, 140 U. S. 106, 117.

This court has no jurisdiction to settle or determine the principle upon which West Virginia shall be made liable for any portion of the old debt of Virginia, because this was matter of contract between Virginia and West Virginia upon the admission of the latter into the Union.

When West Virginia framed her constitution and inserted in it the provision concerning the public debt of Virginia created prior to 1861, and the State of Virginia through her legislature accepted the constitution of West Virginia as the basis of her consent, this created a compact between the two States and was absolutely binding both upon Virginia and West Virginia.

By this compact between Virginia and West Virginia, the former State referred to the legislature of the latter the matter of ascertaining "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and therefore this "proportion" cannot be otherwise ascertained or determined than by the consent of the State of West Virginia; nor can its liquidation be otherwise provided for than by a sinking fund sufficient in amount to pay the accruing interest, and redeem the principal of whatever sum may thus be ascertained as the equitable proportion that West Virginia agreed to assume. Virginia referred this matter absolutely to the judgment of the legislature of West

Virginia and tacitly agreed to abide by the action of this legislative body.

This stipulation or compact between Virginia and West Virginia, with reference to the public debt of the former, is a valid and binding contract, and Virginia can do nothing, either by legislation or otherwise, to impair its obligation. West Virginia has the undoubted moral and legal right to stand upon its terms; and if in the exercise of its judgment exercised upon a basis just and equitable, it should be ascertained by the legislature of West Virginia that the State owes nothing to the bondholders of the old debt of Virginia, then there is no obligation whatever subsisting which can be enforced by the holders of any part of the old debt of Virginia, and especially has Virginia herself no cause of action against this State.

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

The State of West Virginia was admitted into the Union June 20, 1863, under the proclamation of the President of the United States of April 20, 1863, in pursuance of the act of Congress approved December 31, 1862, upon the terms and conditions prescribed by the Commonwealth of Virginia in ordinances adopted in convention and in acts passed by the General Assembly of the "Restored Government of the Commonwealth," giving her consent to the formation of a new State out of her territory, with a constitution adopted for the new State by the people thereof. The ninth section of the ordinance adopted by the people of the "Restored State of Virginia" in convention assembled in the city of Wheeling, Virginia, on August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," provided as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to

the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia. . . ."

The consent of the Commonwealth of Virginia was given to the formation of a new State on this condition. February 3 and 4, 1863, the General Assembly of the "Restored State of Virginia" enacted two statutes in pursuance of the provisions of which money and property amounting to and of the value of several millions of dollars were, after the admission of the new State, paid over and transferred to West Virginia. The constitution of the State of West Virginia when admitted contained these provisions, being sections 5, 7 and 8 of Article VIII thereof, as follows:

"5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

"7. The legislature may at any time direct a sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt; and hereafter the State shall not become a stockholder in any bank. . . ."

"8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accru-

ing interest, and redeem the principal within thirty-four years."

The "public debt" and the "previous liability" manifestly referred to a portion of the public debt of the original State of Virginia and liability for the money and property of the original State, which had been received by West Virginia under the acts of the General Assembly above cited, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia, though one may be involved in the other; while the provisions of sections 7 and 8 were obviously framed in compliance with the conditions on which the consent of Virginia was given to the creation of the State of West Virginia, and the money and property were transferred. From 1865 to 1905 various efforts were made by Virginia through its constituted authorities to effect an adjustment and settlement with West Virginia for an equitable proportion of the public debt of the undivided State, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it is charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia.

The original jurisdiction of this court was, therefore, invoked by Virginia to procure a decree for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts, the adjudication and determination of the amount due Virginia by West Virginia in the premises.

But it is objected that this court has no jurisdiction because the matters set forth in the bill do not constitute such a controversy or such controversies as can be heard and determined in this court, and because the court has no power to enforce and therefore none to render any final judgment or decree herein. We think these objections are disposed of by many decisions of this court. *Cohens* v. *Virginia*, 6 Wheat. 264, 378, 406; *Kansas* v. *Colorado*, 185 U. S. 125; *Kansas* v. *Colorado*, May 13, 1907, *ante*, p. 46; *Missouri* v. *Illinois*, 180 U. S. 208; *S. C.*, 200 U. S. 496; *Georgia* v. *Copper Company*, May 13,

1907, *ante*, p. 230; *United States* v. *Texas*, 143 U. S. 621; *United States* v. *North Carolina*, 136 U. S. 211; *United States* v. *Michigan*, 190 U. S. 379.

In *Cohens* v. *Virginia*, the Chief Justice said: "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' 'and between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

And, referring to the Eleventh Amendment, it was further said:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the Nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would

be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

By the cases cited, and there are many more, it is established that, in the exercise of original jurisdiction as between States, this court necessarily in such a case as this has jurisdiction. *United States* v. *North Carolina* and *United States* v. *Michigan, supra,* were controversies arising upon pecuniary demands, and jurisdiction was exercised in those cases just as in those for the prevention of the flow of polluted water from one State along the borders of another State, or of the diminution in the natural flow of rivers by the State in which they have their sources through and across another State or States, or of the discharge of noxious gases from works in one State over the territory of another.

The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that State to Virginia, and when this court has ascertained and adjudged the proportion of the debt of the original State which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced. Consent to be sued was given when West Virginia was admitted into the Union, and it must be assumed that the legislature of West Virginia would in the natural course make provision for the satisfaction of any decree that may be rendered.

It is, however, further insisted that this court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of West Virginia to Virginia was submitted to the arbitrament and award

of the legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the constitution of West Virginia when admitted into the Union contained the provision: "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years." And it is said that, on May 13, 1862, the legislature of Virginia passed an act entitled "An act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State," by which consent was given to the creation of the proposed new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861;" and that by the act of Congress the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two States. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided "for the formation of a new State out of the territory of this State," and declared therein that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should "ascertain the same as soon as practicable," it referred to the method of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows

that what was meant by the expression that the "legislature shall ascertain" was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained. And it may well be inquired why, in the forty-three years that have elapsed since the alleged compact was entered into, West Virginia has never indicated that she stood upon such a compact, and, if so, why no step has ever been taken by West Virginia to enter upon the performance of the duty which such "compact" imposed, and to notify Virginia that she was ready and willing to discharge such duty.

It is also urged that Virginia had no interest in the subject matter of the controversy because she had been released from all liability on account of the public debt of the old Commonwealth, evidenced by her bonds outstanding on the first day of January, 1861. This relates to the acts of the General Assembly of Virginia of March 30, 1871, March 28, 1879, February 14, 1882, February 20, 1892, March 6, 1894, and March 6, 1900. According to the bill, Virginia by the act of March 30, 1871, and subsequent acts, in an attempt to provide for the funding and payment of the public debt, having estimated that the liability of West Virginia was for one-third of the amount of the old bonds, provided for the issue of new bonds to the amount of two-thirds of the total, and for the issue of certificates for the other third, which showed that Virginia held the old bonds so far as unfunded in trust for the holders or their assignees to be paid by the funds expected to be obtained from West Virginia as her "just and equitable proportion of the public debt." The legislation resulted in the surrender of most of the old bonds to Virginia, satisfied as to two-thirds, and held as security for the creditors as to one-third. We do not care to take up and discuss this legislation. We are satisfied that as we have jurisdiction, these questions ought not to be passed upon on demurrer. *Kansas* v. *Colorado*, 185 U. S. 125, 144, 145. And this also furnishes sufficient ground for not considering at length the objection of multi-

fariousness. The observations of Lord Cottenham, in *Campbell* v. *Mackay*, 1 Mylne & Craig, 603, that it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must be left where the authorities leave it, to the sound discretion of the court, have been often affirmed in this court. *Oliver* v. *Piatt*, 3 How. 333, 411; *Gaines* v. *Relf*, 2 How. 619, 642. But we do not mean to rule that the bill is multifarious. It is true that the prayer contains, among other things, the request, "that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix in her own right and as trustee aforesaid," but it also prays that the court "will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises." And we understand the reference to holding in trust to be in the interest of mere convenience, and that the bill cannot properly be regarded as seeking in chief anything more than a decree for "an equitable proportion of the public debt of the Commonwealth of Virginia on the first day of January, 1861." The objections of misjoinder of parties and misjoinder of causes of action may be treated as resting on matter of surplusage merely, and at all events further consideration thereof may wisely be postponed to final hearing. *Florida* v. *Georgia*, 17 How. 491, 492; *California* v. *Southern Pacific Company*, 157 U. S. 249.

The order will be—

Demurrer overruled without prejudice to any question, and leave to answer by the first Monday of next term.

In re JAMES POLLITZ, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 16, Original. Argued April 8, 1907.—Decided May 27, 1907.

The writ of mandamus cannot be used to perform the office of an appeal or writ of error; it will not issue to compel the Circuit Court to reverse its decision refusing to remand a case removed by a defendant on the ground that the controversy between it and the plaintiff is separate and fully determinable without the presence of the other defendants. Such a decision being within the jurisdiction and discretion of the court should be reviewed after final judgment by appeal or writ of error.

JAMES POLLITZ, a citizen of the State of New York, brought suit in the Supreme Court of the State of New York for the county of New York against the Wabash Railroad Company, a consolidated railroad corporation existing under the laws of the States of Ohio, Michigan, Illinois and Missouri, and a citizen of the State of Ohio; and sundry other defendants, chiefly citizens and residents of the State of New York, being individual directors of the railroad company; the trust company, registrar of the stock of the railroad company; a committee representing debenture holders; mortgage trustees, etc. The complaint alleged in substance that the railroad company in 1906 entered into certain negotiations for the retirement of the debenture mortgage bonds of the company through the issue of other securities, both bonds and stocks, and that the plan to accomplish that end was subsequently authorized and approved by the stockholders of the company and debenture mortgage bondholders, at a meeting at Toledo, October 22, 1906, at which the issue of certain new bonds and preferred and common stock of the company and the exchange of certain new bonds, preferred and common stock, for the company's debenture mortgage bonds was authorized and approved. The complaint alleged that the plan of exchange was unlawful, unauthorized, and contrary to the laws of the States in which

the company was organized, and was unjust, inequitable and injurious to complainant, who claimed to be the owner of one thousand shares of the common capital stock of the railroad company. It was also alleged that ninety per cent. of the debenture holders voted in favor of the exchange, and that the plan had been carried out as to more than nine-tenths of the debenture bonds, and new bonds and stocks to the requisite amount had been issued. And it was prayed that the plan "be decreed and adjudged to be *ultra vires*, and that all said bonds and the preferred and common stock, used and issued and applied by the said Wabash Railroad Company for the purpose and plan of said scheme be decreed and adjudged of no effect." The complaint prayed in the alternative that if the court should decree that Pollitz was not entitled to the main relief he had asked, then that he might have an accounting by the defendant officers and directors of the railroad company, etc., in respect of the new bonds and common and preferred stock which had been issued under the plan of exchange.

The railroad company filed its petition to remove the case into the Circuit Court of the United States for the Southern District of New York, which set forth in substance the foregoing matters, and further averred:

"That your petitioner disputes the claim against it as set forth by the plaintiff in his complaint, and denies that the plaintiff is entitled to the judgment and relief prayed for against this petitioner or to any judgment or relief against it; and this petitioner alleges that the fundamental and primary controversy, as set forth in said complaint, is whether or not the plan for the exchange of the debenture mortgage bonds by this petitioner, the authorization and creation by it of the new securities in the said complaint set forth and the issue of the same by it for the purpose of carrying said plan into effect is, as alleged in said complaint, illegal, unlawful, void and prohibited by the charter of this petitioner and the laws under which it is incorporated; and whether said new se-

curities are, as alleged in said complaint, invalid and void; and that such controversy is a separable and distinct controversy between the plaintiff and this petitioner.

"That a complete determination of said controversy can be had without the presence of any of the defendants in this action other than this petitioner; and that all of said other defendants are neither indispensable nor necessary parties to the complete determination of said controversy.

"That the foregoing controversy, which is solely between the plaintiff and the petitioner, must be determined before any other controversy alleged in the complaint can be considered and determined; and that said controversy between the plaintiff and this petitioner, as above set forth, is separate and distinct from any other or further controversy.

"That said fundamental and primary controversy herein between the plaintiff and this petitioner is a controversy wholly between citizens of different States—to wit: Between the plaintiff, a citizen of the State of New York, and this petitioner, a citizen of the State of Ohio."

The cause was removed, and Pollitz made a motion to remand, which was denied by the Circuit Court, Lacombe, J., presiding.

Pollitz thereupon applied to this court on March 18 for leave to file a petition for a writ of mandamus directing the cause to be remanded to the state court. Leave to file was granted March 25, and a rule was entered thereon returnable April 8, to which return was duly made to the effect that the order denying the motion of Pollitz to remand the cause had been made and entered in the exercise of the jurisdiction and judicial discretion conferred upon the circuit judge by law and for the reasons expressed in his opinion filed with the order. The case was heard on the return to the rule.

Mr. Roger Foster for petitioner:

The Circuit Court of the United States had no original jurisdiction of the case, since the presence of all the defendants

was indispensable to an adjudication concerning any part of the relief prayed against the Wabash Railroad Company. There can be no right to the removal of the case of a controversy, of which that court could not have taken original jurisdiction. *Ex parte Wisner,* 203 U. S. 51.

There can be no separable controversy where all the parties are indispensable to the determination of the matters in dispute between the plaintiff and the defendant, who seeks a removal.

There can be no removal, when an indispensable party to the controversy is a citizen of the same State as any party on the side opposite to him. When the removal is because there are two controversies, the case must be separable into parts, so that in one of them a controversy will be presented wholly between citizens of different States, which can be fully determined without the presence of the other parties. *Gardner* v. *Brown,* 21 Wall. 36; *Hyde* v. *Ruble,* 99 U. S. 407; *Fraser* v. *Jennisen,* 106 U. S. 191; *Winchester* v. *Loud,* 108 U. S. 130; *Shainwald* v. *Lewis,* 108 U. S. 158; *Ayers* v. *Wiswall,* 112 U. S. 187; *St. Louis & S. F. R. Co.* v. *Wilson,* 114 U. S. 60; *Torrence* v. *Shedd,* 144 U. S. 527; *Merchants' Cotton Press & Storage Co.* v. *Insurance Co. of North America,* 151 U. S. 368; *Bixby* v. *Couse,* Fed. Cas. No. 1451; *S. C.,* 8 Blatchf. 73; *Maine* v. *Gilman,* 11 Fed. Rep. 214; *Connell* v. *Utica, U. & E. R. Co.,* 13 Fed. Rep. 241; *New Jersey Zinc & Iron Co.* v. *Trotter,* 18 Fed. Rep. 337; *Gudger* v. *Western N. C. R. Co.,* 21 Fed. Rep. 81; *Capital City Bank* v. *Hodgin,* 22 Fed. Rep. 209; *Snow* v. *Smith,* 88 Fed. Rep. 657; *Insurance Co. of North America* v. *Delaware Mut. Ins. Co.,* 50 Fed. Rep. 243; *Burke* v. *Flood,* 1 Fed. Rep. 541; *Lyddy* v. *Gano,* 26 Fed. Rep. 177; *Perrin* v. *Lepper,* 26 Fed. Rep. 545; *Vinal* v. *Continental Const. & Imp. Co.,* 35 Fed. Rep. 673; *Rogers* v. *Van Nortwick,* 45 Fed. Rep. 513; *Barth* v. *Coler,* 60 Fed. Rep. 466; *Carter* v. *Scott,* 82 Georgia, 297; *S. C.,* 8 S. E. Rep. 421; *Burch* v. *Davenport & St. P. R. Co.,* 46 Iowa, 449; *S. C.,* 26 Am. Rep. 150; *Succession of Townsend* v. *Sykes,* 38 La. Ann. 410; *National*

Docks & New Jersey Junction Connecting Ry. Co. v. *Pennsylvania R. Co.*, 52 N. J. Eq. (7 Dick.) 58; *S. C.*, 28 Atl. 71.

Where there are separate remedies against the several parties upon the same cause of action, there is no separable controversy. *Gudger* v. *Western N. C. R. Co.*, 21 Fed. Rep. 81; *Winchester* v. *Loud*, 108 U. S. 130; *Merchants' Cotton Press & Storage Co.* v. *Insurance Co. of N. A.* 151 U. S. 368; *Ayers* v. *Wiswall*, 112 U. S. 187.

Where defendants are interested in separate parts of the same subject matter, no separable controversy is presented. *Temple* v. *Smith*, 4 Fed. Rep. 392; *Merchants' Nat. Bank* v. *Thompson*, 4 Fed. Rep. 876; *Freidler* v. *Chotard*, 19 Fed. Rep. 227; *In re City of Chicago*, 64 Fed. Rep. 897.

The trustees of the new mortgage, the issue of bonds under which is attacked, and probably some other representatives of the bondholders, by whom the complaint prays that a re-exchange may be compelled of whatever has been exchanged, and that a further exchange may be enjoined; the depositary of the new securities, the registrar of the new stock, and the directors charged with fraud, are all indispensable parties to the relief here sought. *Brown* v. *Trousdale*, 138 U. S. 389.

Every party to a contract is a necessary party in a suit to set it aside, or unless its performance would amount to a nuisance to enjoin a person from bringing it into effect. *Northern Ind. R. Co.* v. *Michigan C. R. Co.*, 15 How. 233; *Shields* v. *Barrow*, 17 How. 130; *Coiron* v. *Millaudon*, 19 How. 113; *Gaylords* v. *Kelshaw*, 1 Wall. 81; *Ribon* v. *Railroad Cos.*, 16 Wall. 446; *Lawrence* v. *Wirtz*, 1 Wash. C. C. 417; *Tobin* v. *Walkinshaw*, 1 McAll. 26; *Bell* v. *Donohoe*, 17 Fed. Rep. 710; *Florence S. Mach. Co.* v. *Singer Mfg. Co.*, 4 Fisher's Pat. Cas. 329; *S. C.*, 8 Blatchf. 113; *Chadbourne* v. *Coe*, 45 Fed. Rep. 822; *Empire C. & T. Co.* v. *Empire C. & M. Co.*, 150 U. S. 159; *New Orleans W. Co.* v. *New Orleans*, 164 U. S. 471; *S. C.*, in C. C. A. 51 Fed. Rep. 479; *Clarke* v. *Great Northern Ry. Co.*, 81 Fed. Rep. 282; *Wall* v. *Thomas*, 41 Fed. Rep. 620; *Raphael* v. *Trask*, 118 Fed. Rep. 777.

Since both the debenture bondholders and the holders of the new bonds are numerous, it is absolutely indispensable that some one should be made a party to protect their interests. The trustee of the mortgage is, consequently, an indispensable party. *Ribon* v. *Railroad Co.*, 16 Wall. 446; *Wenger* v. *Chicago & E. R. Co.*, 114 Fed. Rep. 34.

The bondholders' committee is also an indispensable party, being a party to the original contract which provided for this illegal exchange of securities. *Farmers' Loan & Trust Co.* v. *Cape Fear & Y. V. Ry. Co.*, 71 Fed. Rep. 38.

The trustee of an active trust is always an indispensable party. *Knapp* v. *Railroad Co.*, 20 Wall. 117; *Rust* v. *Britol Silver Co.*, 58 Fed. Rep. 611; *Tell* v. *Walker*, Fed. Cas. No. 13,812; *Thair* v. *Life Association of America*, 112 U. S. 717; *Pepper* v. *Fordysche*, 119 U. S. 469.

The registrar of the stock, the Mercantile Trust Company, and the United States Mortgage and Trust Company, which is the depositary of the new bonds, are also indispensable parties.

It is well settled that a stakeholder in the possession of property is an indispensable party to a suit affecting the same. *Wilson* v. *Oswego Twp.*, 151 U. S. 56; *Massachusetts & S. Constr. Co.* v. *Cane Creek Twp.*, 155 U. S. 283; *Scoutt* v. *Keck*, 73 Fed. Rep. 900.

The remand was not denied because of the pendency of any other suit in the Federal court; and had that been so, it would have been no justification for the removal.

Neither the opinion of Judge Lacombe, nor his order, nor the petition for the removal, makes any reference to any previous suit in the Federal court, as an alleged ground for the removal. The respondents are bound by the record below. They cannot ask this court to take judicial notice of papers below that are not recited in the order.

Were it otherwise, the courts would be liable to be misled by garbled statements of the contents of their records, not verified by affidavit, nor by the certification of the clerk. *Thornton* v. *Carson*, 7 Cranch, 596; *Pennsylvania Co.* v. *Ben-*

der, 148 U. S. 255; *Rout* v. *Ninde*, 118 Indiana, 123; *S. C.*, 20 N. E. Rep. 704; *Magee* v. *Hartzell*, 7 Kan. App. 489; *S. C.*, 54 Pac. 129; *Dours* v. *Cazentre*, McGloin (La.), 251; *Stockbridge* v. *Fahnestock*, 87 Maryland, 127; *S. C.*, 39 Atl. 95; *Scott* v. *Scott*, 17 Maryland, 78; *Cherry* v. *Baker*, 17 Maryland, 75; *Lyon* v. *Boilvin*, 7 Illinois, 629.

Were the record of the suit, to which the respondents referred, to be examined, it would be found to be entirely different from that which is the subject of the present review, and that the present case in no respect could be deemed ancillary to the same.

Even, however, were the suit below ancillary to one previously brought, of which there is no suggestion in the pleading or the record, still that would constitute no ground for the removal.

In *Gilmore* v. *Herrick*, 93 Fed. Rep. 525, Judge Taft said: "There is no language in any removal act which justifies the removal of a cause from a state court to a Federal court, on the ground that it is ancillary to a suit in a Federal court." To the same effect are *Ray* v. *Pierce*, 81 Fed. Rep. 881; *Pitkin* v. *Cowen*, 91 Fed. Rep. 599; *State Trust Co.* v. *Kansas City, P. & G. R. Co.*, 110 Fed. Rep. 10.

Mandamus is the proper remedy.

It would be a needless waste of time of the court below to reserve a decision upon this vital point of jurisdiction until after a final hearing on the merits. *Ex parte Wisner*, 203 U. S. 51.

Mr. Rush Taggart, with whom *Mr. Lawrence Greer* was on the brief, for respondents:

Mandamus is not the proper remedy.

Where the record discloses no lack of jurisdiction, and where judicial acts have been performed by the inferior court, these may not be reviewed in any other manner than that properly prescribed through writ of error or appeal. *United States* v. *Lawrence*, 3 Dall. 42; *Ex parte Bradstreet*, 7 Pet. 634; *Ex parte Bradley*, 7 Wall. 364; *Ins. Co.* v. *Comstock*, 16 Wall. 258;

R. R. Co. v. *Wiswall*, 23 Wall. 507; *Ex parte Loring*, 94 U. S. 418; *Virginia* v. *Rives*, 100 U. S. 313; *In re Rice*, 155 U. S. 396; *In re Atlantic City R. R.*, 164 U. S. 693. *Ex parte Wisner* distinguished.

The proper and adequate remedy is by appeal after entry of final judgment or decree.

The writ of mandamus cannot be used to perform the functions of an appeal or writ of error, and is only granted when there is no other adequate remedy available. In this case the petitioner has an adequate remedy by way of an appeal or writ of error.

The whole issue upon the motion to remand is, whether a complete determination of a separable controversy can be had without the presence of the defendants other than the Wabash Railroad Company, and this question has been judicially determined by the proper tribunal, to which it was regularly presented. To issue a writ of mandamus to that tribunal, directing the remand of the action, would constitute a premature review and reversal of this judicial determination in a manner not permitted by law.

Whether or not the other defendants were indispensable parties; whether or not a separable controversy existed, are judicial questions which have been decided by the proper tribunal, whose decision thereon is final until reversed in the regular manner.

The correctness or incorrectness of the judicial action taken by the court below in deciding these questions cannot be reviewed by this court at this time and in the manner sought. The petitioner must await the entry of a final judgment before attempting to review by appeal the action of the court below. *Graves* v. *Corbin*, 132 U. S. 571; *Mo. Pac. Ry. Co.* v. *Fitzgerald*, 160 U. S. 556; *The Removal Cases*, 100 U. S. 457.

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

The suit was commenced in the state court by a citizen

and resident of the city, county and State of New York against a corporation, a citizen of the State of Ohio, and other defendants, many of whom were residents and citizens of the State of New York, the value of the matter in dispute, exclusive of interest and costs, exceeding the jurisdictional sum.

The defendant, the Wabash Railroad Company, a citizen of Ohio, filed its petition and bond in proper form for the removal of the suit into the United States Circuit Court for the Southern District of New York, on the ground of separable controversy so far as it was concerned, and it was removed accordingly. A motion to remand was made and denied by the Circuit Court, which held that the controversy was separable, and that the other defendants were not indispensable or necessary parties to the complete determination of that separable controversy.

The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court, to which the decision was by law committed.

The application to this court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.

But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. *In re Grossmayer, Petitioner*, 177 U. S. 48; *In re Hohorst, Petitioner*, 150 U. S. 653. And so where the court assumes to exercise jurisdiction on removal when on the face of the record abso-

lutely no jurisdiction has attached. *Virginia* v. *Paul*, 148 U. S. 107; *Ex parte Wisner*, 203 U. S. 449.

"In *In re Hohorst, Petitioner*, 150 U. S. 653, the bill was filed in the Circuit Court of the United States for the Southern District of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. 148 U. S. 262. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judges of the Circuit Court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded." *In re Atlantic City Railroad*, 164 U. S. 633.

In *Ex parte Wisner*, Wisner, a citizen of the State of Michigan, commenced an action at law in the Circuit Court for the city of St. Louis, State of Missouri, against Beardsley, a citizen of the State of Louisiana. After service of summons on Beardsley, he filed his petition to remove the action from the state court into the Circuit Court of the United States for the Eastern District of Missouri, on the ground of diversity of citizenship, with the proper bond, and an order of removal was made by the state court, and the transcript of record was filed in the Circuit Court. Wisner (who had had no choice but to sue in the state court) at once moved to remand the case, on the ground that the suit did not raise a controversy within the jurisdiction of the Circuit Court, and that as it appeared on the face of the record that plaintiff was a citizen and resident of Michigan, and defendant a citizen and resident of Louisiana, the case was not one within the original jurisdiction of the Circuit Court, in accordance with the statute providing that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought

only in the district of the residence of either the plaintiff or the defendant. The motion to remand was denied, and Wisner applied to this court for a writ of mandamus which was subsequently awarded.

In the present case the removal was granted and sustained on the ground that there was a controversy between the removing defendant and plaintiff, which could be fully determined as between them without the presence of the other defendants. That being so, the suit might have been brought originally in the Circuit Court against the railroad company as sole defendant.

If the ruling of the Circuit Court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582.

Rule discharged; petition dismissed.

HOMER E. GRAFTON, PLAINTIFF IN ERROR *v.* THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 358. Argued March 18, 19, 1907.—Decided May 27, 1907.

The prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippine Islands.

A person is not put in second jeopardy unless his prior acquittal or conviction was by a court having jurisdiction to try him for the offense charged.

The judgment of a court-martial having jurisdiction to try an officer or soldier for a crime is entitled to the same finality and conclusiveness as to the issues involved as the judgment of a civil court in cases within its jurisdiction is entitled to.

General courts-martial may take cognizance, under the 62d article of war, of all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory within which he is serving; and, while this jurisdiction is not exclusive, but only concur-

rent with that of the civil courts, if a court-martial first acquires jurisdiction its judgment cannot be disregarded by the civil courts for mere error, or for any reason not affecting the jurisdiction of the court rendering it.

The same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government.

Although the same act when committed in a State might constitute two distinct offenses, one against the United States and the other against the State, for both of which the accused might be tried, that rule does not apply to acts committed in the Philippine Islands. The government of a State does not derive its powers from the United States, while that of the Philippine Islands does owe its existence wholly to the United States.

A soldier in the army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippine Islands, by a military court-martial of competent jurisdiction proceeding under authority of the United States, cannot be subsequently tried for the same offense in a civil court exercising authority in that Territory.

THE facts are stated in the opinion.

Mr. Clarence S. Nettles and *Mr. John H. Atwood,* with whom *Mr. Frederic D. McKenney* was on the brief, for plaintiff in error:

The plaintiff in error, having been tried and acquitted of the alleged homicide by a lawfully constituted court, having jurisdiction of his person and the subject matter of the offense, his second trial unlawfully put him in jeopardy of punishment a second time for the same offense, in direct violation of the Fifth Amendment, and sec. 5 of the Act of July 1, 1902 (32 Stat. at L. 691, chap. 1369).

Our courts have always guarded, with jealous care, the constitutional right of accused persons not to be twice placed in jeopardy for the same offense. *Ex Parte Lange,* 18 Wall. 205; 1 Bishop on Criminal Law, § 979; *The Abbottsford,* 92 U. S. 440; *Coleman* v. *Tennessee,* 97 U. S. 509; *People* v. *Minor,* 144 Illinois, 308; *State* v. *Bowen,* 45 Minnesota, 145; *State* v. *Lange,* 96 Tennessee, 668.

Plaintiff in error was tried and acquitted by a lawfully constituted court, having jurisdiction of his person and the subject matter, upon a valid indictment, upon the same offense alleged in the indictment upon which he was tried in the court below. *Ex parte Milligan,* 4 Wall. 123; *Ex parte Davidson,* 21 Fed. Rep. 620; *Ex parte Reed,* 100 U. S. 13; *In re McVey,* 23 Fed. Rep. 878.

The charge and specifications upon which the plaintiff was arraigned and tried in the general court-martial, conformed to the pleading and practice of military courts, was sufficient to support a valid judgment, and cannot be attacked in a collateral proceeding.

Neither this court, nor any other civil tribunal has jurisdiction or authority to adjudicate any question relative to the sufficiency of the pleading and practice of courts-martial, or to undertake any inquiry as to the proceedings of a court-martial, except for the purpose of ascertaining two things: First, whether the court had jurisdiction of the person and the subject matter of the offense. Second, whether, having jurisdiction and having arrived at its conclusions, the sentence imposed is warranted by law. A court-martial, as a legally constituted court, having the jurisdiction, has the right to determine for itself the practice and procedure under the Articles of War, and whether or not the charges and specifications are properly pleaded. *In re McVey,* 23 Fed. Rep. 878.

The offense with which the plaintiff is charged, and for the commission of which he now stands in jeopardy of punishment, is in fact identical with that of which he was acquitted by the judgment of the general court-martial. 2 Am. & Eng. Enc. of Law, 247; *Hoffman* v. *State,* 20 Maryland, 425; *Holt* v. *State,* 38 Georgia, 137; *State* v. *Cooper,* 13 N. J. Law, 361; *State* v. *Cameron,* 50 Tennessee, 78; *Wilson* v. *State,* 24 Connecticut, 57; *Roberts* v. *State,* 14 Georgia, 8; *State* v. *Keogh,* 13 La. Ann. 243.

On the rule of construction established by these authorities to the facts of this case no doubt remains as to the identity

of the offense alleged in the indictment with that for which the plaintiff was tried by the court-martial. It is the same transaction. The two cases rest upon the same facts, and have been testified to by the same witnesses. The accused is the same, and he is charged with the homicide of the same person, at the same time and place, and under the same circumstances. What more could be asked to establish the identity of the transaction set forth in the two records?

The Solicitor General for defendant in error:

The acquittal by court-martial was no bar to the civil prosecution. The precise point has never been adjudged by this court. *Ex parte Mason*, 105 U. S. 696, 699. The military and civil jurisdictions are not mutually exclusive; the former takes cognizance of the offense against the military organization and discipline, the latter of the crime against the whole community. An officer or soldier of the army who commits an act anywhere within the territorial jurisdiction of the United States, which is criminal both by the military and the general law, is subject to trial by the latter in preference to the former. An act punishable by the laws of the land is to be punished according to those laws, that is, by the competent ordinary tribunals of the State or Territory in which the offense was committed. Our Articles of War are based on the British Mutiny Acts, which have always provided in terms or in substance that they shall not be construed to exempt any officer or soldier whatsoever from being proceeded against by due course of law. 4 Geo. IV, c. 81, § 17; 3 & 4 Will. IV, c. 5, § 45; 3 & 4 Vict. c. 37, § 5; see also Tytler's Essay on Military Law, 153, 154; Winthrop's Military Law, 2d ed. 124, 396, 1076; 7 Op. A. G. 561.

Practically, as to all acts of ordinary violence committed within the interior of the army, the civil authority leaves to the military complete and exclusive jurisdiction. But a felony is distinguishable, whether committed within or without the army. In the case of murder it is the right of the State to

move the courts to apply the laws of the land to the criminal. 6 Op. A. G. 413, 506; see also *United States* v. *Amy*, cited in *Negro Ann Hammond* v. *State*, 14 Maryland, 135; *Moore* v. *Illinois*, 14 How. 13; *Fox* v. *State of Ohio*, 5 How. 434; *United States* v. *Marigold*, 9 How. 569. When a man stands in the particular dual relation of criminal liability to a court-martial and to the civil courts, he may be punished by each without involving double jeopardy, and no distinction can be drawn between different offenses against different sovereigns and different offenses against the same sovereign. *United States* v. *Clark*, 31 Fed. Rep. 710; *United States* v. *Cashiel*, Fed. Cas. 14,744; *Morey* v. *Comm'lth*, 108 Massachusetts, 433, cited in *Carter* v. *McClaughry*, 183 U. S. 365; *United States* v. *Cruikshank*, 92 U. S. 542; *Moore* v. *People*, 14 How. 17; *United States* v. *Barnhart*, 22 Fed. Rep. 285; *State* v. *Taylor*, 133 N. Car. 755; *Abbott* v. *State*, 75 N. Y. 602; *Campbell* v. *People*, 109 Illinois, 565. The military authorities establish these doctrines as a matter of existing practice. Benet, Military Laws and Courts-Martial, 100, 102; Dig. Op. J. A. G., par. 306, 309, p. 92; *id.* par. 102, p. 38; *id.* par. 148, p. 48.

The Court of First Instance had jurisdiction. However the cases may stand as between national and local jurisdiction, civil or criminal, over a reservation of the United States in one of the original States or in a State subsequently admitted, there is no doubt of the plenary power of Congress anywhere in a Territory. *United States* v. *Cornell*, 2 Mason, 60; *People* v. *Godfrey*, 17 Johns. 225; *Comm'lth* v. *Young*, Brightly (Pa.), 302; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *United States* v. *Stahl*, 1 Woolw. 192; *United States* v. *Ward*, 1 Woolw. 1; *Painter* v. *Ives*, 4 Nebraska, 122; *Marion* v. *State*, 16 Nebraska, 349; *McCracken* v. *Todd*, 1 Kansas, 148; *Clay* v. *State*, 4 Kansas, 49; *United States* v. *McBratney*, 104 U. S. 621; *Ex parte Crow Dog*, 109 U. S. 556; *United States* v. *Kagama*, 118 U. S. 375; *In re Wilson*, 140 U. S. 575; *Mormon Church* v. *U. S.*, 136 U. S. 1.

Congress has created the territorial courts, and authorized

and approved their general civil and criminal jurisdiction. R. S. Title XXIII, c. 1, 2, especially §§ 1851, 1868, 1895, 1910, 1925; *Ex parte Crow Dog*, 109 U. S. 560; *Ex parte Gon-Shay-Ee*, 130 U. S. 343; *Franklin* v. *United States*, 1 Colorado, 35. Congress has not distinguished between crimes committed by or against military persons or between crimes so committed on or off a military reservation. In defining and punishing crimes subject to exclusive Federal jurisdiction, Congress had in mind the case of a Federal reservation in a State and not the case of a Territory in general, or of a reservation within a Territory. As Congress has exclusive jurisdiction everywhere in a Territory, and has made no exception regarding a military reservation, it would seem that Congress intends the jurisdiction over ordinary crimes to be exercised by the local courts.

There is competent civil judicature in the Philippines established by the legislature. During the war and insurrection there was at first a suspension of the civil courts, but they were gradually restored with their former jurisdiction, first on the civil and then on the criminal side. G. O. 58, 1 Pub. Laws Phil. Com. pp. 1082, 1095; Act of June 11, 1901, *id.* 252, 262; Act of August 5, 1901, *id.* 375; Act of May 16, 1902, *id.* 963. The civil government has passed laws in aid of the military control of reservations for military uses, but they plainly assert the civil jurisdiction so far as it does not interfere with military administration or use. Act of November 24, 1902, 2 Pub. Laws, 157; Act of Sept. 3, 1903, 3 *id.* 9; act of April 28, 1904, *id.* 327. There is no substantial distinction between the case of a military reservation in the Philippines and in an organized Territory of the United States. Congress has directed that all laws passed by the Philippine government shall be reported to Congress, and reserved the power to annul the same. Act of July 1, 1902, 32 Stat. 691.

The reservation by the President of lands in the Philippines for military purposes merely subjects them to the proprietary control of the National Government, and does not withdraw

them from the operation of laws passed by the commission nor from the jurisdiction of the regularly constituted authorities. 1 Op. A. G. Phil. I, 326; *id.* 332; 4 O. G. 61. No reservation of exclusive jurisdiction can be claimed under the order of reservation itself. G. O. 34, War Dept. Oct. 13, 1903.

Finally, it is found here also that the existing military law of the United States holds that territorial courts take jurisdiction of a crime committed on a reservation. Dig. Op. J. A. G. par. 96, p. 36; *id.* par. 101, p. 38; *id.* par. 2437, p. 687; *id.* par. 2439, p. 687.

Plaintiff in error Grafton was not entitled to be indicted by a grand jury or tried by a petit jury. It is well settled that the Sixth Amendment to the Constitution does not apply to prosecutions by a State. *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581, and cases cited. The right to trial by jury has not been extended to our territorial possessions. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138, 149.

The claim is made here that because defendant was in the Philippines in pursuance of his duty by virtue of military orders, the decision in the *Dorr case* does not apply. But anyone who violates law is to be tried by the law violated, whether in a State or a Territory or a possession of the United States. *In re Ross*, 140 U. S. 453. No objection can be predicated on the literal restriction of the 59th Article of War to "any offense against the person or property of any *citizen* of the United States." The *Ross case* is authority for the conclusion that the law means not only citizens but "also all who though not strictly citizens, are . . . equally entitled to the care and protection of the Government." 140 U. S. pp. 475, 476, citing 1 Hale's Pleas of the Crown, 542. While citizens and others within the United States are entitled to trial by jury in criminal cases arising under the Constitution and laws of the United States, neither citizens nor others, whether in the military service or not, are so entitled before a tribunal created by or under the authority of the United States, either in a

foreign country or in a territorial possession of the United States. 140 U. S. p. 464, citing *Cook* v. *United States*, 138 U. S. 157, 181.

If soldiers in the Philippines are to be tried in accordance with the constitutional provisions, but other citizens and the native inhabitants have no such right, there would be a violation of the guarantee of equal protection of the laws. Sec. 5, Philippine Government Act.

Plaintiff in error, Grafton, was not in the performance of his military duty, and is not justifiable. This was not the case of an escaping felon. *Drury* v. *Lewis*, 200 U. S. 1, 8. Unless the accused has reasonable ground of apprehension at the time, the justification of self-defense will fail. The rule that one may pursue his adversary until he has secured himself from all danger, and may even kill him in so doing (1 East P. C. 271), applies only where the aggressor is retreating in order to gain advantage so as to renew the conflict; the right to pursue and kill a retreating assailant ceases as soon as the necessity for defense has ceased and the danger is no longer immediate and impending. 4 Bl. Com. 185; *Morgan* v. *State*, 67 S. W. Rep. 420; *Johnson* v. *State*, 50 S. W. Rep. 343; *People* v. *Hecker*, 109 California, 451; *Luckinbill* v. *State*, 52 Arkansas, 45; *Oregon* v. *Conally*, 3 Oregon, 69; *State* v. *Scott*, 4 Ired. 409; *State* v. *Harris*, 4 Jones, 190; *Dill* v. *State*, 25 Alabama, 15; *Dyson* v. *State*, 26 Mississippi, 362; *Holmes* v. *State*, 23 Alabama, 24; *Carroll* v. *State*, 23 Alabama, 33. The act was plainly deliberate here, because Grafton knew, or ought to have known under the circumstances, that he need not shoot again, and the killing was unnecessary if not wanton.

Mr. Justice Harlan delivered the opinion of the court.

The writ of error brings up for review a judgment of the Supreme Court of the Philippine Islands, affirming a judgment of the Court of First Instance in the Province of Iloilo, by which the plaintiff in error, Grafton, was adjudged guilty

of homicide as defined by the Penal Code of the Philippines, and sentenced to imprisonment for twelve years and one day.

The history of this criminal prosecution, as disclosed by the record, is as follows:

Homer E. Grafton, a private in the Army of the United States, was tried before a general court-martial convened in 1904 by Brigadier General Carter, commanding the Department of the Visayas, Philippine Islands, upon the following charge and specifications: "Charge: Violation of the 62nd Article of War: Specification I. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Florentino Castro, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P. I., July 24th 1904. Specification II. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Felix Villanueva, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P. I., July 24th 1904."

By the 58th Article of War it is provided: "In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which such offense may have been committed."

The 62d Article of War is in these words: "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a

regimental, garrison, or field officers' court-martial according to the nature and degree of the offense, and punished at the discretion of such court."

The accused pleaded not guilty to each specification as well as to the charge. At the trial he made the following admission in writing: "I admit that on July 24th, 1904, I was a member of a detachment of Company G, 12th Infantry, on duty at Buena Vista Landing, Guimaras, P. I.; that on July 24th, 1904, I was regularly detailed on guard and was a member of the first relief. That I was on post between the hours of 2 and 4 p. m. In the execution of my duty I shot two male Philippinos with a U. S. magazine rifle, caliber .30."

The court found the soldier not guilty as to each specification and not guilty of the charge. His acquittal was approved by the Department Commander on August 25th, 1904, and he was released from confinement and restored to duty. It appeared in proof that the accused was of excellent character; and it is stated in the opinion of the Supreme Court of the Philippines that, before holding the court-martial, the Department Commander offered to submit the case to the Court of First Instance of the Province, but it did not appear what action was taken by the judge of that court in reference to that offer.

On the twenty-eighth day of November, 1904, the prosecuting attorney of the Province of Iloilo, Philippine Islands, filed a criminal information or complaint in the name of the United States, in the Court of First Instance of that Province, as follows: "The subscriber accuses Homer E. Grafton of the crime of assassination, committed in the manner following: That on the 24th of July, 1904, and in the barrio of Santo Rosario, within the jurisdiction of the municipality of Buena Vista, Guimaras Island, province of Iloilo, Philippine Islands, the said accused, with illegal intention and maliciously and without justification and with treachery and deliberate premeditation killed Felix Villanueva in the manner following: That on said day and in said barrio the said accused, Homer E.

Grafton, with the rifle that he carried at the time, known as the United States magazine rifle c. .30, fired a shot directly at Felix Villanueva, causing with said shot a serious and necessarily fatal wound, and in consequence of said wound the aforesaid Felix Villaneuva died immediately after the infliction thereof, in violation of the law."

When the above information was filed, as well as when the court-martial convened, the Philippines Penal Code provided as follows:

"Art. 402. He who shall kill his father, mother, or child, whether legitimate or illegitimate, or any other of his ascendants or descendants or his spouse, shall be punished as a parricide, with the penalty of *cadena perpetua* to death.

"Art. 403. He who, without being included in the preceding article, shall kill any person, is guilty of assassination if the deed is attended by any of the following circumstances: (1) With treachery; (2) For price or promise of reward; (3) By means of flood, fire, or poison; (4) With deliberate premeditation; (5) With vindictiveness, by deliberately and inhumanly increasing the suffering of the person attacked. A person guilty of assassination shall be punished with the penalty of *cadena temporal* in its maximum degree to death.

"Art. 404. He who, without being included in the provisions of article 402, shall kill another without the attendance of any of the circumstances specified in the foregoing article is guilty of homicide. A person guilty of homicide shall be punished with the penalty of *reclusión temporal*."

At the trial in the Court of First Instance the accused interposed a demurrer, alleging that that court had no jurisdiction to try him for the offense charged for the following reasons: The acts constituting the alleged offense were committed within the limits of a military reservation of the United States and by a soldier duly enlisted in the Army of the United States, in the line of duty; the Court of First Instance of the Philippine Islands had no jurisdiction of the persons of officers or enlisted men of the United States Army for offenses com-

mitted by them in the performance of military duty; such courts were not constitutional courts as contemplated by the 3d Article of the Constitution of the United States, and were without jurisdiction to try causes of which such constitutional courts have exclusive jurisdiction; the courts of the Philippine Islands could not deprive the accused of his constitutional privilege of trial by jury; and no court other than a military tribunal, constituted by the authority of the United States, could try the accused upon an indictment which had not been found or presented by a grand jury.

The demurrer also stated that if the court held that it had jurisdiction to try the accused, then he pleaded, in bar of the proceedings against him, the judgment of the general court-martial acquitting him of the offense of which he was found guilty in the Court of First Instance.

The demurrer and plea were both overruled, the trial court holding that it had jurisdiction to try the accused and that the plea of jeopardy based on his trial by court-martial was insufficient, in that the military court could not legally have taken cognizance of the crime of assassination charged in the information, but only of a violation of the 62d Article of War.

A trial was then had in the Court of First Instance before the judge thereof, without a jury, and resulted in a judgment declaring Grafton guilty of "an infraction of article 404 of said Penal Code, and of the crime of homicide, in killing the said Felix Villanueva, at the time and place and in the manner hereinbefore stated, and in view of the extenuating circumstances before remarked upon, he is sentenced by the court to imprisonment in such prison as the law directs, for the term of twelve years and one day, it being the minimum term of the mimimum degree of *reclusión temporal* which is the penalty for homicide, and to pay the costs of the prosecution, and to suffer all the other accessories of said sentence." The case was carried to the Supreme Court of the Philippines, where the judgment was affirmed by a divided court. The plea of double jeopardy was overruled by that court and three of the seven

judges were of opinion that, under the facts proven at the trial, the accused should have been acquitted.

The principal contention of the accused is that his acquittal by the court-martial forbade his being again tried in the civil court for the same offense. He bases this contention, in part, upon that clause of the Fifth Amendment of the Constitution, providing, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and, in part, upon the act of Congress of July 1st, 1902, providing temporarily for the administration of the affairs of civil government in the Philippine Islands, and which act declared that "no person for the same offense shall be twice put in jeopardy of punishment." 32 Stat. 691. That the prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippines was settled upon full consideration in the recent case of *Kepner* v. *United States*, 195 U. S. 100, 124, 126, 129, 130, in which it was held that by force of the above act of Congress such prohibition was carried to the Philippines and became the law of those Islands. In the same case it was said—what may be repeated as applicable to the present case—that "this case does not call for a discussion of the limitations of such power [the power of Congress] nor require determination of the question whether the jeopardy clause became the law of the Islands after the ratification of the treaty without Congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted."

We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance. In *Ex parte Reed*,

100 U. S. 13, 23, the court, referring to a court-martial, said: "The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court."

In *Ex parte Mason*, 105 U. S. 696, 699, the question arose whether a court-martial could lawfully sentence an officer of the Army, charged with the offense of attempting to kill a prisoner in the custody of the United States, to be imprisoned at hard labor in the penitentiary. The accused was tried under the 62d Article of War. The court said: "He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court-martial, he can be again tried in the civil courts is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction." It was objected, in that case, that the sentence was in excess of what the law allowed. The court referred to the 97th Article of War, which provided that "No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States or by some statute of the State, Territory or District in which such offense may be committed, or by the common law, as the same exists

in such State, Territory, or District, subject such convict to such imprisonment." It then proceeded: "Under this article, when the offense is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true when the offense, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act charged as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the army to which he belonged. The sixty-second article provides that the offender, when convicted, shall be punished at the discretion of the court, and the ninety-seventh article does no more than prohibit the court from sentencing him to imprisonment in a penitentiary in a case where, if he were tried for the same act in the civil courts, such imprisonment could not be inflicted." In *Carter* v. *Roberts*, 177 U. S. 496, 498, which was a case of the punishment under the judgment of a general court-martial of an officer of the Army, the court, after observing that every officer, before entering on the duties of his office, subscribes to the Articles of War enacted by Congress and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them, said: "Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers

in the sentence pronounced." This language was repeated in *Carter* v. *McClaughry*, 183 U. S. 365, 380.

It thus appears to be settled that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier, if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts.

We are now to inquire whether the court-martial in the Philippines had jurisdiction to try Grafton for the offenses charged against him. It is unnecessary to enter upon an extended discussion of that question; for, it is entirely clear that the court-martial had jurisdiction to try the accused upon the charges preferred against him. The 62d article of War, in express words, confers upon a general, or a regimental garrison, or field officers' court-martial, according to the nature and degree of the offense, jurisdiction to try "all crimes" not capital, committed in time of peace by an officer or soldier of the Army. The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the above article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the 62d Article of War, and, if they first acquire jurisdiction, their judgments cannot be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court.

We are next to inquire whether having been acquitted by a

court-martial of the crime of homicide as defined by the Penal Code of the Philippines, could Grafton be subjected thereafter to trial for the same offense in a civil tribunal deriving its authority, as did the court-martial, from the same government, namely, that of the United States? That he will be punished for the identical offense of which he has been acquitted, if the judgment of the civil court, now before us, be affirmed, is beyond question, because, as appears from the record, the civil court adjudged him guilty and sentenced him to imprisonment specifically for "an infraction of Article 404 of said Penal Code and of the crime of homicide."

It was said by the trial judge that the offense *charged* against Grafton in the civil court was "assassination," which offense, he said, was punishable under section 403 of the Philippines Penal Code by death, and of which crime the military court could not, under the Articles of War, have taken cognizance; whereas, the offense for which he was tried by court-martial was only homicide as defined by section 404 of the Penal Code. But if not guilty of homicide as defined in the latter section of the Penal Code—and such was the finding of the court-martial—he could not, for the same acts and under the same evidence, be guilty of assassination as defined in the former section of the Code. Looking at the matter in another way, the above suggestion by the trial judge could only mean that simply because, speaking generally, the civil court has jurisdiction to try an officer or soldier of the Army for the crime of assassination, it may yet render a judgment by which he could be subjected to punishment for an offense included in the charge of assassination, although of such lesser offense he had been previously acquitted by another court of competent jurisdiction. This view is wholly inadmissible. Upon this general point the Supreme Court of the Philippines, referring to the defense of former jeopardy, said: "The circumstance that the civil trial was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the

defense on this theory. The identity of the offenses is determined, not by their grade, but by their nature. One crime may be a constituent part of the other. The criterion is, Does the result of the first prosecution negative the facts charged in the second? It is apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy." The offense, homicide or manslaughter, charged against Grafton was the unlawful killing of a named person. The facts which attended that killing would show the degree of such offense, whether assassination of which the civil court might take cognizance if it acquired jurisdiction before the military court acted, or homicide of which the military court could take cognizance if it acted before the civil court did. If tried by the military court for homicide as defined in the Penal Code, and acquitted on that charge, the guaranty of exemption from being twice put in jeopardy of punishment for the same offense would be of no value to the accused, if on a trial for assassination, arising out of the same acts, he could be again punished for the identical offense of which he had been previously acquitted.

In Chitty's Criminal Law, vol. 1, pp. 452, 455, 462, the author says: "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge upon an indictment for manslaughter upon the same person, because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense; and, on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime he could not be guilty of the same fact, with the addition of malice and design." Mr. Bishop, in his treatise on Criminal Law (7th ed.), § 1050, says: "It is not necessary to establish the defense '*autrefois acquit*' or 'con-

vict' that the offense in each indictment should be the same in name. If the transaction is the same, or if each rests upon the same facts between the same parties, it is sufficient to make good the defense." In *Commonwealth* v. *Roby*, 12 Pick. 503, the court said: "Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder. 1 Stark. Cr. Pl. (3d ed.) 322."

It must, then, be taken on the present record that an affirmance of the judgment of the civil court will subject the accused to punishment for the same acts, constituting the same offense as that of which he had been previously acquitted by a military court having complete jurisdiction to try and punish him for such offense. It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses —one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed—and that a trial for either offense, whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We cannot assent to this view. It is, we think, inconsistent with the principle, already announced, that a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitu-

tion or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102d Article of War (which is the same as Article 87, adopted in 1806, 2 Stat. 369) declares that "no person"—referring, we take it, to persons in the Army—"shall be tried a second time for the same offense." But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb. Any possible conflict in these matters, between civil and military courts, can be obviated either by withholding from courts-martial all

authority to try officers or soldiers for crimes prescribed by the civil power, leaving the civil tribunals to try such offenses, or by investing courts-martial with exclusive jurisdiction to try such officers and soldiers for all crimes, not capital.

In support of the view that the judgment of a military court against an officer or soldier of the Army for acts constituting a crime against both the civil law and the military organization, is no bar to a second trial in the civil courts for the same acts, we are referred to *Fox* v. *Ohio*, 5 How. 410, 435; *United States* v. *Marigold*, 9 How. 560, and *Moore* v. *State of Illinois*, 14 How. 13, 19, 20. Nothing said or determined in either of those cases conflicts with the decision in this case. In the above cases, especially in *Moore's case*, the question was mooted whether the same acts could be treated as crimes both against the United States and a State. It was there suggested that a person could not be punished by two governments on account of or for the same act constituting crime, without violating the Fifth Amendment. But this court, speaking by Mr. Justice Grier, said: "An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted.

Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox* v. *The State of Ohio*, 5 How. 432, that a State may punish the offense of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States* v. *Marigold*, 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States."

It is clear that the cases above cited are not in point here. The Government of the United States and the governments of the several States in the exercise of their respective powers move on different lines. The Government of the United States has no power, except such as expressly or by necessary implication has been granted to it, while the several States may exert such powers as are not inconsistent with the Constitution of the United States nor with a republican form of government and which have not been surrendered by them to the General Government. An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a State can be punished only by its authority and in its tribunals. The same act, as held in *Moore's case*, may constitute two offenses, one against the United States and the other against a State. But these things cannot be predicated of the relations between the United States and the Philippines. The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense

against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States.

It may be difficult at times to determine whether the offense for which an officer or soldier is being tried is, in every substantial respect, the same offense for which he had been previously tried. We will not therefore attempt to formulate any rule by which every conceivable case must be solved. But passing by all other questions discussed by counsel or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902 and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that Territory. This is sufficient to dispose of the present case.

The judgment must be reversed, and the case remanded with directions to the Supreme Court of the Philippines to order the complaint or information in the Court of First Instance to be dismissed and the plaintiff discharged from custody.

It is so ordered.

LOVE *v.* FLAHIVE.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 236. Submitted March 8, 1907.—Decided May 27, 1907.

Petition for rehearing in *Love* v. *Flahive*, 205 U. S. 195, denied.

A sale made by a party who is in possession of a tract of public land with an intent thereafter to enter it as a homestead is equivalent to a relinquishment of the right to enter, and the Department may properly treat the party making the sale as having no further claims upon the land. He may not sell and still have the rights of one who has not sold; nor does he by merely continuing in possession create a new right of entry against the party in whose favor he relinquished his right.

THE facts are stated in the opinion.

Mr. Thomas C. Bach, for petitioner.

Mr. S. M. Stockslager and *Mr. George C. Heard,* opposing.

MR. JUSTICE BREWER delivered the opinion of the court.

A petition for rehearing calls our attention to a misstatement in the opinion. We said that "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 Rundell," etc. The facts are that in May, 1882, Love settled upon and occupied the tract in controversy with the purpose of entering it as a homestead; that the land was then unsurveyed public land; that it was not surveyed until 1888, and that on January 2, 1889, plaintiff for the first time filed in the Land Office an application for an entry. It further appears that the sale to Rundell was made in September, 1883, after the original settlement by the plaintiff, while the land was unsurveyed and before the application to enter. Hence it is not strictly true that while "proceedings were pending in the Land Department,

Love made a sale," for there was nothing of record or on file in that Department until after the entry.

Now the plaintiff contends that conceding that there was a sale and that thereby the plaintiff relinquished the right of entry which he had acquired by his settlement, yet thereafter without having abandoned the possession he filed his application in the land office; that that application must be considered as an entirely new proceeding initiated by one in actual possession, desiring to take the land as a homestead, and that it is error, and error of law, to adjudge it vitiated or affected by the prior sale.

Conceding that the effect of a sale prior to the application projects into the case a question of law, we are still of opinion that the decision of the Secretary was right, and that the award of the patent to Mrs. Flahive must be sustained. A sale made by a party who is in possession of a tract of public land with an intent thereafter to enter it as a homestead is equivalent to a relinquishment of his right to enter, and the Department may properly treat him as having no further claims upon the land. He may not sell and still have the rights of one who has not sold. He does not by merely continuing in possession create a new right of entry as against the party in whose favor he has relinquished his right.

We are of opinion, therefore, that the sale in 1883 was rightfully held by the Department to estop the plaintiff from subsequent entry of the land, at least as against one who was a purchaser from his vendee.

The petition for rehearing is

Denied.

ROMEU *v.* TODD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

No. 269. Argued April 19, 1907.—Decided May 27, 1907.

All the local law of Porto Rico is within the legislative control of Congress, and under § 8 of the Foraker Act, 31 Stat. 79, the local law remains in force until altered, amended or repealed by Congress or in the manner provided in the act, and cannot be disregarded by the courts.

The local statutory law of real property in Porto Rico, requiring the giving and recording of a cautionary notice of a pending suit in order to affect third parties dealing with the recorded owner, not having been altered, amended or repealed, applies to a suit brought on the equity side of the District Court of the United States for Porto Rico, and notwithstanding the provisions of § 34 of the Foraker Act, constructive notice of the pendency of such an action is not, in the absence of the cautionary notice required by the local law, operative against innocent purchasers.

The District Court of the United States is not a constitutional court of the United States; its authority emanates wholly from Congress under the sanction of its power to govern territory occupying the relation that Porto Rico does to the United States.

THE facts are stated in the opinion.

Mr. Frederick L. Cornwell, for appellant, submitted:

Under the laws of Porto Rico a conveyance of real property can neither be attacked nor rescinded where such property is legally in the hands of a third party who has not acted in bad faith. Civil Code, Rev. Stat., 1902, § 1262.

A *bona fide* possessor is deemed to be a person who is not aware that there exists in his title or the manner of acquiring it, any flaw invalidating the same." Civil Code, Rev. Stat., ed. 1902, sec. 436.

As appellant purchased the land in question after making due and diligent inquiry in the proper office as to the conditions of the title thereto, acquiring the title and possession thereof in good faith and in a legal manner, fraud, cheat or deceit

being absent from the transaction, he having no knowledge of any flaw in his title, and recorded the same according to law, his title and possession are unassailable. Mortgage Law, § 36.

Good faith is always presumed, and any person averring bad faith on the part of the possessor is bound to prove the same. Civil Code, Rev. Stat., ed. 1902, § 437.

The possessor who believes himself owner has in his favor the legal presumption that he possesses under a just title, and he cannot be compelled to show the same. Civil Code, Rev. Stat., ed. 1902, § 450.

Under these provisions the title of the appellant is unassailable, there being no inscription of the *lis pendens* and he being a purchaser in good faith.

In Porto Rico the registry of the property is the only office for the information of prospective purchasers of land as to conditions of title thereto, and one who purchases land in litigation from one of the parties to the suit acquires a good title if upon due search being made in said registry nothing is found that will affect the title to be acquired. Mortgage Law, article 42. Execution of the Mortgage Law, article 91; 1 Galindo & Escosura, Commentaries on the Mortgage Legislation of Spain, 102.

The equitable doctrine of *lis pendens* being inapplicable to the case at bar, the United States District Court should have decided as the insular court would do in the premises.

Federal courts are bound to decide precisely as the state courts ought to do, where their decision will affect titles to real property. *Hinde* v. *Vattier*, 5 Pet. 398; 8 id. 170; *Union Pacific Ry. Co.* v. *Reed*, 80 Fed. Rep. 234, 239; *Hoge* v. *Magnes*, 85 Fed. Rep. 355–357.

The United States courts also follow the decisions of the highest court of a State where they settle rules of law relating to real property. *Myers* v. *Reed*, 17 Fed. Rep. 404; *O'Connell* v. *Reed*, 5 C. C. A. 586; *Belding* v. *Hebard*, 43 C. C. A. 296–308.

Mr. N. B. K. Pettingill, for appellee, submitted:

If a litigation pending in any court of the United States

within the States had taken the same course as that herein involved, and the same question now brought before the court on this appeal had come from a Federal court in any one of the States, there can be no question how it would be decided, because there has been a uniform line of decisions as to the application of the equitable doctrine of *lis pendens*, which is entirely distinct from the statutory *lis pendens* provided for in many States in suits at law. See Pomeroy's Equity Jurisprudence, §§ 632 and 633; *Murray* v. *Ballou*, 1 Johns. Ch. 566; *Union Trust Co.* v. *Southern &c. Co.*, 130 U. S. 565; *Mellen* v. *Moline Iron Works*, 131 U. S. 352; *Murray* v. *Lylburn*, 2 Johns. Ch. 441; *County of Warren* v. *Marcy*, 97 U. S. 105; *Miller* v. *Sherry*, 2 Wall. 237; *Terrell* v. *Allison*, 21 Wall. 289; *Lacassagne* v. *Chapuis*, 144 U. S. 119.

Congress intended to grant full equity powers to the United States court established in Porto Rico; otherwise it could not have jurisdiction of all cases cognizant in the Circuit Courts, nor could it proceed therein in the same manner as a Circuit Court. This provision has always been by that court interpreted as such a grant of power, and further, as a requirement to maintain the distinction between the law and equity sides of the court and the pleading and procedure to be followed on each side, and that interpretation has had the tacit approval of this court, by its consideration and decision of cases purely equitable in their nature, in *Rodriguez* v. *Vivoni*, 201 U. S. 371, and *Garrozi* v. *Dastas*, 204 U. S. 64.

While the engrafting of an equitable jurisdiction on the laws of Porto Rico constituted a departure from the system of law formerly prevailing there, it does not follow that such departure was not a beneficient exercise of the power of the new sovereign. In any event such was the intention of the Congress and an evidence of its desire to give to the new territory, by bestowing upon it the dual system of courts existing in the States, all the advantages for the most perfect administration of justice. *Noonan* v. *Braley*, 2 Black, 499; *Kirby* v. *Lake Shore R. R. Co.*, 120 U. S. 130.

The main contention of appellant is that even courts of equity of the United States in a State are bound by the statutory provisions for recording a *lis pendens* when such provision has been enacted in such State. But in this contention counsel fail to distinguish between cases at law and cases in equity, and an investigation of the cases cited will show that they are cases upon the law side of the court. *Vance* v. *Wesley*, 85 Fed. Rep. 157 and *Smith* v. *Gale*, 144 U. S. 509, discussed; *Bondurant* v. *Watson*, 103 U. S. 281, distinguished.

Mr. Justice White delivered the opinion of the court.

Robert H. Todd obtained a judgment in the United States Provisional Court of Porto Rico in the year 1900 for the sum of $2,946.05 against Pedro and Juan Agostini, and execution to enforce the same was returned *nulla bona*. Thereupon Todd, in 1901, filed a bill in equity in the United States court for the District of Porto Rico against the judgment debtors (the two Agostinis) and one Ana Merle for the purpose of enforcing the judgment upon certain real property of which Ana Merle stood upon the public records as the owner. The ground was that the property had been paid for with the money of the Agostinis and was hence liable to be applied to their debts. Without further detail it is only necessary to say that the court decreed that a certain parcel of land described in the bill had been purchased by Ana Merle with funds belonging to Pedro Agostini, and said Agostini "was the owner of the equitable and beneficial title of the same." And it was ordered that to pay the indebtedness to Todd, the property, with the improvements thereon, be sold at public sale by a commissioner appointed for that purpose. Whilst this suit was pending, before decree, the piece of real estate embraced by the decree was sold by Merle to Higinio Romeu, the plaintiff in error. The present bill was filed on behalf of Romeu against Todd to enjoin the sale of this piece of property. The bill alleged the bringing of the Todd suit, the purchase of Romeu pending such suit, the

decree rendered therein as above stated and the fact that the decree was about to be executed. It was averred that the purchase by Romeu had been made for an adequate consideration, with the utmost good faith and without knowledge of the pendency of the Todd suit; that the property since it was bought by Romeu had been largely improved by him, and that, as no cautionary notice concerning the Todd suit, as authorized and required by the law of Porto Rico, had been put upon the records, the property acquired by Romeu under the circumstances alleged was not subject, in Romeu's hands, to the Todd decree. A temporary restraining order was allowed. The bill was demurred to on two grounds—first, that it stated no cause of action, and second that, admitting all its averments to be true, as the property was bought whilst the equity cause was pending, the purchaser took subject to the *lis pendens*. The demurrer was sustained, and, Romeu electing not to plead further, a final decree was made dismissing the bill.

The court below, in its opinion, assumed that under the local law a third party in good faith purchasing from or dealing with the registered owner of real estate, without notice in fact of the existence of a pending suit concerning the title to property, was not to be treated by operation of law as constructively notified of the pendency of the suit, unless the cautionary notice, which the law of Porto Rico required to be put upon the record, was given. But whilst so declaring, it was nevertheless decided that the local rule of real property referred to was not controlling in this case. This ruling was based upon the conception that the constructive notice resulting from a suit in equity in the United States court for Porto Rico was to be imputed, irrespective of the positive requirements of the local law. The court said:

"As this is a proceeding on the equity side of the court it is governed by the principles of equity followed by the Federal courts as distinguished from suits at law where local statutes are adopted. As local laws have no binding force upon the United States courts in matters of procedure in equity and

maritime law, the laws of Porto Rico relating to filing of notice of *lis pendens* have therefore no application in this case and the sufficiency of this bill must be determined by the rules and principles followed in like proceedings in the courts of the United States. *Stewart* v. *Wheeling & Lake Erie R. R. Co.*, 29 L. R. A. 438."

Proceeding then to apply what it deemed to be the conclusive force of decisions of this court, it was held that the pendency of an equity cause in a court of the United States affecting real property constituted constructive notice as to third parties and was therefore operative against those dealing with the owner as to such property in good faith, any rule of state law to the contrary.

In the argument at bar on behalf of the appellee the correctness of the ground upon which the court based its decision is insisted on as follows:

"The main contention of appellant, however, seems to be that even courts of equity of the United States in a State are bound by the statutory provisions for recording a *lis pendens* when such provision has been enacted in such State. But in this contention counsel fail to distinguish between cases at law and cases in equity, . . ."

Nevertheless, in substance, it is contended that even if the court below was wrong in its reasoning, it was right in its conclusion. This rests on the proposition that the court mistakenly assumed that the local law provided for a notice of the pendency of suit of the character of the *Todd case* and protected an innocent purchaser where a notice was not given.

That issue arises, therefore, and as it underlies the question whether the court should have applied the local law, we come first to ascertain the local law concerning notice and its effect.

It appears certain that by the ancient Spanish law the sale or the dismemberment by mortgage of the ownership of real property, which was involved in a pending litigation, was forbidden. (Law 13, Tit. 7, Part 3; see also Resolution of November 29, 1770, referred to in commentaries upon the Spanish

mortgage legislation by D. Leon Galindo y De Vera, ed. 1903, vol. 2, p. 594.) The result was that acts done in violation of the prohibitory law were void, even as to innocent third parties. But as pointed out by the author, just referred to, the prohibition in question was omitted from the Spanish Civil Code, and, therefore, the right to deal with real property, involved in a pending litigation, was no longer prohibited. And when the comprehensive system, known as the mortgage law, came to be adopted, the power of the record owner of real property involved in litigation to mortgage or contract concerning the same was not left to the implication resulting from the disappearance of the ancient prohibitions, but was expressly recognized by articles 71 and 107 of the mortgage laws. D. Leon Galindo y De Vera, in his commentaries, considering the provisions of the mortgage law concerning the power of the owner of real property to deal with it *pendente lite*, and of the right of the plaintiff in a suit affecting such property to obtain a cautionary notice, and his duty to record the same in order to affect third parties, points out that these provisions were the natural result of three considerations: respect for the rights of property, regard for the rights of one seeking redress in the courts against such owner, and solicitude for the public interest. Because of the first the owner was not deprived of his right to dispose of his real property merely because a suit relating to the same had been brought against him, but was left free to make contracts concerning the property, if anyone could be found willing to do so, and thus assume the risk of the pending litigation. On account of the second consideration a means was provided for giving a notice by which one who brought suit would be able to secure the results of an ultimate decision in his favor. Because of the third those dealing in good faith, in reliance on the public records, were protected from the risks of pending suits, unless the cautionary notice was made and recorded according to the statute.

That the essence of the statute was the protection of innocent third parties dealing with the recorded owner when no

cautionary notice had been given is obvious. Answering the contrary contention, D. Leon Galindo y De Vera says (p. 192):

"That is not so; if the mortgagor has on the record the ownership of the properties in litigation and those who claim the properties have not made the cautionary notice on the register, and the writing establishing the mortgage does not show that the properties are in litigation, the debtor can freely mortgage them, and the mortgage will have effect, even when the decision of the case is in favor of the plaintiffs, declaring that the ownership of the properties mortgaged belongs to them."

See articles 71 and 107 of the "Mortgage Law for Cuba, Proto Rico and the Philippine Islands," War Department Translation, 1899, and see also title 2 of the same law concerning the method of recording instruments and the effect of such record, and title 3 relating to cautionary notices.

Granting that the general result of the local law is as we have just stated it, the contention yet is that the character of the Todd suit and the nature of the relief sought therein caused it to be not within the scope of the mortgage law, and the provisions thereof for giving a cautionary notice. This is based upon article 42 of the mortgage law, reading:

"Art. 42. Cautionary notices of their respective interests in the corresponding public registries may be demanded by:

"1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right. . . ."

And article 91 of the general regulations for the execution of the mortgage law, War Department Translation, 1899, as follows:

"The person who brings action for ownership, referred to in case No. 1 of article 42 of the law, may at the same time or subsequently request that a cautionary notice thereof be made, offering to indemnify any damages which may be caused the defendant thereby, should he win the suit."

Now, it is said when the issues in the Todd suit are clearly apprehended they were not within the purview of the articles

in question, since that suit did not seek to divest Ana Merle of the ownership of the property standing in her name on the public records, but simply to subject such property to the payment of the indebtedness due by the Agostinis to Todd. This, however, assumes that article 42 embraces only suits having for their object the entire divestiture of ownership—that is, the divestiture of perfect ownership—whilst the text of the article relied upon not only relates to suits so operating, but also to those which seek the modification "or extension of any property right." But even if the proposition relied upon might find some color of support in a narrow and technical construction of the provisions of the mortgage law referred to, its unsoundness is, we think, demonstrated by a consideration of other provisions of the law, especially articles 2 and 23 of that law, the first reading as follows:

"In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use and occupancy, emphyteusis, mortgage, annuity (censo), servitudes, and any others by which estates are created, acknowledged, modified, or extinguished."

The second (art. 23) reads as follows:

"The instruments mentioned in articles 2 and 5, which are not duly recorded or entered in the registry, cannot prejudice third persons."

Mark the constructive power of the provision of the second paragraph of article 2, requiring the registry, in order that they may affect third parties, of all acts "by which estates are created, acknowledged, modified or extinguished" when applied to the words of article 43, providing for the registry of a cautionary notice, not only of all suits for the "ownership of real property," but likewise of suits brought "for the creation, declaration, modification or extinction of *any property right.*"

Besides, when the purpose of the mortgage law is borne in

mind, it is apparent that the interpretation relied upon would frustrate the very ends which the adoption of the law was intended to subserve.

But, passing this view, it is, we think, clear that the proposition rests upon a misconception of the true import of the bill in the *Todd case*. The property stood upon the records, not in the name of the Agostinis, but in the name of Merle. The bill alleged that the Agostinis, and not Merle, owned the property, because it had been bought and paid for by the former. The purpose, therefore, of the suit was to change the recorded title by in effect obtaining a decree placing the property in the name of the real owner. In the very nature of things, under the civil law, the cause of action thus asserted was not merely revocatory (the Actio Pauliana of the Roman law), but was an action to unmask a simulation. It was therefore essentially revendicatory. *Bonnafon* v. *Wiltz*, 10 La. Ann. 657; and see the copious list of authorities illustrating the subject, compiled in 2 Hennen's La. Dig. 1031, No. 1). The decree rendered conforms to this conclusion. It held Pedro Agostini to be the "owner of the equitable and beneficial title" to the property. It therefore divested the registered owner, Merle, of every essential element of ownership. This is clearly the case, since the *fructus*, the *usus* and the *abusus* could not be in one who was stripped of all beneficial interest. This becomes more clearly manifest when it is borne in mind that the civil law prevailing in Porto Rico is oblivious concerning a technical or formal distinction between legal and equitable title. As beyond peradventure, then, the suit and the decree took from the recorded owner the ownership upon which necessarily the innocent third party must have relied, we think it clearly follows that the cautionary notice required by the provisions of the mortgage law was essential to affect the innocent third person.

The remaining question, then, is, Was the local statutory rule of real property, requiring the giving and recording of a cautionary notice of the pending suit in order to affect innocent third parties dealing with the recorded owner, applicable to a

suit brought on the equity side of the United States District Court for Porto Rico? Let us assume, for the sake of argument, that the lower court correctly reasoned that an innocent third party would be affected by the constructive notice resulting from the pendency of an equity cause in a Circuit Court of the United States sitting within a State. Again, let us further assume, for the sake of argument, that it was correctly held that the rule just stated would govern, although there had been no compliance with a statutory rule of property prevailing in such State requiring the recording of a notice of the pendency of suits affecting real property, in order to make the same operative against innocent third parties. Neither of these concessions, we think, is here controlling. The District Court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates wholly from Congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does. Now, by section 8 of the act commonly known as the Foraker Act (31 Stat. 79, chap. 191) it is provided as follows:

"SEC. 8. That the laws and ordinances of Porto Rico now in force continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. . . ."

The provision just quoted, it may be added, is qualified by a proviso repealing enumerated provisions of the local laws concerning marriage, divorce and other subjects.

Now, as a general proposition, it is clear that as a result of the relation which Porto Rico occupies to the United States all the local law of that island has its ultimate sanction in the

lawful exercise by Congress of its legislative authority. So also, as Congress has provided that the local law, "not inconsistent or in conflict with the statutory laws of the United States," shall remain in force "until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States," it must follow that the local law of real property prevailing in the island is controlling until changed, as provided by Congress. This being true, we cannot assent to the conclusion that the court of the United States created by Congress had the authority to disregard the local law which Congress by express legislation directed to be continued in force. But it is said that the act (sec. 34) in providing for the District Court of the United States for Porto Rico declared, among other things, that that court shall have, "in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court." From this it is argued that the constructive notice resulting from the equity cause in the District Court for Porto Rico must, in the nature of things, be operative against innocent purchasers without reference to the local law prevailing for cautionary notices and registry, if such result would flow from an equity cause pending in a constitutional court of the United States sitting within one of the States. But the proposition begs the question, since it puts out of view the express provision of the act of Congress sanctioning and enforcing the local law, except in so far as Congress had deemed fit to abrogate the same. Considering the manifest intent of Congress, we cannot close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed, nor can we, consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act, by which a court was created to enforce the local law, empowered the court so created to set at naught the local law

by disregarding fundamental rules of real property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. Especially is this conclusion rendered necessary when a consideration, previously adverted to, is again called to mind, that is, that all the local law of Porto Rico is within the legislative control of Congress. The considerations which we have thus expounded are illustrated in various other aspects by previous rulings, concerning the construction and import of the Foraker Act. *Crowley* v. *United States*, 194 U. S. 461; *Rodriguez* v. *United States*, 198 U. S. 156; *Seralles* v. *Esbri*, 200 U. S. 103; *American R. Co.* v. *Castro*, 200 U. S. 453.

The decree of the District Court for Porto Rico must be reversed, and the cause remanded for further proceedings conformable to this opinion.

UNITED STATES *v.* HEINSZEN & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 580. Argued April 9, 10, 1907.—Decided May 27, 1907.

Congress in dealing with the Philippine Islands may delegate legislative authority to such agencies as it may select and may ratify the acts of agents as fully as if such acts had been specially authorized by a prior act of Congress.

The act of June 30, 1906, 34 Stat. 636, legalizing and ratifying the imposition and collection of duties by the authorities of the United States in the Philippine Islands prior to March 8, 1902, was within the power of Congress and can be given effect without depriving persons who had paid such duties of their property without due process of law or taking their property for public use without compensation in violation of the Fifth Amendment.

The mere commencement of a suit does not affect the right of Congress to ratify executive acts and the fact that at the time the ratifying statute was enacted actions were pending for the recovery of sums paid does not cause the statute to be repugnant to the Constitution. References in *De Lima* v. *Bidwell*, 182 U. S., as to want of power to ratify after suit brought are to be regarded as *obiter dicta*.

THE facts are stated in the opinion.

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

This case is essentially different from the case of *Warner, Barnes & Co.* v. *United States,* 197 U. S. 419. "The judgment in that case was *res adjudicata* only of the issue then presented, of the facts as they then appeared, and of the legislation then existing." *Utter* v. *Franklin,* 172 U. S. 416. Here the issues are altogether new—the lack of protest and the power of Congress to ratify under the new act of 1906. The matter of protest was not raised before until rehearing, and the court will recall the suggestion then made from the bench that the defense came too late. Here it has been emphasized from the start.

The petition asserts actual duress because the regulations provided that vessels should be placed under military guard until discharge. That regulation applied, of course, to all vessels, and would excuse failure to protest on importations from foreign countries as well as from the United States. The phrase "military guard" means only *customs control,* and that is the very term employed in the amendment to this particular paragraph of the regulations dated May 24, 1899. The law and customs regulations of the United States require exactly the same control by boarding, examination and custody pending discharge under civilian inspectors. If this was duress, then the same compulsion and extortion to prevent smuggling and secure duties are practiced daily at all ports of the United States.

If there is no compulsion, payment is voluntary and protest will not avail. Where there can be a recovery, protest is necessary. It is so in all tax cases and especially in customs cases.

Protest is doubtless and necessarily a rule of all customs law. It was the rule of the Spanish law of the Philippines, which was equivalent to an express statute. It was the rule of these regulations (par. 10). Of course this is a customs case, although not one under the Customs Administrative Act of

the United States. Counsel say not, that it is military contribution. But their previous victory rested on the basis that the *military* exaction ceased on April 11, 1899.

There was no protest or objection whatever here. The claim was an afterthought, and the courts do not regard that position with favor. It is noticed in *Dewell* v. *Mix*, 116 Fed. Rep., a customs case, and in similar terms in *Newhall* v. *Jordan*, 149 Fed. Rep., advance sheets, and the objection is concisely put in the *Chesebrough case*, 192 U. S. 253; and see also the *Edmonston case*, 181 U. S. 504.

No distinction can be drawn because here the suit is against the United States and not against the agent. *Elliott* v. *Swartwout*, 10 Pet. 153.

The act of 1906 encounters the limitations of *De Lima* v. *Bidwell*, 182 U. S. 1, and has done so in clear terms, from which there is no escape so far as intention is concerned.

De Lima v. *Bidwell* simply holds that an act not retroactive in terms could not have that effect as to duties theretofore paid under protest for which an action to recover back had already been brought.

But see *Grim* v. *School District*, dealing with taxation for the public use, to effect that if an act of assembly be within the legitimate scope of legislative power, it is not a valid objection that it divests vested rights even after suit brought; that if the legislature had the antecedent power to authorize a tax, they could cure a want of authority as well as a mere irregularity in levying it by a retroactive law. If the use is public, if it is taxation, the rule against divesting vested rights for private benefit does not apply. It was not the less taxation because the tax was levied without authority at the time, and the question now is as to the effect of the validating act. It was taxation and just taxation although not valid taxation.

There was due process of law through protest and appeal which the claimants failed to invoke at the proper time. The claimants have no equities; they collected the duties from their customers and they received the usual compensation

for a tax in the maintenance of a Government which made life and property safe and their business possible. In the *De Lima case* the retroactive intention and effect were not clear, and protest was duly made. Here the case is quite otherwise as to both matters.

This is a question of constitutional power, not of expediency or even fairness, although no just mind need shrink from giving full effect to this law on the ground that it is repugnant to the spirit of our institutions or the principles of natural justice.

Counsel say that our authorities do not apply, because before the Fourteenth Amendment was adopted the only restraint on the States in this domain was as to impairing the obligation of contracts or passing *ex post facto* laws. There is no case which says that the law which did not impair a contract or was not *ex post facto* was not however due process of law and yet could be enforced. For the most part the authorities on retroactive legislation cited in the opposing brief either do not refer to taxation at all but to the familiar case (as in *Wilkinson* v. *Leland*, *Palairet's Appeal*, etc.) of transferring the property of A. to B. and thus divesting vested estates; or else, in the tax cases, the citizen had never had his day in court at all, at any time, or the act was only *intended* to cure irregularities and not to validate a total want of authority.

As to what is a vested right see Kent's definition, "An immediate right of present enjoyment or a present *fixed* right of future enjoyment;" and Cooley's, "Rights are vested in contradistinction to being expectant or contingent. They are vested when the right of enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest." Now if our military authorities should take some tangible piece of property for the use of the Quartermaster's Department, let us say, without any relation, of course, to the owner's obligation to contribute his share to the support of Government, that would be a taking of private

property for public use, and compensation would be due. That right would be vested by the Constitution. The right here involved is property, in a qualified sense, because it is a right of action; but it is not a vested right. It is not manifestly contingent—a mere right of action. Such a right of action is not to be regarded as vesting or as constituting property until recovery has been finally adjudged. The bringing of suit is the mere assertion of an undetermined right. Before judgment all is contingent; the right is inchoate, not complete; there is a right to bring suit which may of course be taken away before suit brought, but the included and underlying right of property into which the action may eventually ripen is only inchoate. *Evans* v. *McFadden*, 105 Fed. Rep. 293, affirmed 185 U. S. 505.

By the act of 1906 Congress did not take any right of the claimants vested beyond the power of the legislature. The fact that the right will not be beyond controversy unless and until this court adjudges this case in their favor is proof of that statement. The act in effect said, as it constitutionally might do—In these cases the United States, the sovereign, declines to be sued; it withdraws its consent; so far at least as such claims are concerned, not already reduced to judgment, it denies the right to sue.

Mr. Frederic R. Coudert and *Mr. Henry M. Ward*, with whom *Mr. John G. Carlisle* and *Mr. Paul Fuller* were on the brief, for appellees:

The decisions of this court in *De Lima* v. *Bidwell*, *Dooley* v. *United States* and *Lincoln and Warner Barnes* v. *United States* hold that Congress has not the power to ratify the collection of moneys exacted without warrant of law under the circumstances disclosed by the record now before the court.

As to the power of Congress to ratify the illegal exaction of moneys after suit brought for their recovery, see *De Lima* v. *Bidwell*, 182 U. S. 1, 199.

Legislatures cannot by retroactive laws impair vested

rights without violating the provision common to both state and Federal constitutions—that no man shall be deprived of his property without due process of law. *Kennett's Petition*, 24 N. H. 139; *Alter's Appeal*, 67 Pa. St. 341; *Norman* v. *Heist*, 5 W. & S. 171; *Donovan* v. *Pitcher*, 53 Alabama, 411; *Palairet's Appeal*, 67 Pa. St. 479; *State* v. *Warren*, 28 Maryland, 338.

Congress cannot validate the illegal action of the officers of the Government in exacting moneys from these claimants under the guise of duties but without any warrant of law, after, as in the case at bar, suit has been instituted for their recovery.

"The supposition that the Government will not pay its debts, or will not do justice is not to be indulged." *Gibbons* v. *United States*, 8 Wall. 274.

The act of 1906 must not be interpreted as in conflict with *De Lima* v. *Bidwell* and *Warner, Barnes & Co.* v. *United States*, unless no other construction can be adopted. If the court cannot adopt the construction suggested, then the decisions of this court in *De Lima* v. *Bidwell* and the *Lincoln and Warner Barnes case* on this point are conclusive and require this court to hold that with respect to the rights of these claimants and of others similarly situated, the act of June 30, 1906, is of no effect.

In view of the findings of fact in the case at bar, the decision of this court in *Dooley* v. *United States*, and *Lincoln and Warner Barnes* v. *United States*, are conclusive upon the question of voluntary payment.

The facts as found by the Court of Claims in this case establish the legal conclusion that the payment of the duties was involuntary.

The final fact to be ascertained by the court must be not what was the actual state of mind of the plaintiff but what, under the circumstances of the particular case was his "legal state of mind;" whether a volunteer or a victim of overweening necessity. *Maxwell* v. *Griswold*, 10 How. 242, 256; *Robertson* v. *Frank Brothers*, 132 U. S. 17, 22, 23; 1 Wharton on

Contracts, § 147; *Hackley* v. *Headley*, 45 Michigan, 569, 574, 576.

The rule of law being thus clearly settled, what were the admitted, unquestioned facts in this case from which the court must conclude that the payment was involuntary?

When the complainants' vessel arrived from the domestic port of New York at the equally domestic port of Manilla she found herself and her cargo in possession of Federal troops, whose presence, however otherwise desirable, was designed to and very effectually did prevent claimants from taking possession of their goods and plying their trade. This situation, so obviously detrimental to plaintiff's property and business, could only be effectually determined by his paying the ransom demanded, *i. e.*, the alleged duties or military contributions—admittedly illegal exactions.

It is true they might have relinquished the goods to the military guard and abandoned their business and property, or again they might have sailed away, but as this court has said this was only a choice of evils and one which they were not bound to make. It was in fact no choice at all since the theory of free will cannot hold its own against the doctrine of inevitable necessity in the form of imminent and potentially persuasive bayonets.

The importer whose goods are in the safe-keeping of Krag Jorgensens over whose action he has no control, cannot be successfully likened to the man who buys a revenue stamp from the peaceful apothecary and then sues the Government on the ground that he feared the law if he did not stamp his manifest.

The act of June 30, 1906, in so far as it attempts to deprive claimants here of their right to the moneys which the United States have in their hands justly and equitably belonging to claimants is unconstitutional and void.

The Constitution is everywhere applicable to the actions of the Government, the only open question being as to which clauses extend to governmental operation in the new and as

yet "unincorporated" possessions acquired from Spain by the Treaty of Paris. *Dorr* v. *United States*, 195 U. S. 138.

The right to property is fundamental and Congress can no more resort to confiscation in the new lands than elsewhere in our broad domain. *United States* v. *Lee*, 106 U. S. 196; *Sinking Fund Cases*, 99 U. S. 710, 738; *Dent* v. *West Virginia*, 129 U. S. 114, 124.

It is immaterial that the taking of property assumes the guise of taxation: in determining what is due process of law regard must be had to substance, not to form. *Chicago R. R. Co.* v. *Chicago*, 166 U. S. 226, 235; *Union Transit Co.* v. *Ky.*, 199 U. S. 194; *Angle* v. *Chicago R. R. Co.*, 151 U. S. 1, 19; *Sturgis* v. *Carter*, 114 U. S. 511, 519; *United States* v. *Burr*, 159 U. S. 78, 84, 85.

The section of the act of June 30, 1906, under consideration is in substance and effect an *ex post facto* law prohibited by Art. 1, § 9 of the Constitution. It deprives claimants and others similarly situated of their property, of their money held by the United States. The term *ex post facto* has reference to crimes and penalties, but the question is not of the form of the enactment but of its substance and effect.

The substance and effect of this act is to deprive claimants of their property. That is a penalty, a punishment in substance as much as though it were a fine. A fine would have been *ex post facto*, a penalty for having done an act innocent at the time it was done. There is no difference in substance and effect between such a fine and this act now before us. The substance and effect are the same; the difference is in form and verbiage only. The prohibitions in the Constitution are not to be evaded by mere matter of form. These prohibitions annul every act by which the result which they were intended to prevent might be accomplished. *Cummings* v. *Missouri*, 4 Wall. 277, 325.

Mr. Justice White delivered the opinion of the court.

In an endeavor to clarify the consideration of this contro-

versy we invert somewhat the order in which the facts have been stated in the findings below and refer to previous rulings of this court pertinent to the subject in hand, besides supplementing the same by a reference to relevant matters of public history, of which we take judicial notice.

After the Philippine Islands came under the military control of the United States the President, on July 12, 1898, issued an order providing for the enforcement by the military power in those islands of a system of tariff duties. This order, promulgated by the Secretary of War, was accompanied with an enumeration of the tariff proposed and regulations for the collection of the same. However, for causes which need not be referred to, the tariff in question was subsequently modified and did not go into operation until November, 1898.

The duties imposed by this tariff were levied on goods coming into the Philippine Islands, whether from the United States or other countries. This tariff was in force when the treaty of peace was signed (December 10, 1898), when the treaty was ratified (April 11, 1899), and was continued by the Philippine Commission appointed by the President in April, 1900. Indeed, the civil government, as established in the islands by the President, either in virtue of his inherent authority or as a result of the power recognized and conferred by the act of Congress, approved March 2, 1901 (31 Stat. L. 910), continued the original tariff in force, except as to some modifications not material to be noticed, and formulated its provisions in the shape of a legislative act entitled "An act to revise and amend the tariff laws of the Philippine Archipelago." And this tariff was in force in March, 1902, when it was expressly approved and continued by Congress. 32 Stat. 54.

In December, 1901, the cases of *De Lima* v. *Bidwell* and *Dooley* v. *United States* were, by this court, decided. 182 U. S. 1, 222. The first case involved the right to recover duties paid under protest to the collector of the port of New York upon sugar brought into the United States from the island of Porto Rico during the autumn of 1899 and subsequent to

the cession of the island. The second case involved the right to recover the amount of certain duties on goods carried into Porto Rico from the United States between July 6, 1898, and May 1, 1900, the duties in question having been levied by authority of the general in command of the army of occupation or subsequently by order of the President as commander-in-chief. In the first case (*De Lima* v. *Bidwell*) it was decided that, as the effect of the ratification of the treaty was to take the island of Porto Rico out of the category of foreign territory within the meaning of that word as used in existing tariff laws of the United States, no right remained to enforce, against goods coming from Porto Rico into the United States, the previously enacted tariff of duties, although, considering the terms of the treaty and the relation of the island to the United States, Congress had power to impose a tariff on goods coming from that island into the United States. As a corollary of the doctrine announced in *De Lima* v. *Bidwell*, in the second case (*Dooley* v. *The United States*) it was held that whilst the President, as commander-in-chief, had authority to impose tariff duties in Porto Rico on goods coming into that country from the United States prior to the ratification of the treaty, no such executive power existed after that ratification. It was consequently held that none of the duties paid prior to the ratification of the treaty could be recovered, whilst those paid subsequently could be.

In the following year (December 2, 1901) another case, entitled *Dooley* v. *The United States*, was decided. 183 U. S. 151. That case involved the validity of tariff duties levied in Porto Rico on goods brought into that island from the United States, the duties in question having been imposed after the ratification of the treaty and in and by virtue of the act of Congress known as the Foraker Act. Applying the principles announced in the previous cases just referred to, it was held that the duties were lawful because, although collected after the ratification, they were imposed not simply by virtue of the authority of the President, acting under

the military power, but in conformity to a valid act of Congress.

And on the same day with the foregoing the case of *Fourteen Diamond Rings* was decided. 183 U. S. 176. That case involved the validity of tariff duties levied on diamond rings brought from the Philippine Islands into the United States. Adhering to the doctrine settled by the prior rulings, it was held that, as the Philippine Islands, by the ratification of the treaty, had ceased to be foreign within the meaning of the tariff laws, the imposition of the duties complained of was unlawful. In the course of the opinion the effect of the treaty as applied in the previous cases to Porto Rico was pointed out, and the status of the Philippine Islands in virtue of the treaty was, in effect, held to be controlled by the former decisions.

In April, 1905, the two cases of *Lincoln* v. *The United States* and *Warner, Barnes & Co., Limited,* v. *The United States* were by this court decided. 197 U. S. 419. The cases came here one on error to the District Court of the United States for the Southern District of New York, and the other by appeal from the Court of Claims. The one (*Lincoln case*) was commenced on March 29, 1902; the other (*Warner, Barnes & Co. case*) on January 17, 1902. In both cases recovery from the United States was sought of the amount of duty paid upon goods taken from the United States into the Philippine Islands after the ratification of the treaty with Spain and before the passage of the act of Congress of March 8, 1902. Reversing the judgments which had been rendered below in both cases in favor of the United States, it was declared that there was nothing in the situation of the Philippine Islands which took that territory out of the reach of the doctrine announced in the previous cases which we have reviewed, and it was therefore decided that the President was without power, after the ratification of the treaty, in the absence of express authority from Congress, to impose the tariff duties in question. A contention on the part of the United States that Congress by the second section of the act approved July 1, 1902 (entitled "An act

temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes"), had ratified the action of the President in imposing and collecting the duties in controversy, therefore no recovery could be had, was held to be unfounded, for grounds stated in the opinion, to which we shall hereafter advert. The case was heard upon rehearing, and in a decision announced on May 28, 1906, the views previously entertained by the court were reiterated and adhered to. 202 U. S. 484. In the month following (June, 1906) Congress passed an act containing a provision which reads as follows (34 Stat. L. 636):

"That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two, at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed."

Now this case was commenced, after the decision in the *Fourteen Diamond Rings*, to recover the amount of tariff duties exacted in the Philippine Islands on merchandise brought from the United States, the duties having been collected under the authority of the order of the President after the ratification of the treaty, but before the time when Congress, by § 1 of the act of March 8, 1902, had enacted tariff duties for the Philippine Islands. The case was pending in the Court of Claims when the *Lincoln and Warner, Barnes & Co. cases* were decided by this court. It was found by the court below that the military officers of the United States collected the duties and paid over the amount thereof to the treasurer of the Philippine Islands, and that the money was disbursed for the expenses of that

government without going into the Treasury of the United States. Considering that the original illegality of the duties complained of was established by the previous decisions of this court, and that the act of Congress of June 30, 1906, ratifying the collection of duties was beyond the power of Congress to enact, the court below rendered judgment against the United States for the amount of duties paid.

Applying the doctrine settled by this court in the cases to which we have referred, concerning the power to levy tariff duties under the authority of the President, on goods taken from the United States into Porto Rico and the Philippine Islands, or brought into the United States from either of such countries subsequent to the ratification of the treaty and prior to the levy by Congress of tariff duties, it is obvious that the court below correctly held that such tariff exactions were illegal. It follows therefore that the only question open for consideration is whether the court below erred in refusing to give effect to the act of Congress of June 30, 1906, which ratified the collection of the duties levied under the order of the President.

As the text of the act of Congress is unambiguous and manifests as explicitly as can be done the purpose of Congress to ratify, the case comes to the simple question whether Congress possessed the power to ratify which it assumed to exercise. When the controversy is thus reduced to its ultimate issue we think the error committed by the court below, both in reason and authority, is readily demonstrable.

That where an agent, without precedent authority, has exercised in the name of a principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments or municipal corporations, is also elementary. We shall not stop to review the whole subject or cite the numerous cases contained in the books dealing with

the matter, but content ourselves with referring to two cases as to the power of Congress, which are apposite and illustrative. In *Hamilton* v. *Dillin*, 21 Wall. 73, the facts were as follows: During the Civil War the Secretary of the Treasury, with the sanction of the President, adopted rules and regulations for granting permits to trade between the belligerent lines. One of these rules exacted the payment of a contribution, styled a fee, of four cents a pound on cotton purchased. Hamilton having taken a permit and paid Dillin, surveyor of the port of Nashville, Tennessee, under the regulations, a sum of money for a permit to trade in cotton, sued to recover the same as having been illegally exacted. In deciding the case (p. 88) the court came to consider whether "the action of the executive was authorized, or, if not originally authorized, was confirmed by Congress." Both these questions were determined in the affirmative. When the court came to consider the legislation relied upon as having confirmed the acts of the President in establishing the regulations in question, after stating the same the court declared, "We are also of opinion that the act of July 2, 1864, recognized and confirmed the regulations in question." *Mattingly* v. *The District of Columbia*, 97 U. S. 687, concerned the validity of an act of Congress in effect confirming the doings of the board of public works of the District of Columbia touching the improvement of streets and roads and ratifying certain void assessments for street improvements. The court said (p. 690):

"We do not propose to inquire whether the charges of the bill are well founded. Such an inquiry can have no bearing upon the case as it now stands; for were it conceded that the board of public works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its cost upon the complainant's property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. There has been Congres-

sional legislation since 1872, the effect of which upon the assessments is controlling. There were also acts of the legislative assembly of the District, which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had power to commit to the board the duty of making the improvements, and the power to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*' Under the Constitution Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. *Cohen* v. *Virginia*, 6 Wheat. 264. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."

It is then evident, speaking generally, both on principle and authority, that Congress had the power to pass the ratifying act of June 30, 1906, and that that act bars the plaintiff's right to recover, unless by the application of some exception this case is taken out of the operation of the general rule. And this brings us to consider the several propositions relied upon at bar to establish that such is the case.

First. Whilst it is admitted that Congress had the power to levy tariff duties on goods coming into the United States from the Philippine Islands or coming into such islands from the United States after the ratification of the treaty, it is yet urged that as that body was without authority to delegate to the President the legislative power of prescribing a tariff of duties, it hence could not by ratification make valid the exercise by the President of a legislative authority which could not have

been delegated to him in the first instance. But the premise upon which this proposition rests presupposes that Congress in dealing with the Philippine Islands may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select, a proposition which is not now open for discussion. *Dorr* v. *United States*, 195 U. S. 133.

Second. As the duties collected were illegal, it is insisted that for the purpose of testing the validity of the act of Congress the fact of such collection must be put out of view, and the act ratifying the exaction must be treated as if it were solely an original exercise by Congress of the taxing power. This being done, it is said, reduces the case to the inquiry, Had Congress power, years after goods which were entitled to free entry had been brought into the Philippine Islands, to retroactively impose tariff duties upon the consummated act of bringing the goods into that country? But the proposition begs the question for decision, by shutting out from view the potential fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States. Indeed the contention goes further even than this, since it entirely disregards the important consideration that although the duties were illegally exacted the illegality was not the result of an inherent want of power in the United States to have authorized the imposition of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity to his conduct in enforcing the payment of the duties. And when these misconceptions are borne in mind it results that the unsoundness of the proposition relied upon is demonstrated by the application of the elementary principle of ratification to which we have previously referred. Moreover, the fallacy which the proposition involves becomes yet more obvious when it is observed that the contention cannot even be formulated without misstating the nature of the act of Congress; in other words, without treating that act as retrospective legislation

enacting a tariff, when on its very face the act is but an exercise of the conceded power dependent upon the law of agency to ratify an act done on behalf of the United States which the United States could have originally authorized.

Third. It is urged that the ratifying statute cannot be given effect without violating the Fifth Amendment of the Constitution, since to give efficacy to the act would deprive the claimants of their property without due process of law, or would appropriate the same for public use without just compensation. This rests upon these two contentions: It is said that the money paid to discharge the illegally exacted duties after payment, as before, "justly and equitably belonged" to the claimants, and that the title thereto continued in them as a vested right of property. It is consequently insisted that the right to recover the money could not be taken away without violating the Fifth Amendment, as stated. But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify. To hold to the contrary would be to say that whilst the unauthorized act of an officer done on behalf of the United States was subject to ratification by the United States, yet if the officer acted without authority the act when performed annihilated the power to ratify; that is, that the very condition which engendered the power destroyed it.

But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2. pp. 415, 416):

"The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. *Goshen* v. *Stonington*, 4 Connecticut 209; *Wilkinson* v. *Leland*, 2 Peters, 627; *Langdon* v. *Strong*, 2 Vermont, 234; *Watson* v. *Mercer*, 8 Peters, 88; 3 Story's Comm. on the Constitution, 267."

Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest.

Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed., p. 543):

"Nor is it important, in any of the cases to which we have referred, that the legislative act, which cures the irregularity, defect or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suits vests in a party no right to a particular decision; *Bacon* v. *Callender*, 6 Massachusetts, 303; *Butler* v. *Palmer*, 1 Hill, 324; *Cowgill* v. *Long*, 15 Illinois, 202; *Miller* v. *Graham*, 17 Ohio St. 1; *State* v. *Squires*, 26 Iowa, 340; *Patterson* v. *Philbrook*, 9 Massachusetts, 151, and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered. *Watson* v. *Mercer*, 8 Pet. 88; *Mather* v. *Chapman*, 6 Connecticut, 54; *People* v. *Supervisors &c.*, 20 Michigan, 95; *Satterlee* v. *Matthewson*, 16

S. & R. 169, and 2 Pet. 380; *Excelsior Mfg. Co.* v. *Keyser*, 62 Mississippi, 155; *Phenix Ins. Co.* v. *Pollard*, 63 Mississippi, 641; *McLane* v. *Bonn*, 70 Iowa, 752, 30 N. W. Rep. 478; *Johnson* v. *Richardson*, 44 Ark. 365. . . ."

And the following cases, in various forms, illustrate the application of the principle: *United States* v. *Morris*, 10 Wheat. 246; *Grim* v. *School Dist.*, 57 Pa. St. 433, 438; *City of Chester* v. *Black*, 132 Pa. St. 568; *Price* v. *Huey*, 22 Indiana, 18; *Welch* v. *Wadsworth*, 30 Connecticut, 149, 158; *Rich* v. *Flanders*, 39 N. H. 310, 311; *Iowa Railroad Land Co.* v. *Soper*, 39 Iowa, 112, 119; *Ferry* v. *Campbell*, 110 Iowa, 290; *Mills* v. *Geer*, 111 Georgia, 275, 279, 287, 288.

Fourth. Aside, however, from principle and the general result of the adjudged cases, it is finally insisted that the want of power in Congress to ratify the collection of the duties in question under the circumstances here disclosed conclusively results from the decision in *De Lima* v. *Bidwell*, 182 U. S. 1. As we have seen, that case concerned the validity of collections of duties in the port of New York on goods brought into the United States from Porto Rico, and whilst insisting on the legality of the duties, the Government at the same time urged that, even if originally invalid, they had yet been ratified as the result of provisions of a specified act of Congress which had been passed after the suit to recover the duties had been commenced. As that portion of the duties sued for which had been collected after ratification of the treaty were decided to be illegal, it followed that a decision as to the question of ratification was required. In passing upon the subject, after intimating doubt as to whether the act relied upon, as manifesting the intention of Congress to ratify, was intended to have that effect, it was remarked (p. 199):

"It can clearly have no retroactive effect as to moneys theretofore paid under protest, for which an action to recover back had already been brought. As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could not be taken away by a

subsequent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. In any event, it should not be interpreted so as to make it retroactive. *Kennett's Petition*, 24 N. H. 139; *Alter's Appeal*, 67 Pa. St. 341; *Norman* v. *Heist*, 5 W. & S. 171; *Donovan* v. *Pitcher*, 53 Alabama, 411; *Palairet's Appeal*, 67 Pa. St. 479; *State* v. *Warren*, 28 Maryland, 338."

Now, considering the language just quoted in connection with the doubt expressed as to the import of the alleged ratifying statute, it results that the reasoning employed stated two considerations, first, the want of power in Congress to ratify after suit brought; and second, the duty of construing the statute relied upon so as not to produce ratification, in view of its ambiguity. As the question of construction was last stated and that question was declared to be "in any event" decisive, we think the observations made concerning the want of power to ratify after suit brought must be regarded as not having been necessary to the decision rendered, and therefore must be treated as obiter. And this interpretation was, we think, applied in the cases of *Lincoln* v. *United States* and *Warner, Barnes & Co.* v. *United States, supra.* In those cases, as we have said, one of the defenses insisted upon by the Government was a ratification alleged to have been operated by the act of Congress of July 1, 1902, which was passed after the bringing of the actions to recover. It is patent on the face of the opinion announced on the original hearing that the decision was exclusively based upon the ground that the act of Congress was so ambiguous concerning the ratification relied upon that it should not be implied that such ratification was contemplated. And it is to be observed that *De Lima* v. *Bidwell* was not overlooked, since that case was referred to in the course of the opinion. On the rehearing the case was argued on questions submitted by the court, viz., whether the act relied upon manifested the purpose to ratify, and if it did, whether Congress had

power so to do. In the opinion on the rehearing, while the court reiterated the view previously expressed, that the act could not be treated as ratifying the collection of the duties sought to be recovered because of its ambiguity in that regard, yet it expressly recognized the power in Congress to ratify, and in effect declared that as to those things to which the alleged ratifying act clearly applied ratification had resulted. This is so, since in the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it was held applicable to the particular duties in controversy, it was pointed out (p. 499) that there were duties which had been levied and collected other than those in controversy to which the act clearly applied, and "that question (as to them) was put at rest by this ratification." Further, in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the passage of the ratifying act lent cogency to the view that if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the court said (p. 498):

"This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted, *Hamilton* v. *Dillin*, 21 Wall. 73, still it is not to be presumed to do so on language which, literally taken, has a narrower sense."

Certainly, this language, particularly in view of the reference made to *Hamilton* v. *Dillin*, is wholly incompatible with the conception that the observation as to pending actions made in *De Lima* v. *Bidwell* was to be taken as having settled the proposition that a power to ratify which otherwise obtained could not be exerted after suit brought.

Be this as it may, however, as after deliberate consideration we are of opinion that the mere bringing of this action did not deprive Congress of its power to ratify the collections made by

its officers in the name of the United States of the moneys sought to be recovered in this action, we may not allow the remarks made in *De Lima* v. *Bidwell* under the circumstances stated to control our judgment.

There was much discussion at bar concerning whether the payments of the duties were voluntary. As it would seem that the circumstances surrounding these payments were substantially like unto those existing in the *Lincoln and Warner, Barnes & Co. cases*, in which the opinions of the court made no reference to the question of voluntary payment, we have concluded to pass that question by, as our conclusion on the subject of ratification disposes of the controversy.

Reversed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissent.

MR. JUSTICE MOODY took no part in the decision of the cause.

MR. JUSTICE HARLAN concurring:

By the act of 1906, 34 Stat. 636, Congress legalized, ratified and confirmed, as fully to all intents and purposes as if the same had by prior act been specifically authorized and directed, the collection of all duties, both import and export, imposed by the authorities of the United States or of the provisional military government in the Philippine Islands, prior to March 8, 1902, at all ports and places in said Islands, from the United States or from foreign countries. Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the collector, if his exaction of

the duties in question was without authority of law. Upon this ground alone, and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal.

BUCK *v.* BEACH, TREASURER OF TIPPECANOE COUNTY, INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 14. Argued March 22, 1907.—Decided May 27, 1907.

The old rule of *mobilia sequuntur personam* has been modified so that the owner of personal property may be taxed on its account at its *situs* although not his residence, or domicil; but the mere presence of notes within a State which is not the residence or domicil of the owner does not bring the debts of which they are the written evidence within the taxing jurisdiction of that State, and a tax thereon by that State is illegal and void under the due process clause of the Fourteenth Amendment.

An attempt to escape proper taxation in one State on the debt represented by a note does not confer jurisdiction on another State, not the residence or domicil of the owner, to tax the note on account of its mere presence therein.

Mortgage notes made and payable in Ohio and secured by mortgages on property in that State, the owner whereof resides in New York, are not taxable in Indiana because they are therein for safe keeping.

JUDGMENT against the plaintiff in error (who was defendant below) was recovered in a state Circuit Court in Indiana, which was affirmed by the Supreme Court of the State (164 Indiana, 37), and the plaintiff in error brings the case here to review that judgment. The predecessor of the defendant in error, being at the time treasurer of Tippecanoe County, in the State of Indiana, brought this action in 1897 against the plaintiff in error to subject funds in his hands to the payment of taxes alleged to be due from the estate of one Job M. Nash, deceased, which taxes had been assessed in above county and State in 1894, after the death of Nash, on personal property of the deceased that

had been omitted from the tax list in his lifetime, during the years 1881 to 1893, both inclusive.

The point in dispute between the parties relates to the assessment for omitted property on what are called the "Ohio notes," the plaintiff in error insisting that such assessment was illegal as beyond the jurisdiction of the State to impose.

The material facts are not really in dispute. It appears that Nash died in 1893, at that time, and for more than twenty years prior thereto, a resident of the city and State of New York. He left a will which was admitted to probate in Hamilton County, Ohio, and his executors qualified there. They thereafter refused to pay the tax imposed upon the Ohio notes in Indiana. By the terms of the will a trust was created, and part of the personal property constituting such trust (more than enough to pay the taxes in dispute) was turned over to James Buck, plaintiff in error and one of the two trustees named in the will. He resided in Lafayette, in the State of Indiana, and the other trustee resided in Cincinnati, in the State of Ohio. From this fund, in the hands of Buck, the defendant in error asked to have the taxes paid which had been assessed, as above stated, and which he claimed were due the State. This was refused, and this action was thereupon commenced.

A former action had been brought by the trustees for relief by injunction against the predecessor of the defendant in error to enjoin him from seizing upon or interfering with the trust fund for the payment of the taxes in dispute, and in that action the trustees had been unsuccessful. *Buck* v. *Miller*, 147 Indiana, 586, decided in 1896.

The amount assessed on the estate of decedent upon the "Ohio notes" from 1884 to 1893, on account of omitted assessments during those years, aside from the penalties for nonpayment, was $36,357.71.

During the above-mentioned years, while the decedent was, as stated, a resident of the State of New York, he had a large sum of money invested in the States of Ohio and Indiana, approximating $750,000. The money loaned by him in Ohio

was evidenced by Ohio notes, made by the borrowers, who were residents of Ohio, the payment of the money borrowed being secured by mortgages on lands situated in Ohio. The moneys loaned in Ohio were loaned through an agent of Mr. Nash, residing in Cincinnati. The notes were dated and payable in Cincinnati, to the order of Mr. Nash, but were not endorsed by him, and all renewals and payments on account of them were made to his agent in Cincinnati. All moneys paid upon or by reason of these notes were deposited in a bank in Cincinnati to the credit of Mr. Nash, and no part thereof was sent to Indiana. The Cincinnati agent commenced loaning decedent's money about 1860, and, upon the removal of decedent to New York in 1870, and until his death, in 1893, the agent made investments on decedent's behalf in Ohio, collected the principal and interest upon his mortgage loans and had general charge of his financial interests in that State.

James Buck was the agent of decedent at Lafayette, in the State of Indiana, for many years preceding the death of Mr. Nash. The Ohio notes were sent to him from Cincinnati by the agent there, during the years in question, together with the mortgages securing the payment of the notes, and they were kept in a safe at Lafayette, Indiana, by Mr. Buck, but no business was transacted in regard to them nor any use made of them in Indiana, otherwise than that a short time before the interest on or principal of the notes became due they were sent to the Ohio agent to have the interest payments made to him endorsed upon them, or to be delivered up if the principal were paid.

Nothing else was done in Indiana in regard to the notes, except that a few days prior to the first day of April in each year (which is the day upon which assessments for taxes are, by law, made in the State of Indiana) Mr. Buck sent the notes and mortgages to the Ohio agent, and a few days subsequent to that day in each year the same were returned by the Ohio agent to Mr. Buck, who retained them in his possession.

When the Ohio notes and mortgages were sent from Cincin-

nati to Mr. Buck by the Ohio agent, Mr. Buck made a record of their receipt in a book kept by him for that purpose, showing the dates and amounts of the notes and when due, and whenever payment or renewal of said notes was reported by the Ohio agent to the Indiana agent, he made entries of the facts in the register kept by him.

Mr. Buck also had possession of the notes and mortgages given to Mr. Nash for moneys loaned in the State of Indiana, and such moneys were invested and reinvested in that State during these years, and the taxes thereon were duly paid.

Mr. Buck transacted no business directly with the makers of the Ohio notes or mortgages but, as stated, sent the notes to the Ohio agent for any business to be done in regard to them.

During Mr. Buck's agency money was sometimes sent to him at Lafayette from Cincinnati to be invested, which money was placed on deposit in the bank in Indiana and loaned for Mr. Nash. Such moneys have nothing to do with the "Ohio notes" in issue in this action.

During these years, at least from 1886, Mr. Buck was authorized by virtue of a power of attorney from Mr. Nash to satisfy when due and when the money was paid all notes and mortgages, but so far as the Ohio notes and mortgages were concerned he never assumed to satisfy any of them or receive payment for the same. That was all done by the Ohio agent at Cincinnati.

Mr. W. H. H. Miller and *Mr. Byron W. Langdon* for plaintiff in error:

The presence of the Ohio notes in Indiana did not constitute taxable property in that State.

The powers of taxation of a State are uncontrollable except as restrained by the provisions of the Federal Constitution. *McCullough* v. *State of Maryland*, 4 Wheat. 316, 418, 428, 429.

These powers can only be exercised over persons, property and business within the jurisdiction of the State. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319; *Dewey* v. *Des Moines*,

173 U. S. 193, 204; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396, 397, 398.

The powers of taxation are solely vested in the law-making department of the State. Sec. 1, Art. 10, Const. Indiana.

There must be statutory warrant for taxation. *New Orleans* v. *Stempel*, 175 U. S. 309, 312.

There was no statute of Indiana concerning the taxation of the transfer of property by death or otherwise; or, the taxing of title papers or written instruments themselves, apart and distinguished from the property interests or rights to which they related, or by which they were evidenced; or, on account of the business of loaning, collecting, reloaning or investment of money in the State.

A debt is not a *corpus* capable of a local position, but purely a *jus incorporale*, and contracts respecting personal property and debts are now universally treated as having no *situs* or locality, and they follow the person of the owner in point of right, although the remedy on them must be according to the law of the place where they are sought to be enforced. Story on Conflict of Laws, §§ 362, 399; *Kirtland v. Hotchkiss*, 100 U. S. 491.

The obligations of the borrowers of Nash's money were to return it to him, and they were personal to them, because no one else received the loans, and also on account of their express promise to pay.

These promises or obligations being inseparable from the borrowers, they were intangible and were where the borrowers were, and their permanent *siti* were at the domicil of the borrowers in Ohio. The *situs* of the mortgaged lands was likewise in Ohio, and, therefore, not taxable in Indiana.

In case of a non-resident the money due him, in the taxing State, is the only subject of taxation, and not his paper evidence. *Catlin* v. *Hull*, 21 Vermont, 152; *Board* v. *Davenport*, 40 Illinois, 197, 209; *Goldgart* v. *People*, 106 Illinois, 25; *In re Jefferson*, 35 Minnesota, 215; *Fitch* v. *York County*, 19 Nebraska, 50; *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 422;

New Orleans v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133.

Assuming that Nash and his debtors owning property were without the jurisdiction of Indiana, and that the physical presence of the Ohio notes did not constitute taxable property in that State, the taxes assessed on them were without just foundation and are illegal, and the State of Indiana would, by enforcing the collection of them by its officers, deprive the plaintiff in error of his trust property, without due process of law.

Mr. William R. Wood, with whom *Mr. Cassius C. Hadley* and *Mr. J. Frank Hanly* were on the brief, for defendant in error:

The State cannot be deprived of its right to tax property within its jurisdiction by the owner thereof removing the property temporarily out of its jurisdiction for the purpose of avoiding taxation thereon. *Dundee Company* v. *School District*, 19 Fed. Rep. 368; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421; *Connecticut Co.* v. *Town of Monroe*, 52 Atl. Rep. (N. H.) 942; *H. M. Loud & Sons Lumber Co.* v. *Elmer Township*, 123 Michigan, 61; *Shotwell* v. *Moore*, 129 U. S. 596; *Ogden, Treas.*, v. *Walker*, 59 Indiana, 460; *Senour* v. *Matchett*, 140 Indiana, 640; *Crowder* v. *Riggs*, 123 Indiana, 160; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 91.

In determining what the law of a State is, this court will look not only at the state constitution and statutes, but at decisions of its highest court giving construction to them, and the construction given the statute of a State by its highest court will be adopted by this court. *Wade* v. *Travis County*, 174 U. S. 508; *New Orleans* v. *Stempel*, 175 U. S. 316; *Stockard* v. *Morgan*, 185 U. S. 30; *Williams* v. *Parker*, 188 U. S. 504; *Williams* v. *Eggleston*, 170 U. S. 311; *Board of Liquidation* v. *Louisiana*, 179 U. S. 638; *Yazoo & Mississippi Valley Railroad Co.* v. *Adams*, 181 U. S. 583; *Mead* v. *Portland*, 200 U. S. 164; *Armour Packing Co.* v. *Lacy*, 200 U. S. 234, 236.

The General Assembly of Indiana has power to make notes,

mortgages, bonds and other evidences of indebtedness taxable. The question as to the taxability of such property is therefore one of will or intention and not of power. *Hart* v. *Smith*, 159 Indiana, 185, 188, 193; *Gallup* v. *Schmidt*, 154 Indiana, 203; *Western &c. Co.* v. *Halliday*, 110 Fed. Rep. 264; *Pullman's &c. Co.* v. *Commonwealth of Pennsylvania*, 141 U. S. 18; *Finch* v. *County of York*, 26 N. W. Rep. (Neb.) 590; *Hutchinson* v. *Board*, 23 N. W. Rep. (Ia.) 250; *Tappan* v. *Merchants' Bank*, 19 Wallace, 490; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421; *Coe* v. *Errol*, 116 U. S. 517.

Notes, bonds, mortgages and other evidences of indebtedness are "property" within the meaning of the Constitution, and ought to be assessed for taxation. In the construction of the legislative scheme of taxation the court ought to impute to the General Assembly an intent to obey the constitutional mandate if its enactments fairly admit of such construction. *Hart* v. *Smith*, 159 Indiana, 185.

It is not essential that both the owner and the thing assessed should be within the jurisdiction of the State. It is sufficient if either is within such jurisdiction. *Pullman's Co.* v. *Commonwealth*, 141 U. S. 18; *Goldgart* v. *People*, 106 Illinois, 28; *In re Romaine Estate*, 127 N. Y. 88; *In re Whiting Estate*, 150 N. Y. 29; *In re Morgan Estate*, 150 N. Y. 35; *In re Houdayer Estate*, 150 N. Y. 37.

The Ohio notes were not kept by plaintiff in error in Lafayette for clerical convenience. They were kept there permanently. They had at no time any other permanent location. They were kept there and held and controlled by Buck, as the agent of Nash, under such circumstances as to give them a taxable *situs* in Indiana. Acts 1891, p. 199, § 3; Acts 1891, p. 199, § 4; Acts 1891, p. 201, § 11; *Buck* v. *Miller*, 147 Indiana, 589; *Tousey* v. *Bell*, 23 Indiana, 426; *Schmidt* v. *Failey*, 148 Indiana, 153; *Powell* v. *City*, 21 Indiana, 340; *Rieman* v. *Shepard*, 27 Indiana, 289; *Standard Oil Co.* v. *Combs*, 96 Indiana, 183; *Board* v. *Standard Oil Co.*, 103 Indiana, 304.

The notes and mortgages, upon which the assessment in this

case is based, had a "business situs" in the city of Lafayette within the meaning of the law. Acts 1891, p. 199, § 3; Acts 1891, p. 199, § 4; Acts 1891, p. 201, § 11; *Buck* v. *Miller*, 147 Indiana, 589; *Tousey* v. *Bell*, 23 Indiana, 426; *Schmidt* v. *Failey*, 148 Indiana, 153; *Powell* v. *City*, 21 Indiana, 340; *Rieman* v. *Shepard*, 27 Indiana, 289; *Standard Oil Co.* v. *Combs*, 96 Indiana, 183; *Board* v. *Standard Oil Co.*, 103 Indiana, 304; *Western &c. Co.* v. *Halliday*, 110 Fed. Rep. 263.

Bank bills, municipal bonds, promissory notes and real estate mortgages have such a concrete form that they are subject to taxation where found, irrespective of the domicil of the owner. If such evidences of indebtedness are kept for an indefinite period, and are given a permanent location within the limits of the State, they are subject to taxation. *Buck* v. *Miller*, 147 Indiana, 586; *Tousey* v. *Bell*, 23 Indiana, 426; *Western &c. Co.* v. *Halliday*, 110 Fed. Rep. 264; *Black Hawk* v. *Dorris*, 90 N. W. Rep. (Ia.) 90; *Arosin* v. *London Co.*, 83 N. W. Rep. (Minn.) 340; *People* v. *Board*, 48 N. Y. 390; *People ex rel.* v. *Smith*, 88 N. Y. 581; *People* v. *Gaus*, 61 N. E. Rep. (N. Y.) 989; *Comptoir* v. *Board*, 27 So. Rep. (La.) 805.

No question in the case at bar, apart from the specific constitutional objection that the assessment of the property in issue contravenes § 1, Art. 14, of the Federal Constitution, is subject to review in this court. *Blackstone* v. *Miller*, 188 U. S. 207.

The assessment of the property in issue in this cause does not contravene § 1, Art. 14, of the Federal Constitution. Acts 1891, p. 199, § 4; § 1, Art. 14, U. S. Const.; *Pullman &c. Co.* v. *Commonwealth*, 141 U. S. 18; *New Orleans* v. *Stempel*, 175 U. S. 309; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421; *Comptoir &c. Co.* v. *Board*, 27 So. Rep. 805.

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

The only question involved here is in regard to the taxability of the Ohio notes in the State of Indiana.

The plaintiff in error asserts that the simple physical presence

of the Ohio notes in Indiana payable to and not endorsed by the decedent, did not constitute taxable property there, because such notes were given and were payable and were paid in Ohio by residents of Ohio, and to a non-resident of Indiana, and for loans made in Ohio, the capital represented by such notes never having been used in business in Indiana, and he insists that a tax upon such capital or upon the notes themselves as representing that capital is an illegal tax, and that to take property in payment of such an illegal tax is to take it without due process of law and constitutes a violation of the Fourteenth Amendment.

If the facts in this case constituted the debts evidenced by the Ohio notes property in the jurisdiction of the State of Indiana at the time when such taxes were imposed, then the tax was valid, if there were statutory authority of that State for the same. The state court has held that there was such authority, *Buck* v. *Miller*, 147 Indiana, 586; *Buck* v. *Beach*, 164 Indiana, 37, being the case at bar, and that construction of the statute concludes this court. *Delaware &c. Co.* v. *Pennsylvania*, 198 U. S. 341, 352.

The sole question then for this court is whether the mere presence of the notes in Indiana constituted the debts of which the notes were the written evidence, property within the jurisdiction of that State, so that such debts could be therein taxed.

Generally, property in order to be the subject of taxation must be within the jurisdiction of the power assuming to tax. *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Erie Railroad* v. *Pennsylvania*, 153 U. S. 628, 646; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 427; *Louisville &c.* v. *Kentucky*, 188 U. S. 385; *Delaware &c.* v. *Pennslyvania*, 198 U. S. 341; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Metropolitan Ins. Co.* v. *New Orleans*, 205 U. S. 395.

In regard to tangible property the old rule was *mobilia sequunter personam*, by which personal property was supposed to follow the person of its owner, and to be subject to the law

of the owner's domicil. For the purpose of taxation, however, it has long been held that personal property may be separated from its owner, and he may be taxed on its account at the place where the property is, although it is not the place of his own domicil, and even if he is not a citizen or resident of the State which imposes the tax. *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *People ex rel. Hoyt* v. *The Commissioner of Taxes*, 23 N. Y. 224, 240. The same rule applies to intangible property. Generally speaking, intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicil of the creditor and within the jurisdiction of the State where he has such domicil. It is property within that State. Thus it has been held that a debt owned by a citizen of one State against a citizen of another State and evidenced by the bond of the debtor, secured by a deed of trust or mortgage upon real estate situated in the State where the debtor resides, is properly taxed by the State of the residence of the creditor, if the statute of that State so provides, and such tax violates no provision of the Federal Constitution. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498.

Rejecting the fiction of law in regard to the *situs* of personal property, including therein choses in action, the courts of Indiana have asserted jurisdiction by reason of the statute of that State over these Ohio notes for the purpose of taxation in Indiana, founded upon the simple fact that such notes were placed in the latter State by the Ohio agent of the decedent under the circumstances above set forth. The Supreme Court of Indiana refused to accept the testimony of the agents that the Ohio notes were sent to Lafayette merely for safe keeping, and for clerical convenience, and said that "the court below was authorized to make the opposite deduction from the uniform course of the business in respect to the keeping of said notes and mortgages and from the evidence that decedent gave the direction which established the practice that was pursued in that particular. More than that, the evidence

clearly warranted the conclusion that Buck was vested with a control of said notes and securities for the purposes of enabling decedent to escape taxation in Ohio. We must, therefore, conclude, in support of the general finding, that the court below found that in the conducting of the business of the Ohio agency the decedent separated from said business the possession of said notes and mortgages and vested the right to such possession in said Buck. There was no return for taxation of said notes, or of the investments represented by them, either in Ohio or in New York during the lifetime of the decedent."

Taking this to be a finding of fact by the Supreme Court of the State, it is plain that the action of the decedent in sending the Ohio notes into the State of Indiana for the purpose stated (whether successful or not), was improper and unjustifiable. The record does show, however, that the executors subsequently paid the Ohio authorities over $40,000 for taxes on the moneys invested in Ohio.

But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside and beyond the jurisdiction of that State. Jurisdiction of the State of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the State of Indiana these evidences of debts owing him by residents of Ohio. The question still remains, was there any property within the jurisdiction of the State of Indiana, so as to permit that State to tax it, simply because of the presence of the Ohio notes in that State? It was not the value of the paper as a tangible thing, on which these promises to pay the debts existing in Ohio were written, that was taxed by that State. The property really taxed was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon. And jurisdiction over these debts for the purpose of taxation was asserted and exercised solely by reason of the physical presence in Indiana of the notes themselves,

although they were only written evidence of the existence of the debts which were in fact thereby taxed.

A distinction has been sometimes taken between bonds and other specialty debts belonging to the deceased, on the one hand, and simple contract debts on the other, for the purpose of probate jurisdiction, and the probate court, where the bonds are found, has been held to have jurisdiction to grant probate, while in the other class of debts (including promissory notes) jurisdiction has attached to the probate court where the debtor resided at the death of the creditor. 1 Williams on Executors, 6th Am. from 7th English ed., bottom paging 288, 290, note [*h*]; *Wyman* v. *Halstead Adm'r*, 109 U. S. 654. See also *Beers* v. *Shannon*, 73 N. Y. 292, 299; *Owen* v. *Miller*, 10 Ohio St. 136.

Under such rule, the debts here in question were not property within the State of Indiana, nor were the promissory notes themselves, which were only evidence of such debts. The rule giving jurisdiction where the specialty may be found, has no application to a promissory note. Assuming such a rule, the case here is not covered by it.

Questions of the validity of state taxation with reference to the Federal Constitution have become quite frequent in this court within the last few years. The case of *Metropolitan Life Insurance Company* v. *The City of New Orleans*, 205 U. S. 395, is the latest. The question there was in relation to the validity of certain taxes assessed in the city of New Orleans against the Metropolitan Life Insurance Company by reason of the company doing business in lending money to the holders of its policies in New Orleans. The domicil of the company was in the city of New York, and the evidences of the credits, in the form of notes, were kept most of the time in New York, being sent to New Orleans when due. The tax was, under the laws of the State of Louisiana, levied on the "credits, money loaned, bills receivable," etc., of the plaintiff in error and its amount was ascertained by computing the sum of the face value of all the notes held by the company in New Orleans

at the time of the assessment. The assessment was made under an act which provided that "bills receivable, obligations, or credits arising from the business done in this State," shall be assessable at the business domicil of the non-resident, the assessment being made in such a way under the statute as would "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." The tax was sustained because, as is stated in the opinion of the court, which was delivered by Mr. Justice Moody, "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 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 temporary absence of the notes, given for the loans, from the State (being in New York, the domicil of the company) except when they became due, was regarded as unimportant. The law, it was said, regarded the place of their origin as their true home, to which they would return to be paid, and their temporary absence, however long continued, was left out of account.

The prior cases of *New Orleans* v. *Stempel*, 175 U. S. 309, and *Board of Assessors* v. *Comptoir National*, 191 U. S. 388, were also cited. In the first there was a tax on credits, evidenced by notes (secured by mortgages on real estate in New Orleans) which the owner a non-resident, who had inherited them, left in Louisiana in the possession of an agent, who collected the principal and interest as they became due. The

capital of the owner was thus invested in the State, and was thereby subject to taxation there, and the notes did not alter the nature of the debt, but were merely evidence of it. In the latter case 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 held taxable in Louisiana. The corporation was held to be doing business and had capital employed in the city of New Orleans, to the extent of the assessment made upon it therein.

In *Bristol* v. *Washington County*, 177 U. S. 133, the assessment was upheld because it appeared that the person assessed was doing business in Minnesota through an agent, in lending money in that State, which was secured by mortgages on real property therein. The amount of money thus invested in that State was held to be properly taxable therein.

In *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, the assessment was upon the real estate mortgaged, the interest of the mortgagee therein being taxed to him and the rest to the mortgagor, and it was held by this court that the fact that the mortgage was owned by a citizen of another State, and in his possession outside of the State of Oregon, where the real estate was situated, did not violate the Fourteenth Amendment. It was stated that "The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed like other choses in action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property at its *situs*." Under the statute of Oregon

the assessment was made against the mortgagee upon his interest in the land as real estate.

There are no cases in this court where an assessment such as the one before us has been involved. We have not had a case where neither the party assessed nor the debtor was a resident of or present in the State where the tax was imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation. We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the State for taxation. That promissory notes may be the subject of larceny, as stated in 48 N. Y. cited below, does not make the debts evidenced by them, property liable to taxation within the State where there is no other fact than the presence of the notes upon which to base the claim.

In *People* v. *The Board of Trustees &c.*, 48 N. Y. 390, it was held that money due upon a contract for the sale of land was personal property, and that where such contract belonging to a non-resident was in the hands of a resident agent, it might, for the purposes of municipal taxation, be assessed to the agent and taxed. In the opinion Judge Earl said: "The debts due upon these contracts are personal estate, the same as if they were due upon notes or bonds; and such personal estate may be said to exist where the obligations for payment are held." The contracts spoken of in that case were contracts for the sale of land by a non-resident owner to persons within the county where the lands were situated. The debtors resided within the State, and the agent of the non-resident for the sale of the land resided in the State and had possession of the contracts. A different case as to its facts from the one before us.

In *People* v. *Smith*, 88 N. Y. 576, jurisdiction to tax in New York was denied under the statute of that State, because the personal estate was not within the State, although the

same principle, page 581 as contained in 48 N. Y., *supra*, was asserted.

If payment of these notes had to be enforced it would not be to the courts of Indiana that the owner would resort. He would have to go to Ohio to find the debtor as well as the lands mortgaged as security for the payment of the notes. It is true that if the notes were stolen while in Indiana, and they were therein a subject of larceny, the Indiana courts would have to be resorted to for the punishment of the thieves. That would be in vindication of the general criminal justice of the State. This consideration, however, is not near enough to the question involved to cause us to change our views of the law in regard to the taxation of property, and make that property within the State, which we think is clearly outside it.

Although public securities, consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions have sometimes been treated as property in the place where they were found, though removed from the domicil of the owner, *State Tax on Foreign-held Bonds*, 15 Wall. 300, 324, it has not been held in this court that simple contract debts, though evidenced by promissory notes, can under the facts herein stated be treated as property and taxed in the State where the notes may be found.

As is said in the above cited case at page 320: "All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expressions could add anything to its obvious truth, which is recognized upon its simple statement."

The cases cited in *Metropolitan Insurance Co. case, supra*, show that this rule is enlarged to the extent of holding that capital, evidenced by written instruments, invested in a

State may be taxed by the authorities of the State, although their owner is a non-resident and such evidences of debt are temporarily outside of the State when the assessment is made. Although the language of the opinion in the case of *State Tax on Foreign-held Bonds, supra,* has been somewhat restricted so far as regards the character of the interest of the mortgagee in the land mortgaged, *Savings &c. Society* v. *Multnomah County,* 169 U. S. 421, 428, the principle upon which the case itself was decided has not been otherwise shaken by the later cases. *New Orleans* v. *Stempel,* 175 U. S. 309, 319, 320; *Blackstone* v. *Miller,* 188 U. S. 189, 206. In the *Stempel case, supra,* the notes, as we have said, represented the capital of the owner invested in the State, and the capital was taxed, although the owner was a non-resident.

Cases arising under collateral inheritance tax or succession tax acts have been cited as affording foundation for the right to tax as herein asserted. The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property, as has been frequently held by this court, *Knowlton* v. *Moore,* 178 U. S. 41, and *Blackstone* v. *Miller,* 188 U. S. 189, and therefore the decisions arising under such inheritance tax cases are not in point.

Our decision in this case has no tendency to aid the owner of taxable property in any effort to avoid or evade proper and legitimate taxation. The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, of taxing the debts, evidenced by the notes, in Ohio. It does, however, tend to prevent the taxation in one State of property in the shape of debts not existing there and which if so taxed would make double taxation almost sure, which is certainly not to be desired and ought, wherever possible, to be prevented.

For the reason that as the assessment in this case was made upon property which was never within the jurisdiction of the State of Indiana the State had no power to tax it, and the

enforcement of such a tax would be the taking of property without due process of law.

The judgment of the Supreme Court of Indiana is reversed and the case remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

MR. JUSTICE DAY, dissenting:

I am unable to concur in the opinion and judgment of the court in this case and believe that its importance and far-reaching effect warrant a statement of the grounds upon which I differ.

Before stating the view which it seems to me should be controlling I believe that the statement of facts, as outlined by the learned justice speaking for the court, should be somewhat amplified with a view to a more complete showing of the case.

The office in Lafayette, Indiana, was the office of Nash, for which he paid the rent. The safes in which the notes were kept in this office were the safes of Nash, and the power of attorney under which the agent held the "Ohio notes" not only authorized him to enter satisfaction of them when paid, but gave him complete control and dominion over them with power of sale. And while it does not clearly appear that the proceeds of the notes in question were reinvested by the agent in Indiana, it does appear that after 1886 large sums of money were sent from Cincinnati to Lafayette and were invested by Nash's agent in Indiana. Furthermore, in the opinion it is said that the executors, subsequently to the death of Nash, paid over $40,000 of taxes on money invested in Ohio. It does appear that after the death of Nash, under the Ohio law the auditor of Hamilton County instituted a proceeding for the collection of five years (of the thirteen here involved) of back taxes upon some of the notes representing the Ohio investments, and rather than litigate, a settlement was made

by the executors for this five years' claim in the sum of $40,000. Whether that was for the notes here in question the record does not disclose. As the Ohio agent testified, only a part of the Ohio notes were sent to Indiana, and others in large amounts were kept in Ohio. We know of no statute in Ohio which would tax the notes permanently kept in Indiana, and none is pointed out. The Supreme Court of Indiana in this case reached the conclusion that these particular notes were not taxable in Ohio. Of course the settlement of the claim could not affect the legal proposition here involved, but for accuracy of statement it must not be regarded that equitably the claim for taxes upon these notes has been satisfied. On the contrary, this record discloses that by the scheme adopted more than three-quarters of a million of dollars in capital invested in notes and mortgages successfully evaded taxes during Nash's lifetime in New York, where he was domiciled, and in Ohio and Indiana, where his agents were loaning his money for him and where his notes and mortgages, the results of such loans, were held for him.

Accepting the decision of the Supreme Court of the State that a statute of the State has undertaken to tax these notes, it is now held that the Constitution of the United States prevents such taxation of notes and mortgages held under the protection and within the power of the State by the agent of a non-resident owner, although such agent holds the securities in an office belonging to the owner, in a safe provided by him, with a power of attorney which gives him full dominion over them, and for the convenience of the owner keeps a book in which transactions concerning them are recorded at the instance of the owner, and sends them out for collection. These notes were sent beyond the borders of the State of Indiana only for collection, or for the few days when they were supposed to be liable for taxation, and, when such danger was thought to be past, returned to the agent in Indiana.

I agree that a debt intangible in form cannot acquire a *situs* for the purpose of taxation, but I submit that when a

debt takes the shape of note and mortgage it may, if the State, in the exercise of its taxing power so wills, acquire a *situs* separate from the domicil of the owner under the circumstances shown in this case. I concede that the precise point here involved has not been decided in previous cases in this court, but in my view the principles declared in this court were followed in the Supreme Court of Indiana and require the affirmance of its judgment.

This court in a series of cases has held that notes, bonds and mortgages may acquire a *situs* at the place where they are held. Some of the cases are: *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Blackstone* v. *Miller*, 188 U. S. 189; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388, 403; *Carstairs* v. *Cochran*, 193 U. S. 10; *Scottish Union & Nat. Ins. Co.* v. *Bowland*, 196 U. S. 611.

It would unnecessarily extend this dissent to analyze these cases. Brief reference to some of them, in my judgment, shows that the principles therein declared, when extended to this case, would warrant the State, if it so chose in exerting its taxing power, to reach notes and mortgages held within its jurisdiction under the circumstances which we have detailed.

In *New Orleans* v. *Stempel*, 175 U. S. 309, a tax on credits evidenced by notes and secured by mortgages was upheld, where the owner left them in Louisiana in the possession of an agent who collected the same as they fell due. There was no fact of investment and reinvestment of capital in the case, and the court, speaking through Mr. Justice Brewer, said:

"This matter of *situs* may be regarded in another aspect. In the absence of statute, bills and notes are treated as choses in action and are not subject to levy and sale on execution, but by the statutes of many States they are made so subject to seizure and sale as any tangible personal property. 1 Freeman on Executions, § 112; 4 Am. and Eng. Enc. of Law, 2d ed., 282; 11 Am. and Eng. Enc. of Law, 2d ed., 623. Among the States referred to in these authorities as having statutes war-

ranting such levy and sale are California, Indiana, Kentucky, New York, Tennessee, Iowa, and Louisiana. *Brown* v. *Anderson*, 4 Martin (N. S.), 416, affirmed the rightfulness of such a levy and sale. In *Fluker* v. *Bullard*, 2 La. Ann. 338, it was held that if a note was not taken into the actual possession of the sheriff a sale by him on an execution conveyed no title on the purchaser, the court saying: 'In the case of *Simpson* v. *Allain*, it was held that, in order to make a valid seizure of tangible property, it is necessary that the sheriff should take the property levied upon into actual possession.' 7 Rob. 504. In the case of *Gobeau* v. *New Orleans & Nashville Railroad Company* the same doctrine is still more distinctly announced. The court there says: 'From all the different provisions of our laws above referred to, can it be controverted that, in order to have them carried into effect, the sheriff must necessarily take the property seized into his possession? This is the essence of the seizure. It cannot exist without such possession.' 6 Rob. 348. It is clear, under these authorities, that the sheriff effected no seizure of the note in controversy, and consequently his subsequent adjudication of it conferred no title on Bailey.

"The same doctrine was reaffirmed in *Stocto* v. *Stanbrough*, 3 La. Ann. 390. Now if property can have such a situs within the State as to be subject to seizure and sale on execution, it would seem to follow that the State has power to establish a like *situs* within the State for the purposes of taxation. It has also been held that a note may be made the subject of seizure and delivery in a replevin suit. *Graff* v. *Shannon*, 7 Iowa, 508; *Smith* v. *Eals*, 81 Iowa, 235; *Pritchard* v. *Norwood*, 155 Massachusetts, 539.

"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner, are subject to levy and sale on execution and to seizure and delivery upon replevin; and, yet, they are but promises to pay, evidences of existing indebtedness. *Notes and mortgages are of the same nature; and, while they may not have be-*

come so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that, if found within its limits, they shall be subject to taxation."

In commenting on this case and *State Assessors* v. *Comptoire National &c.*, 191 U. S. 388, Mr. Justice Moody, speaking for the court in the late case of *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, said: "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."

In *Blackstone* v. *Miller*, 188 U. S. 206, Mr. Justice Holmes, speaking for the court, said:

"There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-held Bonds*, 15 Wall. 300; 21 L. ed. 179. The taxation in that case was on the interest on bonds held out of the State. *Bonds and negotiable instruments are more than merely evidences of debt.* The debt is inseparable from the paper which declares and constitutes it by a tradition which comes down from more archaic conditions. 177 Massachusetts, 335, 337."

To the consideration of the subject in the opinions of the learned justices just quoted, it may be added that bills and notes are the subject of conversion in trover, and the measure of damages is the collectible value of the obligation. *Mercer* v. *Jones*, 3 Camp. 477; 2 Ames on Bills and Notes, p. 693, and numerous cases there cited. Bills and notes may be the subject of *donatio causa mortis*, even though payable to order and unendorsed. 2 Ames' Bills and Notes, 699–701. They are held to be governed by the designation of "goods and chattels" in the statute of frauds and other statutes. 2 Ames' Bills and Notes, 706.

Bills and notes have been held to be "goods, wares and merchandise" within the meaning of the statute of frauds. *Baldwin* v. *Williams*, 3 Met. 365; *Somerby* v. *Buntin*, 118 Massachusetts, 279.

In view of this recognition of the character of bills and notes as tangible property, it seems to me inaccurate to say that they are mere evidences of debt. They are tangible things, capable of delivery; passing from hand to hand, and for many purposes may be regarded as of the value of the debt which they evidence.

It is elementary that the power of the States as to matters of taxation is very broad, and subject only in the limitation of its exercise to the constitution of the State and the Nation.

It seems to me that a State, in pursuance of its taxing policy, may give a *situs* to such evidences of debt held within its jurisdiction as have taken the tangible form of bonds, notes and mortgages.

It is said to deny this power to the States, under the circumstances of this case, will tend to prevent double taxation—a thing much to be desired. This case seems to me an apt illustration of the contrary view, by denying the power to Indiana to tax these notes under the circumstances shown, the scheme of the owner to avoid any tax upon them is made effectual, and, except for the recovery after his death for a small part of the taxes actually due, this vast sum of money escapes taxation altogether. I think that the powers of taxation here invoked by the State of Indiana ought not to be denied, and if the practical effect can be given any weight in deciding legal rights, to me it seems evident that such denial will work immunity from just taxation of property represented in promissory notes and mortgages sent beyond the jurisdiction of the State where the owner is domiciled and held by agents in distant States within the protection of their laws, for the sole purpose of avoiding contribution to the public treasury. As I understand the opinion, municipal bonds, or other such securities held as these are, would be legitimately subject to taxation. They are but promises to pay in a concrete form of the same character as notes and mortgages. In my opinion there is no constitutional objection to their localization for

taxation by the law of the State when the owner has chosen to give them a *situs* there as in this case.

Without further extending these views, I am constrained to dissent from the opinion and judgment of the court in this case.

MR. JUSTICE BREWER concurs in this dissent.

SECURITY WAREHOUSING COMPANY *v.* HAND.

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

No. 229. Argued March 7, 8, 1907.—Decided May 27, 1907.

The general law of pledge requires possession and it cannot exist without it, and this is the law in Wisconsin.

Where there is no delivery or change of possession receipts issued by a warehouse company are not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned therein. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, distinguished.

Although the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and property in his hands unless otherwise provided in the bankrupt act is subject to all the equities impressed upon it in the hands of the bankrupt, on the facts in this case and the law of the State there was no valid pledge of, and no equitable lien on the merchandise in favor of the holders of warehouse receipts, which take precedence of the title of the trustee.

THE above-named appellants have appealed from a judgment of the Circuit Court of Appeals of the Seventh Circuit, affirming a decree of the United States District Court for the Eastern District of Wisconsin dismissing certain petitions of the appellants for want of equity. 143 Fed. Rep. 32.

Certain creditors filed a petition in bankruptcy October 5, 1903, against the Racine Knitting Company, a company en-

gaged in manufacturing hose and other knit goods, with factories at Racine and Stevens Point, Wisconsin. The company was, on the twenty-sixth of October, 1903, duly adjudged a bankrupt, and the appellees were appointed receivers and were later elected trustees. The appellees asserted the right to certain merchandise covered by receipts issued by the appellants, the security company, which company thereupon filed in the bankruptcy court an intervening petition asserting its exclusive possession and control of the merchandise in question and the issuing of its receipts therefor to the knitting company, and their negotiation by it prior to its bankruptcy, and that those receipts were given to the other appellants in good faith in due course of business as security for loans. The intervening petitioner alleged that the appellees were claiming title to the merchandise and were obstructing the petitioner in its possession, and the prayer was for an order that the appellees be restrained from interfering with the petitioner in its custody and control of the property. The other appellants then intervened and also set up the same facts, and prayed that the appellees might be restrained from interfering with the security company in delivering the merchandise to the petitioners, and from asserting any right or title to the property as against them. Issues were joined and the matters were referred to the referee, who reported his findings of fact. From these findings it appeared that the Security Warehousing Company was a corporation of the State of New York, duly licensed to do business in the State of Wisconsin, and that it was engaged in the business of "field warehousing," so called; that it owned no warehouse of its own and occupied no public warehouse at any place. The warehousing company leased certain premises from the knitting company in Racine, in the State of Wisconsin, and also certain premises at a place called Stevens Point, in the same State. These two places were occupied by the knitting company with their goods to be sold, and the goods were placed on the premises really occupied by the knitting company,

although in form leased by it to the warehousing company, and the so-called warehouse receipts were given to the knitting company by the warehousing company, acknowledging the receipt of the property at such places. There was no change of possession in fact, and scarcely any in form. These receipts were in turn pledged by the knitting company to various banks, and moneys obtained upon the security of such receipts from them. The general character of business of this form is stated in *Union Trust Company* v. *Wilson*, 198 U. S. 530, but the particular facts in this case, given in detail as findings by the referee and adopted by the District Court and Circuit Court of Appeals, may be found in 143 Fed. Rep. 32, *supra*. Reference is made to that report for the findings of the referee. The report shows a radically different state of facts from the *Wilson case*.

Mr. Henry S. Robbins, for appellants, submitted:

This case is not distinguishable from the case of *Union Trust Co.* v. *Wilson*, 198 U. S. 530.

The fact that the boards constituting the enclosure were four to six inches apart instead of being closely fitted, as in the *Wilson case*, 198 U. S. 530, seems too trivial to require discussion. This was more favorable to publicity than a tightly fitted enclosure, as it enabled one seeing the enclosure from the outside to see also the signs that were within. Anyone making the most superficial inspection could see the enclosure, and the locked door, and were without being put upon notice of the warehousing company's control.

Nor does a substantial difference between the two cases arise out of the fact that in the case at bar the custodians appointed by the warehousing company to watch the property and release it upon the return of the receipts, were also employés of the dealer. *Sumner* v. *Hamlet*, 12 Pick. 76.

Nor does any material difference between this and the *Wilson case* arise out of the fact found in the case at bar by the master that on three or four occasions "manifested goods

were taken out of the enclosures by the custodian" and other goods were substituted therefor. The quantities thus taken out were trifling. But whatever be the law as to chattel mortgages, substitutions—especially such trifling ones—do not invalidate a pledge. *Blydenstein* v. *N. Y. Security Co.*, 67 Fed. Rep. 469; 15 C. C. A. 14; *Sumner* v. *Hamlet*, 12 Pick. 76; *Clark* v. *Iselin*, 21 Wall. 360; Colebrooke on Collateral Securities, 2d ed. § 15; *Sawyer* v. *Turpin*, 91 U. S. 114; *Cook* v. *Tullis*, 18 Wall. 332.

Nor is the *Wilson case* inapplicable to the case at bar because the former arose in Illinois and the latter in Wisconsin.

The law of Illinois abhors secret liens as much as does that of Wisconsin, and this was pressed upon the attention of this court in the *Wilson case*. See *Funk* v. *Staats*, 24 Illinois, 632; *Harkness* v. *Russell*, 118 U. S. 663.

In both States, as well as generally, a change of possession is essential to the validity of a pledge or warehouse receipt.

The appellant creditors acquired at least equitable liens, which were superior to the title of the trustees in bankruptcy. If there was not a sufficient change of possession to support a pledge or warehouse receipt, still the delivery by the knitting company of these receipts as security for loans created equitable liens. *Union Trust Company* v. *Trumbull*, 137 Illinois, 146.

The receipt holders here were unacquainted with the physical nature of the storage or the methods of the Security Warehousing Company. Equitable liens have been upheld by this court in *Hauselt* v. *Harrison*, 105 U. S. 401; *Walker* v. *Brown*, 165 U. S. 654. Equitable liens are recognized in Wisconsin. *McDonald* v. *Daskam*, 116 Fed. Rep. 276; *S. C.* 53 C. C. A. 554.

An equitable lien is superior to the title of the trustee in bankruptcy—so held under the act of 1841. *Fletcher* v. *Morey*, 2 Story, 555; *S. C.* Fed. Cas., 4,864; *Winsor* v. *McLellan*, 2 Story, 492; *S. C.* Fed. Cas., 17,887. And under the act of 1867. *Hauselt* v. *Harrison*, 105 U. S. 401; *Yeatman* v. *Savings Inst.*, 95 U. S. 764; *Stewart* v. *Platt*, 101 U. S. 731.

The present bankrupt act did not intend to change this rule.

Reading clauses (a) and (d) of § 67 together, as they should be, the proper construction is that liens "accepted in good faith," and which are of a nature to be recorded, such as chattel mortgages, are not good against the estate unless recorded; but that liens accepted in good faith, but not of a nature to be recorded, shall be unaffected by the bankrupt act, although not superior to writs of attachment and execution.

There is a clear distinction between a fraudulent conveyance —to avoid which both parties must have participated in the fraudulent intent—and an equitable lien in which, as at bar, the creditor is not a participant in any legal or actual wrong doing. See *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Thompson* v. *Fairbanks*, 196 U. S. 516–520; *Hewit* v. *Berlin Works*, 194 U. S. 296; *In re Economical Printing Co.*, 110 Fed. Rep. 514; *S. C.* 49 C. C. A. 133.

Mr. John B. Simmons for appellees:

The receipts issued by the Security Warehousing Company were not warehouse receipts within the legal or commercial signification of the term, and their endorsement in blank and delivery as collateral in no way affected the title to the goods of the bankrupt.

In controversies of this sort, involving the validity of transfers of property by warehouse receipts, chattel mortgage, and the like, the law of the State where the property is situated must govern. *In re St. Paul & Kansas City Grain Co.* (Minn.), 94 N. W. Rep. 218; *Hallgarten* v. *Oldham*, 135 Massachusetts, 1; *Etheridge* v. *Sperry*, 139 U. S. 276, 277; *Bamberger* v. *Schoolfield*, 160 U. S. 149; *Hartford Ins. Co.* v. *C., M. & St. Paul Ry. Co.*, 175 U. S. 91.

The facts shown by the record do not establish the existence of valid liens by way of pledge. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, distinguished.

In respect to a pledge, as distinguished from a mortgage

of personal property, delivery of possession is not a consequence, but the very essence of the contract. *Lee* v. *Bradlee*, 8 Martin (O. S.), La. 20.

To comply with the law, the possession, as in a case of pledge, must be exclusive. Not only must possession be taken, but that possession must be exclusive of the vendor, and concurrent possession will not do. *McKibbon* v. *Martin*, 3 Am. R. 588, 593. See *Hale* v. *Sweet*, 40 N. Y. 97, where the mortgagee of a vessel employed a man to take charge of and run her, but clearances were made in the name of the mortgagor who also collected the freight.

A similar case of an attempted pledge, is *Wickham* v. *Levistone*, 11 La. Ann. 702. And supporting the same proposition are: Jones on Chattel Mortgages, § 185; *Grant* v. *Lewis*, 14 Wisconsin, 487; *Orsen* v. *Sherman*, 27 Wisconsin, 501; *Schneider* v. *Kraby*, 97 Wisconsin, 519; *Pierce* v. *Kelley* (Ore.), 34 Pac. Rep. 963; *Hale* v. *Sweet*, 40 N. Y. 97; *Steele* v. *Benham*, 84 N. Y. 634.

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

A careful reading of the findings of the referee and of the evidence upon which they were based satisfies us that they ought to be approved. The findings show that the receipts of the warehousing company were not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned in them. Upon that question the case is sufficiently stated in the opinion of the court below, wherein it was said that the "receipts themselves would put the holders on notice of the facts."

If the receipts were not negotiable instruments, it is contended that the transactions showed a valid pledge of the property to some of the appellants, and hence they are entitled to its possession until they are paid the debts due them from the bankrupt. Whether there was a sufficient change of

possession of the thing pledged to render the same valid under the law of Wisconsin, we think was correctly answered in the negative by the courts below. *Geilfuss* v. *Corrigan*, 95 Wisconsin, 651, 665, 669. The general law of pledge requires possession, and it cannot exist without it. *Casey* v. *Cavaroc*, 96 U. S. 467. There was scarcely a semblance of an attempt at such change of possession from the hands of the knitting company to the hands of the warehousing company. Actual possession of the property in question was exercised by and existed with the knitting company substantially the same after the issuing of the receipts as before. It is a trifling with words to call the various transactions between the knitting company and the warehousing company a transfer of possession from the former to the latter. There was really no delivery, and no change of possession, continuous or otherwise. The alleged change was a mere pretense, a sham. Upon the subject of change of possession the opinion of the Circuit Court of Appeals contains the following statement of fact: "In the present case the main office of the security company was in New York; the nearest district office was in Chicago; from there the receipts were issued; and in Wisconsin the security company had no office and no warehouses, unless the enclosures within the buildings of the knitting company at Racine and Stevens Point be counted such. The receipts themselves would put the holders thereof on notice of these facts. And at Racine and Stevens Point the security company gave no evidences to the public of its presence. No signs were displayed to the passer-by. No business was sought from the public. The only property within the enclosures was the knitting company's. The knitting company did not want storage room, but collaterals, which the security company agreed to furnish for a commission upon the amount thereof plus all expenses. The security company's only agents on the scene were the agents of the knitting company, who cared for and shipped out its goods. That this was the only business contemplated is disclosed by the agreement that the knitting

company should be restored to full possession of the premises at any time it returned the outstanding receipts. This, in our judgment, was not warehousing within the law of Wisconsin."

Also: "So far from the security company's maintaining an open, exclusive, unequivocal possession during the two years this arrangement was carried on, it seems to us that the security company might as well have been eliminated, and the knitting company have employed its own stockkeepers and shipping clerks as custodians for intending lenders, directly, instead of indirectly through the security company. In that view this becomes one of the cases 'in which the exclusive power of the so-called bailee, *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 537, tapers down to nothingness. *Drury* v. *Moors*, 171 Massachusetts, 252; *Bank* v. *Jagode*, 186 Pa. St. 556.'"

The actual transactions in the case at bar differ radically from the facts as stated in *Union Trust Company* v. *Wilson*, *supra*. The court there held that there was sufficient proof to show a change of possession and that the transaction was valid within the law of the State of Illinois. Assuming the law of Wisconsin to be the same on the subject of possession by the pledgee of the property pledged, the facts in this case are so different from the *Wilson case* as to prevent that case from forming a foundation for holding there was a sufficient change of possession here to make the pledge a valid one.

We are satisfied with the decision of the courts below upon the merits.

There is, however, an important matter which has been raised by the appellants aside from the merits. That is, whether a trustee in bankruptcy can question the validity of these receipts, or the sufficiency of the alleged transfer of the property belonging to the bankrupt knitting company, to constitute a pledge of such property. The right is denied by the appellants, and it is contended that the transfers were valid between the parties; that the trustee in bankruptcy takes only the title and right of the bankrupt, and therefore he cannot assert a right not possessed by the knitting company.

It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Thompson* v. *Fairbanks*, 196 U. S. 516, 526; *Humphrey* v. *Tatman*, 198 U. S. 91; *York Manufacturing Company* v. *Cassell*, 201 U. S. 344, 352.

In the *Hewit case* there was a sale of property to the bankrupt upon condition that the title should not pass until the property was paid for. Such a conditional sale was good in New York State, where the contract was made, and it was held good as against the trustee in bankruptcy, because it was good against the bankrupt. It was further held that the property was not, under the facts and the law of New York, such as might have been levied upon and sold under judicial process against the bankrupt, nor could she have transferred it, within the meaning of section 70 of the bankrupt act. It was a clear case for the application of the doctrine that the trustee stands in the shoes of the bankrupt, and there was nothing in the act which made any inconsistent provision.

In *Thompson* v. *Fairbanks* the question arose as to the validity of a chattel mortgage (which had been duly filed) upon after-acquired property as against the trustee in bankruptcy of the mortgagor. The mortgagee took possession of the mortgaged property before the filing of the petition in bankruptcy, and the question raised was whether there was a violation of any provision of the bankruptcy act. It was held that the validity of such a mortgage was a local and not a Federal question, and that in such case this court would follow the decisions of the state court; and, as in Vermont such a mortgage was good, and the taking possession of the property related back to the date of the mortgage, even as against an assignee in insolvency, it was good as against the trustee in bankruptcy. It was said: "Under the present bankrupt act,

the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act." As there was no provision therein making such a mortgage void, the mortgagee was permitted to enforce his mortgage as a valid instrument, and to retain possession of the property. There was no fraud in fact and no transfer of any property in fraud of creditors, and the property was not at the time of the filing of the petition in bankruptcy, or, at the time of the adjudication, liable to levy and sale under judicial process against the bankrupt. It had already been taken possession of by the mortgagee under a valid mortgage, and was not subject to any other liability of the mortgagor.

Humphrey v. *Tatman* reiterates the principle that whether such a mortgage as is referred to in the *Fairbanks case* is good or bad, depends upon the state law.

In *York Manufacturing Company* v. *Cassell*, the same question arose as in the *Hewit case*. There was a sale of property to one who thereafter became bankrupt, with a condition that no title to the property should pass until it was paid for. Such a conditional sale was good under the Ohio law, where the instrument was executed, except as to those creditors who, between the time of the execution of the instrument and the filing thereof, had obtained some specific lien upon the property. There were no such creditors, and hence there was no one who could question the validity of the instrument at the time the trustee's title would have accrued, unless it was the trustee in bankruptcy. He made the claim that the adjudication in bankruptcy was equivalent to a judgment or an attachment or other specific lien on the property, so as to prevent the vendor from asserting its title and its legal right to remove the property on account of the non-payment of the purchase price. We held that, as the conditional sale was valid

by the law of Ohio, except as to a certain class of creditors, if there were no such creditors there was no one who could question the validity of the instrument; that the adjudication in bankruptcy did not give the trustee the right to do so, because in that case the adjudication did not operate as the equivalent of a judgment or attachment or other specific lien on the property. The trustee represented no one who had that right, as there were no creditors who had liens on the property when the title of the trustee to the property of the bankrupt accrued. Section 70 of the bankrupt act had no application. There was no property within either the fourth or fifth subdivision of that section. The fact that if there had been a creditor of the bankrupt of the class mentioned who had obtained a specific lien on the property prior to the adjudication in bankruptcy, the trustee could in that case have enforced the same, did not make any difference, because no such thing had been done when the adjudication in bankruptcy was made. This court had theretofore approved the remark in *In re New York Economical Printing Company*, 110 Fed. Rep. 514, 518, that the present bankrupt act contemplates that a lien good as against the bankrupt and all of his creditors at the time of the filing of the petition in bankruptcy should remain undisturbed. *Hewit case, supra.* Upon these facts it was reiterated that the trustee takes the property as the bankrupt held it.

The case at bar bears no resemblance in its facts to the cases just cited. There was no valid disposition of the property in the case before us, or any valid lien. The so-called warehouse receipts issued by the warehousing company to the knitting company, upon the facts of this case, gave no lien under the law in Wisconsin, in which State they were issued. In such case this court follows the state court. *Etheridge* v. *Sperry*, 139 U. S. 266; *Dooley* v. *Pease*, 180 U. S. 126.

By section 70*a*, the trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been

levied upon and sold by judicial process against him; and by subdivision (*e*) of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property, which any creditor of the bankrupt might avoid, and may recover the property so transferred, or its value. Here are special provisions placing the title to the property transferred by fraud, or otherwise as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same.

The title to this property was in the knitting company. There had been no valid pledge of it, because the possession had been, at all times, in the knitting company, and it could have been levied upon and sold under judicial process against the knitting company at the time of the adjudication in bankruptcy. The security company had, of course, full knowledge that the knitting company in fact at least shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial possession, and even that was subject to the control of the knitting company.

The method taken to store the property was, as found by the District Court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgor and under its control, and such scheme the court said ought not to receive judicial sanction. Such a scheme, under the facts and as carried out in this case, and with regard to Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors.

It was held by the Circuit Court of Appeals in a case arising in Wisconsin, relative to a chattel mortgage, which gave power to the mortgagor to make sales from the mortgaged property for his own use and benefit, that such a mortgage was fraudulent in fact, so it could not be asserted even against general creditors, citing Wisconsin cases. *In re Antigo Screen Door Co.*, 123 Fed. Rep. 249, 254.

A further question was ruled upon in the above-cited case. It was in respect to a second mortgage upon chattels which had not been properly filed, but the mortgagee had taken possession of the mortgaged property prior to the filing of the petition in bankruptcy, although long subsequent to the giving of the mortgage, and it was held that the mortgagee might hold the property as against the trustee in bankruptcy representing general creditors. There was no fraud in fact alleged. It was said by Judge Jenkins, in delivering the opinion of the court: "When the statute (Rev. St., Wis., 1898, section 2313) declares that a chattel mortgage shall be invalid against any other person than the parties thereto, unless possession be delivered and retained, or the mortgage be filed—there being no actual fraud and no collusive delay in the filing or the taking of possession—we think the statute must be construed to mean that the omission to file or to take possession renders the mortgage invalid only as to the creditor who, by execution or attachment, has acquired a lien upon the property." The case illustrates the distinction taken between fraud in fact and the mere failure to file a mortgage otherwise valid against the world.

Under the circumstances of this case we are satisfied there was no valid pledge and no equitable lien in favor of the intervenors which would take precedence of the title of the trustee by virtue of the special provisions of the bankrupt act.

The decree is

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* TIFT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 601. Argued April 22, 23, 1907.—Decided May 27, 1907.

Although an action at law for damages to recover unreasonable railroad rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act (*Texas & Pacific Railway Co.* v. *Abilene Cotton Co.*, 204 U. S. 426), the Circuit Court may entertain jurisdiction of a bill in equity to restrain the filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates.

Where, as in this case, the Circuit Court granted no relief on the original bill prejudicial to the railway company, but sent the parties to the Interstate Commerce Commission, and afterwards rendered a decree based upon the findings and conclusions of that commission and testimony adduced before it, which was stipulated into the case, this court will not reverse the decree, as affirmed by the Circuit Court of Appeals, either because the Circuit Court was without jurisdiction, or because an order of reference in the case was too broad in requiring the master to ascertain the amounts paid by shippers in increased rates after the schedules sought to be enjoined went into effect.

Although reparation for excess rates must be obtained in a proceeding before the Interstate Commerce Commission, the parties to an action brought under § 16 of the Interstate Commerce Act may stipulate after the commission has declared the rate complained of to be excessive that the court adjudge the amount of reparation, and presumably, after the master has reported, the court will make the reparation adequate for the injury and award only the advance on the old rate and to those who are parties to the cause.

The facts are stated in the opinion.

Mr. Ed. Baxter for appellants:

The "findings of fact" made by the Commission in the case at bar are not conclusive.

The inquiry made by the Commission in this case was not conducted on a proper basis; it was not made upon a full consideration of all the circumstances and conditions upon

which a legitimate order could be founded; and it was unduly restricted in its scope. *T. & P. Ry.* v. *I. C. C.*, 162 U. S. 235.

The fact that the court is authorized to "hear and determine the matter as a court of equity" necessarily implies that the court is not concluded by the findings or conclusions of the Commission. There is power in the Circuit Court, and the Circuit Court of Appeals "to consider and apply the evidence," and in this court to review their decisions. *T. & P. Ry.* v. *I. C. C.*, 162 U. S. 239; *I. C. C.* v. *Ala. Midland Ry.*, 168 U. S. 175; *I. C. C.* v. *A., T. & S. F. R. Co.*, 50 Fed. Rep. 304; *I. C. C.* v. *L. V. R. Co.*, 49 Fed. Rep. 180; *K. & I. Bridge Co.* v. *L. & N. R. R.*, 37 Fed. Rep. 613, 614.

The finding made by the Commission on a mixed question of law and fact is not entitled to as much weight as the general verdict of a jury.

Whether a rate is reasonable, is a question of "fact." *C. N. O. & T. P. Ry.* v. *I. C. C.*, 162 U. S. 196; *T. & P. Ry.* v. *I. C. C.*, 162 U. S. 219, 227, 235, 238; *L. & N. R. R.* v. *Behlmer*, 175 U. S. 676; *E. T. V. & G. Ry.* v. *I. C. C.*, 181 U. S. 28.

But whether a rate is reasonable is not a question of "pure fact;" it is a question of "fact mixed with law."

The finding made by the Commission on a mixed question of law and fact is not entitled to as much weight as the general finding of a court.

When the parties waive a jury, under § 4 of the act of March 3, 1865, a general finding of the court upon the facts has the same effect as the general verdict of a jury; and where the general finding of a court includes a mixed question of law and fact, it is as conclusive as the general verdict of a jury, except so far as the matter of law involved in the question may be saved by some exception which the party has taken to the ruling of the court on the law. *Norris* v. *Jackson*, 9 Wall. 127, 128; *Miller* v. *Life Ins. Co.*, 12 Wall. 297.

But, where the finding of a trial court is general, either party may readily obtain the judgment of the Appellate Court on any matter of law that may be involved in a mixed question

of law and fact, in one of four ways: Either party may object to the admission or exclusion of evidence and require the trial court to rule on the objection. Or either party may present to the trial court his propositions of law and require the court to rule on them. Or either party may ask for definite ruling by the court as to whether all the evidence is sufficient in law to warrant a finding in his favor. Or either party may get the trial court to make a special finding, which raises the legal propositions. *Norris* v. *Jackson*, 9 Wall. 128, 129; *Miller* v. *Life Ins. Co.*, 12 Wall. 297; *Martinton* v. *Fairbanks*, 112 U. S. 672, 673.

When the verdict of a jury is special, or the finding of facts by a court is special, such a verdict, or finding, "raises the legal propositions" involved in a mixed question of law and fact, and the power of review by this court extends "to the determination of the sufficiency of the facts found to support the judgment." *Norris* v. *Jackson*, 9 Wall. 128, 129; *Miller* v. *Life Ins. Co.*, 12 Wall. 297; *Martinton* v. *Fairbanks*, 112 U. S. 672, 673.

Whether the verdict of a jury or the finding of a court be general or special, either party can compel the separation of matter of law from matter of fact involved in a mixed question of law and fact, and demand the judgment of the court upon so much of the question as consists of matter of law. But according to the contention of appellee, the finding of the Commission on the mixed question of law and fact as to the reasonableness of a rate is conclusive on the matter of law involved in the question, and neither this nor any other court can review the judgment of the Commission on such matter of law. To paraphrase the language of this court in *C. M. &c. Ry.* v. *Tompkins*, 176 U. S. 172, when we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting principle which insures to everyone else the judgment of the courts upon all questions of law, is one which cannot be tolerated.

Mr. William Hepburn Russell and *Mr. William A. Wimbish*, with whom *Mr. W. D. Ellis* was on the brief, for appellees:

The Interstate Commerce Commission had power to adjudge the advanced rate unreasonable and the Circuit Court had jurisdiction to enforce the order of the Commission by injunction and a decree for an accounting. *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, *N. Y. N. H. & Hartford R. R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361.

There was no attempt in the case at bar to fix a rate. But the Commission decided that the advanced rate was unreasonable and ordered it discontinued, and this decision was enforced by the decree of the Circuit Court. Hence the procedure in this case is in full accord with the decisions of this court. *Texas & Pac. Ry. Co.* v. *Abilene Oil Co., supra*; *C. N. O. & T. P. Ry. Co.* v. *Interstate Com. Com.*, 162 U. S. 184, 196; *Interstate Com. Com.* v. *C. N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499, 505; Beale & Wyman R. R. Rate Regulation, § 1046.

On such state of the record, that equity had jurisdiction to order the reference, take an account and decree restitution, is clear upon settled principles of equity jurisdiction. 1 Pomeroy's Eq. Jurisp. (3d ed.), § 181; *Peck* v. *School Dist.*, 21 Wisconsin, 516, 523; *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1, 52.

Jurisdiction in equity being acquired for the purposes of an injunction to prevent the enforcement of the advanced rates, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the complainants and the railroad companies. *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1, 50, 52; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 460. Nor is there an adequate remedy at law. *Van Patten* v. *Chicago, M. & St. P. Ry. Co.*, 81 Fed. Rep. 545, 551.

Even if the Circuit Court was without primary jurisdiction in this case to enjoin the enforcement of the advanced rates and decree reparation through an accounting, it acquired secondary jurisdiction, justifying the final decree herein under

the petition based on the order of the Interstate Commerce Commission and the stipulations of the defendants as to what decree might be entered and what reparation would be made.

Both the Interstate Commerce Commission and the Circuit Court had power to determine that the advance in rates was unreasonable, and the court had jurisdiction to prevent the enforcement of the rate by injunction, both before and after the order of the Commission directing the discontinuance of the rate as unreasonable. Act to Regulate Commerce, §§ 1, 16, 22; *In re Lennon*, 166 U. S. 548.

The courts have power to pass on the reasonableness or unreasonableness of railroad freight rates. *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 579.

"A legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U. S. 339, 344; *Stone* v. *Farmers' Loan & T. Co.*, 116 U. S. 307; *Chicago, Mil. &c. Ry. Co.* v. *Minnesota*, 134 U. S. 418.

The rates in force at the time of the advance complained of, having been long in effect and remunerative to the carrier, constituted fair compensation for the service performed and therefore the advance was unreasonable. Beale & Wyman, Railroad Rate Regulation, §§ 399, 506; Noyes on Am. Railroad Rates, 211, 213.

The reasonableness of the rate in a given case depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. *C. N. O. & T. P. Ry. Co.* v. *Int. Com. Com.*, 162 U. S. 184, 196. And see *E. T. V. & G. Ry. Co.* v. *Int. Com. Com.*, 181 U. S. 1; *L. & N. R. Co.* v. *Behlman*, 175 U. S. 648.

The advance in rate being the result of a combination among the defendant carriers in restraint of trade and not the product of free competition but the consequence of a suppression of competition, it is illegal and unreasonable and its enforcement was properly enjoined.

Competition is a fact to be considered in determining whether

rates are reasonable. *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 164; *Int. Com. Com.* v. *B. & O. R. Co.*, 145 U. S. 263.

Hence the absence of competition, or agreements that suppress and prevent competition, are material and may be considered by the Commission. *United States* v. *Freight Assn.*, 166 U. S. 290, 341; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 565, 575.

The necessary effect of the agreement is to restrain trade or commerce no matter what the intent was on the part of those who signed it. *United States* v. *Freight Assn.*, 166 U. S. 290, 342. And it is not necessary to show that the agreement was entered into for the purpose of restraining trade or commerce if such restraint is its necessary effect. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 291, 312.

Appellants are estopped from questioning the jurisdiction of the court below by the stipulations and agreements into which they entered, and have waived any right to demand a trial by jury as to their obligation to refund and the amount to be refunded by them to complainants and all other shippers of lumber at the advanced rate which has been adjudged unreasonable. *Halliday* v. *Stuart*, 151 U. S. 229; *Perego* v. *Dodge*, 163 U. S. 160, 166; *Bank* v. *Okely*, 4 Wheat. 235, 243.

Parties by their conduct or their silence may waive a right to trial by jury. *Baird* v. *The Mayor*, 74 N. Y. 382, 386; *The Brooklyn &c. R. Co.* v. *R. Co.*, 105 App. Div. (N. Y.) 88; *Book* v. *Justin Min. Co.*, 58 Fed. Rep. 827.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals affirming a decree of the Circuit Court for the Southern District of Georgia, adjudging an advance in freight rates made by appellants to be effective June 22, 1903, upon yellow pine lumber of two cents per one hundred pounds over rates previously in force, to be unjust and unreasonable, and enjoining

the appellants, jointly and severally, from maintaining the same, "in so far as they apply to shipments of lumber from points in Georgia to Ohio River destinations and points basing thereon."

The original bill was filed April 14, 1903, by appellees to enjoin such advance in rates and a temporary restraining order was issued and notice to appellants to show cause why an injunction should not issue. On May 8 the bill was amended. On May 12 the appellants filed a demurrer to the amended bill for want of jurisdiction in the court as a court of equity and as a court of the United States, and the Southeastern Freight Association filed an answer. Appellants also filed a response to the order to show cause. On May 16 the demurrer was overruled. The temporary injunction was, however, dissolved, but the following condition was expressed:

"In case the respondents shall enforce the rates complained of, and the complainants shall make proper application to the Interstate Commerce Commission to redress their alleged grievances, the court will entertain a renewed application on the record as made, and such appropriate additions thereto as may be proposed by either party, enjoining the enforcement of such rates, pending the investigation of the Commission, unless otherwise dissolved, and on presentation to the court of the report of the Commission such other action be taken as will be conformable to law and the principles of equity." 123 Fed. Rep. 789.

The appellants took the steps prescribed by the Interstate Commerce Act to put the advanced rates into effect, and the appellees, on June 23, 1903, filed a petition before the Interstate Commerce Commission, charging that "in promulgating said tariff of increased rates and maintaining and enforcing the same" the appellants were acting "in concert with each other and with other lumber carrying roads," who with them were "co-members of the Southeastern Freight Association." The petition also charged that the advance was "arbitrary, unreasonable and unjust," and prayed for an order commanding

appellants, and each of them, to desist from enforcing the advance. All of the appellants except the Macon and Birmingham Railway Company filed a joint and several answer, in which they traversed the allegations of the petition and pleaded justification by the conditions affecting the roads and the traffic. They also alleged that the Georgia Saw Mill Association, to which appellees belonged, was a combination in restraint of trade and commerce, and that, therefore, appellees did not "come before the Commission with clean hands." A great deal of testimony was taken on the issues presented, and the Commission found and concluded that the advance in rates "was not warranted by the testimony, and that the increased rates put in force June 22, 1903, were unreasonable and unjust." The specific findings and conclusions of the Commission are reported in 10 I. C. C. R. 548. After the petition was filed before the Interstate Commerce Commission, but before final action, appellees filed an amended bill and again moved the Circuit Court for an injunction. In the amended bill it was alleged that appellants, after the dissolution of the restraining order, filed with the Interstate Commerce Commission and gave public notice that on June 22, 1903, the advance in sales on lumber would be established and put in effect, and such advance became effective June 22, 1903. The appellants in a joint and several answer admitted the averments of the amended bill, but reserved the benefit of their demurrer to the original bill. The motion for an injunction was dismissed. 125 Fed. Rep. 789.

The Commission made its order hereinbefore referred to on the seventh of February, 1905, and on March 17, 1905, the appellees presented a petition to the Circuit Court stating the substance of the findings of the Commission and attaching a copy of its report and opinion.

An order to show cause was issued. On June 3, 1905, appellants filed a joint and several answer, which was verified. The Southeastern Association answered separately. The appellees also filed a supplemental bill, the purpose of which

was to obtain restitution of the excess of rates charged over those which it was alleged were unreasonable. To this bill a demurrer was filed.

It was stipulated by counsel of the respective parties that the testimony, including exhibits, taken before the Interstate Commerce Commission, should be filed in the case subject only to objections to its relevancy. In addition to such testimony other evidence was submitted to the Circuit Court, and that court rendered a decree July, 1905, that the advance in rates "from lumber shipping points within the State of Georgia to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River or crossings was and is excessive, unreasonable and unjust, and in violation of the provisions of the act of Congress, known as the Act to Regulate Commerce, and the amendments thereto, and that the rates and charges resulting from said advance are likewise excessive, unreasonable, and unjust, and in violation of the Act to Regulate Commerce." The appellants were enjoined, as we have already said, from enforcing the advance.

The decree also directed an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum total of the increase in rates paid by each of the appellees and other members of the Georgia Saw Mill Asociation to either or all of the appellants since the rate went into effect. This was done, the decree recited, in pursuance of a stipulation made by the respondents (appellants) in open court that in case the complainants (appellees) prevailed decree of restitution might be made. 125 Fed. Rep. 753. The decree was affirmed by the Circuit Court of Appeals without an opinion.

On the merits, as distinguished from the questions which concern the jurisdiction and procedure in the Circuit Court, this case is, though variant in some detail of facts, similar in principle and depends upon the same legal considerations as *Illinois Central Railroad Company* v. *The Interstate Commerce Commission*, just decided. The advance here involved grew

out of the same action by the railroads there considered, and is the advance there referred to as having been made west of the Mississippi. This case was argued and submitted with that and depends on the same ultimate contentions. We need not repeat the discussion of those contentions nor trace out or dwell upon the many subsidiary considerations which the assignments of error and the elaborate briefs of counsel present.

In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in *Texas & Pacific Railroad Company* v. *Abilene Cotton Oil Company,* 204 U. S. 426, upon a different record than that before us. We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates. The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the Commission was stipulated into the case, and the opinion of the court recites that, "with equal meritorious purpose, counsel for the respective parties, agreed that this would stand for and be the hearing for final decree in equity."

It was certainly competent for the appellees to proceed in the Circuit Court under section 16 of the Interstate Commerce Act (24 Stat. 379) and to apply by petition to the Circuit Court, "sitting in equity," for the court to hear and determine

the matter "as a court of equity," and issue an injunction "or other proper process, mandatory or otherwise," to enforce the order of the Commission. We think that under the broad powers conferred upon the Circuit Court by section 16 and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, "but in such manner as to do justice in the premises," and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed.

But objection is made to the extent of the decree. Indeed, the objection may be said to go farther back, and is based on the bill itself, on the ground that "pecuniary reparation was demanded" in it, and "such payment necessarily involves a trial by jury, guaranteed by the Constitution of the United States." And further, that each complainant is separately interested in any amount which may be recovered. The specific part of the decree which is objected to is as follows:

"Third. That an order be taken referring to the standing master of this court, J. N. Talley, Esquire, the pleadings and evidence in this cause, with instructions to ascertain the sum total of the increase in rates paid by each of the complainants and other members of the Georgia Saw Mill Association to either or all of the defendant companies, since the rate went into effect, and to the end of the litigation, and report such amount to the court in order that pursuant to the stipulation made by the respondents in open court, in case the complainants prevailed, decree of restitution may be made."

The errors assigned against this part of the decree are (*a*) That there is nothing in the pleadings or the evidence to justify any reference. (*b*) The master should only have been ordered to ascertain the sum total of the advance paid by each of the appellees as is unreasonable and unjust. (*c*) That no members of the Georgia Saw Mill Association except the complainants (appellees) had themselves made parties to the cause prior

to the rendition of the decree of July 8, 1905, and, therefore, no reference should have been made to ascertain the amounts paid by such other members. (*d*) The master should not have been ordered to report any amount at all. (*e*) No stipulation was made by appellants that a decree of restitution should be made except "in the event that complainants (appellees) finally prevail, and whether they finally prevail cannot be known until the determination of this appeal."

In support of these contentions appellants rely on *Texas & Pacific Railway* v. *Abilene Cotton Oil Company, supra.* In that case the Abilene Cotton Oil Company sued in one of the courts in Texas to recover the excess of what, it alleged, to be an unjust and unreasonable charge on shipments of carloads of cotton seed. The defense was that the rates were charged according to the schedule of rates filed under the Interstate Commerce Act, and that the court had no jurisdiction to grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission. The defense prevailed in the trial court but did not prevail in the Court of Civil Appeals, where judgment was rendered in favor of the cotton oil company. The judgment was reversed by this court on the ground that the state courts had no jurisdiction to entertain a suit based on the unreasonableness of a rate as published in advance of the action of the Interstate Commerce Commission adjudging the rate unreasonable. And it was in effect held that reparation after such action for the excess above a reasonable rate must be by a proceeding before the Commission, "because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one." There is nothing in that case, however, which precludes the parties, after action by the Commission declaring rates unreasonable, from stipulating in the proceedings prosecuted under section 16 that the court adjudge the amount of reparation. By the action of the Commission the foundation for reparation, as

provided in the Interstate Commerce Act, was established, and the inquiry submitted to the court was but of its amount, and had the natural and justifiable inducement to end all the controversies between the parties without carrying part of them to another tribunal. We do not understand that the assignment of errors questions the truth of the recital in the decree that the reference was made in pursuance of the stipulation in open court, and it is upon the stipulation we rest our decision. It is said, however, that it was stipulated that restitution should only be made in the event the appellants prevailed. Necessarily it was so dependent. So was every part of the relief prayed by the appellees. The decree was the first judgment that they should prevail, and properly provided for the satisfaction of all the relief dependent upon their success. Of course, what was granted by the decree was subject to review and change or defeat in the Circuit Court of Appeals and in this court. But it equally was subject to affirmance, and was put in such form and made such provision as made it ready to be executed upon affirmance.

The objection that the reference is too broad is not of substance. What the court may award upon the coming in of the report of the master we cannot know. Presumably it will make the reparation adequate for the injury, and award only the advance on the old rate and to those who are parties to the cause.

Decree affirmed.

MR. JUSTICE MOODY took no part in the decision of this case.
MR. JUSTICE BREWER dissents.

ILLINOIS CENTRAL RAILROAD COMPANY, GULF AND SHIP ISLAND RAILROAD COMPANY, SOUTHERN RAILROAD COMPANY *v.* THE INTERSTATE COMMERCE COMMISSION.

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

No. 588. Argued April 22, 23, 1907.—Decided May 27, 1907.

The findings of the Interstate Commerce Commission are made by the law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.

The reasonableness of a rate is a question of fact, and while the conclusions of the commission are subject to review if that body excludes facts and circumstances that ought to have been considered they will not after having been affirmed by the Circuit Court and Circuit Court of Appeals, be reversed because the commission did not adopt the presumptions of mixed law and fact put forward by appellants as elements for determining the reasonableness of a rate.

A presumption is the expression of a process of reasoning and of inferring one fact from another, and most if not all the rules of indirect evidence may be expressed as such, but the fact on which the inference is based must first be established before the law can draw its inference.

Where the inquiry before the Interstate Commerce Commission is essentially one of fact, the existence of competition cannot in this court be made an inference of law dominating against the actual findings of the commission and their affirmance by the Circuit Court.

In determining the reasonableness of a railroad rate, expenditures for additions to construction and equipment to handle the traffic should be distributed over the period of the duration of those additions and not charged entirely against the revenue of the year in which they are made. *Union Pacific Railway Co.* v. *United States*, 99 U. S. 402, distinguished.

THIS case involves the validity of an order of the Interstate Commerce Commission requiring the appellants "to cease and desist on or before the first day of April, 1905, from further maintaining or enforcing the unlawful advance of two cents per hundred pounds, or the said unlawful rates resulting therefrom, for the transportation of lumber from shipping points

on defendants' respective lines in the State of Louisiana east of the Mississippi River and in the States of Mississippi and Alabama to Cincinnati, Louisville, Evansville, Cairo, and other points on the Ohio River commonly called and known as Ohio River Points."

The order was made in the matter of the complaint filed with the Commission by the Central Yellow Pine Association, an incorporated association composed of persons, firms and corporations engaged in the business of manufacturing yellow pine lumber in the States of Mississippi, Alabama, and that part of Louisiana east of the Mississippi River.

The complaint charged that the appellants were common carriers by rail, engaged in interstate commerce, and as such were engaged in the transportation of yellow pine lumber from the mills and lumber plants of the members of the Yellow Pine Lumber Association to the territory known as the "Central Freight Association Territory," which lies on the north of the Ohio River and on and between the Mississippi River on the west and a line running through Buffalo and Pittsburg on the east, and that the members of the association are dependent upon appellants for the transportation of their lumber to the markets of the country; that the appellants and the railways carrying yellow pine lumber to the same markets from the territory west of the Mississippi River, embracing the States of Texas, Arkansas, and that part of Louisiana west of the river, by agreement or concert of action advanced the rate on yellow pine lumber from the territories both east and west of the Mississippi River on and beyond the Ohio River in Central Freight Association Territory two cents per hundred pounds. The advance was made applicable south of the Ohio River and effective on and from April 15, 1903, except as to the Louisville and Nashville road, as to which it became effective June 22, 1903. And it was alleged that such advance was "unjust, unreasonable, as well as discriminative in violation of the Act to Regulate Commerce." The answer of the railways admitted the advance, but denied that it had the

character and effect charged, but alleged that, on the contrary, it was reasonable and just and not in violation of law. The answers also specifically justified the advance by the conditions of the market and the traffic, including competition, and the costs of operating the roads. Testimony was taken on the issues thus formed.

The Commission sustained the complaint and made the order recited above. 10 I. C. C. R. 505. The railways refused to obey. The Commission then instituted this proceeding in the Circuit Court of the United States for the Eastern District of Louisiana, where further proof was taken and a decree rendered which affirmed the order of the Commission and made it the order of the court. The roads were also enjoined from further disobedience to the order. No opinion was filed. The testimony was voluminous, and the report and findings of the Commission are very long. They are reported in 10 I. C. C. R. 505, *supra*. The conclusions of the Commission are mingled somewhat with legal arguments, but the following may be selected as important and pertinent to the questions which the controversy presents:

The lumber producing districts are divided in territory (1) west of the Mississippi River; (2) territory east of the river; and (3) southeastern territory, composed of the States of Georgia, Florida, and part of Alabama. The lumber producers of each of these districts compete in the sale of their products in "Central Freight Association Territory."

The roads of the appellants are located in and serve the second of these territories.

The advance in rates was made as well in territory west of the Mississippi River, "and was made, in fact, though not expressly, by agreement between the defendants (appellants) and the roads west of the river," after several meetings, at a consultation between the representatives of the roads. The roads east of the river took the initiative.

At Cairo traffic from a large portion of the lumber producing districts meets or converges *en route* to destination. The

rates on other Ohio River crossings are based on Cairo; that is, they bear a fixed relation to the Cairo rate, being advanced or reduced as that rate is advanced or reduced. The through rates to points beyond the Ohio River in Central Freight Association Territory are made up of the full local rates of the roads north of the Ohio as the proportions of those roads. Whatever is left of the through rates are the proportions of the roads south of the Ohio. The rates to interior points north of the Ohio are made on the lowest combination rates to the Ohio plus the rates beyond, and are blanket rates, being the same from all shipping points or points of production to the same destination. The rates to the Ohio are to the north bank and include the bridge tolls.

There are divisions of rates south of the Ohio between what are termed the "originating" roads, on which the lumber is principally manufactured, and the roads intermediate between them and the river.

There had been from time to time changes or fluctuations in the rate. Prior to 1894 the roads west of the Mississippi claimed and were allowed a differential of two cents. This placed at a disadvantage the shippers east of the Mississippi, and a readjustment of rates was made, and on May 1, 1894, the rate to Cairo from east of the Mississippi was reduced to thirteen cents per hundred pounds, the rate in force from west of the Mississippi. This rate remained until September 9, 1899, about five years, when it was advanced to fourteen cents, and so remained until April 15, 1903, nearly four years, when the advance of two cents complained of was made.

The railroads west of the Mississippi make a certain allowance to the mills which have "logging roads," that is, roads by which logs are hauled from the timber to the mills. This is called "tap line allowance or division." It ranges one to two cents per one hundred pounds, up to as high as six cents, and varies, to some extent, according to the destination of the traffic. The mills east of the river have logging roads also, but appellants make no allowance to them. The only exception

is the Mobile and Ohio road, which grants allowances to about four mills on its line. The New Orleans and Northeastern road put in a tap line allowance of two cents, but other roads east of the river objected, and it was withdrawn. There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, and it amounts to a rebate or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same.

The lumber business had grown from its inception and was largely and possibly more prosperous than it had been before, but the proof does not show that for two or three years preceding the advance the prices of mill products had materially increased or that the profits realized were unusual or excessively large.

As to the operating expense of the roads the Commission said:

"The proof shows increase in wages and in prices of material and equipment, but not in a marked degree for the two years, 1901 and 1902, immediately preceding the advance rate. These increases have doubtless added materially to the operating expenses, but the total annual increases in those expenses are, of course, due only in part to the advances in wages and prices of supplies and equipment. They are attributable in a great measure to the constant growth or enlargement of the business of the roads. Not only has the lumber business of the roads greatly increased, but their business in general. The greater the volume of business, the greater is the aggregate cost of conducting it, or, in other words, of operating the roads. The total operating expenses of the roads, as reported by them, have also been much enlarged by the inclusion therein of large expenditures for permanent improvements.

* * * * * * * *

"While the operating expenses of the defendants have constantly grown, the gross earnings from operation have also

increased from year to year to such an extent as to have resulted in a constant increase in net earnings. This is shown in the tables set forth in our findings of fact (Finding 14)."

Sufficient cause was not shown, either in the alleged profit in the lumber business or in the increased cost of operating the roads, for the advance in the rates on lumber. And answering the contention that the former rate was not adequately remunerative, the Commission expressed the view that "reasonableness in this sense of a rate on a *single article* of traffic is one of almost insuperable difficulty." And further, that the value of the entire property of a road "can shed but little, if any, light upon the question." The rate on one article might reasonably or unreasonably be high and the total of rates be remunerative or otherwise. But, it was concluded, even if that be a mistaken view, it was impossible with any degree of accuracy to determine from the voluminous and conflicting testimony on the subject introduced in behalf of both parties what was the value of the property employed by the roads. The Commission thought that the elements to be considered in determining the reasonableness of an entire system of rates were "widely variant" from those to be considered in determining the reasonableness of a single rate, and expressed the elements upon which the latter depends to be "the value, volume, and other characteristics affecting the transportation of the particular commodity to which it is applied." The Commission referred to its findings of facts as having "many things disclosed by the evidence" which bore directly upon the reasonableness of the particular rate in question, and which aided it in arriving at a correct judgment in respect thereto, saying that:

"In the first place, the present advanced rate is the last (up to date) of a series of advances and was made by joint or concerted action of the carriers. It is claimed by them that in advancing the rate they acted independently, each for itself, but the proof shows conclusively that the advance was the outcome of a concert of action and a previous under-

standing between the companies. Through their authorized official representatives they conferred with each other repeatedly as to the making of an advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none, and finally they all promulgated the advance to take effect at exactly the same time and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to the rates charged by them, but was participated in by the lumber hauling roads serving the territories west as well as east of the Mississippi River."

The fourteen-cent rate in force at the date of the advance had been maintained nearly four years, and a still lower rate, thirteen cents, had been maintained for the preceding five years and four months. And the testimony of the officers of the roads was that there was a profit in both rates. The answer also admitted profit, but averred that lumber "was not an exceedingly profitable commodity." The Commission said:

"No reason is given or shown why lumber should be singled out as a commodity upon which an 'exceedingly' large profit should be earned. A reasonable profit is all the defendants are entitled to, and the testimony is far from convincing us that the profit under the fourteen-cent rate was not reasonable or would not now be reasonable. As stated in our 'Findings of Facts,' the fourteen-cent rate appears to be reasonably high when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume and the various conditions affecting the service of transportation. During the period from 1894 to 1899, while the thirteen-cent rate was operative, there were large annual increases in the net earnings of the defendants, and the same was the case from 1899 to 1903, while the fourteen-cent rate was operative (Finding 15). During those periods there was also a large

growth in the tonnage of lumber hauled by the defendants, and, therefore, their increases in net earnings were in part, at least, derived from the lumber traffic under those rates. Dividends have been declared during those periods, and in addition considerable surpluses have been reported (Finding 16) and large sums have been invested in permanent improvements or betterments (Finding 14)."

The seventh and eighth conclusions of the Commission we give entire, as follows;

"The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of their proportions of the through rates. This is due to the large allowances out of the rates made to the originating roads. (See Findings 3 and 4.) Those allowances commenced under the lower rates in force prior to the advance and raise the presumption that those lower rates, minus the allowances were then considered reasonably remunerative for the remainder of the hauls to the Ohio River crossings. As the two cents advance goes entirely to the roads continuing the transportation on to the Ohio and none of it to the originating roads, the inference is that advance was made solely with a view of increasing the proportions of the former roads. If the allowances to the originating roads are unreasonably large, as they appear to be from a distant standpoint, and result in unreasonably low proportion to the other roads, this cannot be remedied by an advance in the total through rates charged the public. It is the total rate, and not its proportions, which is in issue.

"Although both the net and gross earnings of the defendants have grown from year to year, the percentages of what are reported by the defendants as 'operating expenses' to earnings have also somewhat increased (Table, Finding 14), and this is urged as showing the necessity for an advance in the lumber and some other rates. It is to be noted that these operating expenses embrace large annual expenditures for 'real estate, right of way, tunnels, bridges, and other strictly

permanent improvements, and also for equipment, such as locomotives and cars.' "

And the Commission said repairs, whether to improvement or equipment, were properly chargeable to operating expenses, but that expenditures for improvements and equipments should not "be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable, and so far as rates exacted from the public are concerned, 'projected proportionately over the future.' " It was said further, if such expenditures should be deducted from the annual operating expenses it would be found that the percentage of operating expenses to earnings had, in some instances, diminished, and in others increased, to no material extent.

The tenth and eleventh conclusions are as follows:

"10. The general rule is, the greater the tonnage of an article of traffic, the lower is the rate. No rule is more firmly grounded in reason or more universally recognized by carriers. It is because of the greater density of traffic north of the Ohio River in Central Freight Association Territory and in Eastern Territory that rates in general are materially lower in those territories than in Southern Territory. The defendants have made yellow pine lumber an exception to this rule; while the tonnage in general of the defendants and lumber tonnage in particular have grown greatly, the lumber rate has not been lowered but has been materially advanced. Moreover, the testimony is that 'a decrease in the rates on traffic in general has been going on throughout the United States since the improvements in transportation have been put in operation;' here, again, lumber has been taken from under, and deprived of the benefits of, the general rule.

"11. As said in *Marten* v. *L. & N. R. R. Co.*, 9 I. C. C. R. 589, and shown by the proof in this case, 'lumber is an inexpensive freight and only a few other commodities furnish to carriers so large a tonnage.' The lumber business is constant, yielding the carriers revenue all the year; no special equipment is constructed or furnished for its carriage; it is

loaded by the shipper and unloaded by the consignee, and where open cars are furnished, the shipper is required at considerable expense to equip them so as to protect the load and the train; there is small risk incident to its transportation and, in case of accident, the damage is insignificant. For these reasons lumber should be given rates which are relatively low.

"Our conclusion on the whole is that the advance, April 15, 1903, of two cents in the Cairo rate (with a corresponding increase in the rates to the other Ohio River crossings) was not warranted under all the facts in evidence, and that the resultant increased rate is unreasonable and unjust. An order will be issued in accordance with these views."

Mr. Ed. Baxter for appellants:

The majority of the Commission erred in holding that the rates from Mississippi territory to the Ohio River are unreasonable. The phrase "just and reasonable in and of themselves" was used by this court in the case of *E. T., V. & G. Ry. Co.* v. *I. C. C.*, 181 U. S. 18, 19. And see *Van Patten* v. *C., M. & St. P. Ry. Co.*, 81 Fed. Rep. 545; *Kinnavey* v. *Terminal Assn.*, 81 Fed. Rep. 802, and *T. & P. Ry.* v. *Mudd*, 202 U. S. 242. The Commission erred in deciding that said so-called advance of two cents per hundred pounds, made effective April 15, 1903, makes the through rates from Mississippi territory to the Ohio River unreasonably high in and of themselves; because there is no question but that said through rates were "adopted, printed and kept posted" by the respective appellants as required by the act to regulate commerce.

Even if the question of the reasonableness in and of itself of a rate on a single article of traffic is one of almost insuperable difficulty, that gives no authority to the Commission to solve it by mere arbitrary action. *C., N. O. & T. P. Ry.* v. *I. C. C.*, 162 U. S. 197.

The rates from points in Mississippi territory to the Ohio River are reasonably low, because the average rate per ton per mile yielded by said rates is lower than the majority of

other rates per ton per mile on lumber, and also because they are lower than the rates on lumber between many other points for similar distances. Also because the lumber interests in Alabama, Mississippi and Louisiana have prospered under the rate adjustment and the percentage of increase has been greater in the price of lumber than in the rates on lumber.

The increase made was justified by the change in the condition of the lumber market.

It was error of law to hold that the cost of permanent improvements and equipment is improperly charged to operating expenses. *U. P. R. R. Co.* v. *U. S.*, 99 U. S. 420, 421.

In charging the cost of permanent improvements and equipment to operating expenses, appellants adopted the method which this court held to be the most conservative and beneficial to the company and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness.

The rate on lumber may be somewhat remunerative and yet be unreasonably low, as said in *Smyth* v. *Ames*, 169 U. S. 542.

As to competing roads, that competition tends to a reduction of rates—sometimes, as the history of the country has shown, below that which affords any remuneration to those who own property.

Therefore this court has never allowed the fact that the longer distance competitive rate pays something more than the cost of movement of the longer distance competitive traffic (and is, therefore, to some extent remunerative) to avail as an argument that the higher rate for the shorter distance traffic is unreasonably high.

Yellow pine lumber manufactured in Mississippi territory may be moved by various competing lines to New York and other North Atlantic cities, or it may be moved by various competing vessels to Europe; or it may be moved, as in this case, by various competing roads to points on and north of the Ohio River; and when moved to points on and north of

the Ohio River it comes into competition with white pine, spruce and hemlock from Canada and the Northern States, with fir from the Pacific coast, and with yellow pine from Georgia territory and Arkansas territory.

It is manifest therefore, that rates on yellow pine from Mississippi territory to points on and north of the Ohio River must be made in strong competition with other carriers and with other woods. In other words, there is competition of product against product, and competition of carrier against carrier.

Neither the Commission nor the court had jurisdiction to determine the reasonableness of the proportions of a through rate and it was error of law for the Commission and the court to assume jurisdiction to determine either that the proportions of the originating roads are unreasonably large, or that the proportions of the intermediate roads are unreasonably low. 11 Ann. Rep. I. C. C. 1897, 27.

It was not until the act was amended June 29, 1906, that the Commission was given the power by § 15 to prescribe "the just and reasonable proportions of such joint rate to be received by each carrier party thereto." 34 U. S. Stat. at Large, 584.

The articles of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association do not violate the anti-trust act, nor do they conflict with *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, and *United States* v. *Joint Traffic Assn.*, 171 U. S. 505.

Associations were not formed for the purpose of "*maintaining*" rates. On the contrary, each member distinctly reserves to itself, at all times, the right to take separate and independent action on each and every subject; and therefore it may change its rates at any time, without being subject to penalty, or even to censure.

Mr. L. A. Shaver, Mr. T. M. Miller and *Mr. Marcellus Green*, with whom *Mr. Garner Wynn Green* was on the brief, for appellee:

The materially lower lumber rates in force prior to the

advance in rates having been maintained by the carriers for a long period of time, must be presumed to have been reasonably remunerative and the burden is, therefore, upon the carriers to show sufficient grounds for the advance. Am. & Eng. Enc. of Law, 2d ed., Vol. 17, 133; *Holmes* v. *So. Ry. Co.*, 8 I. C. C. R. 568.

The claim that the advance was justified because the yellow pine lumber business was exceptionally prosperous, is untenable. The test of the reasonableness of a rate is not the amount of profit there is in the business of the shipper, but whether the rate yields a reasonable compensation for the service rendered. *Smythe* v. *Ames*, 169 U. S. 466; *Tift* v. *So. Ry. Co. et al.*, 138 Fed. Rep. 754.

The fact that there had been an increase in the operating expenses of the carriers did not justify the advance because there was also a constant increase not only in their gross but also in their net earnings.

If additional revenue was needed to meet increased operating expenses incurred in the handling and transporting of all traffic, it should have been raised by an advance in rates on traffic in general and the imposition of the burden on a comparatively few articles like lumber, was a discrimination against those articles in favor of traffic in general.

If, in such case, it is proper to select a few articles, the selection should be made with due regard to the character of the articles selected and the interests of the public. Lumber being an article of general use or necessity should not have been selected.

Where otherwise competing carriers by a previous understanding or agreement make an advance in rates, the advance so made cannot be held to be the product of unrestrained competition. Competition never advances rates. The natural, direct and immediate effect of competition is to lower rates. *United States* v. *Joint Traffic Association*, 171 U. S. 577.

Where the Commission has duly investigated the facts and the court below has sustained the finding of the Commission

on such investigation, this court will decline to undertake an original investigation of the facts on its own account and will not set aside the findings of the Commission except in a clear case of error. *C., N. O. & T. P. Ry. Co.* v. *I. C. C.*, 162 U. S. 194; *L. & N. R. R. Co.* v. *Behlmer*, 175 U. S. 675; *E. T., Va. & Ga. Ry. Co.* v. *I. C. C.*, 181 U. S. 27.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Counsel for appellants in his oral argument made the declaration that it would not be necessary for this court to open the pages of testimony contained in the record, and says in his supplemental brief:

"I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission to be re-examined upon the testimony in conformity with the principles of transportation law to be announced by this court."

To what, then, shall we resort? How shall we determine what "principles of transportation law" were involved? How determine whether they were recognized and applied, or denied and rejected by the Commission, and, necessarily, by the Circuit Court? An examination of the testimony by concession of counsel is out of the question. And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & Nashville Railroad Co.* v. *Behlmer*, 175 U. S. 648; *East Tenn. &c. Railroad Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 27. And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment and of transportation relations," has had the witnesses before it and has been able to judge of them and

their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the Circuit Court.

The question is one of the reasonableness of a rate, and such a question was said to be one of fact in *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197; *C. N. O. & T. P. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184. In these cases, however, it was declared that the conclusions of the Commission are subject to review if it excluded "facts and circumstances that ought to have been considered." Upon this declaration appellants rely, and justify their invocation that this court express and enforce the principles of transportation which, they contend, the Commission disregarded; and appellants venture the observation that unless this be done "there will be no settled principles of law for the guidance of either the Commission or of the courts," and that "the interstate railroad companies will be the only persons in this country who will not be able to obtain the opinion of the courts upon questions of law which vitally affect their interest." We think the apprehension is groundless and is demonstrated to be groundless by the cases cited. In all of them legal propositions were reviewed as elements in the inquiry of the reasonableness of a rate. Those cases, however, are in marked contrast to the pending case. It will be observed that in them the instances were very simple. There was a salient circumstance in each of them about which there was no uncertainty. In other words, it was unconfused by dispute and was not put to question by a conflict of testimony. A definite legal proposition unmixed with fact was presented and the only act of judgment exercised by the Commission was to reject it.

In *Cincinnati, New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, passing on the effect of a shipment on a through bill of lading to give jurisdiction to the Commission (in which the Commission was sustained), the questions presented were the power in the Commission

to fix a maximum rate, and whether competitive conditions could be considered by a railroad in fixing a greater charge for a shorter than a longer distance on its own line. It was decided that the power to pass on the reasonableness of an existing rate did not imply the power to prescribe a rate. On the conditions affecting competition, it was not found necessary to pass, but the following passage is worth the quoting as bearing on the contention of appellants:

"It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

In *Texas & Pacific Railway* v. *Interstate Commerce Commission* ocean competition as constituting a dissimilar condition and as justifying a difference in rates between import and domestic traffic was the circumstance considered. The Interstate Commerce Commission had ruled against such competition as a factor and condemned rates made in view of it to be undue and unjust. The court observed:

"But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts—that it was shut up by the terms of the act of Congress, to consider only such 'circumstances and conditions' as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada."

And further:

"We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not."

The ruling of the Commission was reversed.

In *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144, there was passed upon a decision of the Commission that the competition of river lines of transportation was not a factor to be considered when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the Interstate Commerce Act. The decision was declared to be an erroneous construction of the act.

In *Louisville & Nashville Railroad Co.* v. *Behlmer* (passing by subordinate questions) the dominant element was the construction of the fourth section of the Interstate Commerce Act. The Commission and the Circuit Court of Appeals, it was said, "mistakenly considered as a matter of law that competition, however material, arising from carriers who were subject to the act to regulate commerce could not be taken into consideration, likewise that competition, however substantial, not originating at the initial point of the traffic, was equally as a matter of law excluded from view."

In all these cases, therefore, there was a single, distinct and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. Indeed, they were mere constructions of the statute, the delegation of the Commission's duties and power. Let us now see what the propositions are which appellants propose for our adoption. They are presented as presumptions of law, which dispense with evidence until rebutted or countervail evidence by their probative force. (1) That the rate published by a carrier is reasonably low. (2) A rate upon a commodity, made by the competition of carriers, is reasonably low, and the burden is on him who assails it. (3) A rate upon a commodity as low, or lower, than the majority of rates charged by other carriers for the transportation of the same grade of commodities for similar distances in the same or other territory, is reasonably low, and the burden is upon him who

insists that it is unreasonably high. (4) A rate charged by a carrier which has the "strongest possible motive" to develop and increase a traffic in a particular commodity, and has maintained such rate for a "long series of years," so as to have induced a large and continuous increase of business in that commodity and of the capital invested, is reasonably low. (5) Rates being so adjusted upon a commodity, so as to enable it to move with profit to the shipper, whatever the conditions of the market, reducing the rates as the market declines, only increasing them as the market improves, a particular increase is reasonable, if it be shown that the percentage of increase has been greater in the price of the commodity than in the rates on it. (6) Rates reduced to meet a market depression and kept in effect during the depression, and increased when the depression ceases which does not cause the increased rates to exceed the rates that were maintained by the carrier, prior to the depression, are reasonable. (7), (8) Increase in rates upon all commodities impartially to meet largely increased expenditures on account of an abnormal increase in the volume of traffic is reasonable, "provided the gross earnings of the carrier yield less than the normal proportion of net earnings." Or provided the percentage of increase has been greater in the operating expenses of the carrier than in the rates upon the commodity. (9), (10) Upon the supposition that certain improvements have been made necessary by "an abnormal increase of traffic," they should be taken into account in determining the reasonableness of an increase of rates upon a commodity, whether as a matter of bookkeeping the expenditures should be charged to capital account or to the operating expenses; and without regard to the fact whether such expenditures have been paid out of the carrier's earnings or have been provided for by the issuance of bonds. (11) A rate on a commodity is profitable if it exceeds the cost of its movement; and, yet, the rate may be unreasonably low, if it does not contribute its fair share to operating expenses, taxes and fixed charges.

If these propositions should be granted as axioms of transportation there is the difficulty, as we have already pointed out, of determining to what extent—that is, whether to prejudicial extent, if at all—they were disregarded by the Commission and by the Circuit Court. The Circuit Court affirmed the order of the Commission, and it is an instant assumption that the court considered all the elements in the testimony and inferences from it. And the propositions of appellant are inferences of mixed law and fact, hence disputable—may be overcome or counterpoised, and, therefore, the court in reaching its ultimate judgment may have given them all the weight to which they were entitled.

It is almost impossible to discuss the contentions of appellants without bringing forward the elemental. A presumption is the expression of a process of reasoning, and most, if not all, the rules of indirect evidence may be expressed as such. We cannot go far in the investigation of any controversy without finding ourselves compelled to infer one fact from another, but we would not therefore be justified in declaring such inferences legal axioms. It is to this that appellants invite us and seek to erect disputable inferences from conduct that may have many explanations into intendments of law.

In this connection *Texas Pacific Railway* v. *Interstate Commerce Commission, supra,* is an instructive case. In that case, we have seen, it was decided that whether the rate was reasonable or unreasonable, was a question, whatever its theoretical nature, for the tribunal that decides upon matters of fact. Among other cases cited to sustain that position was *Denaby Main Colliery Company* v. *Manchester &c. Railway Company,* 3 Railway and Canal Traffic Cases, 426. In that case it was declared that reasonableness of a rate was a question of fact and not reviewable by an appellate court, unless circumstances which ought to have been considered were not considered, and that a decision must be arrived at fairly looking at all the circumstances that are proper to be looked at. The appellant in the case contended against the consideration by the rail-

way commissioners of competition between two places, and the Court of Appeals, replying, said:

"If the appellants can make out that, in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little, becomes a question of fact and not of law. The point is undoubtedly a very important one."

And it may be well to say here as a suggestive principle throughout that, it was pointed out, such conclusions of fact were "to be arrived at, looking at the matter broadly and applying common sense to the facts that are proved." The remarks of Willes, J., in *Phipps* v. *London & North-Western Railway*, 2 Q. B. D. 1892, pp. 229, 236, when the case was before the Railway Commissioners, were in effect approved. This court also quoted them. Willes, J., said, speaking of the questions of undue or unreasonable preference or advantage to or in favor of any particular person under section 2 of the Railway and Canal Traffic Acts, that they were eminently practical, "and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief and no good."

It is conceded, as we have said, that the presumptions contended for by appellants are mixed of law and fact, except, may be, those which we shall presently consider. If either element is dominant in such presumptions, it must be that of fact. In other words, the fact must be ascertained before the law draws its inference. This is especially pertinent to

the propositions urged by appellants. Let us illustrate. Take, for example, the second proposition that "a rate upon a commodity *made by competition* of carriers is reasonably low, and the burden is on him who assails it." But suppose competition is not established or is disproved, what becomes of the inference and the onus of proof dependent upon it? The question marks the condition that appellants encounter in the findings of the Commission. The findings of the Commission in effect negative the facts upon which the propositions depend. In still greater degree there is illustration in the first proposition. That proposition is an inference from an inference, as we shall presently point out. The reasonableness of the rate is inferred from competition, and competition is inferred from the publication of the rate.

This comment, it may be said, is not applicable to the ninth and tenth propositions of appellants, as they present propositions of law which were not only disregarded by the Commission, but the antithesis of them was asserted in the eighth finding. This contention must be specifically considered. The Commission finds that the net and gross earnings of the appellant have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included "expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements, and also for equipment, such as locomotives and cars." The Commission expressed the opinion that such expenditures should not be charged to a single year, but "should be, so far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'" And it was said: "If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants), it will be found that the percentage of operating expenses to earnings has in some extent diminished and in others increased to no material extent." The exact effect of the difference of view between appellants and the Commission as to operating expenses there is no test,

but it cannot be said, even if the Commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. But it is insisted that *Union Pacific Railway Co.* v. *United States*, 99 U. S. 402, establishes the contrary. That case was not concerned with rates of transportation or the rule which should determine them against shippers. It was concerned with the construction of the words "net earnings" in an act of Congress, five per cent of which earnings were provided to be applied annually to a loan by the Government to the railroad. Considering the provision of the act and its purpose, it was concluded "that the true interest of the Government" was "the same as that of stockholders, and would be subserved by encouraging a liberal application of the earnings to the improvement of the works." "It is better," it was said, "for the ultimate security of the Government in reference to the payment of its loan, as well as for the service which it may require in the transportation of its property and mails, that a hundred dollars should be spent in improving the works, than that it should receive five dollars towards the payment of its subsidy. If the five per cent of net earnings, demandable from the company, amounted to a new indebtedness, not due before, like a rent accruing upon a lease, a more

rigid rule might be insisted on. But it is not so; the amount of the indebtedness is fixed and unchangeable. The amount of the five per cent and its receipt at one time or another is simply a question of earlier or later payment of a debt already fixed in amount. If the employment of any earnings of the road in making improvements lessens the amount of net earnings, the Government loses nothing thereby. The only result is, that a less amount is presently paid on its debt, while the general security for the whole debt is largely increased." The interest of the Government in the improvement of the road was even greater than that of a stockholder. This was manifest from its munificent gift of lands, in addition to its generous loan of credit. As benefactor of the road and as creditor of it, as a Government concerned with the development of the country, as a money lender concerned with the extent of security, "the true interest" of the United States might be that revenue should be applied to improvements. Payment of the debt was only postponed, not denied, and this and the other considerations, might well determine the construction of words in the statute which were capable of different meanings. But such is not the relation or concern of a shipper of lumber. His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think, it is clear, that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape.

The first proposition submitted by appellants may also be said to be so far absolute and independent of evidence as to be considered as a presumption of law simply. This is contended on the authority of *Van Paten* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 81 Fed. Rep. 545. It is difficult to analyze the case briefly. It was an action of damages against the railroad for charging unjust and unreasonable rates under

the assumption that sections 8 and 9 of the Interstate Commerce Act gave such an action, though the railroad had charged according to the schedule of rates filed with the Interstate Commerce Commission. The answer of the railroad set up the schedule and that rates had been charged shippers in accordance with it. The court overruled a demurrer to the answer and adjudged the defense good. The court discussed the question in an elaborate opinion, and, led by the difficulties of applying all of the provisions of the act, which were enacted, the court observed, to correct "the mode in which carriers imposed their charges," sought in the act itself a standard of reasonableness.

The court, in its opinion, referred to the evils which had existed—rebates from published schedules, preferences and discriminations against shippers—and the purpose and hope of the act to correct them through the requirement of an imperative statutory standard, and by that, and other requirements, to establish free competition between railroads and, as a result of competition, reasonable rates. But it was not said or intended to be said that competition followed as a presumption of law in any given case. The court did not intend to assert a rule deduced from the conduct of railroads—conduct so far constant that the law would base a presumption upon it and forever fix it as one of its intendments. Indeed the court meant to do no more than to deny a right of action for unreasonableness in the rates as filed. And this court, in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, has decided that the redress of a shipper for such unreasonableness must be through the Interstate Commerce Commission. It is certain that a presumption that was sufficient to defeat an action in the Circuit Court could not be urged to defeat an inquiry by the Commission. Of course, if a complaint should be filed before the Commission and no proof adduced to support it, we cannot doubt but that the complaint would be dismissed; but this because of the principle that the party who asserts the affirmative in any controversy ought

to prove the assertion, and that he who denies may rest on his denial until, at least, the probable truth of the matter asserted has been established. "The reason is obvious: to all propositions, which are neither the subject of intuitive or sensitive knowledge, nor probabilized by experience, the mind suspends its assent until proof of them is adduced." Best on Presumptions, sec. 32.

There are other contentions of appellants which we think are untenable. One only needs comment. It is said that it was error to hold the advance unreasonable and unjust because the charges made on lumber to Cairo and other points on the Ohio River "are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor the Circuit Court has any jurisdiction to determine." Indeed, it is said, to do so is an exercise of a legislative function. We think the contention is in effect answered by *Cincinnati, New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184. If the contention is intended to be as extensive as its words seemingly make it, it would withdraw from the supervision of the Interstate Commerce Commission and from the courts every shipment over two or more railroads. There necessarily must be some apportionment of the rates between such roads, and whether the advance should be made in the rates over one road or the other, or in the rates over all, can make no difference. In other words, it is competent for the Commission or the courts to consider the through rate, however composed. It must not be overlooked that the Commission and the Circuit Court found that the advance in the case at bar was made by agreement between the roads, and was not the individual action of each, induced by competition. It is true the contrary fact is asserted. It is asserted, that such action was the result of competition, and, that the "legal value" to which competition was entitled was not given it. The argument to support the contention has not convinced us. The inquiry was essentially one of fact, and the attempt to make competition an inference of law and dominating against the

findings of the Commission and their affirmance by the Circuit Court we have already rejected.

But little more discussion is necessary. The concession of counsel with which we have commenced this opinion is a frank recognition of the effect which this court has given to the decisions of the Interstate Commerce Commission on questions of fact. And we have said very recently: "The statute gives *prima facie* effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court, we think they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed." *Cincinnati, Hamilton & Dayton R. R.* v. *Interstate Commerce Commission, ante,* page 142.

It is true, appellants assert, that clear and unmistakable error has been committed, but upon ground untenable as we have seen. And the present case above all others calls for the application of the rule. The question submitted to the Commission, as we have said, with tiresome repetition perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact and not of law. It seems from the findings, report and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

Further testimony was taken by the Circuit Court and its judgment confirmed that of the Commission and approved its order.

Decree affirmed.

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

MR. JUSTICE BREWER dissents.

UNITED STATES *v.* PAINE LUMBER COMPANY.

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

No. 101. Submitted April 15, 1907.—Decided May 27, 1907.

The title of Indians to lands belonging to the tribe is more than the right of mere occupation, and although the actual title may be in the United States it is held in trust for the Indians and the restraint on alienation should not be exaggerated.

Indian allottees under the Stockbridge and Munsie treaty of 1856, 11 Stat. 663, and the Act of February 6, 1871, 16 Stat. 404, were vested with sufficient title in their allotments to authorize the cutting of timber, for sale and not by way of improvements, without the approval of the Department of the Interior.

THE facts are stated in the opinion.

The Solicitor General and *Mr. Henry C. Lewis*, Special Assistant to the Attorney General, for plaintiff in error.

Mr. Charles Barber and *Mr. J. C. Thompson*, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action by the United States against the Paine Lumber Company for the recovery of the value of a quantity of timber and logs, to wit: 7,500 feet of basswood; 6,500 feet of elm; 51,020 feet of pine logs, alleged to have been cut and removed from certain lands in the Eastern District of Wisconsin.

The answer contained denials of the complaint, and set up that defendant company purchased the basswood and elm logs of one Thomas Gardner, and the pine logs of one Daniel

Davids, in the fore part of 1899, the logs being at the time in the county of Shawano in Wisconsin, and being in possession of Gardner and Davids respectively, who claimed and represented themselves to be the sole and absolute owners thereof, and that defendant in the regular course of its business sold and disposed of them.

Defendant also pleaded payment of the sum of $271.37 in full satisfaction and accord.

The action was tried by the court, who found the following facts:

"That the defendant is and was during all the times mentioned in the complaint a duly incorporated Wisconsin corporation.

"That long prior to the commencement of this action and long prior to the acts alleged in the complaint the head men or council of the Stockbridge and Munsie Indians, claiming authority so to do under the treaties and arrangements with the United States, allotted to one Thomas Gardner the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the State of Wisconsin, and to one Daniel Davids the northeast quarter of the southeast quarter of section twenty-one (21), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the State of Wisconsin, said lands being a part of the tract of land given to the Stockbridge and Munsie Indians by the treaty of 1856, each of said Indians being a member of said tribe of Stockbridge and Munsie Indians and the head of a family, and the said allotments being made to them respectively as their separate and individual allotments and being the same lands described in the complaint herein.

"That thereupon Thomas Gardner and Daniel Davids entered into immediate possession of their respective allotments and each of them has ever since claimed to hold the same as his allotment and has constantly asserted his ownership and right to take the timber therefrom without restric-

tions under the said treaty and arrangements with the plaintiff.

"That no patent has ever been issued for either of said parcels of land and that the ownership of the same by said Indians has received no official sanction on the part of the plaintiff aside from the recognition of their respective rights to the occupancy of the parcels so claimed and held by them respectively as aforesaid.

"And that their respective rights to the occupancy of their respective parcels of land allotted to them as aforesaid has been recognized by the United States.

"That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 of elm, and 51,020 feet of pine were cut in the winter of 1898–1899, upon said respective parcels of land by the said Thomas Gardner and the said Daniel Davids, respectively, not for the purpose of clearing the land for cultivation, but for the purpose of providing means for the support of their families, and that such cutting by each of them was done in good faith, and each of them claiming and believing that he had the right to so cut for said purpose.

"That after said cutting, and in the summer of 1899, at Weeds Point, in the county of Shawano, Wisconsin, the said logs were bought by the defendant of said Thomas Gardner and Daniel Davids, the same then and there being at said Weeds Point and off of the said reservation, for a valuable and fair consideration.

"That the defendant bought the same in good faith, believing the said Thomas Gardner and the said Daniel Davids were the *bona fide* and absolute owners thereof, and that they respectively were lawfully entitled to sell the logs cut from their respective allotments.

"That at the time of the cutting of the timber in question the said Thomas Gardner was living upon his said allotment; that shortly thereafter his wife died, and that he has not since lived thereon except at intervals of two or three months at

a time, but for the most part has lived elsewhere with his brother.

"That at the time of the said cutting the said Daniel Davids had no house on his allotment and was only there at times temporarily.

"It is stipulated in this case that if defendant is liable for the value of the logs and timber at the time of taking or while in his hands that the measure of damages therefor be the sum of five hundred and sixty-six dollars and twenty-eight cents ($566.28), and that if it be liable for the value of said logs and timber at the time of the cutting thereof or at the time of the taking thereof by the defendant, less the additions in value made thereto by the Indians in cutting, hauling, and banking the same, then the measure of damages therefor shall be the sum of three hundred and seventy-eight dollars and fifty-nine cents ($378.59). The measure of damages in both cases includes the cost of the scale and estimate thereof made by the Government officials."

From these findings the conclusion of law was deduced:

"That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold, and that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, but without costs."

The court expressed the reasons for its judgment in an opinion of such circumstantial care and consideration that makes unnecessary an elaborate discussion by us. It stated the primary issue to be "whether the Indian allottees under the Stockbridge and Munsie treaty of 1856 (11 Stat. 663) and the act of Congress of 1871 (16 Stat. 404) were vested with sufficient title in their allotments to authorize the cutting of timber, for sale and not by way of improvements, without the approval of the Department of the Interior." And stating the purpose of the treaty and its provision, the court said:

"The Stockbridge and Munsie treaty of 1856 was entered into to provide for relocation of the remnant of the tribe in Wisconsin, as they were unwilling to remove to a reservation in Minnesota theretofore provided. It recites valuable retrocessions and releases to the United States and reserves a tract 'near the south boundary of the Menominee Reservation' of sufficient extent to furnish individual allotments. The terms of the grant were substantially these: After survey into the usual subdivisions the council of the tribes, under the direction of the superintendent, shall 'make a fair and just allotment among the individuals and families of their tribes,' in eighty-acre tracts to heads of families and other classes named, and forty acres to others. The allottees 'may take immediate possession thereof, and the United States will thenceforth and until the issuing of 'patents' hold the same in trust for such persons;' certificates are to be issued 'securing to the holders their possession and an ultimate title to the land;' but 'such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale or transfer by the holder' of such land. After ten years, upon application of the holder and consent of the council, 'and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued in the usual form.' In the event of the death of an allottee without heirs, before patent, the allotment was not to revert to the United States, but to the tribe for disposition by the council. It is further declared (art. 11): 'The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient, from causes that cannot now be foreseen, to effect these ends, then the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provisions of law as experience shall prove necessary."

And another act should be mentioned, as it has induced a concession by the plaintiff of the right of Gardner to cut the timber upon his allotment. It is provided by the act of March 3, 1893 (27 Stat. 744) that all members of the tribe "who entered into possession of lands under the allotments of eighteen hundred and fifty-six and of eighteen hundred and seventy-one, and who by themselves or by their lawful heirs have resided on said lands continuously since, are hereby declared to be owners of such lands in fee simple, in severalty, and the Government shall issue patents to them therefor."

It is contended that Davids is not within the act of 1893, and "that his title is only such as can be read out of the treaty of 1856 and the act of 1871." Granting this to be so, it hardly needs to be said that the allotments were intended to be of some use and benefit to the Indians. And, it will be observed, that on that use there is no restraint whatever. A restraint, however, is deduced from the provision against alienation, the supervision to which, it is asserted, the Indians are subject and the character of their title. It is contended that the right of the Indians is that of occupation only, and that the measure of power over the timber on their allotments is expressed in *United States* v. *Cook*, 19 Wall. 592. We do not regard that case as controlling. The ultimate conclusion of the court was determined by the limited right which the Indians had in the lands from which the timber there in controversy was cut.

Certain parties of the Oneida Indians ceded to the United States all the lands set apart to them, except a tract containing one hundred acres for each individual, or in all about 65,000 acres, which they reserved to themselves, *to be held as other Indian lands are held.* Some of the lands were held in severalty by individuals of the tribe with the consent of the tribe, but the timber sued for was cut by a small number of the tribe from a part of the reservation not occupied in severalty. It was held, citing *Johnson* v. *McIntosh*, 8 Wheat. 574, that the right of the Indians in the land from which the logs were taken was that of occupancy only. Necessarily the

timber when cut "became the property of the United States absolutely, discharged of any rights of the Indians therein." It was hence concluded "the cutting was waste, and, in accordance with well-settled principles, the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion." If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Schly* v. *Clark*, 118 U. S. 250. The title is held by the United States, it is true, but it is held "in trust for individuals and their heirs to whom the same were allotted." The considerations, therefore, which determined the decision in *United States* v. *Cook* do not exist. The land is not the land of the United States, and the timber when cut did not become the property of the United States. And we cannot extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians, a use which can in no way affect any interest of the United States. It was recognized in *United States* v. *Clark* that "in theory, at least," that land might be "better and more valuable with the timber off than with it on." Indeed, it may be said that arable land is of no use until the timber is off, and it was of arable land that the treaty contemplated the allotments would be made. We encounter difficulties and baffling inquiries when we concede a cutting for clearing the land for cultivation, and deny it for other purpose. At what time shall we date the preparation for cultivation and make the right to sell the timber depend? Must the axe immediately precede the plow and do no more than keep out of its way? And if that close relation be not always maintained, may the purpose of an allottee be questioned and referred to some advantage other than the cultivation of the land, and his title or that of his vendee to the timber be denied? Nor does the argument

which makes the occupation of the land a test of the title to the timber seem to us more adequate to justify the qualification of the Indians' rights.

It is based upon the necessity of superintending the weakness of the Indians and protecting them from imposition. The argument proves too much. If the provision against alienation of the land be extended to timber cut for purposes other than the cultivation of the land it would extend to timber cut for the purpose of cultivation. What is there in the latter purpose to protect from imposition that there is not in the other? Shall we say such evil was contemplated and considered as counterbalanced by benefit? And what was the benefit? The allotments, as we have said, were to be of arable lands useless, may be, certainly improved by being clear of their timber, and yet, it is insisted, that this improvement may not be made, though it have the additional inducement of providing means for the support of the Indians and their families. We are unable to assent to this view.

Judgment affirmed.

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

COPPER QUEEN CONSOLIDATED MINING COMPANY *v.* TERRITORIAL BOARD OF EQUALIZATION OF THE TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 280. Argued April 26, 1907.—Decided May 27, 1907.

While this court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of a local statute adopted by the local court.

The reënactment of a statute in the same words carries with it the presumption that the legislature is satisfied with the construction which it has notoriously received from those whose duty it has been to carry it out;

and this presumption is as strong as one that the enactors of the original statute which was adopted verbatim from one of another State knew a single decision of the courts of that State giving a different construction to the statute.

The construction by the Supreme Court of Arizona of § 2282, Rev. Stat., of that State sustained by this court as to the power of the Territorial Board of Equalization to increase the total valuation of the property in the Territory above the sum of the returns from the Board of Supervisors of the several counties, and to change the valuations of particular classes of property within the several counties.

THE facts are stated in the opinion.

Mr. William Herring, with whom *Mrs. Sarah Herring Sorin* and *Mr. Everett E. Ellinwood* were on the brief, for appellant:

The Territorial Board of Equalization may, for the purpose of adjusting and equalizing, increase the aggregate value of one county and decrease that of another, but it has no power to increase the aggregate valuation of property in the Territory above the valuations returned by the Boards of Supervisors of the several counties. It is wholly a creature of statute and is of special and limited jurisdiction. It is essential to the validity of its acts that they should be authorized by some express provision of the statute, otherwise they are absolutely null and void. *Central Pacific R. R. Co.* v. *Evans,* 111 Fed. Rep. 79; 1 Cooley on Taxation, 3d ed., 772. See Rev. Stats. Arizona, 1901, pars. 3877, 3880, 3879 as amended by Act No. 23 Laws 1903, the same being reënacted *verbatim* from pars. 2655, 2657, and 2658, Rev. Stats. Arizona, 1887. See construction of Colorado statutes prior to the adoption of these statutes by Arizona. *People ex rel. Crawford* v. *Lathrop,* 3 Colorado, 428; *People* v. *Amos,* 26 Colorado, 83; *S. C.,* 27 Colorado, 126.

A judicial interpretation given the statute in the State of its origin, prior to the adoption thereof, becomes a part of the statute itself, with the same force and to the same extent as though the decision was written into the law. *Henrietta M. & N. Co.* v. *Gardner,* 173 U. S. 123; *Goldman* v. *Sotelo,* 7 Arizona, 23.

On the adoption of a statute where the law antecedently to the adoption was settled by judicial interpretation thereof, the mere change of phraseology will not be construed a change of the law unless such phraseology evidently purports an intention in the legislature to work a change. *McDonald* v. *Hovey*, 110 U. S. 619; *Metropolitan Railway Co.* v. *Moore*, 121 U. S. 558; *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295.

The Territorial Board of Equalization in equalizing and adjusting property valuations between the several counties has no power to increase or diminish the valuations of certain kinds, classes, sub-classes or grades of property within any county. It must deal with the respective valuations as returned by the counties as entireties by making such changes in each county valuation as a whole as will relatively equalize the entire property values in the different counties. *State ex rel. Wallace* v. *State Board*, 18 Montana, 473; *State ex rel. State Board* v. *Fortune*, 24 Montana, 154; *Poe* v. *Howell*, 67 Pac. Rep. 62 (New Mexico) *nisi prius; M., K. & T. Ry. Co.* v. *Miami County Commissioners*, 67 Kansas, 434; *Chamberlain* v. *Cleveland*, 31 Ohio St. 51; *County of San Mateo* v. *Southern Pacific R. R. Co.*, 13 Fed. Rep. 722; *County of Santa Clara* v. *Southern Pacific R. R. Co.*, 18 Fed. Rep. 325.

Mr. Elias S. Clark and *Mr. William C. Prentiss*, with whom *Mr. Horace F. Clark* was on the brief, for appellee:

It is clear, and admitted by the appellant, that the Board of Equalization had the power to increase the aggregate valuation of taxable property in Cochise County, and in so doing had the power to increase the valuation of the petitioner's property in that county along with all of the other taxable property therein. So that, inasmuch as it is not contended that the valuation of the petitioner's property was raised beyond or even to its actual cash value, which is the statutory measure of valuation for taxation, it would seem that there has not been any injury done to the petitioner; but its whole contention

is that, so far as the merits of the matter go, other classes of property have not been equally increased, on the one hand, and on the other, that the aggregate valuation of property in some other county or counties has not been reduced in such measure as not to disturb the aggregate valuations of property in all the counties.

It would seem, therefore, that the petitioner has no substantial claim of injury and that the action of the appellees ought not to be reviewed at its instance in certiorari proceedings.

In Arizona clear and adequate remedies in cases of alleged illegal or erroneous tax assessments are provided by statute and, therefore, certiorari will not lie.

Act 92 session laws of the Legislative Assembly of Arizona of 1903, amending Chapter VII, Rev. Stat. 1901.

The Supreme Court of the United States will not disturb a decision of the Supreme Court of a Territory construing a local statute unless manifest error appear. *Sweeney* v. *Lomme*, 22 Wall. 208; *Northern Pac. Ry. Co.* v. *Hambly*, 154 U. S. 349; *Fox* v. *Haarstick*, 156 U. S. 674; *Whitney* v. *Fox*, 166 U. S. 637.

Tax laws are remedial and to be liberally construed to effect their purpose of just distribution of the burdens of taxation.

Revenue laws are not to be regarded as penal in the sense that requires them to be strictly construed, though they impose penalties and forfeitures. They have even been declared remedial in character. Sutherland Stat. Construction, par. 535; *Wood* v. *United States*, 16 Pet. 342; *Taylor* v. *United States*, 3 How. 197; *Cliquot's Champagne*, 3 Wall. 114; *In re Twenty-eight cases*, 2 Ben. 63; *United States* v. *Willets*, 5 Ben. 220; *United States* v. *Hodson*, 10 Wall. 395, and many others.

Under the power conferred on the board to equalize, and, with the cash value as a standard, it may, as incidental to that power, raise the sum of all the valuations as returned by the various assessors and local boards of equalization. The following authorities sustain this proposition: *State ex rel. Thompson* v. *Nichols*, 69 Pac. Rep. 775; *State ex rel. Cunningham* v. *Thomas*, 50 Pac. Rep. 615; *Wallace et al.* v. *Bullen et*

al., 52 Pac. Rep. 854; *Kittle* v. *Shervin*, 11 Nebraska, 66; *Renfrew et al.* v. *Webb et al.*, 54 Pac. Rep. 449; *Burdrick et al.* v. *Dillon et al.*, 54 Pac. Rep. 785; *Weber et al.* v. *Dillon*, 54 Pac. Rep. 894; *Hacker* v. *Howe*, 101 N. W. Rep. 256.

MR. JUSTICE HOLMES delivered the opinion of the court.

THIS is an appeal from a judgment on demurrer to a petition for a writ of certiorari. The object of the petition was to vacate proceedings of the Board of Equalization in 1905, by which the Board added very largely to the assessed valuation of patented mines and, in a less degree, of work horses and saddle horses, in Cochise County and other counties in Arizona. It was alleged that by these proceedings the Board increased the total valuation of property in the Territory and increased the valuation of the petitioner's property of the above-mentioned kinds. The writ had been issued by a single justice returnable before the full bench, but the case was heard on the demurrer by consent, and by the judgment the demurrer was sustained and the writ was quashed.

The errors alleged are two: first, that while the Board for purposes of equalizing might add to the total value of the property in one county and diminish that of property in another, it had no power to increase the total valuation of property in the Territory above the sum of the returns from the Boards of Supervisors of the several counties; and second, that the Board was bound to deal with the valuation of each county as a whole, and could not increase or diminish the valuations of particular classes of property within a county. The power of the Board depends, of course, upon statute, and it is said that the statute of Arizona was taken almost *verbatim* from one of Colorado, which had been construed by the Supreme Court of that State in accordance with the first of the petitioner's above contentions before it was adopted by Arizona. *People* v. *Lothrop*, 3 Colorado, 428. The construction, it is said, goes with the act. *Henrietta Mining & Milling Co.* v.

Gardner, 173 U. S. 123, 130. The second contention is based on an interpretation of the statutes, the supposed absence of an express grant of power, and later decisions in Colorado and other States.

On the other hand, while this court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of a local statute adopted by the local court. *Sweeney* v. *Lomme*, 22 Wall. 208; *Northern Pacific R. R. Co.* v. *Hambly*, 154 U. S. 349, 361; *Fox* v. *Haarstick*, 156 U. S. 674, 679. And again, when for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is reënacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401, 402. The statute of Arizona was reënacted in 1901 and was said by the Supreme Court to have been construed by the Board against the petitioner's contention ever since the Board was created, eighteen years before. Even apart from the reënactment a certain weight attaches to this fact. *United States* v. *Finnell*, 185 U. S. 236, 243, 244. *United States* v. *Sweet*, 189 U. S. 471. The presumption that the codifiers of 1901 knew and approved the practice of the Board certainly is as strong as the presumption that the original enactors of the statute knew a single decision in another State; and it is more important since it refers to a later time.

As an original question the construction adopted by the Supreme Court appears to us at least as reasonable as the opposite one contended for, and the variations in the Arizona act from the prototype, if Colorado furnished the prototype, and the different background against which it was to be construed, seem to us to have warranted the refusal to be bound by the Colorado case.

We give a section of the General Laws of Colorado, 1877, and of the Revised Statutes of Arizona side by side.

2282. Sec. 43. Said Board shall ascertain whether the valuation of real estate in each county bears a fair relation or proportion to the valuation in all other counties of the State, and on such examination they may increase or diminish the aggregate valuation of real estate in any county, as much as in their judgment may be necessary to produce a just relation between all the valuations of real estate in the State; but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the clerks of the several counties.	3880. (Sec. 50.) The said board shall ascertain whether the valuation of property in each county bears a fair relation or proportion to the valuation in all other counties in the territory, and on such examination they may increase or diminish the valuation of property in any county, as much as in their judgment may be necessary to produce a just relation between all the valuations of property in the territory; but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the boards of supervisors of the several counties. And said board shall at the same time fix the rate of taxes for territorial purposes which is to be levied and collected in each county.

For convenience we take up the second of the alleged errors first. It will be seen that the word "property" takes the place of "real estate" at the beginning, and that the power given, instead being only a power to increase or diminish the aggregate valuation of real estate in any county, is to increase or diminish the valuation of property (not the property) in (not of) any county. The word "aggregate" is left out, and the fact that it was left out favors the construction that apart from that fact would be reasonable, that the power extends to the valuation of any property, and is not confined to the valuation of all the property as one whole. This construction

is further favored by the purpose of the changes in valuation, which is to "produce a just relation between all the valuations of property in the Territory." This phrase is interstitial in its working. It does not confine the equality to the valuations by county, but extends it to all the valuations of property. Yet a further argument may be drawn from the language of § 3874: "No assessor, board of supervisors, or the territorial board of equalization shall assess any real estate at a less valuation than seventy-five cents per acre." This recognizes the power of the Board to deal with a special class of property, and we may add, by way of anticipation, by also recognizing a function of assessment, does much to make inapplicable the reasoning of the Colorado decision upon the other point.

It seems to have been argued below that at least the Board was confined to dealing with property by the classes mentioned in other sections of the statutes, especially §§ 3849, 3861, 3877. But the classifications and specifications provided for in those sections do not affect the power expressly given by § 3880 as we have construed the latter, and further, by § 3877 the Territorial Board is given power in very broad terms to change the list. It is not necessary to rely on this power to change the list for the power of the Board to change valuations of a particular class of property. It is mentioned simply to show that the powers given by § 3880 are not diminished by other provisions.

The first contention of the petitioner needs but a few words in addition to what we have said. The power to increase the valuation of property in any county is as power to increase it in all, or, at least, to increase the valuation of some kinds of property in all, so as to produce a just relation between them and the other valuations left undisturbed. We find nothing in the statute that requires the increase to be so adjusted that the total valuation shall be unchanged. On the contrary, the prohibition against reducing it implies that the Board has the power of change and, but for the prohibition, might reduce

the total. Therefore it may add to the total since the law does not forbid that. The Colorado decision to the contrary turned partly on the notion, which has been shown to be inapplicable to Arizona, that the Board of Equalization had no function of assessment. It also turned in part at least on the constitution of the State, to which, of course, the statute was subject. There was no Constitution to be conformed to in Arizona and therefore the construction of the statute depends on the meaning of the words alone, and the Supreme Court of the Territory in construing them was left at large.

Judgment affirmed.

IOWA RAILROAD LAND COMPANY *v.* BLUMER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 207. Argued February 26, 27, 1907.—Decided May 27, 1907.

Under the act of Congress of May 15, 1856, 11 Stat. 9, and the act of the legislature of Iowa of July 14, 1856, the grant to the Dubuque & Pacific Railroad Co. was *in præsenti* and the title passed from the United States and vested in the State of Iowa when the map of definite location was lodged in the General Land Office, and the right of the company then attached. *Iowa Falls Land Co.* v. *Griffey*, 143 U. S. 32.

Where a grant is *in præsenti* and nothing remains to be done for the administration of the grant in the Land Office, and the conditions have been complied with and the grant fully earned, the company has such a title, notwithstanding the want of final certificate and the issue of the patent, as will enable it to maintain ejectment against one wrongfully on the lands, and prescription will run in favor of one in adverse possession under color of title. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 421; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532.

Although one who in good faith enters and occupies lands within the place limits of a railway grant *in præsenti* may not obtain any adverse title against the Government, if, as in this case, his possession is open, notorious, continuous and adverse, it may, if the railway company fails to assert its rights, ripen into full title as against the latter, notwithstanding the entry in the Land Office was cancelled without notice as having been improperly made and allowed.

THIS is a writ of error to the Supreme Court of the State of Iowa, seeking reversal of its judgment affirming the decree of the District Court of Woodbury County, quieting the land title of Claude F. Blumer, defendant in error, as against the Iowa Railroad Land Company, plaintiff in error. 129 Iowa, 32. The record discloses that Blumer brought his action by a petition in equity under the Iowa Code, claiming to be owner in fee simple of forty acres of land in Woodbury County, Iowa, being the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 1, township 89 north, range 46 west, containing about forty acres; averring that the plaintiff and his immediate grantor had been in open, notorious, continuous and adverse possession for more than ten years under a claim of title and that the plaintiff was then in the possession of the same; and that defendant made some claim to the said estate, and prayed that he be quieted in his title and that defendant be estopped from setting up any claim adverse to his own.

Defendant answered and set up general denials and that the defendant was the owner of the premises by virtue of an act of Congress of May 15, 1856, making a grant of lands to the State of Iowa in alternate sections in aid of the construction of certain railways in that State, whereby the lands were granted to the State of Iowa in trust for the railway companies; that the act and trust were duly accepted by the State of Iowa, by act of its legislature, approved July 14, 1856; that thereafter, by the act of April 7, 1868, of the same state legislature, the Iowa Falls & Sioux City Railroad Company was designated to construct and complete the portion of the railroad west of Iowa Falls, and the State granted, on conditions contained in said act, the unearned portions of said lands west of Iowa Falls to the said Iowa Falls & Sioux City Railroad Company, and that all the terms of the act had been complied with and that the same were rightfully subject to the certification and conveyance to the said railway company, which was the grantor of the defendant.

A reply and amendment were filed, and also a supplemental

answer setting forth that the lands on the twenty-fourth of January, 1903, since the former answer in the case, had been duly certified to the State of Iowa in trust for the Iowa Falls and Sioux City Railroad Company, and had been subsequently patented to the railroad company by the Governor of the State on February 2, 1903, and that all the rights and title of the railway company had been succeeded to by the defendant, the Iowa Railroad Land Company, and prayed to be quieted in its title as against the plaintiff. By an amended reply the plaintiff reiterated that for more than ten years prior to the commencement of the suit, plaintiff and his immediate grantor had been in open, notorious, continuous and adverse possession of the premises under a claim of right and color of title, and that plaintiff was then in possession of the same.

The lands in question are within the place limits of the grant to the State of Iowa by the act of May 15, 1856. 11 Stat. 9. By the act of the legislature of Iowa, passed July 14, 1856, the lands were granted to the Dubuque & Pacific Railroad Company. The map of definite location of the line of the road was filed in the office of the Commissioner of the General Land Office of the United States on October 11, 1856, and accepted on October 13, 1856.

The legislature of Iowa, on April 7, 1868, passed a statute (Iowa Laws, 1868, chap. 124, pp. 164–167), designating the Iowa Falls & Sioux City Railroad Company (grantor of the plaintiff in error) to construct and complete the uncompleted portion of the road west of Iowa Falls. Sec. 1 of the act legalized and confirmed the contract between the Dubuque and Sioux City Railroad Company and the Iowa Falls & Sioux City Railroad Company "transferring so much of the Dubuque and Sioux City [successor of the Dubuque and Pacific] Railroad as remains to be constructed, together with the franchises, right of way, depot grounds, and other appurtenances of said road to be completed, also transferring all right and title of the said Dubuque and Sioux City Railroad Company to so much of the lands granted by Congress to aid

in the construction of said road as shall appertain to, or be legally applicable to the construction of the uncompleted part of the Dubuque and Sioux City Railroad, as aforesaid, except as to the lands hereinafter granted to the Dubuque, Bellevue and Sabula Railroad Company." Sec. 4 of that act provides: "That so much of land grant as is applicable to the uncompleted portion of the road aforesaid, west of Iowa Falls . . . is hereby conferred upon the said Iowa Falls & Sioux City Railroad Company, subject to the terms and conditions of the act of Congress granting the said lands, dated the 15th day of May, A. D. 1856, and the act amendatory thereto and the act of Congress passed the present session" (subject to certain conditions as to the time and manner of construction).

The railroad company complied with this act as to the completion of the road, having done so by January 1, 1872, also complying with the act of Congress of March 2, 1868, 15 Stat. 38, requiring the completion of the road by that date. The tract of land in controversy was again selected and designated by the Iowa Falls & Sioux City Railroad Company, on June 19, 1884, and on April 24, 1885, as lands to which the company was entitled under said land grants, and said last named selection was accepted by the register and receiver, and certified to the Commissioner of the General Land Office at Washington, May 13, 1885.

In December, 1858, the lands were listed for the benefit of the Dubuque & Pacific (since Iowa Falls & Sioux City) grant under the act of May 15, 1856, but afterwards, on February 21, 1859, the tract was included in a selection of the State of Iowa under the Swamp Land Grant. Under the order of the Secretary of the Interior the lands were stricken from the certified list with a view of determining the claim of the State under the Swamp Land Grant, which claim was finally rejected on February 16, 1878.

The lands were certified pending the suit, January 20, 1903, and on February 2, 1903, the lands were patented by the

Governor of Iowa to the Iowa Falls & Sioux City Railroad Company.

On October 2, 1883, John Carraher (predecessor in title of the defendant in error) made application to the local land office at Des Moines, Iowa, to enter the lands under the Timber Culture Act, 20 Stat. 113. His application was rejected and Carraher appealed. The rejection was because of conflict with the railroad grant. On December 3, 1883, the Commissioner affirmed this action. Carraher appealed to the Secretary of the Interior. Afterwards, July 17, 1891, the Secretary approved the decisions and rejected the claim of Carraher. Pending his appeal, on May 31, 1888, Carraher made another timber culture entry (No. 607). When the Secretary's decision of June 17, 1891, finally rejecting the first application of Carraher was promulgated by the Commissioner (July 11, 1891), it was also directed that the second timber culture entry (of May 31, 1888), be cancelled on the ground that it had been allowed without authority.

The delay in certifying the lands after the final decision against Carraher is thus accounted for by Mr. Samuel S. Burdett, at one time Commissioner of the General Land Office, and attorney for the plaintiff in error from June, 1888:

"On July 15, 1891, my firm advised the Iowa Railroad Land Company of the Commissioner's action of July 11, 1891, in which the Carraher entry had been cancelled and received in reply the letter thereto attached and marked 'Exhibit B' from P. E. Hall, president, dated July 28, 1891, in which he asked that we 'take such steps as will result in the tract in question being certified to the State for our benefit.'

"Thereafter, by personal application by myself and other members of my firm, effort was made to secure the due certification of the land under the grant, resulting in a promise from the proper officials of the General Land Office, given on or about October 1, 1891, that the tract would be included in a patent which was then about to be prepared. . . .

"The duty of certifying the tract rested with the proper

officials of the General Land Office, and was in fact a mere clerical duty. No rule required the filing of an application in writing for the certification of lands embraced in a pending selection, and the practice of my firm in such matters was to urge, by personal request, the proper officials of the General Land Office to take up such lists and prepare the necessary certificate for the action of the Commissioner and Secretary. This was what was done with respect to the tract in question here, and our requests in the matter resulted in the promise that the land would be included in a patent, such as set out in my firm's letter of that date, to P. E. Hall, president, Exhibit 'C.' In the multitude of business transacted by my firm in the years succeeding the action referred to, it is impossible for me [to] recollect the details of this particular matter, nor do I recollect the circumstances under which the promise referred to in said letter was given, but that it was made to me or to some member of my firm, as a result of urgent requests for proper action, is certain, or the said letter of my firm, of October 1, 1891, Exhibit 'C,' would not have been written. It was the practice of my firm, in all matters in our hands from time to time, to call them up by personal application, with a view to securing action. When the certification finally issued on January 22, 1903, it was in response to a personal and urgent request from my firm.

"I know of no delay whatever caused by either the Iowa Railroad Land Company or its predecessors in interest, or by any of its agents or attorneys, and certainly none by myself or my firm in securing the final issuance of title by the United States to the tract of land in question. The delay in certifying the said land, after the Secretary's action of July 17, 1891, was wholly due to the want of action by the General Land Office, the company and its agents having performed every duty in timely manner required by the rules of the Department.

"The first cause of delay in final certification of said tract under the aforesaid railroad grant of May 15, 1856, was the selection by the State of Iowa, under the Swamp Land Grant

of 1850, which was filed February 21, 1859, and embraced said tract, which selection was not finally disposed of by the Land Department until 1878.

"The next cause of delay was the appeal of John Carraher from the decision of the Commissioner of the General Land Office, dated December 3, 1883, to make entry of said tract under the provision of the timber culture law. Delay was next caused by the loss of Carraher's application papers in the General Land Office, which is mentioned in the letter of the Commissioner to Mr. Van Deventer, dated September 6, 1887, Doc. No. 1, of this deposition, and in that of the Commissioner to Geo. W. Wakefield, Esq., Doc. No. 4, of this deposition. The next cause of delay appears to have grown out of the contention made in behalf of Carraher in support of his appeal, that the railroad grant had been fully satisfied, and that this tract was not needed to fill up the quota of lands due under the grant. This made necessary the adjustment of the grant which took place on April 9, 1891, as already detailed.

"Thereafter the Secretary disposed of Carraher's appeal on June 17, 1891. The delay in certifying the land under grant which subsequently ensued, occurred in the General Land Office. As to the causes of this last delay, I have no certain knowledge, but I can state it as a fact, that between the date of the Secretary's final decision on the Carraher application, down to a very recent date, the railroad division of the General Land Office has been overburdened with work consequent upon the duty of adjusting all of the railroad land grants made by Congress in aid of railroads, which was cast upon the Land Department by the provisions of the act of March 3, 1887, 24 Stats. at Large, p. 556. For the most of the time during that period the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grants. The delay in certifying the tract in question may have been due to these conditions."

Mr. Charles A. Clark for plaintiff in error:

The claims of plaintiff in error, specially set up and pleaded, of title to the land under a grant and certification, the equivalent of a patent from the United States, has been denied by the court below. Also its like claim that title by prescription could not be acquired against it while certification, was refused under the railroad grant and while the title remained in the United States. These present Federal questions.

Carraher's claim under the timber culture entry was not a claim to title in fee which alone can furnish the basis for title by prescription. *Ricard* v. *Williams*, 7 Wheat. 59.

Nor can a prescriptive title arise with no claim of right. *Harvey* v. *Tyler*, 2 Wall. 328; *Society for Prop. of Gosp.* v. *Town of Paulet*, 4 Pet. 480.

A claim under a sheriff's deed void for want of jurisdiction will not support title by prescription. *Walker* v. *Turner*, 9 Wheat. 541.

There can be no color of title in an occupant of land who does not hold under an instrument or proceeding or law purporting to transfer the title or to give the right of possession.

Nor can good faith be affirmed of a party in holding adversely where he knows he has no title and that under the law he can acquire none. *Deffeback* v. *Hawke*, 115 U. S. 392, 407; *Sparks* v. *Pierce*, 115 U. S. 412; *Litchfield* v. *Sewell*, 97 Iowa, 251; *Hayes* v. *United States*, 175 U. S. 260.

Under the statute of limitations of Iowa relating to lands, title by prescription cannot be acquired in the absence of an honest, *bona fide*, good faith claim of title. *Litchfield* v. *Sewell*, 97 Iowa, 260; *Wright* v. *Keithler*, 7 Iowa, 92; *Smith* v. *Young*, 89 Iowa, 340; *Clark* v. *Sexton*, 122 Iowa, 313; *Snell* v. *Mecham*, 80 Iowa, 55.

No such good faith is shown on Carraher's part. The facts to which attention has been called, *supra*, conclusively show bad faith on his part.

Courts cannot interfere while title is withheld by Land Department, in administration of the grant. *Humbird* v.

Avery, 195 U. S. 498, and cases cited; *Oregon* v. *Hitchcock*, 202 U. S. 70.

The statute of limitations cannot run or title by prescription have its inception while the Land Department withholds the title in the administration of the grant. *Gibson* v. *Choteau*, 13 Wall. 92; *Redfield* v. *Parks*, 132 U. S. 246, and cases there cited; *Morrow* v. *Whitney*, 95 U. S. 557; *North Pac. Ry. Co.* v. *Traill Co.*, 115 U. S. 600; *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Churchill* v. *Sowards*, 78 Iowa, 473; *Durham* v. *Hoosman*, 88 Iowa, 36; *Dickerson* v. *Yetzer*, 53 Iowa, 681; *Grant* v. *Railway Co.*, 54 Iowa, 673; *United States* v. *Montana Mfg. Co.*, 196 U. S. 577.

Cancellation of timber culture entry cannot be collaterally assailed. *Brown* v. *Gurney*, 201 U. S. 193; *Steele* v. *Smelting Co.*, 106 U. S. 447; *Smelting Co.* v. *Kemp*, 104 U. S. 636.

Mr. Constant R. Marks and *Mr. Henry C. Gardiner*, for defendant in error, submitted:

The grant under which the defendant claimed title in this case was a grant *in præsenti*, under which title passed from the Government to the railroad company upon the filing of the map of definite location, as was done in this case on October 13, 1856. *C., R. I. & P. Ry. Co.* v. *Grinnell*, 51 Iowa, 476; *Sioux City &c. Co.* v. *Griffy*, 72 Iowa, 505; *S. C.*, 143 U. S. 32; *B. & M. R. R. Co.* v. *Lawson*, 58 Iowa, 145; *Iowa Falls & S. C. Ry. Co.* v. *Beck*, 67 Iowa, 421; *C., B. & Q. R. Co.* v. *Lewis*, 53 Iowa, 101; *Courtright* v. *Railway Co.*, 35 Iowa, 386.

One can hold in subservience to the Government, invoking the aid of its Land Department and then, when the railroad company obtains title, use that holding as an honest claim of right in sustaining adverse possession against the railroad company. *Cole* v. *Railroad Co.*, 76 Iowa, 185.

One can obtain color of title and enter into possession while the title is in the Government, and when the title passes to the railroad company hold adversely against the latter until the statute has run, under the same color of title and posses-

sion. *Railroad Co.* v. *Allfree*, 64 Iowa, 500; *Sater* v. *Meadows*, 68 Iowa, 507.

As a general rule of all courts of last resort, the Statute of Limitations will begin to run against one claiming title from the Government from the date of his compliance with the requirements of the Government in favor of one holding adverse possession of the real estate. *Dolen* v. *Black*, 67 N. W. Rep. (Neb.) 760; *Udell* v. *Peak*, 7 S. W. Rep. (Tex.) 786; *Patten* v. *Scott*, 12 Atl. Rep. (Pa.) 292; *Hayes* v. *Martin*, 45 California, 559.

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

The original grant of May, 1856, was *in præsenti*. The title passed from the United States and vested in the State of Iowa on October 13, 1856, when the map of definite location was lodged in the General Land Office, and the right of the company then attached. *Iowa Falls Land Company* v. *Griffy*, 143 U. S. 32.

Under the decisions made by this court in *Desert Salt Company* v. *Tarpey*, 142 U. S. 241, and *Toltec Ranch Company* v. *Cook*, 191 U. S. 532, notwithstanding the patent had not been issued, the railway company, grantor of the plaintiff in error, having succeeded to the right and title of the original company and complied with all the terms and conditions of the grant, as required in the legislation of Congress and the acts of the Iowa legislature after the acceptance of the grant by the State, was in a position and clothed with the requisite title in order to transmit the same to another who might have recovered possession of the lands, and it could itself have brought an action in ejectment to oust one holding adverse possession thereof, and being clothed with these rights was in such position that the Statute of Limitations would run against it in favor of one who occupied the premises by adverse possession under color of title. This was distinctly decided in the *Toltec Ranch Company case*, wherein it was held that the Stat-

ute of Limitations would run against the railroad company, thus situated toward the lands, although the patent had not issued.

It is sought to withdraw this case from the application of the doctrine of *Salt Co.* v. *Tarpey*, and *Toltec Ranch Company* v. *Cook*. It is argued that § 4 of the act of May, 1856, provided that if the roads were not completed in ten years the unsold lands should revert to the United States; that on March 10, 1868, the State of Iowa resumed the grant of lands as made to the original grantees; that by act of June 2, 1864, Congress provided in section 8:

"That no lands hereby granted shall be certified to either of said companies until the Governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof, as aforesaid, of the completion of the additional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the legislature of the State of Iowa, to aid in the completion of such road."

And, it is argued, that the effect of this section was to hold the legal title until the railways were built and completed, as therein specified, and that the Iowa Falls and Sioux City Railroad Company never took the legal title to the lands in controversy until certified under section 8, of the act of 1864, which, it is alleged, was not until January 20, 1903, followed by the Governor's patent of February 2, 1903.

But when the grant is *in præsenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the grant have been complied

with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession under color of title. *Salt Co.* v. *Tarpey*, and *Toltec Ranch Co.* v. *Cook, supra.*

Applying and giving weight to the decisions thus recently rendered in this court, we think the debatable proposition in the case concerns not the title of the railway company, or its right to have maintained an action to recover the premises, but involves the right of Carraher, and the defendant in error as his successor, to claim the title to the premises by adverse possession.

We think the record discloses that for more than ten years required by the Iowa statute to ripen such title, Carraher was in possession of the premises. He had planted a large number of trees; caused the lands to be cultivated; had raised crops; had rented the lands to others, and was understood to be claiming the ownership. The answer of plaintiff in error to this claim of title is that Carraher was not in possession of the premises claiming title in good faith.

The record shows that in 1883, by an entry under the Timber Culture Act, Carraher claimed this forty acre tract. As we have seen in the statement preceding this opinion, his application was rejected by the Register of the General Land Office, whose decision was affirmed by the Commissioner and ultimately by the Secretary of the Interior. Pending his appeal, Carraher made a second application for the lands to the Register of the Land Office, and a receiver's receipt was issued to him. This receiver's receipt was dated May 31, 1888, and is as follows:

"Receiver's Receipt No. 607. Application No. 607.

"Receiver's Office, Des Moines, Iowa, May 31st, 1888.

"Received of John Carraher the sum of Nine Dollars ——

cents, being the amount of fee and compensation of Register and Receiver for the entry of Northeast —— of N. E. quarter of Section one, in township 89 of range 46, under the first section of the act of Congress approved June 14th, 1878, entitled 'An act to amend an act entitled an act to encourage the growth of timber on the Western Prairies.'

"$9.00. M. V. McHenry, *Receiver.*

"Endorsed: State of Iowa, Woodbury County, Filed for record this 9th day of Dec., 1891, at 2 o'clock P. M., and recorded in Book 40 Lands, page 162, C. A. DeMun, Recorder. P. Shontz, Deputy."

It was enclosed to Carraher in a letter, of which the following is a copy:

"Mr. John Carraher. Sioux City, Iowa, June 2, 1888.

"My Dear Sir: I have the pleasure of handing you herewith your timber culture entry Receiver's receipt No. 607 for N. E. ¼ of N. E. ¼, 1, 89, 46.

"Respectfully, Geo. W. Wakefield.

"P. S. You can take possession and proceed to comply with the timber culture laws."

After this receiver's receipt and letter, Carraher went into possession in the manner we have already stated and held it until 1901, when, shortly before his death, he conveyed the premises to the defendant in error. The contention is that this possession could not have been in good faith with any expectation of obtaining title from the Government at the conclusion of the eight years required by law in which to earn it; that Carraher knew that his first application under the Timber Culture Act had been rejected, and afterwards that decision was affirmed on appeal in 1891, and that he could not have continued in the occupation of the premises in good faith under claim of title.

The record shows that when the Secretary of the Interior (July 11, 1891), affirmed the decision against Carraher's first

timber culture entry the Commissioner in advising the Register and Receiver at Des Moines by letter of July 13, 1891, of that decision, added: "It appears that on May 31, 1888, more than three years after the rejection of his application, and while his case was pending before the Secretary of the Interior on appeal, your office allowed Carraher to make timber culture entry 607 of the land. The action was without authority and the entry has this day been cancelled." It does not appear that Carraher was notified that this entry 607 had been cancelled, nor was he ever called upon to appear in reference to the same, and the letter of the Commissioner discloses that the Register of the Land Office at Des Moines should not have allowed the entry to be made and that it was summarily cancelled without notice or hearing. Carraher had been advised by the letter from his counsel, who had become a judge of a court in Iowa, that he might take possession and proceed to comply with the timber culture law. As far as the record shows, he heard nothing further from his entry, knew nothing of its summary cancellation, and no attempt was made to disturb his possession of the premises.

The Supreme Court of Iowa held that there was nothing in these facts to show that Carraher was not acting in good faith, and with the belief that he would acquire title under the last entry under the Timber Culture Act, and we are not prepared to disturb this holding.

After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this, and so far as the record discloses made no objection to Carraher planting and cultivating the trees required by the act of Congress to perfect his title under the second application. His possession was certainly open, notorious, continuous and adverse, and unless he was acting in bad faith, was such as would ripen into full title as against the railway company, it failing to assert its rights within the period of the Statute of Limitations. While until the time had run required by the

Timber Culture Act, Carraher would have been in no position to claim title as against the Government, he was occupying a hostile attitude toward the railway company, and, while recognizing title in the United States, he expected to acquire title from it, had excluded all others from the use and occupation of the land and held under no other title. The Supreme Court of Iowa has held that under such circumstances the statute of limitations of Iowa would run in his favor as against the railroad company, and we find no reason to disturb that conclusion. And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carraher.

We find no error in the judgment of the Supreme Court of Iowa and it will be

Affirmed.

MR. JUSTICE BREWER concurs in the judgment.

VICKSBURG *v.* VICKSBURG WATERWORKS COMPANY.

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

No. 275. Argued April 24, 1907.—Decided May 27, 1907.

A decree must be read in the light of the issues involved in the pleadings and the relief sought, and a decree in a suit brought by a water company against a municipality to enjoin it from regulating rates does not finally dispose of the right of the city to regulate rates under a law passed after the contract went into effect and after the bill was filed.

A State may, in matters of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves, from the right of regulation of such matters as water rates.

In view of the decisions of the highest court of Mississippi a municipality of that State may, under a broad grant of legislative authority conferred without restrictions or conditions, make a contract with a corporation, fixing a maximum rate at which water should be supplied to the inhabi-

tants of the city for a limited period, which in the absence of fraud or convention, will be beyond legislative or municipal power to alter to the prejudice of the other contracting party under the impairment of obligation clause of the Federal Constitution.

CASES involving the rights of the Vicksburg Waterworks Company, under the contract made between the city of Vicksburg and the company, for furnishing the water supply of the city, have been before this court in two preceding actions, viz: *Vicksburg* v. *The Waterworks Company,* 185 U. S. 65; and the *Same* v. *Same,* 202 U. S. 453.

Owing to the previous statements of the case, it is only necessary to set out enough of the facts involved in the controversy now before us to make plain the conclusions at which we arrive.

The city of Vicksburg, by act of the legislature of Mississippi (Laws of 1886, chap. 358, sec. 5, p. 695), was authorized "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties, who shall build and operate waterworks."

Acting under this authority conferred by the legislature, the city of Vicksburg made a contract with Samuel R. Bullock & Company, their associates and assigns, for the supply of water to the city and its inhabitants, which was contained in the ordinance of November 18, 1886, section 13 thereof providing that—

"The said Samuel R. Bullock & Company, their associates, successors or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water as they may determine, provided that such rates and charges shall not exceed 50 cents for each thousand gallons of water."

The ordinance, by its terms, ran for thirty years, and Bullock & Company, as provided in section 5 of the ordinance, assigned the contract to the Vicksburg Water Supply Company,

and it was duly accepted by that company. The supply company put in the works and operated until August, 1900, when the mortgage upon the property, including all the franchises and contract rights, was foreclosed and purchased by a Mr. Crumpler, who assigned all his rights and title to the Vicksburg Waterworks Company, the appellee herein, which company has operated the works since.

The contract contained an agreement to pay a stipulated rental for certain hydrants for public use.

The legislature of Mississippi, on March 18, 1900, passed an act authorizing the city to issue bonds and build a waterworks system of its own for the supply of the city and its inhabitants, and on the third of July, 1900, an election was held in the city under the statute, which resulted in a vote to build or buy a waterworks plant of its own.

The city repudiated any contract relations with the company. Thereupon the company filed its bill in the United States Circuit Court for the District of Mississippi on the fourteenth day of February, 1901, the objects of which were thus stated by Mr. Justice Shiras in delivering the opinion of the court (185 U. S. 65):

"The bill prays for an injunction to restrain the defendant from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and that said act of the legislature of Mississippi, adopted on March 9, 1900, and said resolution and ordinance adopted and passed by said city on the seventh day of November, 1900, be declared to impair the obligations of said contract between said city and said Bullock & Company and their assigns, and to cast a cloud upon the title, franchises and rights of complainant, and said act, ordinance and resolution, and each of them, are alleged to be in contravention of the Constitution of the United States, in this, that they impair the obligations of said contract between said city and said Bullock & Company and their assigns."

In the court of original jurisdiction the bill was dismissed for want of jurisdiction. On the appeal, 185 U. S. 65, the judgment was reversed, and this court held that there was jurisdiction, and the cause was remanded. The case went to trial upon its merits, and on May 18, 1904, a final decree was rendered, which was affirmed on appeal to this court in the case reported in 202 U. S. 453. The decree in that case, known in the record as No. 41, is given in the margin.[1]

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[1] Equity, No. 41.

Vicksburg Waterworks Company
vs.
Mayor and Aldermen of the City of Vicksburg, Mississippi.

This day this cause came to be heard in accordance with the motion of complainant and defendant filed January 12th, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendant, proof and exhibits and the court after hearing and attending the evidence and the arguments of counsel and being fully advised in the premises and being satisfied that the complainant is entitled to the relief prayed for in its original and amended and supplemental bills and for full relief; it is thereupon hereby ordered, adjudged and decreed:

First, that the defendants, the Mayor and Aldermen of the city of Vicksburg be and are hereby perpetually enjoined from abrogating and taking away, or from assuming to abrogate or take away the franchises or contract rights of complainant under and by virtue of the ordinances, franchises or contract of said defendants entitled, "An ordinance to provide for a supply of water to the city of Vicksburg in Warren county, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock & Company, their associates, successors and assigns for a supply of water for public use and giving the said city of Vicksburg an option to purchase the said works," ordained the 19th day of November, 1886, approved by John W. Powell, Mayor, November 19th, 1886, being the ordinance, contract and franchise marked Exhibit B to the original bill of complaint, and said ordinance, contract and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by and is the sole and exclusive property of said complainant.

Second, that said ordinance, contract and franchise be and is hereby declared and held to be in every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts, or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by complainant thereunder.

Third, that said defendant be, and he is hereby, directed to rescind its resolution and ordinance adopted the 7th day of November, 1900, which

During the pendency of the original action the legislature of Mississippi passed an act authorizing the cities and villages of the State to prescribe, by ordinance, maximum rates and charges for the supply of water, electric light and gas furnished to cities and the inhabitants thereof. Laws of Mississippi, 1904, p. 231. Section 1 of this act is inserted in the margin.[1]

is in words and figures as follows: "Resolved, that the Mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the Mayor & Aldermen deny any liability upon any contract for the use of the waterworks hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the City Attorney take such action as shall be necessary to determine the rights of the city in the premises."

And also to rescind the ordinance or resolution of said defendant adopted the 7th day of February, 1901, when said defendant adopted the report of the Committee on Waterworks, as set out in the pleadings.

Fourth, that the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the legislature of the State of Mississippi approved March 9, 1900, and from issuing bonds under and by virtue of said act, or any other act or ordinance, for the purpose of erecting waterworks of its own during the period prescribed by ordinance, contract and franchise.

Fifth, that the said defendant refrain from constructing waterworks of its own until the expiration of the period prescribed in said ordinance, contract and franchise, dated the 16 day of November, 1886.

Sixth, that the said defendant be, and is hereby, required to pay all moneys due or owing, or that *may be* hereafter be due and owing to said Complainant under and by virtue of said ordinance, contract and franchise.

Seventh, that the said defendant be, and is hereby, perpetually enjoined from making or adopting any resolutions, or ordinance, refusing to pay the contract price of water fixed by said ordinance, contract and franchise until the expiration of the period prescribed in said ordinance, contract and franchise.

Eighth (relates to certain sewers).

Ninth, that said defendant pay the costs of this cause to be taxed.

[1] Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That the corporate authorities of any city, town or village now or hereafter incorporated under any general or specific laws of this state, in which any individual, company or corporation has been or hereafter may be authorized by said city, town or village to supply water, electric light or gas to said city, town, or village, or the inhabitants thereof, be and they are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water, electric light or gas furnished by such individual, company or corporation to such city, town or village or the inhabitants thereof, such rates and

On April 20, 1904, about one month before the rendition of the final decree in the original case, the city adopted two ordinances fixing the maximum charge for the use of water, one by what is known as the "flat rate" and the other for water measured by meters.

On December 7, 1903, the city passed an ordinance prohibiting the water company and gas company from charging damages and other penalties for failure to pay bills, until ten days after presenting the same and giving an opportunity for the payment thereof.

On the seventh of January, 1905, the water company, in view of this action by the city, filed another bill, which is the original bill in this case, and was numbered 79, in which it set forth the preceding history of the litigation, the decree of May 18, 1904, the city ordinance of December 7, 1903, and the two of April 20, 1904, and in that bill alleged its contract under the ordinance of 1886 and the former decree, and that the enforcement of the ordinances was in violation of that decree and the company's contract of 1886 and would be destructive of its business, and they prayed for an injunction. A temporary injunction was allowed, and afterwards, the case standing on the bill, answer, and exhibits attached thereto, a final decree was rendered in the case, which final decree is set forth in the margin.[1]

From this decree the present appeal has been prosecuted.

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charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges the same may be reviewed and determined by the Circuit Court of the county in which said city, town or village may be; provided, that this act shall not be construed so as to impose (impair) the effect or obligation of any valid or binding contract with any waterworks company, electric light company or gas company now existing or heretofore made with any individual or water company, electric light or gas company.

[1] This case coming on to be finally heard at this Jan'y Term, 1906, of this court, upon the original bill of complaint and the answer of the defendant thereto, and all the exhibits which are made such, to said original bill of complaint and said answer, and all of the other pleas and proceedings in this cause, together with a certified copy of the charter of the said Vicksburg

Mr. Hannis Taylor, with whom *Mr. George Anderson* was on the brief, for appellants:

Appellee rests its claim of exemption from the right of the

Waterworks Company, which is filed in the record as evidence in the cause, also the petition of the defendant for a modification of the temporary injunction granted in this cause, so that the complainant shall not be authorized to cut off water from its patrons who refuse to pay the rates of complainant, claiming the right to have the injunction modified by virtue of the ordinances of the defendant, fixing water rates; and the motion of complainant to have said injunction granted heretofore made perpetual. And the court having heard the arguments of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its bill of complaint for full relief, it is thereupon finally ordered, adjudged and decreed:

First. That the defendant, the Mayor & Aldermen of the City of Vicksburg, is hereby denied the relief prayed for in its petition, to wit, that the injunction be modified so that the Mayor & Aldermen of the City of Vicksburg shall not be restrained from enforcing the ordinances passed by them fixing the water rates and prescribing rules and regulations of the Vicksburg Waterworks Company, and that the Vicksburg Waterworks Company shall not be permitted to cut off patrons' water, provided patrons pay the rates fixed in said ordinances.

Second. That said defendant be and is hereby enjoined from enforcing the said three ordinances described in said bill, to wit: An ordinance entitled "An Ordinance to fix and prescribe maximum rates and charges for water supplied to the inhabitants of the City of Vicksburg, whether measured by meters, and for other purposes," approved the 20th of April, 1904, an ordinance entitled "An Ordinance to fix and prescribe the maximum flat rates and charges for the supply of water to consumers in the City of Vicksburg, and for other purposes," approved the 20th day of April, 1904; and an ordinance entitled "An Ordinance to require waterworks, gas and electric companies to present bills before charging damages for a failure to pay them when due," approved the 8th day of December, 1903, so far as the latter relates to complainant.

Third. That the restraining order heretofore granted in this cause on the 11th day of January, 1905, be and the same is hereby made permanent.

Fourth. That the said defendant be and is hereby enjoined from in any manner interfering with the complainant's contract rights under its said contract with the City of Vicksburg entered into between Samuel R. Bullock & Company and said city under the ordinance of November 19th, 1886.

Fifth. That the defendant be and is hereby enjoined from interfering with the rules and regulations of Complainant, the Vicksburg Waterworks Company, and the water rates for the inhabitants of the city of Vicksburg now in force established by the Vicksburg Waterworks Company.

legislature of Mississippi to regulate water rates solely on § 13 of the ordinance of November 18, 1886, by which Bullock & Co. were authorized to construct and operate waterworks for public use. But the only legislative authority the mayor and aldermen of the city of Vicksburg had to enact this ordinance, is an act amending the charter of Vicksburg, approved March 7, 1884, authorizing them "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." This emphatically negatives the idea that the city of Vicksburg was to have the power to grant any special privileges to appellee whatsoever. No authority was given, expressed or implied, to make the grant to appellee an exclusive one; nor was any limitation upon the power of the legislature subsequently to regulate or reduce water rates even hinted at. The act of March 18, 1886 is not in the record, but it is before the court as a part of its judicial knowledge. In the exercise of its appellate jurisdiction over the lower courts of the United States, this court takes judicial notice of the laws of all the States. *Renaud* v. *Abbott*, 116 U. S. 277; *Hanley* v. *Donoghue*, 116 U. S. 1; *Liverpool and G. W. Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 445.

The city of Vicksburg was not authorized to create a monopoly or to confer special privileges of any kind. Dillon on Mun. Cor. §§ 443, 457.

Exclusive rights to public franchises are not favored, and will never be presumed in the absence of an express grant. *Wright* v. *Nagle*, 101 U. S. 791; *Ruggles* v. *Illinois*, 108 U. S. 536. "Every statute which takes away from a legislature its power will be construed most strongly in favor of the State."

Sixth. That said defendant be and is hereby enjoined from interfering with the water rates known as the flat rates now in force established by the Vicksburg Waterworks Company.

It is further ordered, adjudged and decreed that the defendant pay all costs of this cause.

Finally ordered, adjudged and decreed this the 3d day of Jan. A. D. 1906.

Vicksburg v. *Waterworks Co.*, 202 U. S. 469; *Knoxville Water Works Co.* v. *Knoxville*, 200 U. S. 22.

The adjudication as to the exclusive right of appellee to maintain and operate waterworks for a definite period cannot in any manner give color to the present contention, never considered or passed upon heretofore, that the legislature of Mississippi has deprived itself of the power subsequently to authorize the city of Vicksburg to regulate rates of charges for water, and prescribe rules and regulations for the conduct of the water company. *Railroad Commission Cases*, 116 U. S. 307; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624; *City of Joplin* v. *Light Co.*, 191 U. S. 150; *Owensboro Water Co.* v. *Owensboro*, 191 U. S. 358; *Stanislaus* v. *San Joaquin &c. Co.*, 192 U. S. 201.

Mr. Joseph Hirsh, with whom *Mr. Murray F. Smith* was on the brief, for appellee:

The questions now at issue have already been heretofore conclusively adjudicated and are no longer open for investigation and determination here again.

No case can be properly tried by installments; no complainant or defendant can speculate with judicial decisions; when a defendant or complainant once has a standing in court to uphold or to annul a contract or any other solemn undertaking, that it is incumbent upon both parties to the litigation to formulate, present, and seek a final disposition of all material issues involved; when a contract is presented for consideration in its entirety, and when the owner of the contract prays that the other party to the contract should be prohibited from annulling it, destroying it, or impairing it, if the other party then has any real or substantial defenses known to him upon the basis of which said contract can be assailed, it is the bounden duty of that party to interpose such defenses—not one, but all—and, failing to do so, should not thereafter be permitted to reopen the controversy to interpose

defenses known to him and existing at the time the contract is under consideration and an adjudication of its validity is sought. 24 Am. & Eng. Ency. of Law (2d ed.), pp. 781 and 782.

Under the laws of Mississippi, as construed by the highest court, and under the constitution of 1890, the contract of the waterworks company is unassailable.

The decision in the *Freeport case* and *Rogers Park case* and other cases announcing similar principles must be construed, of course, in the light of the facts involved in those cases.

If a state legislature has reserved to itself the right to amend, repeal, or alter a state statute, and to amend or repeal a corporate charter, it can be readily maintained that by the creation of such a charter or by the enactment of such a law the legislature has not parted with its power to regulate a corporation organized under such laws, or to regulate, change, modify, or vary rates authorized by such laws. A corporation which makes a contract under such laws is chargeable with knowledge thereof, and if by so doing it invites destruction by a practical confiscation of its property under a so-called regulation of its rates, it has only itself to blame. When its powers are limited by the law under which it claims a right or privilege, that law of course furnishes the measure of its right or privilege, and it cannot be heard to complain if that law operates to its detriment. But in the State of Mississippi, in the year 1886, there was not vested in the legislature the right to repeal, annul, or abrogate a charter procured under the laws then existing. That charter was a contract, and was protected both by the state and the Federal constitutions, and the Supreme Court of the State of Mississippi has not held, so far as we have been able to ascertain, that a charter thus obtained prior to the constitution of 1890 was subject to repeal or amendment unless such right was especially reserved in the act, and the provision of the constitution of 1890 which vested the power in the legislature to repeal or amend corporate charters expressly exempts from its operation any charter

then existing and irrevocable, and was mainly intended to be prospective in its operation.

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

It is contended on behalf of the appellee that the original decree of May 18, 1904, finally disposed of all the issues between the parties, including the right of the city to make rates for water consumption to private consumers under the authority of the act of March 19, 1904, and that the present controversy is foreclosed by the decree in the former case.

While it is true that the decree is very broad, we cannot agree to the contention of the appellee that it finally disposed of the matter now in controversy. When the case was first here, reported in 185 U. S. 65, while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal court, which was sustained, and the cause remanded for further proceedings. Upon the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as settling the right of the Vicksburg Waterworks Company, under the contract, to carry on its business without the competition of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition; and it was further held, as incidental to that controversy, in passing upon an issue made in the suit, that the Vicksburg Waterworks Company had succeeded to all the right, title, and interest of the original contracting party, and that the contract, having been made prior to the constitution of 1890, was not controlled by its provisions. The right to recover for rentals was also directly involved, as the city had denied its liability therefor, and an accounting was prayed in the original bill and the decree specifically disposed of that issue. It is true that in the answer it was averred that the alleged contract imposed upon the inhabitants of Vicksburg an onerous

and extortionate burden; "that no such contract would now be made with the Vicksburg Waterworks Company or any other company; that the rates authorized in said ordinance far exceeded the rates charged in other cities under like circumstances and, in general terms," the city denied that it was bound to the complainant by contract; "that for the many reasons therein set forth, no liability existed on the part of the city by reason of the contract."

An examination of the record in the former case shows that the only testimony taken in the case, as to the reasonableness of the rates charged to private consumers, was on behalf of the company, and tended to show that the rates charged were reasonable, and if it could be said that the pleadings put in issue the reasonableness of the rates then charged, was the right of the city to regulate rates under a subsequent law of the State necessarily involved and concluded? The determination of issues as to the right of injunction against the city building its own works, or denying liability or refusing to pay the rentals contracted for, and a finding that existing rates were reasonable, did not necessarily conclude a controversy which might thereafter arise, as to the right of the city to fix rates when the legislature of Mississippi should pass a law for that purpose, giving the city the right to regulate the same. It is to be remembered that when the bill was filed in the original case no such law had been passed; that when the act of March, 1904, went into effect the case was nearly ready for final decree, and the city passed its ordinances long after the beginning of the suit, and shortly before that decree. No supplemental bill was filed, but after the decree, in January, 1905, the present independent suit was brought, with a view to enjoining the proposed action of the city in enforcing ordinances regulating the rates by charges other than those contained in the contract.

Upon the appeal, the question seems to have been argued by the city as though made in the case, though the brief on behalf of the appellee contends that the act of 1904 was not

involved. But a decree must be read in the light of the issues involved in the pleadings and the relief sought, and we are of opinion that the matters now litigated were not involved in or disposed of in the former case, and that when properly construed the decree does not finally dispose of the right of the city to regulate rates under a law passed after the contract went into effect and long after the bill was filed in the case.

Holding, then, that the plea of *res judicata* must be denied, had the city authority, under the charter of Vicksburg, passed in 1886, to make a binding contract, fixing maximum rates for water supply to private consumers for a definite period, thirty years in the present case? The grant of legislative power upon its face is unrestricted, and authorizes the city "to provide for the erection and maintenances of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks."

That a State may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. *Los Angeles* v. *Los Angeles City Water Company*, 177 U. S. 558; *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1–7; *New Orleans Waterworks Company* v. *Rivers*, 167 U. S. 674; *Freeport Water Company* v. *Freeport*, 180 U. S. 587–593.

In the latter case this court, following the construction of the Supreme Court of Illinois, held that where a city council was authorized to contract with any person or corporation to construct and maintain waterworks at such a rate as may be fixed by ordinance for a period not exceeding thirty years, the words "fixed by ordinance" being capable of application so as to make one ordinance endure for the period of thirty years, for which the contract was made, or to give the right to pass ordinances from time to time regulating rates, the latter construction was adopted.

In the cases generally in this court it will be found that, in determining the matter of contract, the local decisions have been given much weight and, ordinarily, followed. As this is a Mississippi contract, and the power was exercised under the authority of an act of the legislature of that State, we naturally look to the decisions of the courts of that State, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred.

While the case now before us was pending, Griffith and others, citizens of Vicksburg, filed a bill, setting forth the city ordinances of 1903 and 1904, and asking to have them established and maintained and an injunction granted against enforcing charges for higher rates, and upon appeal the case went to the Supreme Court of Mississippi, and is reported in 40 So. Rep. 1011. In that case the Supreme Court of Mississippi held that the municipal corporation represented the citizens and taxpayers of the city, and that where a right had been adjudged as between the company and the city it would conclude private citizens, and while the court declined to pass directly upon the question here involved, because of its pendency in the Federal courts, it used this pertinent and suggestive language:

"We decline to follow the decision in *Griffin* v. *Goldsboro Water Company* (N. C.), 30 S. E. 319; 41 L. R. A. 240, in holding that while a water company which accepts an ordinance by which a maximum rate is fixed is bound, and cannot exceed the same because of its contract, yet such rates are not binding upon consumers, who have a right to litigate against unreasonable charges. This holding, it seems to us, practically denies the power of a company, under a contract embodied in its charter giving the power, so to fix a rate as to bind a private consumer at all. It opens a never-ending and limitless field of litigation. It is well settled that the courts cannot fix a rate; and if, proceeding duly under statutes enacted for that purpose, the municipality cannot do so, or authorize the com-

pany by contract to do so, and thereby bind the citizens, then there is no authority by which it can be done.

"It is not a matter open to serious discussion in this State, since the decision by this court in the case of *Stone* v. *Railroad Company*, 62 Mississippi, 607, 52 Am. Rep. 193, decided at the April term, 1885, and before the act of 1886 (Laws 1886, p. 694, c. 358), amending the charter of Vicksburg, was enacted, that a *quasi*-public corporation may have a contract right to fix rates within a certain designated maximum, and that the rates so fixed are matter of contract guaranteed by the contract clauses of the United States Constitution. In that decision the court was manifestly directing its observations to the binding character of the rates as between the company and the shippers; otherwise, the decision was practically meaningless and without point. The philosophy of the situation is simple. Granting that the company is lawfully invested with authority to fix its rate, then such rate being so fixed by it within the maximum limit allowed by the charter, or allowed by the duly authorized ordinance, is by the courts presumed to be reasonable; and it is not permissible for each individual citizen, in every controversy that may arise, to have that question, once passed upon by the lawfully constituted public authorities charged with power in the premises, reopened and litigated anew."

The case to which the court refers in the preceding extract, *Stone* v. *The Railroad Company*, 62 Mississippi, 607, as having been decided prior to the enactment of the charter of Vicksburg under which the contract in question was made, did not directly involve the question of authorizing municipal corporations to make such contracts, but did maintain, after an exhaustive consideration of the subject, that a grant to a railroad company, in the charter, of a right to fix rates within maximum limits named, was a contract, within the meaning of the Federal and state constitutions, which could not be violated by a subsequent attempt to prescribe different rates, and held that the railroad company's grant was not a renun-

ciation of the legislative power to secure reasonable rates, but rather an exercise of that power, and, when rights were thus conferred, to that extent there was a renunciation of the right of the State to control the subject. In the course of the discussion the learned judge, speaking for the court, said:

"The power to contract is an essential attribute of sovereignty and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. . . . The right to grant charters includes the right to grant such as will be upheld. Conferring power on the grantee of the franchise to fix rates of compensation at discretion, or within prescribed limits fixed by the charter, has been the common practice of the legislatures of the States of the United States from an early period of their history. The right of the corporators to exercise the powers conferred by the act of incorporation, whether to fix rates themselves or to take those fixed by their charter and to rest securely on its provisions in this respect, has hitherto been generally regarded as indisputable.

"A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable.

* * * * * * * *

"If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable—an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance."

We are referred to other cases in Mississippi which deal directly with the extent of the power conferred upon municipal corporations in charters in general terms, some of which we may notice.

In *Light, Heat & Water Company* v. *City of Jackson*, 73 Mississippi, 598, the city of Jackson had filed its bill, undertaking to annul a contract binding the city to pay for water for a period of twenty years at a price and rate fixed in a certain ordinance, on the ground that it was *ultra vires* and without authority from the legislature. In that case the authority conferred was in general terms, authorizing the city to contract with any reliable corporation, association or individual for supplying the city of Jackson with water and electric or gas lights from year to year. Under authority of this general power the city undertook to make a contract with the Light, Heat and Power Company of Jackson, contracting for the furnishing of water to the public at certain annual rentals for a period of twenty years, and fixing a certain rate for annual rentals to private consumers. The Supreme Court of Mississippi dealt directly with the question: Was the contract made between the city and company and set forth in the bill invalid for want of power in the city to contract for a series of years? And the court said:

"In view of the nature and character of the subject-matter of the contract which the board of mayor and aldermen of the city of Jackson was authorized to make by the third section of the act of February 29th, 1888, we think the contract entered into with the appellant was within the delegation of power so far as the time of its duration is involved. . . . We know that the machinery, mains and appliances required for supplying the city with water are costly to begin with, and are relatively of little value if removed when once located. Permanency of the plant is essential to the realization of any profit in the enterprise, and in cities having no greater population than that of Jackson the use of water for municipal purposes would probably be a prerequisite to secure the in-

vestment of the capital necessary to the construction of the plant. The words 'from year to year' relied upon by the appellee as limiting the power of the officers of the city to the making of the annual contracts, derived much of their significance from the subject and nature of the thing contracted for, the character of the body on which the power is conferred, the end to the attainment of which the power is to be exercised, and the extent to which such powers for such purposes are usually conferred.

"A few days after the act was passed, a commission was appointed by the legislature to contract for water for the state institutions, situated in and near the city, for the term of twenty-five years. In this act power was conferred upon all municipalities to enter into contracts for a term not exceeding twenty-five years, for supplies of water, on a two-thirds affirmative vote of the qualified electors, but the act provided that it should not apply to municipalities, whose charters already conferred the power of making contracts for water.

* * * * * * * *

"A contract made by the authorities of a municipality with a water company for supplying the city with water for a period of twenty years, is within the power conferred on them by an act of the legislature authorizing them to contract with any reliable corporation for supplying the city with water from year to year, in view of the purpose of the delegation of power, the nature of the body on which it was conferred, the subject-matter of the contract, the large outlay for machinery and appliances, the profit of which was dependent upon the permanency of the enterprise, and the cotemporaneous legislation, from which the intent to authorize a contract of as great duration as twenty-five years is deducible."

Again, in the case of *Reid* v. *Trowbridge*, 78 Mississippi, 542, the mayor and aldermen of the city of Vicksburg had been authorized, in general terms, to provide for the lighting of said city by electric light or other method. Under this general power the city made a contract with the Vicksburg Railroad,

Power and Manufacturing Company for lighting the streets by electricity, at a given rental per annum, for one hundred and twenty-five lights, for a period of ten years. The taxpayers of the city of Vicksburg filed a bill to enjoin the carrying out of the contract, alleging that the city had no authority to make such a contract without submitting it to a vote of the people under the act of March, 1888, passed subsequent to the charter, requiring submission to a vote of the people, that the contract was unreasonable and oppressive, and that the council had acted arbitrarily and without exercising discretion in awarding it. The court held that the act of 1888 had no application to the case, and, speaking of the general terms of the charter authorizing a contract for lighting purposes, said:

"The intent of the legislature to confer the power without restriction appears to us to be too plain, from the collocation and order and sequence of the sections and article of the charter act, to admit of obscuration by learned argument about original power. The very last legislative action on the subject, that in the municipal charter of the Code of 1892, shows that the lawmakers thought the power to be one to be conferred or prohibited, because it expressly confers it on cities and towns and prohibits its exercise by villages.

* * * * * * * *

"It is claimed now that the last clause of section 1 of the first quoted of the above acts, that approved March 10, 1888, applied to and modified the charter of the city of Vicksburg so as to make the contract here in controversy void because not submitted to vote. In order to this result it is claimed that, in the charter of Vicksburg, it is not 'otherwise provided,' because the charter expressly confers the power, without restriction, on the municipal board at any 'regular or special meeting.' Besides, in construing the section of the act secondly above quoted, this court expressly so held in the case of *Light &c. Co.* v. *Jackson*, 73 Mississippi, 644. If the precise point was not made, the omission is quite significant of the opinion of the eminent counsel for appellee in that case

that there was nothing in it. Aside from this, the question was at the very root of the cause, and was considered and decided, and it is the exact question in the case at bar, except that this case is somewhat stronger in favor of the power than the case decided.

"By section 3 of the act of February 29, 1888, the Jackson board was 'hereby authorized and empowered to contract,' etc., while by the Vicksburg charter act, the board was authorized to so contract 'at any regular or special meeting.' We presume that no charter then existent 'otherwise provided' by an express prohibition of electric lighting without vote. The grant of the power without restriction is to 'otherwise provide.' "

And the court held that under this power the municipal authorities had the right to make the contract for electric lights without advertising for bids and without submitting the matter to a popular vote, and the power was not taken away by the act of March, 1888.

In this case the learned judge, speaking for the court, further said:

"Within its charter powers, the board has a discretion independent of courts, and no exercise of it will be held void for unreasonableness, unless so gross as to strongly suggest fraud or corruption. The people elect their council, and the courts are not chosen members of it."

In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years, and, in the absence of a showing of unreasonableness "so gross," as the court of Mississippi has said, "as to strongly suggest fraud or corruption," this action of the council is binding, and for the time limited puts the

right beyond legislative or municipal alteration to the prejudice of the other contracting party.

While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city.

In this case the Circuit Court rendered a final decree practically upon the bill and answer. No testimony was taken, and all that was before the court was the bill, answer and exhibits. We think the decree goes too far in enjoining the city from interfering with the contract right of the company to charge the rates fixed thereby, in view of the allegations of the answer, that the rates charged by the company exceeded those named in section 13 of the ordinance of 1886.

The decree should be modified, so as to enjoin interference on the part of the city during the term of this contract, with the right of the company to charge rates not in excess of fifty cents a thousand gallons to private consumers, as set forth in the ordinance.

With this modification, the decree will be

Affirmed.

BERNHEIMER *v.* CONVERSE.
DREY AND BERNHEIMER *v.* CONVERSE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 278, 279. Argued April 25, 26, 1907.—Decided May 27, 1907.

This court in this case followed the judgment of the highest court of the State in determining that a corporation was not within the exception, constitutional and statutory, as to stockholders' liability in favor of certain classes of corporations. Where, as in Minnesota, stockholders' liability is fixed and measured by the Constitution, a stockholder upon

acquiring his stock incurs an obligation arising from the constitutional provisions, and as such capable of being enforced in the courts not only of that State but of another State and of the United States.

There is a broad distinction between laws impairing the obligation of contracts and those which simply give a more efficient remedy to enforce a contract already given, and the statute of Minnesota of 1899 for the enforcement of stockholders' liability, under which the constitutional liability can be enforced by the receiver without the State, is not void under the impairment of obligation clause of the Constitution of the United States because it repealed a prior act under which the stockholders' liability could not be so enforced.

An act intended to make effectual a liability which is incurred by stockholders under the constitution of the State and which operates equally upon all stockholders and assesses all by a uniform rule should not, in the absence of substantial reasons, be rendered nugatory, and the Minnesota act of 1899 will not be declared void as violating the constitutional rights of stockholders either because it provides for fixing the liability in a proceeding within the State to which non-resident stockholders are not parties, or because it changes the procedure for collecting the assessment, and gives the receiver the right to maintain actions without the State.

One who becomes a member of a corporation assumes the liability attaching to such membership and becomes subject to such regulations as the State may lawfully make to render the liability effectual.

While a chancery receiver, having no authority other than that arising from his appointment, may not maintain an action in another jurisdiction, a receiver may sue in a foreign jurisdiction to collect statutory liability of stockholders where the statute confers the right upon the receiver as *quasi*-assignee.

Section 55 of ch. 588, N. Y. Laws of 1892, limiting the time within which to bring an action against a stockholder for a debt of the corporation does not apply to an action brought by a receiver to enforce statutory liability of stockholder of a foreign corporation.

THESE are writs of error to the Circuit Court of the United States for the Southern District of New York.

The actions were brought (January 28, 29, 1904) by Theodore R. Converse as receiver of the Minnesota Thresher Manufacturing Company, a corporation of the State of Minnesota, to enforce an alleged stockholders' liability under the constitution and laws of the State of Minnesota. The court below held the executors of Simon Bernheimer and Isaac Bernheimer, both having died before the suits were brought, liable as such stockholders.

The record discloses that the Minnesota Thresher Manufacturing Company was incorporated under the laws of the State of Minnesota on the fifth of December, 1884, the objects for which the corporation was formed being the purchase of the capital stock, evidences of indebtedness and assets of the Northwestern Manufacturing and Car Company, also a corporation under the laws of the State of Minnesota, and for the further purpose of manufacturing and selling steam engines, farm implements, machinery, etc., and the manufacture and sale of articles, implements and machinery of which wood and iron form the principal parts.

The Northwestern Manufacturing and Car Company was in the hands of a receiver, carrying on its business under the orders of a court, and, on October 27, 1887, the property and plant of that company, including all its bills receivable, farmers' notes and assets were sold under decree and purchased by the Minnesota Thresher Manufacturing Company. The last-named company continued in business until December, 1900. On December 14 of that year the property and business of the thresher company were placed in the hands of a receiver by the order of the Circuit Court of the United States for the District of Minnesota, in a suit for the foreclosure of a mortgage upon its property, and this receiver carried on the business until the mortgaged property was sold under a decree of foreclosure on May 25, 1901.

On May 6, 1901, the Merchants' National Bank of St. Paul obtained a judgment in the District Court of Ramsey County, Minnesota, against the thresher company, and executions thereon having been returned unsatisfied, the judgment creditor brought suit against the thresher company for the appointment of a receiver and the enforcement of the individual liability of its stockholders in the District Court of Washington County, Minnesota. In that suit Theodore R. Converse, defendant in error in these cases, was appointed receiver. On the petition of the receiver, for the purpose of providing funds for the payment of the expenses of the receiver-

ship in the enforcement of the stock liability and payment of indebtedness, an order was made, December 22, 1902, reciting, among other things, that copies of an order of April 16, 1902 (not in the record), had been published, mailed and served as therein required, and that due notice of the hearing had been given to the defendant company and to each stockholder of record as directed by the order, and, on a hearing duly had, an order of assessment of thirty-six per cent of the par value of each share of the capital stock of the thresher company, to wit, eighteen dollars per share, was assessed against each and every share of the capital stock and against each and every person, corporation or party liable as such stockholder, and each such person, corporation or party was directed to pay to the said receiver, at his office in the city of Stillwater, Minnesota, within thirty days after the date of the order, the said sum of eighteen dollars a share; and, further, upon failure to pay said sums, the receiver was authorized to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the State of Minnesota or elsewhere. On appeal to the Supreme Court of the State of Minnesota this order was affirmed. 90 Minnesota, 144. Subsequently, as stated, these actions were brought and judgment rendered against the executors of the Bernheimers.

Mr. Lawrence Arnold Tanzer for plaintiffs in error:

The statute of 1899, under which the proceedings for the assessment were taken, impairs the obligation of the contract between the stockholders and the creditors.

The liability is a contractual liability. *Hanson* v. *Davison*, 73 Minnesota, 454, 460; *Flash* v. *Conn*, 109 U. S. 371, 377; *Hawthorne* v. *Calef*, 2 Wall. 10; *Whitman* v. *Oxford National Bank*, 176 U. S. 559, 563; *Knickerbocker Trust Co.* v. *Myers*, 133 Fed. Rep. 764, affirmed *Myers* v. *Knickerbocker Trust Co.*, 139 Fed. Rep. 111, 112, 114; *Carroll* v. *Green*, 92 U. S. 509, 513.

The terms of the stockholders' contract are embodied in the constitution and statutes in force at the time when he ac-

quired his stock. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550; *Webster* v. *Bowers*, 104 Fed. Rep. 627.

The constitution and the statute are to be construed together. *Allen* v. *Walsh*, 25 Minnesota, 543, 551; *Whitman* v. *Oxford National Bank*, 176 U. S. 559, 563; *Middletown National Bank* v. *Toledo &c. Ry. Co.*, 197 U. S. 394, 405.

The provisions creating the liability are to be strictly construed, and cannot be extended beyond the words used. *Brunswick Terminal Co.* v. *National Bank of Baltimore*, 192 U. S. 386, 390; *Converse* v. *Ætna National Bank*, 64 Atl. Rep. 341, 344.

The act of 1899 deprives stockholders of property without due process of law, by authorizing a conclusive judgment against non-resident stockholders who have not been served with process.

The only notice to stockholders provided for by the act is that on the petition being filed the court "shall direct such notice of such hearing to be given by the party presenting said petition, by publication or otherwise, as the court in its discretion may deem proper." Section 6 provides that it shall be the duty of the assignee or receiver to bring an action against every stockholder for the amount so assessed against him.

In the case at bar, the defendants were not parties to the assessment proceedings, and had no knowledge in fact of them. They contend that the statute, permitting a conclusive assessment against them without service of process upon them, deprives them of their property without due process of law.

Due process of law requires personal service of process, or a voluntary appearance. *Mason* v. *Eldred*, 6 Wall. 231, 239; *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 734; *Haddock* v. *Haddock*, 201 U. S. 562, 567; *Clark* v. *Wells*, 203 U. S. 164, 170.

The Minnesota court was without jurisdiction to make the order of assessment.

These actions were brought upon the assessment order, as on a judicial determination binding upon the defendants. Whether the District Court of Washington County, Minnesota,

had jurisdiction to make that determination is a proper subject of inquiry, for if that court acted without jurisdiction, its determination is a nullity, and no recovery can be based on it. *Williamson* v. *Berry*, 8 How. 495, 540; *Thompson* v. *Whitman*, 18 Wall. 457, 468; *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8, 15–17.

That court had no jurisdiction of the subject-matter, because no state of facts existed under which it was authorized to appoint a receiver and make an assessment. The statute of 1899 authorizes the District Court to proceed in the manner therein prescribed, in certain cases. Unless one of those cases or states of fact existed, the court had no jurisdiction to proceed. *Thatcher* v. *Powell*, 6 Wheat. 119, 127; *East Tennessee, Va. & Ga. R. R. Co.* v. *Southern Telegraph Co.*, 112 U. S. 306, 310; *Griffith* v. *Frazier*, 8 Cranch, 9, 23; *Hatch* v. *Ferguson*, 68 Fed. Rep. 43, 45; *Murray* v. *American Surety Co.*, 70 Fed. Rep. 341, 346.

The District Court had no jurisdiction of the persons of the defendants, because it failed to give them the notice required by the statute. Even if compliance with this requirement would constitute due process of law, the burden of proof was upon plaintiff to show such compliance; in default of which he has failed to show jurisdiction over the persons of the defendants, and the assessment order is a nullty. *Galpin* v. *Page*, 18 Wall. 350; *Windsor* v. *McVeigh*, 93 U. S. 274, 283, 284; *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8, 18.

The actions were barred by limitation, because not brought within two years after the defendants ceased to be stockholders in the thresher company, within the meaning of § 55 of the Stock Corporation Law of New York which provides that "no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder."

The provision cited is a statute of limitations relating to the liability of stockholders in all stock corporations, and

is applicable not only to an action against a single stockholder on a single debt, but also to liabilities of all the stockholders to contribute ratably to a deficiency. *Adams* v. *Wallace*, 82 App. Div. 117; *Adams* v. *Slingerland*, 89 App. Div. 312; *Sanford* v. *Rhoads*, 113 App. Div. 782.

The limitation is applicable to actions against stockholders in all corporations, foreign as well as domestic.

General Corporation Law of New York (Laws of 1892, Chapter 687), §§ 2, 3, subd. 5, § 33. *Platt* v. *Wilmot*, 193 U. S. 602; *Hobbs* v. *National Bank of Commerce*, 96 Fed. Rep. 396.

When the defendants ceased to be stockholders within the meaning of this statute is a question of local law, upon which the decisions of the state courts are controlling. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 339.

The question has been decisively settled in *Hollingshead* v. *Woodward*, 107 N. Y. 96.

Mr. William G. Wilson, with whom *Mr. C. A. Severance* was on the brief, for defendant in error:

The plaintiff, as receiver, is entitled to maintain actions in New York and elsewhere to enforce the individual liabilities of the defendant's testators and other stockholders, inasmuch as those liabilities are made assets for the payment of corporate obligations and are vested in the receiver.

The constitution of Minnesota imposed upon stockholders of the Minnesota Thresher Company a general and several liability for all legal obligations of the corporation to an amount equal to the par value of the stock respectively owned or held by them.

The act of 1899, in legal effect, vested the title to these individual liabilities in the receiver, as a trustee for creditors, and directly authorized the receiver to maintain actions for their collection wherever the stockholder should be found.

The receiver thereby became a statutory assignee. See *Kennedy* v. *Gibson*, 8 Wall. 498; *Relfe* v. *Rundle*, 103 U. S. 222; *Howarth cases.*

The right of a Minnesota receiver appointed and proceeding under the act of 1899 is recognized and, in legal effect, approved by this court in the *Burget case*, 188 U. S. 739, when it reversed the judgment in *Hale* v. *Allinson*, 188 U. S. 56, where the receiver had been appointed before the act of 1899 was passed and refused to entertain the *Burget case*, although its attention was explicitly drawn to the claim that the two cases presented the identical question. And this, also, although this court had in the meanwhile held in *Finney* v. *Guy*, 189 U. S. 335, that a Minnesota receiver appointed before the act of 1899 could not maintain such action.

The right of the present receiver, Converse, to maintain these present actions in the Federal court in New York, is not open to question. *Willis* v. *Mabon*, 48 Minnesota, 140; *Whitman* v. *Oxford Bank*, 176 U. S. 559; *State* v. *Thresher Co.*, 40 Minnesota, 213; *Merchants' Bank* v. *Thresher Co.*, 90 Minnesota, 144; *Bank* v. *Winona Plow Co.*, 58 Minnesota, 167; *Forsyth* v. *Hammond*, 166 U. S. 506; *Bank* v. *Converse*, 200 U. S. 425; *Hale* v. *Hardon*, 89 Fed. Rep. 283; *Howarth* v. *Angle*, 162 N. Y. 179, 187; *Howarth* v. *Lombard*, 175 Massachusetts, 570, 574, 579; *Hale* v. *Allinson*, 188 U. S. 56; *Relfe* v. *Rundle*, 103 U. S. 222; *Burget* v. *Robinson*, 123 Fed. Rep. 262; *Finney* v. *Guy*, 189 U. S. 335.

The obligations and liabilities of the stockholders of the thresher company rest upon a contract by which they have submitted themselves to the jurisdiction and control of the State of Minnesota. *Bank* v. *Deuveaux*, 5 Cranch, 61; *Marshall* v. *B. & O. R. R. Co.*, 16 How. 314; *Muller* v. *Dows*, 94 U. S. 444.

The legislation of Minnesota in providing an adequate and effectual remedy for enforcing the obligations and liabilities of stockholders does not impair any obligation of their contracts. *Sturges* v. *Crowinshield*, 4 Wheat. 122, 197; *Bank* v. *Francklyn*, 120 U. S. 747, 755; *Evans* v. *Nellis*, 187 U. S. 271; *Bank* v. *Reckless*, 96 Fed. Rep. 70; *Commonwealth* v. *Bank*, 3 Allen (Mass.), 42; *Story* v. *Furman*, 25 N. Y. 214; *Bronson* v. *Kinzie*, 1 How. 315; *Railroad Co.* v. *New Orleans*, 157 U. S. 224.

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

Before entering upon a discussion of the objections urged against the validity of the assessment upon stockholders which is the subject of controversy here, we may say we find no reason to disagree with the judgment of the Supreme Court of Minnesota in holding the Minnesota Thresher Manufacturing Company to be a corporation organized for other than the purpose of carrying on any kind of manufacturing or mechanical business, and therefore not within the exception as to stockholders' liability in favor of corporations of that kind. *State* v. *Minnesota Thresher Man. Co.*, 40 Minnesota, 215; *Merchants Bank* v. *Minnesota Thresher Man. Co.*, 90 Minnesota, 144.

The questions made in these cases involve the right to recover upon a stockholder's liability in a Federal court in a State other than the one in which the original proceedings in liquidation were had, and under whose laws the corporation was formed and wherein it carried on business, against stockholders in such corporate companies as the thresher company, where the stock had been acquired before the passage of the statute of 1899. General Laws of Minnesota, chap. 272, being "An act to provide for the better enforcement of the liability of stockholders of corporations."

A former statute had been for some years in force in Minnesota and was the statute law of the State when the stock which concerns the controversy here was acquired by the Bernheimers. This statute was before this court in the cases of *Hale* v. *Allinson*, 188 U. S. 56, and *Finney* v. *Guy*, 189 U. S. 335. It was the act of 1894, General Statutes of Minnesota of that year, chap. 76, p. 1595, and is set forth in full in the margin, 188 U. S. p. 60.

Under that act it was held, in a series of decisions in the State of Minnesota, which were reviewed in *Hale* v. *Allinson*, that an action could only be maintained under the laws of

Minnesota when brought by a creditor or creditors for the benefit of all creditors of the corporation, and the recovery was had for the purpose of making good any deficiency in the corporate assets for the payment of corporate debts; that the receiver could not maintain such an action outside of the jurisdiction of the court appointing him, and that the only remedy was, as stated, in a creditor's action, bringing in all the stockholders, for the realization of a fund to be proportionately distributed among the creditors in one suit.

The principal contentions in these cases are that the act of 1899, above referred to, works such a change in the contract theretofore existing by virtue of the acquisition of stock in a Minnesota corporation as to impair the obligation thereof, and, in ways to be hereafter noticed, undertakes to hold a stockholder by judgment rendered without due process of law.

The act of 1899 was before this court in the case of the *First National Bank* v. *Converse*, 200 U. S. 425, and its principal parts are set forth in the margin of the report of that case on page 428. The act, for our purposes, may be summarized as follows:

"SEC. 1. Whenever any corporation created or existing under the laws of the State of Minnesota, whose stockholders or any of them are liable to it or to its creditors . . . upon or on account of any liability for . . . the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said State or otherwise, has heretofore made or shall hereafter make any assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this State, whether under or pursuant to . . . any statute of this State or under the general equity powers and practice of such court, the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided."

Section 2 provides that upon the petition of the assignee or receiver, or any creditor of the corporation who has filed his claim, the District Court shall appoint a time for hearing not less than thirty days nor more than sixty days from the time of filing said petition, and direct notice of the hearing to be given by publication or otherwise, in the discretion of the court, but if the petition be filed by a creditor, other than the assignee or receiver, the court shall direct notice of the hearing to be personally served on the assignee or receiver.

Section 3 provides that the court shall consider the proofs offered by the assignee or receiver, or by any creditor or stockholder who may appear in person or by attorney, as to the probable indebtedness of the corporation and the expenses of the assignment or receivership and the probable amount of assets available for the payment of such indebtedness and expenses; also as to what parties are or may be liable as stockholders and the nature and extent of such liability. And if it shall appear to the satisfaction of such court that the ordinary assets, or such amount as may be realized therefrom in a reasonable time, will not be sufficient to pay the expenses of such assignment or receivership and the indebtedness, and it is necessary to resort to the liability of stockholders, the court shall, by order, direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of such corporation for such amount as the court in its discretion may deem proper, taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment, and shall direct the payment of the amount so assessed to the assignee or receiver within such time as the court may specify in said order.

Section 4 provides for an order to the assignee or receiver to proceed to collect the amount so assessed, unless it be paid within the time specified in the order, and in default of payment the receiver is to bring suit.

Section 5 provides that the assessment levied shall be con-

clusive upon and against all parties liable upon or on account of any shares of said stock of such corporation, whether appearing or having notice thereof or not, as to all matters relating to the amount of and the necessity for said assessment, which provision shall also apply to any subsequent assessment levied by order of the court.

Section 6 makes it the duty of the assignee or receiver, upon failure to pay as required by the order, to institute and maintain an action against any party liable upon or on account of any such shares of stock, and that actions may be maintained against each stockholder in Minnesota or in any other State or country, where such stockholder, or any property subject to attachment, garnishment, or other process may be found, and provides that if the assignee or receiver shall believe any such stockholder to be insolvent, or that the expense of prosecuting such action will work to the disadvantage of the estate, he shall not be required to prosecute the same, unless specifically directed so to do by the court.

Section 7 provides for further assessments in case the first proves inadequate.

Section 8 extends the provisions of the act to such subsequent assessments.

Section 9 provides where two or more assessments are levied or directed, the assignee or receiver may join the causes of action against any stockholder on two or more such assessments.

Section 10 provides that if the assignee or receiver fails to institute or prosecute the action, the creditors may petition the court to compel him to proceed, under certain conditions.

Section 11 provides for the return of the surplus, if any remain, in the hands of the assignee or receiver after paying the expenses of the assignment or receivership and the claims of the creditors, and that stockholders who have paid assessments shall, in addition to the remedy provided in the statute, be entitled to enforce contributions from stockholders who have not paid assessments.

Section 12 provides for additional judgments in case of the inadequacy of former assessments.

Section 13 excludes certain stockholders in pending actions from the operation of the act.

This statute came before the Supreme Court of Minnesota in *Straw & Ellsworth Company* v. *Kilbourne Boot & Shoe Manufacturing Company,* 80 Minnesota, 125. In that case it was given full consideration and its constitutionality sustained, and it was held that while the assessments upon the outstanding shares of stock in an amount necessary to meet the deficiency in the assets of the corporation was conclusive upon the stockholders as members of the corporation, yet the statute, properly construed, did not have the effect to deprive a person, when sued for the amount assessed on shares of stock under the provisions of the act, from showing that he was not a stockholder, or that he was not the holder of so large an amount of stock as was alleged, or that he had a claim against the corporation which in law or equity he might be enabled to set off as against a claim for assessments, or from making any other defense personal to himself; and that the order of assessment was conclusive upon stockholders only in so far as it decided the amount of assets or liabilities of the insolvent corporation and the necessity of making an assessment upon the stock to the extent and in the amount ordered.

The constitutionality of the act was again affirmed in the same court in the later case of *The London &c. Mortgage Co.* v. *St. Paul Park & Improvement Co.,* 84 Minnesota, 144.

The stockholders' liability in Minnesota, as in some other States, has its origin in a constitutional provision, and arises under section 3, article X, of the constitution of that State. The language is:

"*Liabilities of stockholders.*

"Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

The courts of Minnesota have held that a stockholder's liability is, therefore, fixed and measured by the constitution. *Willis* v. *Mabon*, 48 Minnesota, 140; *McKusick* v. *Seymour, Sabin & Co.*, 48 Minnesota, 158. It is apparent from a consideration of this constitutional provision that its purpose was to make a stockholder liable to the creditors of the corporation in an amount not exceeding the par value of the stock held by him, and thus secure for the benefit of such creditors, in addition to the assets and property which the corporation might possess, the liability of those who hold its stock in a sum necessary to make good any deficiency between the amount of the assets and the debts within the limitation stated. It is evident from the general language used in this constitutional provision that while a remedy might have been worked out in the courts of equity in the State, it was proper if not necessary that a statute should be passed to make more effectual the liability thus secured by the constitution.

In pursuance of that power the legislature passed the act of 1894, which remained in force until the passage of the act of 1899.

The fundamental contention upon which the argument of the plaintiff in error against the constitutionality of this subsequent act rests is that the statute created a contract into which the stockholder entered upon subscribing to or obtaining his stock, which the legislature had no power to change without running counter to the constitutional requirement invalidating laws impairing the obligation of contracts. Constitution, Art. 1, § 10.

It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature and, as such, capable of being enforced in the courts not only of that State, but of another State and of the United States, *Whitman &c.* v. *Bank*, 176 U. S. 559, although the obligation is not entirely contractual and springs primarily from the law creating the obligation. *Christopher* v. *Norvell*, 201 U. S. 216.

Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.

This principle was stated by Mr. Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheat. 122, as follows:

"The distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and, without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the Nation may direct."

The same rule is recognized in *Hill* v. *Merchants' Ins. Co.*, 134 U. S. 515, wherein a statute was sustained changing the character of the remedy against stockholders in common to one giving a direct remedy against an individual stockholder. The principle was clearly enunciated in *Wagoner* v. *Flack*, 188 U. S. 595–603, in which Mr. Justice Peckham, speaking for the court, said:

"To enact laws providing remedies for a violation of con-

tracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the State in a case like this, contracts in a public act of its legislature to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies."

See, also, *Wilson* v. *Standefer,* 184 U. S. 399; *New Orleans City &c. Railroad Co.* v. *New Orleans,* 157 U. S. 219.

The liability arising under the constitution of Minnesota was such that legislation was appropriate to make it effectual. We can find nothing in the fact that one legislature has passed an act which would conclude a subsequent law-making body of equal power from passing new and additional measures to make the remedy more effectual. That the first act did not accomplish its purpose is evident. Under it stockholders in another State, who could not be reached by personal service, were immune from liability and the entire burden was cast upon local stockholders. There was no provision for a receiver or assignee beginning action outside the State, and it was held by this court in *Hale* v. *Allinson, supra,* that a chancery receiver was powerless to enforce the rights of creditors beyond the borders of the State. In this condition of affairs the State of Minnesota has undertaken to provide a proceeding for the settlement of insolvent corporations which shall ascertain the assets of the corporation, the extent of the indebtedness of the corporation, the amount to which it is necessary, if at all, to call upon the stockholders' liability. It is obviously an act intended to make effectual the liability which is incurred by stockholders under the constitution of the State, and it ought not to be rendered nugatory unless substantial objection exists against its enforcement. It operates equally upon all stockholders at home and abroad and assesses all by a uniform rule.

We shall proceed to notice some of the specific objections which are urged against the validity of this legislation by stockholders who acquired stock before the act of 1899 went into effect.

It is said that the stockholder is held liable in a proceeding to which he is not a party. Under the prior act he could only be held where service could be had upon him personally, but if we are right in the proposition just announced, that additional remedies may be provided by legislation, then the validity of such additional enactments depends not necessarily upon the personal service upon the stockholder, but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligations and not in violation of constitutional rights. It is true that the stockholder is not necessarily served with process in the action wherein the assessment is made under the act of 1899, but no personal judgment is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and of other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts, *Howarth* v. *Lombard*, 175 Massachusetts, 570. And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. *Hawkins* v. *Glenn*, 131 U. S. 319; *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329, 336.

Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for the same purpose which is entailed by becoming a member of a corporation

through the purchase of stock whereby a contract is implied in favor of creditors. The object of the enforcement of both liabilities is for the benefit of creditors, and while it is true that one promise is directly to the corporation and the other does not belong to the corporation but is for the benefit of its creditors, either liability may be enforced through a receiver acting for the benefit of creditors under the orders of a court in winding up the corporation in case of its insolvency.

It is sought to distinguish between the Massachusetts case of *Howarth* v. *Lombard*, 175 Massachusetts, *supra*, and kindred cases, and the one at bar, in the fact that when the stock was acquired in that case a statutory provision was already in existence which made the stockholder liable to an assessment in a proceeding in which the stockholder was represented by the corporation. But, as we have said, keeping within the constitutional measure of liability, it was within the power of the legislature of Minnesota to make provisions, within the limits of due process of law, for the liquidation of the affairs of the corporation in a proceeding in the State of its origin, wherein members of the corporation should be sufficiently represented by the presence of the corporation itself. This practice has the sanction of the courts, as we have already shown. It is substantially the procedure authorized by the national banking act, except that the Comptroller of the Currency takes the place of the court, and, without the presence of the stockholders, makes a conclusive assessment. We cannot find any constitutional right belonging to the stockholder which is violated by this change in the character and nature of the remedy against him.

By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the State might lawfully make to render the liability effectual.

It is further urged that in imposing upon the stockholder the additional expense in a proceeding where the expenses incident to the enforcement of the liability in other States,

and against other parties, are taken into consideration and included in the estimate, there is an unwarranted increase in the amount which could be recovered against the stockholder under the former statute. But remembering at all times that the obligation of the shareholder was the creature of the constitution of Minnesota, we think the fact that the additional expenses were included in the assessment cannot operate to defeat it. Such expenses are incident to the ascertainment of the trust fund, which it is necessary to realize from the liability of stockholders, and as long as these expenses are kept within the amount of the original liability no legal right is violated. *League* v. *Texas*, 184 U. S. 156; *Richmond* v. *Irons*, 121 U. S. 27; *King* v. *Pomeroy*, 121 Fed. Rep. 287.

It is objected that the receiver cannot bring this action, and *Booth* v. *Clark*, 17 How. 322; *Hale* v. *Allinson*, 188 U. S. 56, and *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver, as a *quasi* assignee, and representative of the creditors, and as such vested with the authority to maintain an action. In such case we think the receiver may sue in a foreign jurisdiction. *Relfe* v. *Rundle*, 103 U. S. 222, 226; *Howarth* v. *Lombard*, 175 Massachusetts, 570; *Howarth* v. *Angle*, 162 N. Y. 179, 182.

It is also contended that the action is barred by the statute of the State of New York, limiting to two years the right to bring an action for a debt of a corporation after the defendant ceased to be a stockholder. We do not think the provision of the statute (§ 55, ch. 588, N. Y. Laws, 1892) relied upon covers these cases. It evidently refers to domestic corporations provided for in reference to the stockholder's liability created by the preceding section of the same chapter. The cause of action did not accrue until the receiver could sue

upon the assessment after the stockholder had failed to pay, as required by the order of the Minnesota court of December 22, 1902. *King* v. *Pomeroy*, 121 Fed. Rep. 287. Under the New York statute of limitations there was six years in which to bring the action after it accrued, under § 382 of the code, the Minnesota Thresher Manufacturing Company not being a "moneyed corporation or banking association" within § 394. *Platt* v. *Wilmot*, 193 U. S. 603.

The present suits were brought a little more than one year after the causes of action accrued.

Other objections are urged as to the nature of the proceedings in the court of Washington County, Minnesota, in which the original order was made. We have examined them and think none of them go to the jurisdiction and authority of the court, or are such as would invalidate the order of assessment made therein when sued upon in another jurisdiction.

In what we have said we have noticed the principal objections made to the enforcement of the order of the Minnesota court in another jurisdiction, and, finding no error in the judgment of the court below, it is

Affirmed.

MR. JUSTICE HOLMES:

I regret that the court has thought it unnecessary to state specifically what contract the stockholder is supposed to have made, as different difficulties beset the different views that might be taken. It seems to me hard to reconcile the construction adopted with that given to the stronger words of § 5151 of the national bank act in *McClaine* v. *Rankin*, 197 U. S. 154, 161. But under the circumstances I shall say no more than that I doubt the result.

SAUER *v.* CITY OF NEW YORK.

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

No. 130. Argued March 21, 1907.—Decided May 27, 1907.

While under the law of the State of New York the owner of land abutting on a street has easements of access, light and air as against the erection of an elevated railway by or for a private corporation for its own exclusive purposes, he has no such easements as against the public use of the streets, or any such structure which may be erected upon the street to subserve and promote the public use, and he is not therefore deprived of his property without due process of law by the erection of such a structure for the public use.

The decision of the Court of Appeals of the State of New York in the *Elevated Railroad Cases* related to the structure of an elevated railroad for a private corporation and did not create any contract within the impairment of obligation clause of the Constitution of the United States between the City of New York and owners of property abutting on the streets which would be violated by the change of grade or erection of a viaduct for public use of the city.

These rules applied to the case of an abutting owner on 155th Street in New York City and *held*, that the erection of the viaduct therein was merely a change of grade and that he was not thereby deprived of his property without due process of law nor was the obligation of any contract impaired by the judgment of the Court of Appeals holding that the rule of the *Elevated Railroad Cases* did not apply in such a case. *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544, distinguished.

GEORGE W. SAUER, the intestate of the plaintiffs in error (hereafter called the plaintiff) became, on July 1, 1886, the owner in fee simple of a parcel of land on the corner of One Hundred and Fifty-fifth street and Eighth avenue, in the city of New York. There was then upon the land a building used as a place of public resort. The city of New York was and is the owner of the fee of One Hundred and Fifty-fifth street and Eighth avenue, which it holds in trust for the public for highways.

Before the passage of the act hereinafter referred to One Hundred and Fifty-fifth street had been graded from Eighth

avenue in a westerly direction, until it reached a high and, for street uses, impassable bluff, on the summit of which ran St. Nicholas place, a public highway. The street as laid out on the records, ascends the bluff, and continues westerly to the Hudson River. It extends easterly to the Harlem River at a point where the river is bridged by McComb's Dam Bridge.

In 1887 the legislature of the State of New York enacted a law which authorized the city of New York, for the purpose of improving and regulating the use of One Hundred and Fifty-fifth street, to construct over said street from St. Nicholas place to McComb's Dam Bridge an elevated iron viaduct for the public travel, with the proviso that no railways should be permitted upon it. There was no provision for damages to the owners of land abutting on the street. Subsequently the viaduct was constructed, resting upon iron columns placed in the roadway. The surface of the viaduct consisted of asphalt and paving blocks laid on iron beams. Opposite the plaintiff's land it is sixty-three feet wide and about fifty feet above the surface of the original street, which, except as interfered with by the viaduct, remains unobstructed for public travel. At the junction of the street with Eighth avenue it is widened into a quadrangular platform, 80 by 160 feet in extent. Near the plaintiff's land the viaduct may be reached by a stairway. By the construction and maintenance of the viaduct the plaintiff's access to his land and the free and uninterrupted use of light and air have been impaired, and the value of his property has been decreased by reason of the dust, dirt, and noise occasioned by the structure. This action was brought to enjoin the defendant from maintaining the viaduct, or, in the alternative, for the recovery of damages caused by it. There was judgment for the defendant by the Supreme Court, affirmed by the Appellate Division and the Court of Appeals. 180 N. Y. 27. After the last decision the case was remitted to the Supreme Court, where there was final judgment for the defendant, and it is now here on writ of error under the claim that—

First. Plaintiff has been deprived of his property without due process of law, in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States; and

Second. That the act under which the viaduct was constructed, as construed by the court, impairs the obligation of a contract, in violation of § 10, Article I, of the Constitution of the United States.

Mr. Abram I. Elkus, with whom *Mr. Carlisle J. Gleason* was on the brief, for plaintiffs in error:

Plaintiff established a contract within the contract clause of the Federal Constitution, and his easements of light, air and access were property which could not be taken without due process of law. The New York courts have repeatedly declared that the proceedings under which streets in New York City have been opened constitute a contract with the abutting owners.

The statute under which these streets are opened provides that while the city shall be seized in fee of the streets, nevertheless, that the same be kept open for or as a part of the public street. Laws of 1813, Chap. 86, § 178; Laws of 1888, Chap. 402, § 990; Greater New York Charter, § 990, Chap. 418; Laws of 1903; *Story* v. *N. Y. El. R. Co.*, 90 N. Y. 122; *Kane* v. *N. Y. El. R. Co.*, 125 N. Y. 164, 177.

The plaintiff is entitled to enforce this contract. *United States* v. *Ill. Central R. Co.*, 154 U. S. 225, 238; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 132.

By the law of New York, the owner of premises abutting upon the public street has easements of light, air and access in the street, and these easements are property within the protection of the Constitution.

The act in question is unconstitutional and void in providing for the erection of the elevated driveway or viaduct without regard to plaintiffs' property or contract rights.

By New York law the building of an elevated railroad is a use of the streets inconsistent with the covenant that they

shall be maintained as open public streets, and is also a taking of plaintiffs' property. *Story* v. *N. Y. El. R. Co.*, 90 N. Y. 122, and other elevated cases; *Muhlker* v. *N. Y. & H. R. R. Co.*, 197 U. S. 544.

It was not the railroad but the permanent structure which formed the basis of the elevated railroad decisions. See opinion of Danforth, J., in the *Story case*, p. 161; opinion of Tracy, J., p. 169. *Kellinger* v. *Forty-second Street R. R. Co.*, 50 N. Y. 206; *Fobes* v. *R. W. & O. R. R. Co.*, 121 N. Y. 505.

The Elevated Railroad decisions declare such an injury to be a taking of property, as well as a breach of the contract to maintain the streets as open streets. *Muhlker* v. *N. Y. & H. R. Co.*, 197 U. S. 544; *Birrell* v. *N. Y. & H. R. Co.*, 198 U. S. 390; *Kierns* v. *N. Y. & H. R. Co.*, 198 U. S. 390.

This case is stronger for the abutter than the *Muhlker case*.

Plaintiff's contract right arises by virtue of the act of 1813 and the rule of property laid down in the *Story case* in 1882, which has been constantly reiterated by the New York courts.

Upon the faith of the statutory contract and the judicial construction given it plaintiff purchased his property in 1886, thus becoming a party to that contract, which extended to all abutters.

The construction of a statute by a state court becomes a part of the statute, and rights acquired under it may not be impaired by a change of construction. *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416; *Gelpecke* v. *Dubuque*, 1 Wall. 175; *Louisiana* v. *Pillsbury*, 105 U. S. 278.

Mr. Chandler P. Anderson filed a brief as *amicus curiæ* by leave of the court.

Mr. Theodore Connoly, with whom *Mr. Terence Farley* was on the brief, for defendant in error:

Chapter 576 of the Laws of 1887 does not deprive the plain-

tiffs in error of any property without due process of law, nor does it violate any of the provisions of the Fourteenth Amendment.

The law in the State of New York is well settled that consequential damages caused by the construction or maintenance of a public improvement, authorized by statute, does not constitute a "taking" within the meaning of the constitutional provision. *Uppington* v. *City of New York*, 165 N. Y. 222, 229.

In *Uppington* v. *City of New York*, 165 N. Y. 222, already cited, the injury was permanent, and the doctrine of the case of *Transportation Company* v. *Chicago* has been often applied by this court to cases of permanent injury, among others in the cases of *Gibson* v. *United States*, 166 U. S. 269, 275; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88; *Bauman* v. *Ross*, 167 U. S. 548, 587; *Meyer* v. *Richmond*, 172 U. S. 82, 97; *Scranton* v. *Wheeler*, 179 U. S. 141, 155; *C., B. & Q. Railway Co.* v. *Drainage Commissioners*, 200 U. S. 561, 583; *West Chicago R. R. Co.* v. *Chicago*, 201 U. S. 506, 526.

The construction of the viaduct is practically a change of grade.

It has been urged by plaintiffs in error that the construction of the viaduct is not a change of grade and therefore that the change of grade cases cited do not apply to the present case. The work is, in any event, substantially a change of grade, whether it may be technically so or not, and being such, the case at bar is certainly within the reasoning of the authorities which hold that for a change of grade legally made the city is not liable to abutting owners for damages.

In solving the question as to what is a proper and public use of the streets regard must be had to the changing conditions of city life.

With the march of improvement, new street uses arise. *Sun Publishing Association* v. *The Mayor*, 152 N. Y. 257.

The legislation in question, designed for the improvement of One Hundred and Fifty-fifth street so as to make it more convenient and safer to the travelling public, is a police regu-

lation and the constitutional prohibition against the taking of private property without compensation was not intended as a limitation upon the police powers of the State. *C., B. & Q. Railway* v. *Drainage Commissioners*, 200 U. S. 561, 583–585; *Jones* v. *Brim*, 165 U. S. 182.

The legislation in question contravenes impairment of contract clause of the Constitution.

The *Muhlker case*, 197 U. S. 544 and the *Birrell case*, 198 U. S. 390 can be distinguished. And see *Mead* v. *Portland*, 200 U. S. 148, 163, holding that while the interpretation of a local ordinance or a statute by the highest court of the State is not indisputable and, even though it may conflict with other decisions of the courts of the State, if it does not conflict with any decision made prior to the inception of the rights involved, this court will lean to an agreement with the state court. Citing *Burgess* v. *Seligman*, 107 U. S. 20.

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

The acts of the defendant for which the plaintiff sought a remedy in the courts of New York may be simply stated. The plaintiff owned land with buildings thereon situated at the junction of One Hundred and Fifty-fifth street and Eighth avenue, two public highways, in which the fee was vested in the city upon the trust that they should be forever kept open as public streets. As One Hundred and Fifty-fifth street was graded at the time the plaintiff acquired his title, it was isolated to a considerable extent from the street system of the city. Its west end ran into a high and practically impassable bluff, which rendered further progress in that direction impossible. The east end ran to the bank of the Harlem River at a grade which rendered access to McComb's Dam Bridge, which crossed the river at that point, impossible. Under legislative authority the city constructed, solely for public travel, a viaduct over One Hundred and Fifty-fifth street, beginning at

the bridge and thence running with gradual ascent to the top of the bluff. This viaduct enabled travellers to use One Hundred and Fifty-fifth street, in connection with other streets of the city, from which it had previously been disconnected. The viaduct rested upon columns planted in the street, and they, and the viaduct itself, to a material extent impaired the plaintiff's access to his land and the free admission to it of light and air. The plaintiff, in his complaint, alleged that this structure was unlawful, because the law under which it was constructed did not provide for compensation for the injury to his private property in the easements of access, light, and air, appurtenant to his estate. The Court of Appeals denied the plaintiff the relief which he sought, upon the ground that under the law of New York he had no easements of access, light, or air, as against any improvement of the street for the purpose of adapting it to public travel. In other words, the court in effect decided that the property alleged to have been injured did not exist. The reasons upon which the decision of that court proceeded will appear by quotations from the opinion of the court, delivered by Judge Haight. Judge Haight said (p. 30):

"The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of land abutting thereon hold their title subject to all the legitimate and proper uses to which the streets and public highways may be devoted. As such owners they are subject to the right of the public to grade and improve the streets, and they are presumed to have been compensated for any future improvement or change in the surface or grade rendered necessary for the convenience of public travel, especially in cities where the growth of population increases the use of highways. The rule may be different as to peculiar and extraordinary changes made for some ulterior purpose other than the improvement of the street, as, for instance,

where the natural surface has been changed by artificial means, such as the construction of a railroad embankment, or a bridge over a railroad, making elevated approaches necessary. But as to changes from the natural contour of the surface rendered necessary in order to adapt the street to the free and easy passage of the public, they may be lawfully made without additional compensation to the abutting owners, and for that purpose bridges may be constructed over streams and viaducts over ravines, with approaches thereto from intersecting streets. . . (p. 33). In the case under consideration as we have seen, One Hundred and Fifty-fifth street continued west to Bradhurst avenue. There it met a steep bluff seventy feet high, on the top of which was St. Nicholas place. The title of the street up the bluff had been acquired and recorded, but it had never been opened and worked as a street. The bluff was the natural contour of the surface, and for the purpose of facilitating easy and safe travel of the public from St. Nicholas place to other portions of the city the legislature authorized the construction of the viaduct in question. It is devoted to ordinary traffic by teams, vehicles and pedestrians. It is prohibited for railroad purposes. It is one of the uses to which public highways are primarily opened and devoted. It was constructed under legislative authority in the exercise of governmental powers for a public purpose. It is not, therefore, a nuisance, and the plaintiff is not entitled to have its maintenance enjoined or to recover in this action the consequential damages sustained."

The plaintiff now contends that the judgment afterwards rendered by the Supreme Court of New York, in conformity with the opinion of the Court of Appeals, denied rights secured to him by the Federal Constitution. This contention presents the only question for our determination, and the correctness of the principles of local land law applied by the state courts is not open to inquiry here, unless it has some bearing upon that question. But it may not be inappropriate to say that the decision of the Court of Appeals seems to be in full accord

with the decisions of all other courts in which the same question has arisen. The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it. *Selden* v. *Jacksonville*, 28 Florida, 558; *Willis* v. *Winona*, 59 Minnesota, 27; *Colclough* v. *Milwaukee*, 92 Wisconsin, 182; *Walish* v. *Milwaukee*, 95 Wisconsin, 16; *Home Building Company* v. *Roanoke*, 91 Virginia, 52 (cited with apparent approval by this court in *Meyer* v. *Richmond*, 172 U. S. 82, 95); *Willetts Manufacturing Co.* v. *Mercer County*, 62 N. J. Law, 95; *Brand* v. *Multnomah County*, 38 Oregon, 79; *Mead* v. *Portland*, 45 Oregon, 1, affirmed by this court in 200 U. S. 148; *Sears* v. *Crocker*, 184 Massachusetts, 586; (*Semble*) *DeLucca* v. *North Little Rock*, 142 Fed. Rep. 597.

The case of *Willis* v. *Winona*, *supra* is singularly like the case at bar in its essential facts. There, as here, a viaduct was constructed, connecting by a gradual ascent the level of a public street with the level of a public bridge across the Mississippi. An owner of land abutting on the street over which the viaduct was elevated was denied compensation for his injuries, Mr. Justice Mitchell saying (p. 33):

"The bridge is just as much a public highway as is Main street, with which it connects; and, whether we consider the approach as a part of the former or of the latter, it is merely a part of the highway. The city having, as it was authorized to do, established a new highway across the Mississippi, it was necessary to connect it, for purposes of travel, with Main and the other streets of the city. This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the centre of Main street in front of the plaintiff's lot. It can make no difference in prin-

ciple whether this was done by filling up the street solidly, or, as in this case, by supporting the way on stone or iron columns. Neither is it important if the city raise the grade of only a part of the street, leaving the remainder at a lower grade. . . .

"The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are excepted), is that so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis of an action for damages, unless there be an express statute to that effect. That this is the rule, and that the facts of this case will fall within it, is too well established by the decisions of this court to require the citation of authorities of other jurisdictions. . . .

"The *New York Elevated Railway cases* cited by plaintiff are not authority in his favor, for they recognize and affirm the very doctrine that we have laid down, *Story* v. *New York Elevated R. R. Co.*, 90 N. Y. 122, but hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic, was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages."

The cases cited usually recognized the authority of the *New York Elevated cases*, hereinafter to be discussed, and approved the distinction from them made by Mr. Justice Mitchell.

But, as has been said, we are not concerned primarily with the correctness of the rule adopted by the Court of Appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the Court of Appeals of New York had. It was

the duty of that court to ascertain, declare and apply the law of New York, and its determination of that law is conclusive upon this court. This court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the States, except to a very limited extent, and for a precisely defined purpose. The limitation upon the power of this court in the review of the decisions of the courts of the States, though elementary and fundamental, is not infrequently overlooked at the Bar, and unless it is kept steadily in mind much confusion of thought and argument result. It seems worth while to refer to the provisions of the Constitution and laws which mark and define the relation of this court to the courts of the State. Article III of the Constitution ordains, among other things, that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and that the appellate jurisdiction of the Supreme Court shall be exercised under such regulations as Congress shall make.

It was from this provision of the Constitution that Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, derived the power of this court to review the judgments of the courts of the States, and, in defining the appellate jurisdiction, the Chief Justice expressly limited it to questions concerning the Constitution, laws and treaties of the United States, commonly called Federal questions, and excluded altogether the thought that under the Congressional regulation the jurisdiction included any power to correct any supposed errors of the state courts in the determination of the state law. Such was the expressed limitation of the original judiciary act, in its present form found in section 709 of the Revised Statutes, which has been observed by this court in so many cases that the citation of them would be an idle parade. It is enough to refer to *Murdock* v. *Memphis*, 20 Wall. 590, where, after great consideration, it was held that under the judiciary act, as amended to its present form, this court was limited to the consideration of

the Federal questions named in the Constitution. This court, whose highest function it is to confine all other authorities within the limits prescribed for them by the fundamental law, ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and not be insensibly tempted beyond them by the thought that an unjustified or harsh rule of law may have been applied by the state courts in the determination of a question committed exclusively to their care.

In the case at bar, therefore, we have to consider solely whether the judgment under review has denied to the plaintiff any right secured to him by the Federal Constitution. He complains:

First. That he was denied the due process of law secured to him by the Fourteenth Amendment, in that his property was taken without compensation; and

Second. That the law which authorized the construction of the viaduct, as interpreted by the Court of Appeals of New York, impaired the obligation of the contract with the city of New York, which is implied from the laying out of the street, in violation of article I, § 10, paragraph 1, of the Constitution. The contentions may profitably be considered separately.

Has the plaintiff been deprived of his property without due process of law? The viaduct did not invade the plaintiff's land. It was entirely outside that land. But it is said that appurtenant to the land there were easements of access, light and air, and that the construction and operation of the viaduct impaired these easements to such an extent as to constitute a taking of them. The only question which need here be decided is whether the plaintiff had, as appurtenant to his land, easements of the kind described; in other words, whether the property which the plaintiff alleged was taken existed at all. The court below has decided that the plaintiff had no such easements; in other words, that there was no property taken. It is clear that under the law of New York an owner of land abutting on the street has easements of access, light

and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets or any structures which may be erected upon the street to subserve and promote that public use. The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting land owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the Fourteenth Amendment is shown.

The remaining question in the case is whether the judgment under review impaired the obligation of a contract. It appears from the cases to be cited that the courts of New York have expressed the rights of owners of land abutting upon public streets to and over those streets in terms of contract rather than in terms of title. In the city of New York the city owns the fee of the public streets (whether laid out under the civil law of the Dutch regime, or as the result of conveyances between the city and the owners of land, or by

condemnation proceedings under the statutory law of the State) upon a trust that they shall forever be kept open as public streets, which is regarded as a covenant running with the abutting land. Accepting, for the purposes of this discussion, the view that the plaintiff's rights have their origin in a contract, then it must be that the terms of the trust and the extent of the resulting covenant are for the courts of New York finally to decide and limit, providing that in doing so they deny no Federal right of the owner. The plaintiff asserts that the case of *Story* v. *Elevated Railroad*, 90 N. Y. 122, decided in 1882, four years before he acquired title to the property, interpreted the contract between the city of New York and the owners of land abutting upon its streets as assuring the owner easements of access, light and air, which could not lawfully be impaired by the erection on the street of an elevated structure designed for public travel; that he is entitled to the benefit of his contract as thus interpreted, and that the judgment of the court denying him its benefits impaired its obligation. If the facts upon which this claim is based are accurately stated, then the case comes within the authority of *Muhlker* v. *Railroad Co.*, 197 U. S. 544, which holds that when the Court of Appeals has once interpreted the contract existing between the land owner and the city that interpretation becomes a part of the contract, upon which one acquiring land may rely, and that any subsequent change of it to his injury impairs the obligation of the contract. It will be observed that it is an essential part of the plaintiff's case that he should show that his contract had been interpreted in the manner he states. It therefore becomes necessary to examine the *Story case*, wherein, he asserts, such an interpretation was made. In order to ascertain precisely what that case decided we may consider other decisions of the Court of Appeals, though they are later in time than the acquisition of the plaintiff's title.

The plaintiff in the *Story case* held the title to land, injuriously affected by the construction of an elevated railroad,

as a successor to a grantee from the city. In the deed of the city the land was bounded on the street and contained a covenant that it should "forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of said city, and all others passing through or by the same, in like manner as other streets of the same city now are, or lawfully ought to be." It was held that by virtue of this covenant, which ran with the land, the plaintiff was entitled to easements in the street of access, and of free and uninterrupted passage of light and air; that the easements were property within the meaning of the constitution of the State, and could not lawfully be taken from their owner without compensation, and that the erection of the elevated structure was a taking. The decision rested upon the view that the erection of an elevated structure for railroad purposes was not a legitimate street use. "There is no change," said Judge Danforth (p. 156), "in the street surface intended; but the elevation of a structure useless for general street purposes, and as foreign thereto as the house in Vesey street, *Corning* v. *Lowerre*, 6 Johns. Chan. 439, or the freight depot, *Barney* v. *Keokuk*, 94 U. S. 324."

"The question here presented," said Judge Tracy (p. 174), "is not whether the legislature has the power to regulate and control the public uses of the public streets of the city, but whether it has the power to grant to a railroad corporation authority to take possession of such streets and appropriate them to uses inconsistent with and destructive of their continued use as open public streets of the city."

In the case of *Lahr* v. *Metropolitan Elevated Railroad Co.*, 104 N. Y. 268, decided in 1887, the plaintiff held title by mesne conveyances from the owner, from whom the land for the street had been acquired by condemnation under a statute, which provided that the land thus taken should be held (p. 289) "in trust, nevertheless, that the same be appropriated and kept open for or as part of a public street . . . forever, in like manner as other public streets . . . in the said city

are, and of right ought to be." It was contended that the principle of the *Story case* should be confined to those who, like Story, held title under a grant from the city with a covenant that the street should be kept open. But the court held that there was no legal difference between the two cases, and that from the condemnation statute a covenant running with the land was implied for the benefit of its owners, and that the plaintiff was entitled to recover damages for the injury to his easements of access, light, and air. But, as in the *Story case*, the extent of the decision was carefully limited. "The logical effect of the decision in the *Story case*," said Chief Judge Ruger (p. 292), "is to so construe the Constitution, as to operate as a restriction upon the legislative power over the public streets opened under the act of 1813, and confine its exercise to such legislation, as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets which attempt to authorize their use for additional street uses are obviously within the power of the legislature to enact."

In the case of *Kane* v. *Elevated R. R. Co.*, 125 N. Y. 164, decided in 1891, it appeared that the street there in question was laid out during the Dutch regime, when the town had absolute title to the fee of the streets, with no easement over them in favor of the abutting land. But it was held by the court that by virtue of certain legislation, not necessary here to be stated, New York City owns the fee in all of its streets upon a trust, both for the public and the abutting land, that they shall forever be kept open as public streets, and that as to an abutting owner this trust cannot be violated without compensation. But in the opinion the limits of the principle were again carefully guarded. It was said by Judge Andrews (p. 175): "Under the decisions made there seems to be no longer any doubt in this State that streets in a city laid out and opened under charter provisions may, under legislative and municipal authority, be used for any public use consistent

with their preservation as public streets, and this, although the use may be new, and may seem to impose an additional burden, and may subject lot owners to injury. The mere disturbance of their rights of light, air and access, by the interposition of a new street use, must be borne and gives no right of action." And again (p. 185): "We conclude this part of the case with the remark that neither the *Story* nor the *Lahr case* imposes any limitations upon the legislative power over streets for street uses. They simply hold that the trust upon which streets are held cannot be subverted by devoting them to other and inconsistent uses."

It would be difficult for words to show more clearly, than those quoted from the opinions, that such a case, as that now before us, was not within the scope of the decisions or of the reasons upon which they were founded. The difference between a structure erected for the exclusive use of a railroad and one erected for the general use of the public was sharply defined. It was only the former which the court had in view. That the structure was elevated, and for that reason affected access, light and air, was an important element in the decisions, but it was not the only essential element. The structures in these cases were held to violate the land owners' rights, not only because they were elevated and thereby obstructed access, light and air, but also because they were designed for the exclusive and permanent use of private corporations. The limitation of the scope of the decision to such structures, erected for such purposes, appears not only in the decisions themselves, but quite clearly from subsequent decisions of the Court of Appeals. In the case of *Fobes* v. *R. W. & O. R. R. Co.*, 121 N. Y. 505, Judge Peckham, now Mr. Justice Peckham, made the following statement of the effect of the *Story case*. Certain portions of it are italicized here for the purpose of emphasizing the point now under consideration (p. 517; the italics are ours):

"It was not intended in the *Story case* to overrule or change the law in regard to steam surface railroads. The case em-

bodied the application of what was regarded as well-established principles of law to a new combination of facts, such facts amounting, as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a *total and exclusive use of* such portion *by the defendant,* and such *permanent obstruction and total exclusive use,* it was further held, amounted to taking of some portion of the plaintiff's easement in the street for the purpose of furnishing light, air and access to his adjoining lot. This *absolute* and *permanent obstruction of the street, and this total and exclusive use of a portion thereof by the defendant were accomplished by the erection of a structure for the elevated railroad of the defendant;* which structure is fully described in the case as reported.

"The structure, by the mere fact of its existence in the street, permanently and at every moment of the day took away from the plaintiff some portion of the light and air which otherwise would have reached him, and, in a degree very appreciable, interfered with and took away from him his facility of access to his lot; such interference not being intermittent and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the day and night. *Such a permanent, total, exclusive and absolute appropriation of a portion of the street as this structure amounted to* was held to be illegal and wholly beyond any legitimate or lawful use of a public street. The taking of the property of the plaintiff in that case was held to follow upon the *permanent and exclusive nature of the appropriation by the defendant of the public street, or some portion thereof.*"

The distinction between the erection of an elevated structure for the exclusive use of a private corporation and the same structure for the use of public travel is clearly illustrated in the contrast in the decisions of *Reining* v. *Railroad,* 128 N. Y. 157, and *Talbot* v. *Railroad,* 151 N. Y. 155. In the first case

it was held that the abutting land owner had the right to compensation for the construction of a viaduct in the street for the practically exclusive occupation of a railroad. In the second case it was held that the abutting owner had no right of compensation for the erection of a public bridge with inclined approaches, and a guard wall, to carry travel over a railroad, although the structure impaired the access to his land. We are not concerned with the question whether the distinction between an elevated structure for the exclusive use of a corporation and the same structure for the purposes of public travel is, so far as an abutting land owner is concerned, a just or harsh one, provided it is a clear distinction based upon real differences. We think that before the plaintiff had acquired his title the law of New York had plainly drawn this distinction. The highest court of the State had held that the contract of the owner of land abutting on streets entitled him to the right of unimpaired access and uninterrupted circulation of light and air as against an elevated structure erected for the exclusive use of a private corporation, had, with scrupulous care, refrained from holding that he had the same right as against an elevated structure of the same kind erected for the purpose of public travel, and had pointed out plainly the essential distinction between the two cases. This distinction, as we have already seen, has been made or approved by the courts of other States wherever the occasion to consider it arose, and it is a real and substantial distinction which arises out of the trust upon which the public owns the public highways.

The trust upon which streets are held is that they shall be devoted to the uses of public travel. When they, or a substantial part of them, are turned over to the exclusive use of a single person or corporation, we see no reason why a state court may not hold that it is a perversion of their legitimate uses, a violation of the trust, and the imposition of a new servitude. But the same court may consistently hold that with the acquisition of the fee, and in accordance with the trust,

the city obtained the right to use the surface, the soil below, and the space above the surface, in any manner which is plainly designed to promote the ease, facility and safety of all those who may desire to travel upon the streets; and that the rights attached to the adjoining land, or held by contract by its owner, are subordinate to such uses, whether they were foreseen or not when the street was laid out. In earlier and simpler times the surface of the streets was enough to accommodate all travel. But under the more complex conditions of modern urban life, with its high and populous buildings, and its rapid interurban transportation, the requirements of public travel are largely increased. Sometimes the increased demands may be met by subways and sometimes by viaducts. The construction of either solely for public travel may well be held by a state court to be a reasonable adaptation of the streets to the uses for which they were primarily designed. What we might hold on these questions, where we had full jurisdiction of the subject, it is not necessary here even to consider.

In basing its judgment on the broad, plain and approved distinction between the abandonment of the street to private uses and its further devotion to public uses, the court below overruled none of its decisions, but, on the contrary, acted upon the principles which they clearly declared. The plaintiff, therefore, has not shown that in his case the state court has changed, to his injury, the interpretation of his contract with the city, which it had previously made, and upon which he had the right to rely. The case at bar is not within the authority of the *Muhlker case*. When Muhlker acquired his title the elevated railroad cases had declared the law of New York and it was here held that he had the right to rely upon his contract as in them it had been interpreted. The structure complained of was in the *Muhlker case*, as in the *Elevated Railroad case*, one devoted to the exclusive use of a private corporation. This court, in order to obtain jurisdiction and to declare that a Federal right was violated, was obliged to hold, and did hold, that the two cases were identical, and that

in deciding the *Muhlker case* the Court of Appeals had in effect overruled the *Elevated Railroad Cases*, and this view was supported by the Court of Appeals itself in *Lewis* v. *Railroad*, 162 N. Y. 202, where a plaintiff in like situation with Muhlker had obtained damages for exactly the same structure. The theory upon which the *Muhlker case* stands and upon which it was put in the opinion of the court, is that in deciding against Muhlker the state court had overruled its own decisions, and changed the interpretation of the contract upon which he had the right to rely. But the fundamental fact upon which the decision in the *Muhlker case* rested, present there, is absent in the case at bar. Here there was no overruling of decisions and no change in the interpretation of the contract. There was, therefore, no impairment of the obligation of a contract, and the decision was merely on a question of local law, with the soundness of which we have no concern.

The judgment is

Affirmed.

Mr. Justice McKenna, dissenting:

I am unable to agree with the opinion and judgment of the court. I think this case cannot be distinguished in principle from *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544; *Burrell* v. *New York & Harlem Railroad Co.* and *Kierns* v. *New York & Harlem Railroad Co.*, 198 U. S. 390. On the authority of those cases the judgment in this case should be reversed. Those cases were determined by *Story* v. *Elevated Railroad*, 90 N. Y. 122, and *Lahr* v. *Metropolitan Elevated Railroad Co.*, 104 N. Y. 268, known as the *Elevated Railroad cases*. The structures there described are what are known as elevated railroads, and may be presumed to be familiar, and a structure of substantially similar character was the subject of the controversy in *Muhlker* v. *Harlem Railroad Co.*, *Burrell* v. *Same* and *Kierns* v. *Same*. Its characteristic was elevation above the *surface* of the street, and this was the point of the decisions. Let me quote from the *Story case:* "But what," said the court,

"is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot and light and air furnished across the *open way*. The street occupies the *surface*, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And again, it was said that the agreement—grant from the city—was "that if the grantee would buy the lot abutting on the street he might have the use of light and air *over the open space* [italics mine] designated as a street." And yet again (and the passage was quoted in the *Muhlker case*, page 566): "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The *Lahr case* repeated the principle. And it was said in the *Muhlker case*, in effect, that the disregard of the distinction between the surface of a street and the space above the surface would leave "remaining no vital element of the *Elevated Railroad cases*."

It may be said there was a qualification made in those cases and recognized in the *Muhlker case*, that it was not alone the elevation of a structure above the surface, but the elevation of one "useless for general street purposes." I may accept the limitation. The structure in the case at bar comes within the characterization. It is useless for general street purposes. It obstructs the frontage of abutting lots and affords no access to or from them in any proper sense. There is a descent by stairs from it to the street below, but for pedestrians only—necessarily not for vehicles. But there is a like descent by stairs from elevated railroads to streets below, but this did not save the roads from liability for abutting property.

It must be borne in mind that this case is not disposed of by making a contrast between the passage of a railroad and the traffic on a street. The contrast is catching and only seems important. In New York a railroad is a street use and can be

imposed on the surface of a street without liability for consequential damages, and this even if it be a steam railroad. *Fobes* v. *R. W. & O. R. Co.*, 121 N. Y. 505. The distinction, therefore, was necessary to be made between the *surface* and the open space over the surface. And we have seen that this distinction was noted in the cases and determined their judgment. In other words, the use of a street by a railroad was decided to be a proper street use, and, therefore, whether put upon the surface or above the surface, retained that character. In either place it was a proper street use and damages could only have been consequent to the elevation of the road above the surface, to which, to quote again the *Story case*, the "public purpose of a street" attached only.

The *Elevated Railroad cases* get significance from the arguments of counsel. Such arguments, of course, are not necessarily a test of the decision. But they may be. The opinion may respond accurately to them. We find from the report of the *Story case* that the argument of Mr. Evarts for the plaintiff was that "a permanent structure above the surface, and an encroachment thereby, and by its use upon the appurtenant easement of the open frontage held by the abutting proprietors, was not covered by the original condemnation for the public easement, which was limited to a maintenance of such open streets and perpetual frontage. *People* v. *Kerr*, 27 N. Y. 188; *Craig* v. *Rochester R. R. Co.*, 39 N. Y. 404."

Mr. Choate, also for the property owners, submitted the following: "The abutting owners on the streets have an interest in the nature of property for all time in the streets above their surface, and in having them kept open and unobstructed forever, of which they cannot be deprived without being compensated." The contentions express the invocation of the property owner of the court, and the court responded to and sustained it. Is not that response rejected in the case at bar? The structure in the case towers as high as a house of five stories and is planted on columns, the size and strength and number of which can easily be imagined. Does it need any

comment to describe its effect? The plaintiffs have really no access to it from their land or from any building that may be put upon their land, because they may not bridge the intervening gap. They have no other access to it but that which I have described. The public has no access from it to plaintiffs' property but that which I have described.

The buildings that stood upon the land when the structure was built were practically under its shadow.[1] Any buildings that may be erected will be equally so. "To get above it," plaintiffs' counsel asserts, "the abuttor must build up five stories," and it is only from such elevation that he may contemplate the traffic that passes his premises, and must pass his premises. And even then, counsel also asserts, light can only reach the abuttor "through a slit ten feet wide between his eaves and the edge of the structure." And to this measure his right to an unobstructed frontage, his right to unobstructed light and air, has been reduced. Is it possible that the law can see no legal detriment in this, no impairment of the abuttor's grant from the city, no right to compensation?

I am not insensible of the strength of the reasoning by which this court sustains that conclusion, but certainly all lawyers would not assent to it. Indeed one must be a lawyer to assent to it. At times there seems to be a legal result which takes no account of the obviously practical result. At times there seems to come an antithesis between legal sense and common sense.

I say this in no reproach of the law and its judgments. I say it in no reproach to the opinion of the court. I recognize it proceeds upon distinctions which are intelligible, although

[1] When the original plaintiff, George Sauer, became the owner of the property there were standing upon it certain frame buildings, which had been used as a pleasure resort. In 1890 he enlarged and improved the buildings at great expense and occupied them at the time of the erection of the structure in controversy. These buildings were destroyed in 1897 by fire, and the land is now vacant. And it may be noted that Sauer having died pending this writ of error, his administratrix and heirs have been substituted as parties plaintiff.

I do not assent to them. My purpose is only to express the view that the legal opinion which I hold has justification in the serious practical consequences that the plaintiffs in error have sustained, by the violation of a right which this court said, in the *Muhlker case*, citing *Barnett* v. *Johnson*, 15 N. J. Eq. 481, was founded in the "common practice and sense of the world."

From my standpoint, what the courts of States other than New York have decided is of no consequence to the pending controversy, and I take no time therefore to dispute the pertinence of their citation to justify the structure of which plaintiffs complain.

I am authorized to say that Mr. Justice Day concurs in this dissent.

OPINIONS PER CURIAM, ETC., MAY 13 AND 27, 1907.

No. —, Original. *Ex parte:* IN THE MATTER OF GEORGE H. CRAWFORD, PETITIONER. Submitted April 29, 1907. Decided May 13, 1907. Motion for leave to file petition for a writ of *habeas corpus* denied. *Mr. Seth T. McCormick* for petitioner. *Mr. A. L. Cole, Mr. Jno. Houston Merrill* and *Mr. C. H. McCauley* opposing.

No. —, Original. IN THE MATTER OF CHARLES UGHBANKS, PETITIONER. Submitted April 29, 1907. Decided May 13, 1907. Motion for leave to file petition for a writ of *habeas corpus* denied. *Mr. J. B. Chaddock* for petitioner.

No. 17, Original. *Ex parte:* IN THE MATTER OF THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, PETITIONER. Submitted April 29, 1907. Decided May 27, 1907. *Per Curiam.* Rule discharged and petition for writ of mandamus dismissed. *In re Rice, Petitioner,* 155 U. S. 396; *In re Pollitz, Petitioner,* this day decided, *ante,* p. 323. *Mr. Jackson H. Ralston* for petitioner. *Mr. Charles J. Hughes, Jr., Mr. W. E. Cullen, Mr. A. B. Browne* and *Mr. Alexander Britton* for respondent.

Decisions on Petitions for Writs of Certiorari May 13 *and* 27, 1907.

No. 713. EXPANDED METAL COMPANY ET AL., PETITIONERS, *v.* EUGENE S. BRADFORD ET AL. May 13, 1907. Petition for

a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Ernest Howard Hunter* for petitioners. *Mr. E. Hayward Fairbanks* for respondents.

No. 719. SAMUEL B. HARTMAN, PETITIONER, *v.* JOHN D. PARK & SONS CO. May 13, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Frank F. Reed* for petitioner. No appearance for respondent.

No. 655. THOMAS B. CLEMENT, PETITIONER, *v.* THE UNITED STATES. May 13, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George N. Baxter* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 685. FREDERICK HERBERT RAMSDEN, PETITIONER, *v.* HENRY M. KNOWLES. May 13, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Wm. Reed Bigelow* for petitioner. *Mr. Felix Rackemann* for respondent.

No. 695. ARMOUR & COMPANY, PETITIONERS, *v.* AGNES SKENE. May 13, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Roland Gray* and *Mr. John C. Gray* for petitioners. *Mr. Charles H. Fiske, Mr. Andrew Fiske* and *Mr. Charles H. Fiske, Jr.*, for respondent.

No. 697. ALASKA TREADWELL GOLD MINING COMPANY, PETITIONER, *v.* Z. R. CHENEY, ADMINISTRATOR, ETC. May 13, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles J. Faulkner* for petitioner. *Mr. J. J. Darlington* and *Mr. R. W. Jennings* for respondent.

No. 711. JOCK B. HENDERSON, PETITIONER, *v.* JAMES M. HENRIE ET AL. May 13, 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. *Mr. John G. McCluer* and *Mr. James S. McCluer* for respondents.

Nos. 717 and 718. JAMES L. BRADFORD ET AL., PETITIONERS, *v.* THE UNITED STATES. May 13, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edgar H. Farrar* and *Mr. F. L. Richardson* for petitioners. *The Attorney General, The Solicitor General* and *Mr. W. W. Howe* for respondent.

Nos. 742 and 743. LEEDS & CATLIN COMPANY, PETITIONER, *v.* VICTOR TALKING MACHINE COMPANY ET AL. May 27, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Louis Hicks* for petitioner. *Mr. Horace Pettit* for respondents.

No. 641. TROY WAGON WORKS COMPANY, PETITIONER, *v.* HOWARD L. HANCOCK, TRUSTEE. May 27, 1907. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles Martindale* and *Mr. Almon W. Bulkley* for petitioner. *Mr. James W. Noel* for respondent.

No. 716. National Exchange Bank of Providence, R. I., Petitioner, *v.* City of Superior. May 27, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. H. Caldwell* for petitioner. *Mr. Louis K. Luse* for respondent.

No. 731. Town of Centerville Station, St. Clair County, Ill., Petitioner, *v.* Northwestern Savings Bank. May 27, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward C. Kramer* for petitioner. *Mr. B. H. Canby* for respondent.

No. 734. Seymour W. Bonsall, Petitioner, *v.* Arthur C. Pratt. May 27, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Lowenstein* for petitioner. *Mr. John M. Coit* for respondent.

Nos. 735 and 736. Charles M. Ward et al., etc., Petitioners, *v.* Maria E. G. McK. Ward et al. May 27, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry M.*

Ward and *Mr. Austen G. Fox* for petitioners. *Mr. William G. Wilson* for respondents.

No. 737. NORTH CHICAGO STREET RAILROAD COMPANY ET AL., PETITIONERS, *v.* CHICAGO CONSOLIDATED TRACTION COMPANY ET AL; and No. 738, WEST CHICAGO STREET RAILROAD COMPANY ET AL., PETITIONERS, *v.* CHICAGO CONSOLIDATED TRACTION COMPANY ET AL. May 27, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry S. Robbins* for petitioners. *Mr. James F. Meagher, Mr. Nathaniel C. Sears, Mr. Clarence A. Knight* and *Mr. A. J. Hopkins* for respondents.

No. 740. THE AMERICAN NEWS COMPANY, PETITIONER, *v.* THE UNITED STATES. May 27, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert H. Washburn* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 744. OXFORD AND COAST LINE RAILROAD COMPANY, PETITIONER, *v.* UNION BANK OF RICHMOND, VA. May 27, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas B. Womack* for petitioner. *Mr. William L. Royall* for respondent.

No. 745. STANLEY FRANCIS, PETITIONER, *v.* THE UNITED STATES. May 27, 1907. Petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles L. Frailey* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT MAY 13 AND 27, 1907.

No. 172. EMMA L. KAIPU IN BEHALF OF MIKALA KAIPU, APPELLANT, *v.* L. E. PINKHAM, PRESIDENT OF THE BOARD OF HEALTH, ETC. Appeal from the District Court of the United States for the Territory of Hawaii. May 13, 1907. Death of Mikala Kaipu having been suggested, and the case abated, appeal dismissed. *Mr. A. G. M. Robertson* for appellant. *Mr. Lorrin Andrews* for appellee.

No. 781. CANDIDO ACOSTA ET AL., APPELLANTS, *v.* THE PEOPLE OF PORTO RICO. Appeal from the Supreme Court of Porto Rico. May 27, 1907. Docketed and dismissed with costs, on motion of *Mr. Solicitor-General Hoyt* in behalf of counsel for appellees. No one opposing.

No. 728. SUSAN E. PORTERFIELD, PETITIONER, *v.* GERARD D. MOORE, TRUSTEE, ETC., ET AL. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. May 27, 1907. Dismissed, on motion of counsel for petitioner. *Mr. Forrest W. Brown* for petitioner. No appearance for respondents.

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ARMY AND NAVY.

1. *Construction of Navy Personnel Act of* 1898 *and* § 1466, *Rev. Stat.—Pay of passed assistant and assistant surgeons.*

A court is not always confined to the written words of a statute; construction is to be exercised as well as interpretation and a statute will not be con-

strued as giving higher pay to the inferior officer. Under the Navy Personnel Act of March 3, 1898, 30 Stat. 1007, and § 1466, Rev. Stat., passed assistant surgeons of the navy, as well as assistant surgeons, rank with captains in the army and are entitled to the pay of a captain mounted. *United States* v. *Farenholt*, 226.

2. *Courts-martial, personnel of—Right to pay of officer dismissed on sentence of court-martial illegally constituted.*

The prohibition in the 77th Article of War against officers of the regular army serving on courts-martial to try soldiers and officers of other forces is peremptory, and, notwithstanding the contrary construction of former articles on the same subject, an officer of the regular army, although on indefinite leave of absence, to enable him to accept a volunteer commission, is not competent to sit on a court-martial to try a volunteer officer; and if without him there would have been insufficient number there is no court and the sentence of dismissal void, and in this case an officer so sentenced and dismissed was entitled to his pay until the organization to which he belonged was mustered out. The refusal to grant an officer so discharged an honorable discharge did not under the circumstances amount to his active retention in the service and entitle him to pay after the organization to which he belonged had been discharged. *United States* v. *Brown*, 240.

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1. *Effect of bankruptcy act on state law.*

The bankruptcy act does not deprive a lienor of any remedy with which he is vested by the state law. *Hiscock* v. *Varick Bank*, 28.

2. *Provable claims—Life insurance policies—Partnership and individual debts.*

Individual policies on the life of a partner held as collateral security for his individual indebtedness can be sold by the creditor and applied to the payment of such individual debt although the debtor was also liable for partnership debts; and if the policies are fairly sold by the creditor he can prove for the balance of the individual debt and the whole of the partnership debt. *Ib.*

See PLEDGE, 3.

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COMMERCE.

1. *Interstate—State interference—C. O. D. shipments of liquor.*

A statute of Kentucky, making penal all shipments of liquor "to be paid for on delivery, commonly called C. O. D. shipments," and further pro-

viding that the place where the money is paid or the goods delivered shall be deemed to be the place of sale and that the carrier and his agents delivering the goods shall be jointly liable with the vendor, is as applied to shipments from one State to another an attempt to regulate interstate commerce and beyond the power of the State. *Adams Express Co.* v. *Kentucky*, 129.

2. *Interstate—State interference—Materiality of evidence in prosecution under state law prohibiting shipment of liquor.*

When, in a prosecution of an express company for a violation of this statute by an interstate shipment, it is averred in the indictment or stipulated by the prosecution that the shipment and delivery were made and done by the express company in the usual course of its business as a carrier, testimony that the consignee did not order the goods or that the goods were held by the agent of the company at the place of delivery for a few days to accommodate the consignee is immaterial. *Ib.*

See INTERSTATE COMMERCE COMMISSION.

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CONGRESS, ACTS OF.

See ACTS OF CONGRESS.

CONGRESS, POWERS OF.

Powers of Federal Government—Control over waters of Territories and of States.

Kansas having brought in this court an original suit to restrain Colorado and certain corporations organized under its laws from diverting the water of the Arkansas River for the irrigation of lands in Colorado, thereby, as alleged, preventing the natural and customary flow of the river into Kansas and through its territory, the United States filed an intervening petition claiming a right to control the waters of the river to aid in the reclamation of arid lands. It was not claimed that the diversion of the waters tended to diminish the navigability of the river. *Held*, that the Government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of the powers granted is to be found in the Constitution of the United States, and in that alone; that the manifest purpose of the Tenth Amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and that if in the changes of the years further powers ought to be possessed by Congress they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the Territories and may control the flow of waters in their streams, it has no power to control a like flow within the limits of a State except to

preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the State. Hence the intervening petition of the United States is dismissed, without prejudice to any action which it may see fit to take in respect to the use of the water for maintaining or improving the navigability of the river. *Kansas* v. *Colorado*, 46.

See CONSTITUTIONAL LAW, 7; EIGHT-HOUR LAW; COURTS; PHILIPPINE ISLANDS; PORTO RICO, 2.

CONSTITUTIONAL LAW.

Commerce clause. See COMMERCE.

1. *Contracts; impairment of obligation of—Power of municipality to enter into contract within protection of Constitution.*

In view of the decisions of the highest court of Mississippi a municipality of that State may, under a broad grant of legislative authority conferred without restrictions or conditions, make a contract with a corporation, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited period, which in the absence of fraud or convention, will be beyond legislative or municipal power to alter to the prejudice of the other contracting party under the impairment of obligation clause of the Federal Constitution. *Vicksburg* v. *Waterworks Co.*, 496.

2. *Contracts; impairment of obligation—Validity of Minnesota stockholders' liability law.*

There is a broad distinction between laws impairing the obligation of contracts and those which simply give a more efficient remedy to enforce a contract already given, and the statute of Minnesota of 1899 for the enforcement of stockholders' liability, under which the constitutional liability can be enforced by the receiver without the State, is not void under the impairment of obligation clause of the Constitution of the United States because it repealed a prior act under which the stockholders' liability could not be so enforced. *Bernheimer* v. *Converse*, 516.

3. *Contracts; impairment of obligation—Effect of judicial decision to create contract—Use of streets in New York City.*

The decision of the Court of Appeals of the State of New York in the *Elevated Railroad Cases* related to the structure of an elevated railroad for a private corporation and did not create any contract within the impairment of obligation clause of the Constitution of the United States between the City of New York and owners of property abutting on the streets which would be violated by the change of grade or erection of a viaduct for public use of the city. *Sauer* v. *City of New York*, 536.

4. *Contracts; impairment of obligation; effect of judicial decision.*

These rules applied to the case of an abutting owner on 155th Street in New York City and *held*, that the erection of the viaduct therein was merely a change of grade and that he was not thereby deprived of his property

without due process of law nor was the obligation of any contract impaired by the judgment of the Court of Appeals holding that the rule of the *Elevated Railroad Cases* did not apply in such a case (*Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544, distinguished.). *Ib.*

See FEDERAL QUESTION, 5.

Double jeopardy. See Supra, 8–13.

5. *Due process of law; deprivation of property—Easement in street of owner of abutting land under New York law—Erection of elevated railway structure.*

While under the law of the State of New York the owner of land abutting on a street has easements of access, light and air as against the erection of an elevated railway by or for a private corporation for its own exclusive purposes, he has no such easements as against the public use of the streets, or any such structure which may be erected upon the street to subserve and promote the public use, and he is not therefore deprived of his property without due process of law by the erection of such a structure for the public use. *Ib.*

See Ante, 4; PHILIPPINE ISLANDS, 2; RAILROADS, 3, 4, 6; TAXES AND TAXATION, 3.

Deprivation of property without due process of law.

See Ante, 5; PHILIPPINE ISLANDS, 2; RAILROADS, 3, 6.

6. *Equal protection of laws—Validity of Minnesota stockholders' liability law.*

An act intended to make effectual a liability which is incurred by stockholders under the constitution of the State and which operates equally upon all stockholders and assesses all by a uniform rule should not, in the absence of substantial reasons, be rendered nugatory, and the Minneosta Act of 1899 will not be declared void as violating the constitutional rights of stockholders either because it provides for fixing the liability in a proceeding within the State to which non-resident stockholders are not parties, or because it changes the procedure for collecting the assessment, and gives the receiver the right to maintain actions without the State. *Bernheimer* v. *Converse*, 516.

See RAILROADS, 3, 4.

Federal governmental powers. See CONGRESS, POWERS OF; PHILIPPINE ISLANDS.

Judicial power of United States. See JURISDICTION, A 1.

7. *Legislative powers—Effect of motive for enactment.*

An act of Congress otherwise valid is not unconstitutional because the motive in enacting it was to secure certain advantages for conditions

of labor not subject to the general control of Congress. *Ellis* v. *United States*, 246.

See CONGRESS, POWERS OF;
EIGHT-HOUR LAW.

8. *Second jeopardy; application to Philippines.*
The prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippine Islands. *Grafton* v. *United States*, 333.

9. *Second jeopardy; what constitutes.*
A person is not put in second jeopardy unless his prior acquittal or conviction was by a court having jurisdiction to try him for the offense charged. *Ib.*

10. *Second jeopardy; effect of judgment of court-martial.*
The judgment of a court-martial having jurisdiction to try an officer or soldier for a crime is entitled to the same finality and conclusiveness as to the issues involved as the judgment of a civil court in cases within its jurisdiction is entitled to. *Ib.*

11. *Second jeopardy; application of prohibition.*
The same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. *Ib.*

12. *Second jeopardy—Same acts constituting distinct offenses—Philippine Islands unlike a State.*
Although the same act when committed in a State might constitute two distinct offenses, one against the United States and the other against the State, for both of which the accused might be tried, that rule does not apply to acts committed in the Philippine Islands. The Government of a State does not derive its powers from the United States, while that of the Philippine Islands does owe its existence wholly to the United States. *Ib.*

13. *Second jeopardy; effect of acquittal by court-martial in Philippine Islands.*
A soldier in the army, having been acquitted of the crime of homicide alleged to have been committed by him in the Philippine Islands by a military court-martial of competent jurisdiction, proceeding under authority of the United States, cannot be subsequently tried for the same offense in a civil court exercising authority in that Territory. *Ib.*

CONSTRUCTION OF STATUTES.

See ARMY AND NAVY, 1; FEDERAL QUESTION, 5;
CUSTOMS DUTIES, 3; PRACTICE AND PROCEDURE, 2;
STATUTES, A.

CONTRACTS.

1. *Construction of contract of shipbuilding company with United States—Effect of release to relieve United States from liability.*

In a contract made between a building company and the United States for the construction of a battleship at a cost of over three millions of dollars it was provided that a special reserve of sixty thousand dollars should be held until the vessel had been finally tried and then paid to the company "on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract." The vessel having been built and the final trial had, all moneys were paid on the execution by the company of a stipulation to "remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid." *Held*, that in the absence of anything to the contrary, it will be assumed that the release which was executed was the one stipulated for in the original contract and was intended to include all matters which according to its terms were to be released by the company as a condition of final payment. The words in the release "by reason of" are equivalent to those in the original contract "by virtue of" and include all claims which grew out of the performance of the contract, although not arising from the actual construction of the vessel. *United States* v. *Wm. Cramp & Sons Co.*, 118.

2. *Construction of contract between mission board and the Hawaiian government in regard to religious institution.*

A foreign mission board maintaining a school in Hawaii in 1849 turned the school over to the government under an agreement, expressed in correspondence, that the government should maintain it as an institution for the cultivation of sound literature and solid science, that no religious tenet or doctrine contrary to those inculcated by the mission, a summary of which was transmitted in the correspondence, should be taught, and that in case the government did not so maintain it, it should pay to the mission $15,000. After maintaining the school for many years as it had been maintained under the mission, the government converted it into an agricultural college and religion ceased to be a part of the curriculum, meanwhile the constitution of Hawaii of 1894 prohibited the appropriation of any money for sectarian institutions. *Held*, in an action brought by the mission to recover the $15,000, that extrinsic evidence, as to what the parties did and the nature of the course of instruction when the agreement was made, and thereafter as continued by the government, was admissible to prove the intent of the parties as to what was meant by sound literature and solid science, and that under all the circumstances the agreement was that religious instruction was to be continued and on the failure of the government to continue such instruction the mission was entitled to recover the $15,000. The government of Hawaii was not relieved from its contract obligation by

reason of the adoption of the constitutional prohibition against appropriation for sectarian institutions. *Lowrey* v. *Hawaii*, 206.

See CONSTITUTIONAL LAW, 1, 2, 3, 4;
FEDERAL QUESTION, 5;
SOVEREIGNTY.

CONVEYANCES.

See INDIANS, 1.

CORPORATIONS.

1. *Stockholders; enforcement of liability—Minnesota law.*

This court in this case followed the judgment of the highest court of the State in determining that a corporation was not within the exception, constitutional and statutory, as to stockholders' liability in favor of certain classes of corporations. Where, as in Minnesota, stockholders' liability is fixed and measured by the Constitution, a stockholder upon acquiring his stock incurs an obligation arising from the constitutional provisions, and as such capable of being enforced in the courts not only of that State but of another State and of the United States. *Bernheimer* v. *Converse*, 516.

2. *Stockholders' liability—State regulation to make effectual.*

One who becomes a member of a corporation assumes the liability attaching to such membership and becomes subject to such regulations as the State may lawfully make to render the liability effectual. *Ib.*

3. *Stockholders' liability—Right of receiver to sue to collect.*

While a chancery receiver, having no authority other than that arising from his appointment, may not maintain an action in another jurisdiction, a receiver may sue in a foreign jurisdiction to collect statutory liability of stockholders where the statute confers the right upon the receiver as *quasi*-assignee. *Ib.*

4. *Stockholders' liability; application of local law limiting time of action to collect.*

Section 55 of ch. 588, N. Y. Laws of 1892, limiting the time within which to bring an action against a stockholder for a debt of the corporation does not apply to an action brought by a receiver to enforce statutory liability of stockholder of a foreign corporation. *Ib.*

See CONSTITUTIONAL LAW, 1, 2, 5, 6;
JURISDICTION, A 4;
RAILROADS.

COST BOND.

See PRACTICE AND PROCEDURE, 1.

COURTS.

Source of authority of District Court of the United States for Porto Rico.

The District Court of the United States is not a constitutional court of the

United States; its authority emanates wholly from Congress under the sanction of its power to govern territory occupying the relation that Porto Rico does to the United States. *Romeu* v. *Todd*, 358.

See ARMY AND NAVY, 1; JURISDICTION;
CORPORATIONS, 1; MANDAMUS;
FEDERAL QUESTION; PORTO RICO, 2;
STARE DECISIS.

COURTS-MARTIAL.

1. *Conclusiveness of judgment of.*

The judgment of a court-martial having jurisdiction to try an officer or a soldier for a crime is entitled to the same finality and conclusiveness as to the issues involved as the judgment of a civil court in cases within its jurisdiction is entitled to. *Grafton* v. *United States*, 333.

2. *Criminal jurisdiction—Effect of judgment on civil courts.*

General courts-martial may take cognizance, under the 62d article of war, of all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory within which he is serving; and, while this jurisdiction is not exclusive, but only concurrent with that of the civil courts, if a court-martial first acquires jurisdiction its judgment cannot be disregarded by the civil courts for mere error, or for any reason not affecting the jurisdiction of the court rendering it. *Ib.*

See ARMY AND NAVY, 2;
CONSTITUTIONAL LAW, 10, 13.

CRIMINAL LAW.

Intentional violation of law; what constitutes.

One who intentionally adopts certain conduct in certain circumstances known to him, which conduct is unlawful, intentionally breaks the law. *Ellis* v. *United States*, 246.

See COMMERCE, 1, 2;
CONSTITUTIONAL LAW, 8, 9, 11, 12, 13;
COURTS-MARTIAL, 2.

CUSTOMS DUTIES.

1. *Classification of imports; designation of articles.*

The commercial designation of an article, which designation was known at the time of the passage of a tariff act, is the name by which the article should be classified for the payment of duty without regard to the scientific designation and material of which it may be made or the use to which it may be put. *Goat & Sheepskin Co.* v. *United States*, 194.

2. *Classification of imports—What constitutes "wool."*

The word "wool" in paragraph 360 of the tariff act of July 24, 1897, 30 Stat. 151, 183, does not include a substance which, while the growth upon a sheepskin is, nevertheless, commercially known, designated, and dealt

in, as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool. *Ib.*

3. *Classification of imports—Duty on metal beads strung on cotton cords.* In construing a tariff act the court cannot disregard the condition upon which the law makes the duty depend. Under paragraph 408 of the tariff act of 1897, 30 Stat. 151, 189, metal beads strung on cotton cords or strings, although only temporarily strung to facilitate transportation, are subject to the higher duty of forty-five per cent and not to the lower duty of thirty-five per cent as beads "not threaded or strung." *Frankenberg* v. *United States*, 224.

See PHILIPPINE ISLANDS.

DAMAGES.

See JURISDICTION, B 1;
NATIONAL BANKS.

DECREES.

See JUDGMENTS AND DECREES, 2.

DELEGATION OF POWER.

See PHILIPPINE ISLANDS, 1;
RAILROADS, 5.

DEMURRER.

See JUDGMENTS AND DECREES, 1.

DEPARTMENT OF THE INTERIOR.

See INDIANS, 2.

DIVERSION OF WATERS.

See STATES, 3.

DOUBLE JEOPARDY.

See CONSTITUTIONAL LAW, 8–13.

DREDGES.

See EIGHT-HOUR LAW, 3.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 4, 5; RAILROADS, 3, 4, 6;
PHILIPPINE ISLANDS, 2; TAXES AND TAXATION, 3.

EASEMENTS.

See CONSTITUTIONAL LAW, 5.

EIGHT-HOUR LAW.

1. *Constitutionality of act of August* 1, 1892—*Power of Congress over construction of public works.*

The provisions in the act of August 1, 1892, 27 Stat. 340, limiting the hours of laborers and mechanics employed by the United States or any contractor or subcontractor upon any of the public works of the United States to eight hours per day except in cases of extraordinary emergency, and imposing penalties for the violation thereof, are constitutional and within the powers of Congress. In this respect Congress has the same power as a State has over the construction of its public works. (*Atkin* v. *Kansas*, 191 U. S. 207.) *Ellis* v. *United States*, 246.

2. *Extraordinary emergency within meaning of.*

The disappointment of a contractor with regard to obtaining some of his materials did not, under the circumstances of this case, amount to an extraordinary emergency within the meaning of the statute and justify him in having laborers work more than eight hours. *Ib.*

3. *Laborers and mechanics within meaning of act.*

Persons employed on dredges and scows, in dredging a channel in a harbor are not within the meaning of the act of August 1, 1892, laborers or mechanics employed on any of the public works of the United States. *Ib.*

See CONSTITUTIONAL LAW, 7.

EJECTMENT.

See PUBLIC LANDS, 2.

ELEVATED RAILWAYS.

See CONSTITUTIONAL LAW, 3, 4, 5.

ELEVATED RAILROAD CASES.

See CONSTITUTIONAL LAW, 3, 4.

EMINENT DOMAIN.

See FEDERAL QUESTION, 3.

ENTRYS.

See PUBLIC LANDS, 3.

ENUMERATED POWERS.

See CONGRESS, POWERS OF.

EQUALIZATION.

See STATUTES, A 2.

EQUAL PROTECTION OF LAWS.

See CONSTITUTIONAL LAW, 6;
RAILROADS, 3, 4.

EQUITABLE LIENS.
See PLEDGE, 3.

EQUITY.
See JURISDICTION, B 1;
PATENTS.

EVIDENCE.
See COMMERCE, 2;
CONTRACTS, 2;
FEDERAL QUESTION, 2;
PENALTIES AND FORFEITURES, 2;
PRESUMPTIONS.

EVIDENCES OF INDEBTEDNESS.
See TAXES AND TAXATION.

EXECUTIVE ORDERS.
See PHILIPPINE ISLANDS.

EXPRESS COMPANIES.
See COMMERCE, 1.

FACTS.
See INTERSTATE COMMERCE COMMISSION, 3.

FEDERAL GOVERNMENT.
See CONGRESS, POWERS OF;
SOVEREIGNTY.

FEDERAL QUESTION.

1. *Whether state regulation of railroad unreasonable not a Federal question.*
Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the powers delegated to the commission is not a Federal question. *Atlantic Coast Line* v. *North Carolina Corp. Comm.*, 1.

2. *Rejection by state court as evidence of letter from superior to subordinate Federal officer.*
The rejection as evidence, by the state court, of a letter written by the Secretary of the Interior to the Commissioner of the Land Office, on the ground that it was *res inter alios*, held, in this case proper and not to present any Federal question. *Chapman & Dewey Land Co.* v. *Bigelow*, 41.

3. *Questions local and not Federal—Effect of state statutes.*
Whether the statutes of a State authorize the incorporation of a bridge company to construct a bridge over a navigable river separating it from another State; whether such statutes confer the right of eminent do-

main on a corporation of another State, and whether such a corporation can exercise therein powers other than those conferred by the State of its creation, are all questions of state law, involving no Federal questions, and the rulings of the highest court of the State are final and conclusive upon this court. *Stone* v. *Southern Illinois Bridge Co.*, 267.

4. *Conformity of state statute with state constitution not a Federal question.*
Whether the proceedings in the enactment of a state statute conform with the state constitution is to be determined by the state court and its judgment is final. *Smith* v. *Jennings*, 276.

5. *State court's construction of state statute held not to raise any Federal question.*
A state statute directing the state treasurer to write certain bonds off the books in his office and no longer to carry them as a debt of the State does not impair any existing obligation of the State to pay the bonds nor affect the remedy to recover upon them; and where the state court has so construed the act, in refusing to enjoin the treasurer from making the entries required thereby, at the suit of one claiming to own the bonds, no Federal right of the plaintiff is denied, obstructed, impaired or affected and the writ of error will be dismissed. *Ib.*

FIFTH AMENDMENT.
See CONSTITUTIONAL LAW, 8–13.
PHILIPPINE ISLANDS, 2.

FOURTEENTH AMENDMENT.
See TAXES AND TAXATION, 3;
CONSTITUTIONAL LAW;
RAILROADS, 4.

GOVERNMENT CONTRACTS.
See EIGHT-HOUR LAW.

GOVERNMENT OF THE UNITED STATES.
See CONGRESS, POWERS OF.

GRANTS.
See PUBLIC LANDS.

HAWAII.
See CONTRACTS, 2.

HOMESTEADS.
See PUBLIC LANDS, 4.

IMPAIRMENT OF CONTRACT OBLIGATION.
See CONSTITUTIONAL LAW, 1, 2, 3, 4;
FEDERAL QUESTION, 5.

IMPORTS.

See CUSTOMS DUTIES.

INDIANS.

1. *Title to tribal lands; restraint on alienation.*

The title of Indians to lands belonging to the tribe is more than the right of mere occupation, and although the actual title may be in the United States it is held in trust for the Indians and the restraint on alienation should not be exaggerated. *United States* v. *Paine Lumber Co.*, 467.

2. *Right of allottee Indians to cut timber.*

Indian allottees under the Stockbridge and Munsie treaty of 1856, 11 Stat. 663, and the Act of February 6, 1871, 16 Stat. 404, were vested with sufficient title in their allotments to authorize the cutting of timber, for sale and not by way of improvements, without the approval of the Department of the Interior. *Ib.*

See PUBLIC OFFICERS, 1.

INJUNCTION.

See CONGRESS, POWERS OF; JUDGMENTS AND DECREES, 2; JURISDICTION, A 4; B 1; PATENTS; STATES, 7.

INTERSTATE COMMERCE.

See COMMERCE; INTERSTATE COMMERCE COMMISSION, 4.

INTERSTATE COMMERCE COMMISSION.

1. *Force and effect of findings of.*

The findings of the Interstate Commerce Commission are made by the law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Illinois Central R. R. Co.* v. *Interstate Com. Comm.*, 441.

2. *Conclusiveness of findings.*

Where the inquiry before the Interstate Commerce Commission is essentially one of fact, the existence of competition cannot in this court be made an inference of law dominating against the actual findings of the commission and their affirmance by the Circuit Court. *Ib.*

3. *Review of findings; effect of affirmance by Circuit Court and Circuit Court of Appeals.*

The reasonableness of a rate is a question of fact, and while the conclusions of the commission are subject to review if that body excludes facts and circumstances that ought to have been considered they will not after having been affirmed by the Circuit Court and Circuit Court of Appeals, be reversed because the commission did not adopt the presumptions of mixed law and fact put forward by appellants as elements for determining the reasonableness of a rate. *Ib.*

4. *Power of Commission in considering the subject and operation of new classification—Soap rate case.*

The Interstate Commerce Commission, in making an investigation on the complaint of a shipper has, in the public interest, the power disembarrassed by any supposed admissions contained in the statement of the complaint to consider the whole subject and the operation of the new classification complained of in the entire territory; also how far its going into effect would be just and reasonable and would create preferences or engender discriminations and whether it is in conformity with the requirements of the act to regulate commerce. And if it finds that the new classification disturbs the rate relations thereupon existing in the official classification territory and creates preferences and engenders discriminations it may, in order to prevent such result, prohibit the further enforcement of the changed classification, and an order to that effect is within the power conferred by Congress on the Commission; and so held as to an order of the Commission directing carriers from further enforcing throughout official classification territory a changed classification in regard to common soap in less than carload lots. *Cincinnati &c. Ry. Co.* v. *Interstate Com. Comm.*, 142.

See JURISDICTION, B 2, 3.

INTERSTATE LAW.

See STATES, 1.

INTOXICATING LIQUORS.

See COMMERCE, 1.

IRRIGATION.

See JURISDICTION, A 1;
STATES, 2.

JEOPARDY.

See CONSTITUTIONAL LAW, 8–13.

JUDGMENTS AND DECREES.

1. *Cogency of judgment rendered upon demurrer.*

That a judgment was rendered upon demurrer does not affect its cogency if it is otherwise efficacious to bring into play the presumption of the thing adjudged. *Yates* v. *Utica Bank*, 181.

2. *Effect of decree enjoining municipality from regulating water rates.*

A decree must be read in the light of the issues involved in the pleadings and the relief sought, and a decree in a suit brought by a water company against a municipality to enjoin it from regulating rates does not finally dispose of the right of the city to regulate rates under a law passed after the contract went into effect and after the bill was filed. *Vicksburg* v. *Waterworks Co.*, 496.

3. *Res judicata; extent of application.*

Rights between litigants once established by the final judgment of a court of competent jurisdiction must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound thereby. *Kessler* v. *Eldred*, 285.

4. *Res judicata; identity of causes of action.*

A judgment of dismissal based on the ground that plaintiff in an action against the directors of a national bank had not set up any individual wrong suffered by him but solely an injury sustained in common with all other creditors of the bank, is not *res adjudicata* of a right of action between the same parties to recover for individual loss suffered as distinct from the right of the bank. *Yates* v. *Utica Bank*, 181.

See CONSTITUTIONAL LAW, 3, 10; INTERSTATE COMMERCE COMMISSION, 1; COURTS-MARTIAL, 2; JURISDICTION, A 6; B 2.

JUDICIAL POWER.

See JURISDICTION, A.

JURISDICTION.

A. OF THIS COURT.

1. *Controversies between States—Justiciable nature of controversy.*

Kansas having brought in this court an original suit to restrain Colorado and certain corporations organized under its laws from diverting the waters of the Arkansas River for the irrigation of lands in Colorado, thereby, as alleged, preventing the natural and customary flow of the river into Kansas and through its territory, *held*, that the controversy between the parties plaintiff and defendant is one of a justiciable nature. By the Constitution the entire judicial power of the United States is vested in its courts, specifically included therein, being a grant to the Supreme Court of jurisdiction over controversies between two or more States. *Kansas* v. *Colorado*, 46.

2. *To review decision of state court dismissing bill to remove cloud on title.*

Writ of error to review decision of the state court, dismissing bill to remove cloud on title to lands under water, dismissed for want of jurisdiction on the findings of the court below and the authority of the cases cited. *Chapman & Dewey Land Co.* v. *Bigelow*, 41.

3. *To review judgment of state court where an immunity claimed under* § 5239, *Rev. Stat.*

Where in the trial and appellate courts an immunity was claimed under § 5239, Rev. Stat., as to the rule of liability to be applied to directors of a national bank and such immunity was denied, this court has jurisdiction to review the judgment under § 709, Rev. Stat., even if in other respects it might not have jurisdiction. *Yates* v. *Jones National Bank*, 158.

4. *Original—Of suit by State against citizen of another State for the abatement of a nuisance.*

This court has jurisdiction to, and at the suit of a State will, enjoin a corporation, citizen of another State, from discharging over its territory noxious fumes from works in another State where it appears that those fumes cause and threaten damage on a considerable scale to the forests and vegetable life, if not to health, within the plaintiff's State. *Georgia* v. *Tennessee Copper Co.*, 230.

5. *Original; of suit by one State against another for an accounting.*

This court has original jurisdiction of a suit by the State of Virginia against the State of West Virginia for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts to adjudicate and determine the amount, if any, due the former by the latter. *Virginia* v. *West Virginia*, 290.

6. *Original—Suits between States—Effect of question of how judgment will be enforced—Consent of State to be sued.*

Consent to be sued in this court by another State is given by a State, by, and at the time of, its admission to the Union. It will be presumed that the legislature of a State will provide for the satisfaction of any judgment that may be rendered against it, and the jurisdiction and power of this court is not affected by the question of how it will be enforced. If a State should repudiate its obligation to satisfy judgment rendered against it, this court will after the event consider the means by which it may be enforced. *Ib.*

7. *Original—Suits between States—Determination of questions, raised by demurrer, postponed to hearing on the merits.*

The court having jurisdiction of the controversy, the effect of the provisions in the constitution of West Virginia, as well as the several statutes enacted by that State and by Virginia on the liability of West Virginia, for a part of the public debt of Virginia, and the relations of Virginia to the holders of bonds will not be determined on demurrer, but postponed to the merits. *Ib.*

B. Of Circuit Court.

1. *Of bill in equity to restrain filing or enforcement of schedule of unreasonable railroad rates.*

Although an action at law for damages to recover unreasonable railroad rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act (*Texas & Pacific Railway Co.* v. *Abilene Cotton Co.*, 204 U. S. 426), the Circuit Court may entertain jurisdiction of a bill in equity to restrain the filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates. *Southern R. R. Co.* v. *Tift*, 428.

2. *To render decree based upon findings and conclusions of Interstate Commerce Commission.*

Where, as in this case, the Circuit Court granted no relief on the original bill

prejudicial to the railway company, but sent the parties to the Interstate Commerce Commission, and afterwards rendered a decree based upon the findings and conclusions of that commission and testimony adduced before it, which was stipulated into the case, this court will not reverse the decree, as affirmed by the Circuit Court of Appeals, either because the Circuit Court was without jurisdiction, or because an order of reference in the case was too broad in requiring the master to ascertain the amounts paid by shippers in increased rates after the schedules sought to be enjoined went into effect. *Ib.*

3. *To adjudge reparation, on stipulation by parties to action under* § 16 *of Interstate Commerce Act.*

Although reparation for excess rates must be obtained in a proceeding before the Interstate Commerce Commission, the parties to an action brought under § 16 of the Interstate Commerce Act may stipulate after the commission has declared the rate complained of to be excessive that the court adjudge the amount of reparation, and presumably, after the master has reported, the court will make reparation adequate for the injury and award only the advance on the old rate and to those who are parties to the cause. *Ib.*

C. Of Courts-martial.

See Courts-martial, 2.

D. Generally.

See Taxes and Taxation.

JUSTICIABLE CONTROVERSY.

See Jurisdiction, A 1.

LABOR.

See Constitutional Law, 7;
Eight-hour Law.

LAND GRANTS.

See Public Lands.

LAND OFFICE.

See Public Officers, 1.

LEGISLATIVE POWERS.

See Constitutional Law, 7;
Congress, Powers of;
Eight-hour Law.

LIENS.

See Bankruptcy, 1;
Pledge, 3.

LIFE INSURANCE POLICIES.
See BANKRUPTCY, 2.

LIMITATION OF ACTIONS.
See CORPORATIONS, 4.

LIQUORS.
See COMMERCE, 1.

LIS PENDENS.
See PHILIPPINE ISLANDS, 3.

LOCAL LAW.

Arizona. Rev. Stat. § 2282 (see Statutes, A 2). *Copper Queen Mining Co.* v. *Arizona Board*, 474.

Iowa. Act of July 14, 1856 (see Public Lands, 1). *Iowa Railroad Land Co.* v. *Blumer*, 482.

Minnesota. Stockholders' liability law of 1899 (see Corporations; Constitutional Law, 2, 6). *Bernheimer* v. *Converse*, 516.

Mississippi. Municipal contracts (see Constitutional Law, 1). *Vicksburg* v. *Waterworks Co.*, 496.

New York. Waiver by pledgor—Validity of sale of pledge. Under the law of New York a pledgor may waive strict performance of the common-law duties of the pledgee and if so waived a sale may be held without notice, demand or advertisement. *Hiscock* v. *Varick Bank*, 28.
Easements in streets (see Constitutional Law, 5). *Sauer* v. *City of New York*, 536.
Sec. 55 of ch. 588, Laws of 1892, limitation of actions against stockholders (see Corporations, 4). *Bernheimer* v. *Converse*, 516.

Porto Rico. *See* PORTO RICO, 2.

Wisconsin. Law of pledge (see Pledge). *Warehousing Co.* v. *Hand*, 415.

Generally. *See* BANKRUPTCY, 1; FEDERAL QUESTION; PRACTICE AND PROCEDURE, 2; STATES, 2.

MANDAMUS.

Writ will not issue to compel Circuit Court to remand case.
The writ of mandamus cannot be used to perform the office of an appeal or writ of error; it will not issue to compel the Circuit Court to reverse its decision refusing to remand a case removed by a defendant on the ground that the controversy between it and the plaintiff is separate and fully determinable without the presence of the other defendants. Such a decision being within the jurisdiction and discretion of the court should be reviewed after final judgment by appeal or writ of error. *In re Pollitz*, 323.

MISSIONS.

See CONTRACTS, 2.

MORTGAGE NOTES.

See TAXES AND TAXATION.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW, 1;
JUDGMENTS AND DECREES, 2;
STATES, 8.

NATIONAL BANKS.

Liability of directors; rule by which measured.

The National Banking Act as embodied in § 5239, Rev. Stat., affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act; and that liability cannot be measured by a higher standard than that imposed by the act. *Yates* v. *Jones National Bank*, 158.

See JUDGMENTS AND DECREES, 4;
JURISDICTION, A 3.

NAVIGABLE WATERS.

Deviation in construction of bridge over navigable waters, from plans approved by Secretary of War—Power of State to authorize extension of bridge.

The act of January 26, 1901, 31 Stat. 741, having authorized the construction by an Illinois corporation of a bridge and approaches across the Mississippi River, it is within the power of one of the States within which the bridge was constructed to authorize extensions thereof and connections therewith necessary and proper to make it available for the use contemplated by the statute, and although such extensions and connections were not within the plans and specifications of the bridge itself and its approaches as approved by the Secretary of War, the condemnation of land necessary for the bridge company to construct them is not in contravention of § 9 of the act of March 3, 1899, 30 Stat. 1151, making it unlawful to deviate in the construction of any bridge over navigable waters from the plans approved by the Secretary of War. *Stone* v. *Southern Illinois Bridge Co.*, 267.

See CONGRESS, POWERS OF;
FEDERAL QUESTION, 3.

NAVY PERSONNEL ACT.

See ARMY AND NAVY, 1.

NEGLIGENCE.

See PENALTIES AND FORFEITURES, 2.

NEGOTIABLE INSTRUMENTS.
See PLEDGE.

NOTES.
See TAXES AND TAXATION.

NOTICE.
See PORTO RICO, 1;
PUBLIC LANDS, 3.

NUISANCE.
See JURISDICTION, A 4;
STATES, 6, 7.

OBITER DICTA.
See PHILIPPINE ISLANDS, 3.

OFFICIAL CLASSIFICATION TERRITORY.
See INTERSTATE COMMERCE COMMISSION, 4.

OSAGE INDIAN LANDS.
See PUBLIC OFFICERS, 2.

PARTNERSHIP.
See BANKRUPTCY, 2.

PATENTS.

Infringement suits; restraint of—Res judicata.
The defeated party in an infringement suit will be restrained by a court of equity from interfering with the business of the successful defendant by bringing infringement suits based on the same patents against the customers of the latter. *Kessler* v. *Eldred*, 285.

PENALTIES AND FORFEITURES.

1. *Test of liability.*
Where a statute creates a duty and prescribes a penalty for its non-performance the rule prescribed by the statute is the exclusive test of liability. *Yates* v. *Jones National Bank*, 158.

2. *Statutory; proof of intentional violation of statute.*
Where by a statute a responsibility is made to arise from its violation knowingly, proof of something more than negligence is required and that the violation was in effect intentional. *Ib.*

PHILIPPINE ISLANDS.

1. *Delegation of authority by Congress in respect of.*
Congress in dealing with the Philippine Islands may delegate legislative

authority to such agencies as it may select and may ratify the acts of agents as fully as if such acts had been specially authorized by a prior act of Congress. *United States* v. *Heinszen*, 370.

2. *Ratification of imposition and collection of duties; power of Congress as to.*
The act of June 30, 1906, 34 Stat. 636, legalizing and ratifying the imposition and collection of duties by the authorities of the United States in the Philippine Islands prior to March 8, 1902, was within the power of Congress and can be given effect without depriving persons who had paid such duties of their property without due process of law or taking their property for public use without compensation in violation of the Fifth Amendment. *Ib.*

3. *Ratification by Congress; power not affected by pendency of suits involving acts ratified.*
The mere commencement of a suit does not affect the right of Congress to ratify executive acts, and the fact that at the time the ratifying statute was enacted actions were pending for the recovery of sums paid does not cause the statute to be repugnant to the Constitution. References in *De Lima* v. *Bidwell*, 182 U. S. 1, as to want of power to ratify after suit brought, are to be regarded as *obiter dicta*. *Ib.*

See CONSTITUTIONAL LAW, 8, 12, 13.

PLEDGE.

1. *Possession necessary.*
The general law of pledge requires possession and it cannot exist without it, and this is the law in Wisconsin. *Warehousing Co.* v. *Hand*, 415.

2. *Warehouse receipts; negotiability.*
Where there is no delivery or change of possession receipts issued by a warehouse company are not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned therein. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, distinguished. *Ib.*

3. *Priority of lien of pledgee over title of trustee in bankruptcy.*
Although the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and property in his hands unless otherwise provided in the bankrupt act is subject to all the equities impressed upon it in the hands of the bankrupt, on the facts in this case and the law of the State there was no valid pledge of, and no equitable lien on, the merchandise in favor of the holders of warehouse receipts, which take precedence of the title of the trustee. *Ib.*

See BANKRUPTCY, 2;
LOCAL LAW (N. Y.);
STARE DECISIS.

PORTO RICO.

1. *Application of local law requiring cautionary notice of pending suit affecting real property.*
The local statutory law of real property in Porto Rico, requiring the giving

and recording of a cautionary notice of a pending suit in order to affect third parties dealing with the recorded owner, not having been altered, amended or repealed applies to a suit brought on the equity side of the District Court of the United States for Porto Rico, and notwithstanding the provisions of § 34 of the Foraker Act, constructive notice of the pendency of such an action is not, in the absence of the cautionary notice required by the local law, operative against innocent purchasers. *Romeu* v. *Todd*, 358.

2. *Control by Congress of local law.*

All the local law of Porto Rico is within the legislative control of Congress, and under § 8 of the Foraker Act, 31 Stat. 79, the local law remains in force until altered, amended or repealed by Congress or in the manner provided in the act, and cannot be disregarded by the courts. *Ib.*

See COURTS.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF;
PHILIPPINE ISLANDS.

PRACTICE AND PROCEDURE.

1. *Abandonment of writ of error; when presumed.*

If one of the plaintiffs in error does not furnish a cost bond, appear by counsel, or file any brief in this court, he will be presumed to have abandoned the prosecution of the writ and it will be dismissed as to him. *Yates* v. *Jones National Bank*, 158.

2. *Following state court's interpretation of state statute.*

While this court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of a local statute adopted by the local court. *Copper Queen Mining Co.* v. *Arizona Board*, 474.

See INTERSTATE COMMERCE COMMISSION, 2;
JURISDICTION, A 6, 7.

PRESCRIPTION.

See PUBLIC LANDS, 2.

PRESUMPTIONS.

Definition of.

A presumption is the expression of a process of reasoning and of inferring one fact from another, and most if not all the rules of indirect evidence may be expressed as such, but the fact on which the inference is based must first be established before the law can draw its inference. *Illinois Central R. R. Co.* v. *Interstate Com. Comm.*, 441.

See CONTRACTS, 1;
INTERSTATE COMMERCE COMMISSION, 3;
JURISDICTION, A 6;
PRACTICE AND PROCEDURE, 1;
STATUTES, A 1.

PRIORITIES.
See PLEDGE.

PRIVILEGES AND IMMUNITIES.
See JURISDICTION, A 3.

PROPERTY RIGHTS.
See RAILROADS, 4.

PUBLIC LANDS.

1. *Grant to Dubuque & Pacific R. R. Co.; when right of company attached.*
Under the act of Congress of May 15, 1856, 11 Stat. 9, and the act of the legislature of Iowa of July 14, 1856, the grant to the Dubuque & Pacific Railroad Co. was *in præsenti* and the title passed from the United States and vested in the State of Iowa when the map of definite location was lodged in the General Land Office, and the right of the company then attached. (*Iowa Falls Land Co.* v. *Griffey*, 143 U. S. 32.) *Iowa Railroad Land Co.* v. *Blumer*, 482.

2. *Title of railroad under land grant; right to maintain ejectment where final certificate and patent wanting.*
Where a grant is *in præsenti* and nothing remains to be done for the administration of the grant in the Land Office, and the conditions have been complied with and the grant fully earned, the company has such a title, notwithstanding the want of final certificate and the issue of the patent, as will enable it to maintain ejectment against one wrongfully on the lands, and prescription will run in favor of one in adverse possession under color of title. (*Deseret Salt Co.* v. *Tarpey*, 142 U. S. 421; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532.) *Ib.*

3. *Rights of entryman on lands within place limits of railway grant.*
Although one who in good faith enters and occupies lands within the place limits of a railway grant *in præsenti* may not obtain any adverse title against the government, if, as in this case, his possession is open, notorious, continuous and adverse, it may, if the railway company fails to assert its rights, ripen into full title as against the latter, notwithstanding the entry in the Land Office was cancelled without notice as having been improperly made and allowed. *Ib.*

4. *Sale; effect as relinquishment of right to enter as homestead.*
Petition for rehearing in *Love* v. *Flahive*, 205 U. S. 195, denied. A sale made by a party who is in possession of a tract of public land with an intent thereafter to enter it as a homestead is equivalent to a relinquishment of the right to enter, and the Department may properly treat the party making the sale as having no further claims upon the land. He may not sell and still have the rights of one who has not sold; nor does he by merely continuing in possession create a new right of entry against the party in whose favor he relinquished his right. *Love* v. *Flahive*, 356.

5. *Power of States over land grants and appropriations for agricultural colleges.*
The land grants made for establishment of agricultural colleges by the act of July 2, 1862, 12 Stat. 503, as amended by the act of March 3, 1883, 22 Stat. 484, and the permanent appropriations for the support of such institutions under the act of August 30, 1890, 26 Stat. 415, were made to the States themselves, and not to any of the institutions established by the States, *Haire* v. *Rice*, 204 U. S. 291, and the disposition of the interest on the land grant fund and the appropriation is wholly within the power of each State acting through its legislature in accordance with the trust imposed upon it by the act of Congress, and an institution, although established by the State for agricultural education, cannot compel the payment of any part thereof to it. *Wyoming Agricultural College* v. *Irvine*, 278.

See PUBLIC OFFICERS, 1.

PUBLIC OFFICERS.

1. *Register of United States Land Office; compensation to which entitled.*
Under the Osage Indian treaty of September 29, 1865, and §§ 2237-2241, Rev. Stat., a register of the United States Land Office is not entitled to any additional compensation beyond the maximum of $2,500 per annum for services in connection with sales of land provided for by treaty. *Stewart* v. *United States*, 185.

2. *Registers and receivers of Land Office—Compensation—Effect of act of March*, 1903, § 13.
Section 13 of the Act of Congress of March, 1903, 32 Stat. 1903, permitting registers and receivers to bring suit in the Court of Claims for commissions and compensation for sales of Osage Indian lands simply provided for presentation of the claims and for a decision on the merits without any admission that any sum was due or assumption that the claims were meritorious. *Ib.*

See ARMY AND NAVY.

PUBLIC WORKS.

See EIGHT-HOUR LAW.

RAILROADS.

1. *Determination of reasonableness of railroad rate.*
In determining the reasonableness of a railroad rate, expenditures for additions to construction and equipment to handle the traffic should be distributed over the period of the duration of those additions and not charged entirely against the revenue of the year in which they are made. (*Union Pacific Railway Co.* v. *United States*, 99 U. S. 402, distinguished.) *Illinois Central R. R. Co.* v. *Interstate Com. Comm.*, 441.

2. *Power of state railroad commission to compel company to make connections with other roads.*
It is within the power of a state railroad commission to compel a railroad company to make reasonable connections with other roads so as to

promote the convenience of the traveling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company. *Atlantic Coast Line* v. *North Carolina Corp. Comm.*, 1.

3. *State regulation as to schedule; constitutionality of.*
An order of a state railroad commission requiring a railroad company to so arrange its schedule as to furnish transportation between two points so as to make connections with through trains, *held*, under the circumstances of this case, not to be so arbitrary or unreasonable as to transcend the limits of regulation and to be in effect either a denial of due process of law or a deprivation of the equal protection of the laws, or a taking of property without compensation. *Ib.*

4. *Validity of state regulation under Fourteenth Amendment.*
The public power to regulate railroads and the private right of ownership of such property coexist and do not the one destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. *Ib.*

5. *State regulation as to state business.*
Railroad companies from the public nature of the business by them carried on, and the interest which the public have in their operation are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. *Ib.*

6. *Power of State to compel performance of duty entailing pecuniary loss.*
While the enforcement by a State of a general scheme of maximum rates so unreasonably low as to be unjust and unreasonable may be confiscation and amount to taking property without due process of law, the State has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss. (*Smyth* v. *Ames*, 169 U. S. 526, distinguished.) *Ib.*

See CONSTITUTIONAL LAW, 5; INTERSTATE COMMERCE COMMISSION;
FEDERAL QUESTION, 1; JURISDICTION, B;
PUBLIC LANDS, 2.

RAILROAD COMMISSIONS.
See FEDERAL QUESTION, 1;
RAILROADS, 2, 3, 5.

RAILROAD LAND GRANTS.
See PUBLIC LANDS, 1, 3.

RAILROAD RATES.
See JURISDICTION, B.

RATES.
See CONSTITUTIONAL LAW, 1; INTERSTATE COMMERCE COMMISSION; JUDGMENTS AND DECREES, 2; JURISDICTION, B; RAILROADS, 1, 6; STATES, 8.

RATIFICATION.
See PHILIPPINE ISLANDS.

REAL PROPERTY.
See INDIANS, 1; PORTO RICO, 1.

RECEIVERS.
See CONSTITUTIONAL LAW, 2, 6; CORPORATIONS, 3, 4.

RECLAMATION OF LANDS.
See CONGRESS, POWERS OF; JURISDICTION, A 1; STATES, 3.

REGISTERS OF LAND OFFICE.
See PUBLIC OFFICERS, 1.

REHEARING.
Petition for rehearing in *Love* v. *Flahive*, 205 U. S. 195, denied, 356.

RELEASE.
See CONTRACTS, 1.

REMEDIES.
See BANKRUPTCY, 1.

REPARATION.
See JURISDICTION, B 3.

RES JUDICATA.
See JUDGMENTS AND DECREES, 3, 4; PATENTS.

RIPARIAN RIGHTS.
See JURISDICTION, A 2; STATES, 2, 3, 4.

RIVERS.

See STATES, 2, 3.

SALES.

See LOCAL LAW (N. Y.);
PUBLIC LANDS, 4.

SCHEDULES.

See RAILROADS, 3.

SCOWS.

See EIGHT-HOUR LAW, 3.

SECOND JEOPARDY.

See CONSTITUTIONAL LAW, 8-13.

SITUS FOR TAXATION.

See TAXES AND TAXATION.

SOAP RATE CASE.

See INTERSTATE COMMERCE COMMISSION, 4.

SOVEREIGNTY.

Effect of making contract, on sovereignty of Government.

Although, in the absence of special laws, the Government, purely as a contractor, may stand like a private person, it does not, by making a contract, waive its sovereignty or give up its power to make laws which render criminal a breach of the contract. *Ellis* v. *United States*, 246.

See CONGRESS, POWERS OF;
STATES, 1, 6, 7.

STARE DECISIS.

Decisions of state court on local question.

The extent and validity of a pledge are local questions and the decisions of the state court are binding on this court. *Hiscock* v. *Varick Bank*, 28.

STATES.

1. *Relation between States—Interstate law.*

In a qualified sense and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law. This court in appropriate cases enforces the principles of that law, and in addition by its decisions of controversies between two or more States is constructing what may not improperly be called a body of interstate law. *Kansas* v. *Colorado*, 46.

2. *Riparian rights—Enforcement against State of its own local rule.*
In a suit brought by a State which recognizes the right of riparian proprietors to the use of flowing waters for purposes of irrigation, subject to the condition of an equitable apportionment, against a State which affirms a public right in flowing waters, it is not unreasonable to enforce against the plaintiff its own local rule. *Ib.*

3. *Riparian rights—Diversion of waters flowing through two States—Effect of diversion.*
While from the testimony it is apparent that the diversion of the waters of the Arkansas River by Colorado for purposes of irrigation does diminish the volume of water flowing into Kansas, yet it does not destroy the entire flow. The benefit to Colorado in the reclamation of arid lands has been great, and ought not lightly to be destroyed. *Ib.*

4. *Riparian rights—Reasonableness of apportionment of waters between States.*
The detriment to Kansas by the diminution of the flow of the water, while substantial, is not so great as to make the appropriation of the part of the water by Colorado an inequitable apportionment between the two States. *Ib.*

5. *Right of State to relief from diminution of interstate waters by another State.*
While a right to present relief is not proved and this suit is dismissed, it is dismissed without prejudice to the right of Kansas to initiate new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas River by the defendants, the substantial interest of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States. *Ib.*

6. *Right to maintain suit in the Federal Supreme Court to abate a nuisance originating in another State.*
When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They retained the right to make reasonable demands on the grounds of their still remaining quasi-sovereign interests, and the alternative to force a suit in this court. *Georgia* v. *Tennessee Copper Co.*, 230.

7. *Quasi-sovereign capacity; maintenance of suit in, to enjoin corporation of another State from perpetrating a nuisance.*
A suit brought by a State to enjoin a corporation having its works in another State from discharging noxious gases over its territory is not the same as one between private parties, and although the elements which would form the basis of relief between private parties are wanting, the State can maintain the suit for injury in a capacity as quasi-sovereign, in which capacity it has an interest independent of and behind its citizens in all the earth and air within its domain; and whether insisting upon bringing such a suit results in more harm than good to its citizens, many of whom may profit through the maintenance of the works causing the nuisance, is for the State itself to determine. *Ib.*

8. *Exclusion of right to regulate water rates.*

A State may, in matters of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves, from the right of regulation of such matters as water rates. *Vicksburg* v. *Waterworks Co.*, 496.

See COMMERCE, 1;
CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 12;
CORPORATIONS, 2;
JURISDICTION, A 1, 4, 5, 6;
LOCAL LAW;
NAVIGABLE WATERS;
PUBLIC LANDS, 5;
RAILROADS, 5, 6;
TAXES AND TAXATION.

STATUTE OF LIMITATIONS.

See CORPORATIONS, 4.

STATUTES.

A. CONSTRUCTION OF.

1. *Presumption of legislative intent as to construction of statute enacted in same words as another.*

The reënactment of a statute in the same words carries with it the presumption that the legislature is satisfied with the construction which it has notoriously received from those whose duty it has been to carry it out; and this presumption is as strong as one that the enactors of the original statute which was adopted verbatim from one of another State knew a single decision of the courts of that State giving a different construction to the statute. *Copper Queen Mining Co.* v. *Arizona Board*, 474.

2. *Construction by Supreme Court of Arizona of* § 2282, *Rev. Stat. of that State, followed.*

The construction by the Supreme Court of Arizona of § 2282, Rev. Stat., of that State sustained by this court as to the power of the Territorial Board of Equalization to increase the total valuation of the property in the Territory above the sum of the returns from the Board of Supervisors of the several counties, and to change the valuations of particular classes of property within the several counties. *Ib.*

See ARMY AND NAVY, 1;
CUSTOMS DUTIES, 3;
FEDERAL QUESTION, 5;
PENALTIES AND FORFEITURES, 1, 2;
PRACTICE AND PROCEDURE, 2.

B. OF THE STATES UNITED.

See ACTS OF CONGRESS.

C. OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STOCKHOLDERS.

See CONSTITUTIONAL LAW, 2, 6;
CORPORATIONS, 1, 2.

STREETS AND SIDEWALKS.

See CONSTITUTIONAL LAW, 3, 5.

TARIFF.

See CUSTOMS DUTIES;
PHILIPPINE ISLANDS.

TAXES AND TAXATION.

1. *Effect of attempt of owner to escape taxation in one State on right of another to tax note therein.*

An attempt to escape proper taxation in one State on the debt represented by a note does not confer jurisdiction on another State, not the residence or domicil of the owner, to tax the note on account of its mere presence therein. *Buck* v. *Beach*, 392.

2. *Of mortgage notes; effect of presence in State.*

Mortgage notes made and payable in Ohio and secured by mortgages on property in that State, the owner whereof resides in New York, are not taxable in Indiana because they are therein for safe keeping. *Ib.*

3. *Unconstitutionality of taxation of notes by State not the residence or domicil of owner.*

The old rule of *mobilia sequuntur personam* has been modified so that the owner of personal property may be taxed on its account at its *situs* although not his residence, or domicil; but the mere presence of notes within a State which is not the residence or domicil of the owner does not bring the debts of which they are the written evidence within the taxing jurisdiction of that State, and a tax thereon by that State is illegal and void under the due process clause of the Fourteenth Amendment. *Ib.*

See STATUTES, A 2.

TENTH AMENDMENT.

See CONGRESS, POWERS OF.

TERRITORIES.

See CONGRESS, POWERS OF.

TIMBER CUTTING.

See INDIANS, 2.

TITLE.

See INDIANS, 1, 2; PLEDGE, 3;
JURISDICTION, A 2; PUBLIC LANDS, 1, 2, 3.

TRANSFERS.

See PLEDGE, 2.

TRUSTS AND TRUSTEES.
See INDIANS, 1.

TREATIES.
See INDIANS, 2;
PHILIPPINE ISLANDS;
PUBLIC OFFICERS, 1.

TRUSTEE IN BANKRUPTCY.
See PLEDGE, 3.

UNITED STATES.
See INDIANS, 1;
PUBLIC LANDS, 3.

VESSELS.
See CONTRACTS, 1.

WAIVER.
See LOCAL LAW (N. Y.)

WAREHOUSE RECEIPTS.
See PLEDGE, 2, 3.

WATERS.
See CONGRESS, POWERS OF; NAVIGABLE WATERS;
JURISDICTION, A 1; STATES, 2.

WATER RATES.
See CONSTITUTIONAL LAW, 1;
JUDGMENTS AND DECREES;
STATES, 8.

WOOL.
See CUSTOMS DUTIES, 2.

WORDS AND PHRASES.
"By reason of" held equivalent to "by virtue of." *United States* v. *Cramp & Sons Co.*, 118.
"Wool" in par. 360 of act of July 24, 1897 (see Customs Duties, 2). *Goat & Sheepskin Co.* v. *United States*, 194.

