UNITED STATES REPORTS

VOLUME 210

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1907

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1908

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.

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.

SUPREME COURT OF THE UNITED STATES.

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

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

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

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1907.

EMPIRE STATE CATTLE COMPANY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

MINNESOTA AND DAKOTA CATTLE COMPANY *v.* SAME.

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

Nos. 178, 179. Argued March 13, 16, 1908.—Decided May 4, 1908.

The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom. *Beuttell* v. *Magone*, 157 U. S. 154, distinguished.

Although a peremptory instruction of the trial court cannot be sustained on the ground that both parties having asked a peremptory instruction the case was taken from the jury notwithstanding special instructions had been asked by the defeated party, the verdict will be sustained if the evidence was of such a conclusive character that it would have been the duty of the court to set aside the verdict had it been for the other party.

The Kansas City flood of 1903 was so unexpected and of such an unprecedented character that a railroad company was not, under the circumstances of this case, chargeable with negligence in sending cattle trains *via* Kansas City or for failing to move the cattle from the stock yards before the climax of the flood.

The duty that may rest on a carrier under normal conditions to transport merchandise by a particular, and the most advantageous, route is re-

strained and limited by the right of the carrier, in case of necessity, to resort to such other reasonable direct route as may be available under the existing conditions to carry the freight to its destination, and if such necessity exists, in the absence of negligence in selecting the changed route, the carrier is not responsible for damages resulting from the change even if such change may be, in law, a concurring and proximate cause of such damages.

147 Fed. Rep. 457.

THE facts are stated in the opinion.

Mr. James S. Botsford, with whom *Mr. Buckner F. Deatherage*, *Mr. Odus G. Young* and *Mr. R. E. Ball* were on the brief, for petitioners:

The court should have submitted the question of negligence to the jury, it being the settled law of the Federal appellate courts that it is the province of the jury to determine that question. *Railroad Co.* v. *Stout*, 17 Wall. 657; *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S. 262, 275; *Marande* v. *R. R. Co.*, 184 U. S. 173.

The question of proximate cause was also a question for the jury, and should have been submitted to them. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469; *Webb* v. *Rome, Watertown & Ogdensburg R. R. Co.*, 49 N. Y. 420; *Pennsylvania R. R. Co.* v. *Hope*, 80 Pa. St. 373; *Kellogg* v. *The Chicago & Northwestern R. R. Co.*, 26 Wisconsin, 224; *Perley* v. *The Eastern R. R. Co.*, 98 Massachusetts, 414; *Higgins* v. *Dewey*, 107 Massachusetts, 404; *Tent* v. *The Toledo, Peoria & Warsaw R. R. Co.*, 49 Illinois, 349.

Contributory negligence of the carrier renders it liable, notwithstanding the act of God relied on by it as the cause. *Sweezey* v. *Philadelphia*, 64 Pa. St. 106; *Helbling* v. *Cemetery Co.*, 201 Pa. St. 171; *Morrison* v. *Davis*, 20 Pa. St. 176; *Williams* v. *Grant*, 1 Connecticut, 487; *Wallace* v. *Clayton*, 42 Georgia, 443; *Railroad Co.* v. *White*, 88 Georgia, 805; *Merritt* v. *Earle*, 29 N. Y. 115, 116*f*; *Michaels* v. *Railroad Co.*, 30 N. Y. 564, 570; *Bibb Broom Corn Co.* v. *A., T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn.) 709; *Railroad Co.* v. *Curtiss*, 80 Illinois, 324; *Wald* v.

Railroad Co., 162 Illinois, 545; *Blodgett* v. *Abbott*, 72 Wisconsin, 516; *Nelson* v. *Railway Co.*, 72 Pac. Rep. (Mont.) 643, 651; *Steamboat Co.* v. *Tiers*, 24 N. J. L. 697; *Railroad Co.* v. *David*, 6 Heisk, 261; *McGraw* v. *Railroad Co.*, 18 W. Va. 361; *Smith* v. *Railway Co.*, 91 Alabama, 455; *Coosa Steamboat Co.* v. *Barclay*, 30 Alabama, 12, 127; *Nugent* v. *Smith*, 1 C. P. Div. 19, 423; 1 Am. & Eng. Enc. of Law (2d ed.), 595; 5 Am. & Eng. Enc. of Law (2d ed.), 234; Hutchinson on Carriers, §§ 181, 187, 188; 6 Enc. of L. & P., 377–384; *Strouss* v. *Railway Co.*, 17 Fed. Rep. 209, 212; *Caldwell* v. *Southern Exp. Co.*, 4 Fed. Cas. 1036, No. 2,303; *Thompkins* v. *Duchess of Ulster*, 24 Fed. Cas. 32, No. 14,087*a*; *Southern Pac. Co.* v. *Schoer*, 52 C. C. A. 269, 274; *Newport News Co.* v. *United States*, 9 C. C. A. 579; *Clark* v. *Barnwell*, 12 How. 272, 280; *Holladay* v. *Kennard*, 12 Wall. 254; *Gleason* v. *Railroad Co.*, 140 U. S. 433; *The Majestic*, 166 U. S. 376, 386; *Gratiot W. H. Co.* v. *Railway Co.*, 102 S. W. Rep. 11.

By the deviation of the cattle from Strong City they were taken from a safe place into what was then known to be a hazardous place. If the deviation from Strong City to Kansas City was made without the consent of the shippers, then, according to all the authorities, it was wrongful, and the company is liable on that ground alone. *Crosby* v. *Fitch*, 12 Connecticut, 410, 420, 423; *Railroad Co.* v. *Beck*, 125 Pa. St. 620; *Phillips* v. *Bingham*, 26 Georgia, 617; *Railroad Co.* v. *Cole*, 68 Georgia, 623; *Cassilay* v. *Young*, 4 B. Mon. 265; *Sager* v. *Railroad Co.*, 31 Maine, 228, 238; *Railroad Co.* v. *Washburn*, 22 Ohio St. 324; *Express Co.* v. *Smith*, 33 O. St. 511; *Brown Co.* v. *Railroad Co.*, 63 Minnesota, 546; *Hendricks* v. *Steamship Co.*, 18 La. Ann. 353; *Hastings* v. *Pepper*, 11 Pick. 41; *Proctor* v. *Railroad Co.*, 105 Massachusetts, 512; *Railway Co.* v. *Allison*, 59 Texas, 193; *Johnson* v. *Railway Co.*, 33 N. Y. 610; *Goodrich* v. *Thompson*, 44 N. Y. 324; *Maghee* v. *Railroad Co.*, 45 N. Y. 514; *Keeney* v. *Railway Co.*, 47 N. Y. 525; *Robertson* v. *Nat. S. S. Co.*, 14 N. Y. Supp. 313; *Seavey Co.* v. *Union Trans. Co.*, 106 Wisconsin, 394; *Railway Co.* v. *Brichetto*, 72 Mississippi, 891; *Railroad Co.*

v. *Odil*, 96 Tennessee, 61; *Mer. Dis. Tr. Co.* v. *Kahn*, 76 Illinois, 520; 1 Am. & Eng. Enc. of Law (2d ed.), 594; 5 Am. & Eng. Enc. of Law (2d ed.), 422, 426; Hutchinson on Carriers, §§ 190, 191; Lawson on Bailments, § 127; 6 Cyc. of Law & Pro. 383; *Marsh* v. *Union Pac. R. R. Co.*, 9 Fed. Rep. 873; *Insurance Co.* v. *LeRoy*, 7 Cranch, 26; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Constable* v. *Steamship Co.*, 154 U. S. 51, 61; *Texas & P. Ry. Co.* v. *Eastin* (Texas), 102 S. W. Rep. 105.

Mr. Gardiner Lathrop and *Mr. Robert Dunlap*, with whom *Mr. William R. Smith* and *Mr. C. Angevine* were on the brief, for respondent:

As each party asked for a peremptory instruction in its favor and argued and submitted such instructions together to the court, and the court determined the same, it must be assumed that they both submitted the case to the court to find the facts upon the assumption that under the evidence there was only involved a question of law as to liability or nonliability. *Beuttell* v. *Magone*, 157 U. S. 154; *Bankers' Mutual Casualty Co.* v. *State Bank of Goffs*, 150 Fed. Rep. 78; *City of Defiance* v. *McGonigale*, 150 Fed. Rep. 689; *Johnson's Admr.* v. *C. & O. Ry. Co.*, 21 S. E. Rep. 238; *S. C.*, 91 Virginia, 171; *Insurance Co.* v. *Wisconsin Central Ry.*, 134 Fed. Rep. 794, 798; *Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep. 459; *Nashville, C. & St. L. Ry. Co.* v. *Sansom*, 84 S. W. Rep. 615, 616; *S. C.*, 113 Tennessee, 683.

Nevertheless, as the evidence was of such a conclusive character in favor of the defendant that the trial court would have been obliged to set aside a verdict in favor of plaintiffs, it therefore properly directed a verdict for the defendant. This is true not only in respect to any question of alleged negligence, but also in respect to the question whether such alleged negligence was the proximate cause of the damage and also whether there was any wrongful deviation from instructions, if any, of the shipper, or from any alleged agreement of defendant. *West* v. *Camden*, 135 U. S. 508; *Southern Pacific Co.* v. *Pool*, 160

U. S. 440; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep. 400; *Christenson* v. *Metropolitan Street Ry. Co.*, 137 Fed. Rep. 708; *Bowditch* v. *Boston*, 101 U. S. 18; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658.

The overflowing of the Kansas City stock yards by this flood being sudden, extraordinary and unprecedented, defendant cannot be held liable for damages caused in consequence thereof as it could not be expected to anticipate the unusual character of the same. The antecedent delay at Strong City and Wellington, as well as the taking of the cattle to and depositing the same in the Union stock yards for the connecting carrier was not culpable negligence, as it could not be anticipated at the time that the disaster complained of was likely to result from any of the preceding acts of the defendant. Such a disaster was not then probable. *Lightfoot* v. *St. Louis & San Francisco Ry. Co.*, 104 S. W. Rep. 483; *Insurance Co.* v. *Boon*, 95 U. S. 130, 131; *Daniel* v. *Directors &c. of Metropolitan Ry. Co.*, L. R., 5 Eng. & Ir. App. (House of Lords) 45; *Milwaukee &c. Ry. Co.* v. *Kellogg*, 94 U. S. 475; *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 152 Fed. Rep. 120; *Cole* v. *German Savings &c. Society*, 124 Fed. Rep. 113; *Stetanowski* v. *Chain Belt Co.*, 109 N. W. Rep. 532; *Mo. Pac. Ry.* v. *Columbia*, 65 Kansas, 390; *S. C.*, 69 Pac. Rep. 338; *Morrison* v. *Davis*, 20 Pa. St. 175; *Railroad Company* v. *Reeves*, 10 Wallace, 176; *C., St. P. M. & O. Ry.* v. *Elliott*, 55 Fed. Rep. 949–952; *Scheffer* v. *Railroad Company*, 105 U. S. 249; *Glassey* v. *Worcester Con. St. Ry. Co.*, 185 Massachusetts, 315; *S. C.*, 70 N. E. Rep. 199; *Stone* v. *B. & A. R. R. Co.*, 171 Massachusetts, 536; *S. C.*, 51 N. E. Rep. 1; Vol. 7, Rose's Notes to U. S. Rep., Reeves Case, pp. 297, 298; Hutchinson on Carriers, 2d ed. by Meachem, §§ 193–195; 5 Am. & Eng. Enc. of Law (2d ed.), 259, 260.

As during the transit over defendant's lines a necessity arose which showed that the cattle could not be delivered by it to the Burlington road at Atchison, as it had intended to do, without further delays likely to injure the shipment, it was in any aspect of the case justified in arranging for delivery to

the Missouri Pacific at Kansas City and in transporting the cattle to the Union stock yards at that place. In doing so there would have been no wrongful deviation even if the contract had expressly provided for carriage over its own line to Atchison. It was simply acting in accordance with a well-established custom. *Hostetter* v. *Park*, 137 U. S. 31, 40; *M., K. & T. R. R. Co.* v. *Olive*, 23 S. W. Rep. 526; 1 Am. & Eng. Enc. of Law (2d ed.), 1063; Ray's Negligence of Imposed Duties, 317; *International &c. Ry. Co.* v. *Wentworth*, 27 S. W. Rep. 680; *Propeller Niagara* v. *Cordes*, 21 How. 7; *Reade* v. *Comm. Ins. Co.*, 3 Johns. 352; *Foster* v. *Great Western Ry. Co.*, L. R. (1904), 2 K. B. Div. 306.

MR. JUSTICE WHITE delivered the opinion of the court.

With the object of saving them from destruction by the flood which engulfed portions of Kansas City on May 31 and the first week of June, 1903, more than three thousand head of cattle belonging to the petitioners, which were in the Kansas City stock yards, were driven and crowded upon certain overhead viaducts in those yards. For about seven days, until the subsidence of the flood, they were there detained and could not be properly fed and watered. Many of them died and the remainder were greatly lessened in value. These actions were brought by the petitioners to recover for the loss so sustained upon the ground that the cattle were in the control of the defendant railway company as a common carrier, and that the loss sustained was occasioned by its negligence.

The railway company defended in each case upon the ground that before the loss happened it had delivered the cattle to a connecting carrier, but that if the cattle were in its custody it was without fault, and the damage was solely the result of an act of God, that is, the flood above referred to.

As the cases depended upon substantially similar facts and involved identical questions of law, they were tried together, and at the close of the evidence the trial court denied a peremp-

tory instruction asked on behalf of the plaintiffs, and gave one asked on behalf of the railway company. 135 Fed. Rep. 135.

While there was some contention in the argument as to what took place concerning the requests for peremptory instructions, we think the bill of exceptions establishes that at the close of the evidence the plaintiffs requested a peremptory instruction in their favor, and on its being refused duly excepted and asked a number of special instructions, which were each in turn refused, and exceptions were separately reserved, and the court then granted a request for a peremptory instruction in favor of the railway company, to which the plaintiffs excepted.

On the writs of error which were prosecuted from the Circuit Court of Appeals for the Eighth Circuit that court affirmed the judgment on the ground that as both parties had asked a peremptory instruction the facts were thereby submitted to the trial judge, and hence the only inquiry open was whether any evidence had been introduced which tended to support the inferences of fact drawn by the trial judge from the evidence. One of the members of the Circuit Court of Appeals (Circuit Judge Sandborn) did not concur in the opinion of the court, because he deemed that as the request for peremptory instruction made on behalf of plaintiffs was followed by special requests seeking to have the jury determine the facts, the asking for a peremptory instruction did not amount to a submission of the facts to the court so as to exclude the right to have the case go to the jury in accordance with the subsequent special requests. He, nevertheless, concurred in the judgment of affirmance, because, after examining the entire case, he was of opinion that prejudicial error had not been committed, as the evidence was insufficient to have justified the submission of the issues to the jury. 147 Fed. Rep. 457.

The cases are here because of the allowance of writs of certiorari. They present similar questions of fact and law, were argued together and are, therefore, embraced in one opinion. The scope of the inquiry before us needs, at the outset, to be accurately fixed. To do so requires us to consider the question

which gave rise to a division of opinion in the Circuit Court of Appeals. If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence then, as said in *Beuttell* v. *Magone*, 157 U. S. 154, "the facts having been thus submitted to the court, we are limited in reviewing its action, to a consideration of the correctness of the finding on the law and must affirm if there be any evidence in support thereof." If, on the other hand, it be that, although the plaintiffs had requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope, that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in *Beuttell* v. *Magone*, *supra*, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell* v. *Magone*, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in *Beuttell* v. *Magone* has been pointed out in several recent decisions of Circuit Courts of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, in *Minahan* v. *Grand Trunk Ry. Co.*, 138 Fed. Rep. 37, 41, and was also lucidly stated in the concurring opinion of

Shelby, Circuit Judge, in *McCormack* v. *National City Bank of Waco*, 142 Fed. Rep. 132, where, referring to *Beuttell* v. *Magone*, he said (p. 133):

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in *Beuttell* v. *Magone, supra*, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

"In New York there are many cases showing conformity to the practice announced in *Beuttell* v. *Magone*, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. *Kirtz* v. *Peck*, 113 N. Y. 226; *S. C.*, 21 N. E. 130; *Sutter* v. *Vanderveer*, 122 N. Y. 652; *S. C.*, 25 N. E. 907.

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. *Minahan* v. *G. T. W. Ry. Co.* (C. C. A.), 138 Fed. Rep. 37."

From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiffs. The

correctness, therefore, of the action of the court in giving the peremptory instruction depends, not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. *McGuire* v. *Blount*, 199 U. S. 142, 148, and cases cited; *Marande* v. *Texas & P. R. Co.*, 184 U. S. 191, and cases cited; *Southern Pacific Co.* v. *Pool*, 160 U. S. 440, and cases cited.

To dispose of this question requires us to consider somewhat in detail the origin of the controversy, the contracts of shipment from which the controversy arose and the proof which is embodied in the bill of exceptions relied on to justify the inference of liability on the part of the railway company.

The action brought by the Minnesota and Dakota Cattle Company concerned 1,635 head of cattle, shipped from Kenna, in the Territory of New Mexico, and 659 head, shipped from Bovina, Texas, both in the latter part of May, 1903, to Evarts, South Dakota, over the line of the Pecos Valley and Northeastern Railway Company, to be transported by that company "and connecting carriers." The other action concerned 798 head of cattle, shipped about the same time, at Hereford, Texas, by the Pecos and Northern Texas Railway Company, "and connecting carriers," to the same place in South Dakota.

There were written contracts of shipment, which it was declared embodied the entire agreement of the parties, and which contained stipulations restricting the liability of each carrier to his own line. In none of the contracts was there a specification as to the several lines of railroad over which the cattle should be transported. The station agent of the initial carrier, however, delivered way bills to the train conductors, routing the

cattle by the Atchison, Topeka and Santa Fé Railway to Atchison, thence by the Burlington Railroad from Atchison to Council Bluffs, and thence by the Milwaukee road from Council Bluffs to destination in South Dakota. Such station agent also made a memorandum on the back of some of the contracts, "Hereford to Atchison;" on others the endorsement was "Kenna, N. M., to Evarts, S. D.;" on others the endorsement was "Kenna, N. M., to Atchison, Kan.;" on others the endorsement was "Bovina, Tex., to Atchison, Kan." It was stipulated that the stock was not to be transported in any specified time nor delivered at destination at any particular date, nor in season for any particular market. The shipper also expressly assumed the risk of and released the company from any loss which might be sustained by reason of any delay in the transportation of the stock or injury thereto caused by damage to tracks or yards from storms and washouts. There was also an express agreement on the part of the shipper to care for the stock at feeding points. The company on its part agreed as follows:

"The company agrees to stop cars at any of its stations for watering and feeding, where it has facilities for so doing, whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than twenty-eight consecutive hours without unloading the same for rest, feeding and water for a period of at least five consecutive hours, provided he is not prevented from doing so by storm or other accidental causes."

The Pecos Valley and Northeastern Railway was the more southerly of the initial carriers. It connected at its northern terminus with the Pecos and Northern Texas road, and this latter road connected with the Atchison, Topeka and Santa Fé. This latter road, from its point of connection with the Pecos and Northern Texas Railway Company (at Amarillo or Higgins, Texas), extends in a generally northeasterly direction through Oklahoma and Kansas. The main line extends by way of Topeka to Kansas City, but at Emporia, south of To-

peka, there is a branch line or cut-off extending towards Kansas City, and which joins the main line running from Topeka to Kansas City at a place called Holliday, thirteen miles west of Kansas City. From Topeka, where the main line veers eastwardly to Kansas City, there is a branch line running to Atchison, which is about fifty miles north or northwest of Kansas City, on the Missouri River. At Kansas City both the Burlington and the Missouri Pacific systems connect with the Atchison, the two roads named operating lines which run in a northwesterly direction, on opposite banks of the Missouri River, to Council Bluffs and Omaha, respectively, and the two roads in question also connect at Atchison with the Achison road, which reaches that point by the branch from Topeka. The Missouri Pacific and Burlington systems connect, respectively, at Omaha and Council Bluffs with the Chicago, Milwaukee and St. Paul Railway, and the latter road extends to Evarts, South Dakota.

The Atchison company had feeding yards at Wellington and Strong City, these places being on the line of its road and situated to the south of Emporia. The road also had feeding yards at Emporia. There was no yard for such purposes, however, between Emporia and Atchison, or at Atchison itself, nor did the Burlington road have feeding yards at Atchison. The proof also was that to unload and reload an ordinary trainload of cattle required from four to five hours. There were in 1903, when the shipments in question were made, as there are at the present time, large public stock yards at Kansas City, where stock in transit could be unloaded for feeding and rest, and to enable it to be transferred from one road to another.

The cattle in controversy were conveyed from the starting points in four trains, and the order in which they arrived at feeding stations was as follows: Empire Company train (21 cars), arrived at Strong City (north of and run of five hours from Wellington) on Wednesday, May 27, 1903, 12:10 A. M.; First Minnesota Company train (20 cars), arrived at Wellington on Tuesday, May 26, 1903, between 10 and 11 P. M.; Second Minnesota Company train (19 cars), arrived at Wellington on Wed-

nesday, May 27, 1903, 5:30 P. M.; Third Minnesota Company train (20 cars), arrived at Wellington on Wednesday, May 27, 1903, between 6 and 7 P. M.

About six or seven hours before the arrival at Strong City of the train containing the Empire company cattle, above referred to, a shipment of cattle made by the same company to the same destination, but which is not here involved, had reached Strong City, and had been there unloaded for feeding and rest. Early on the next morning (Wednesday, May 27), the reloading of these cattle was commenced, but was stopped because of a notice to the Atchison of a washout on the Burlington road, north of Atchison. Notice, however, having been received by the Atchison from the Burlington on the afternoon of the same day that the washout had been repaired, the cattle were again reloaded and the train left Strong City at about 8:30 o'clock that night (Wednesday, May 27). In ordinary course the train would have been delivered to the Burlington at Atchison at about daylight the next (Thursday) morning, but about one o'clock on that morning the Burlington sent the following message to the Atchison company: "We cannot now accept Evarts stock. Our line washed out again. Will inform you when we can transmit stock." The chief clerk of the general superintendent of the Atchison, in communicating this message to him, also informed him that the track at Valley Falls, a station on the Atchison road between Topeka and Atchison, was in very bad condition, and that there was "no certainty as to how long it will be passable." We shall trace the further movement of this train hereafter.

Promptly after its arrival at Wellington the cattle in the first train of the Minnesota company were unloaded for food and rest. They were reloaded at about five o'clock on Wednesday morning, May 27. When information as to the washout on the Burlington came early on that morning the cattle were again unloaded, but when the notification was received that the tracks of the Burlington had been repaired the cattle were a second time reloaded, and the train left Wellington that even-

ing at about eight o'clock for Atchison. When the train was a few miles east of Strong City, very early on Thursday morning, it was ordered to return as far as Strong City and there unload. This order was given in consequence of the second message from the Burlington road above referred to. From this situation it resulted that all the cattle in controversy were in the yards of the Atchison at Wellington or Strong City, that road being uncertain as to the condition of its own tracks on the branch road from Topeka to Atchison, and knowing to a certainty that the Burlington had declined to receive the cattle at Atchison, on account of the condition of its tracks. Under these circumstances, promptly, on Thursday morning, negotiations were commenced by the Atchison with the Missouri Pacific road and by noon that road had agreed to receive the cattle at Kansas City, and soon afterward instructions were given to load the stock then at Wellington and Strong City, preparatory to being forwarded to Kansas City.

The first Empire company train, which was on its way to Atchison when the information of the break came, on Thursday morning, and whose movements we have said we would hereafter trace, along with a train of twenty-two cars which had preceded it with cattle destined to Sioux City, were ordered to proceed to Kansas City, and did so. One of the Minnesota company trains, of nineteen cars, at the Wellington yards was also directed to depart for Kansas City on Thursday. Before, however, it was practicable to move the other cattle trains which remained at Wellington and Strong City, uncertainty arose as to the ability of the Missouri Pacific to take the cattle forward from Kansas City, caused by a telegram on that subject, received from the general superintendent of the Missouri Pacific road. By about nine o'clock on that (Thursday) evening, however, this uncertainty was dispelled, and about the same time the Atchison company was notified by the Burlington that it also was in condition to receive and forward cattle at Kansas City. On the next (Friday) morning the first Minnesota company train of twenty cars, which was at Strong City,

to which point it had been turned back on the advice of the washout on the Burlington road, and the Empire train of twenty-one cars originally unloaded at Strong City were reloaded, and the two trains were consolidated into one and started about noon on Friday for Kansas City. So, also, the third Minnesota company train of twenty cars, which had been held at Wellington waiting for an opportunity to send it forward, left there early Friday morning.

The three trainloads of cattle previously referred to, which had been ordered to Kansas City and started for that point during Thursday before the uncertainty arose as to the ability of the Missouri Pacific to receive and forward the cattle from Kansas City, reached that place as follows: forty-two cars, consisting of the Sioux City and first Empire train, arrived on the morning of Friday, and were delivered to the Burlington and went forward. The nineteen cars belonging to the Minnesota company, which had left Wellington also on Thursday, arrived about three o'clock on the afternoon of Friday, and because of the length of the journey from Wellington did not go forward, but were unloaded at the stock yards for food and rest. The trains which did not get away from Wellington and Strong City on Thursday before the uncertainty arose, but which left those places on Friday after the uncertainty had been dispelled, reached Kansas City early on Saturday morning. The first of these latter trainloads, the twenty cars from Wellington, arrived at about six o'clock, and the cars were placed on the transfer track of the Missouri Pacific at the stock yards and were taken in charge by the switching crew of that company and were unloaded at its chutes at the stock yards. The second—that is, the consolidated train from Strong City—arrived an hour or two afterwards, and was unloaded at the stock yards, the delivery there being claimed to be a delivery to the Missouri Pacific Company.

In the early part of the forenoon of Saturday some of the local officers of the Missouri Pacific, asserting that they had not been notified by the general officers of that road of an arrangement

to take the cattle, hesitated to do so. By noon, however, the doubt was dispelled, since the local officers of the Missouri Pacific applied to the Atchison for cars to move the cattle. Steps were taken by the Atchison to at once furnish the cars, but before midday the Atchison company was notified that the cars would not be required, as the Missouri Pacific would be unable, because of the condition of its tracks, to move the cattle forward on that day.

Prior to the shipments of the cattle in question and at the time of the movement of the trains to which we have referred, there had been copious rainfalls in the valley of the Kaw, or Kansas, River, a tributary of the Missouri River, emptying into the same at Kansas City, and the interruptions and washouts, to which we have referred, were the results of flood conditions created by such rains. The Kansas, or Kaw, River and the Missouri River north of Kansas City, and the Kaw River, especially at Kansas City, were undoubtedly in a more or less accentuated flood condition. On Saturday morning the stage of the Kansas River at Kansas City was slightly below, and certainly was not higher, than that of the previous highest flood recorded at that point, viz., the flood of 1881. The stage of the 1881 rise, however, was not considered dangerous in the yards in 1903, as in the prior flood the water only came upon a small portion of the yard and afterwards the yards were filled and graded, so that in 1903 a rise equalling that of 1881 would not have come into any of the pens. The reports on Saturday from the weather observer at Topeka, Kansas City, and from other sources, were not alarming. Between the time, on Saturday morning, when the cattle were put in the stock yards, and Sunday morning the river rose four feet. Indeed, on Sunday morning, the water was one to four feet deep over one-half to three-fourths of the yard. On that morning all the live stock were put on the viaducts, which were about ten feet above the level of the yards. During daylight Sunday the water rose another four feet, and during Sunday night and Monday morning five feet more, and when the rise ceased on June 1 the river

was thirteen and one-half feet above the high-water mark of 1881.

The stock yards were entirely submerged, and the entire bottoms, east and west of the river, clear to the bluffs, were flooded—the water in that territory being from five and six to fourteen feet deep. Situated within this district was the live stock exchange building, containing a bank and numerous offices, including those used by the live stock officials of the different roads. There was also within the flood area a number of other banks, numerous hotels, stores and lumber yards; all the packing houses of Kansas City, railroad shops and yards, and the union depot; nearly all the large factories, warehouses, implement houses and wholesale grocery stores. So unexpected to all concerned was the rise of the river that not a dollar's worth of property was removed in anticipation of the flood. Many thousands of homes in Kansas City were submerged, and the inhabitants fled to the hills and other places of safety, with nothing saved from destruction but the clothing they had on. An illustration of the suddenness of the disaster is afforded by the following: During the morning of Sunday the finest passenger train of the Atchison road, its California limited from Chicago, arrived at the union depot with passengers. The engine was uncoupled from the train and moved to the coal chute, and after coaling, on account of the rapid rise of the water and floating driftwood, was unable to get back to the depot. When the flood came on Sunday morning, May 31, it swept fifteen or sixteen bridges from their piers, about two thousand houses from their foundations, hundreds of freight cars from the tracks, and every lumber yard in the bottom lands, and the lumber was swept away. Houses, lumber, cars and other wreckage were piled in the streets, completely blocking them, and drifted upon the wrecked bridges. The one bridge which stood was the Missouri Pacific bridge, upon which for safety there had been stationed seventeen locomotives. The debris carried against that bridge completely damned the river, so that the water ran over the top of the locomotives on the bridge.

The vast accumulation of debris in the streets and against the bridges obstructed the flow of the water, so that the river rose higher than it otherwise would have done, it being ten feet and five inches higher at the mouth of Turkey Creek, near the stock yards, than it was at Hannibal bridge over the Missouri River, at about a mile below.

For a period of seven or eight days, whilst these appalling conditions continued, the cattle remained upon the viaducts, as we have said, could not be properly fed and watered, and over five hundred perished, and the remainder were greatly injured. After the subsidence of the flood, owing to the fact that the cattle were in such a starved and weakened condition as to be unfit to be carried forward to the point of destination, the railway company, seeking to minimize the loss, and with the consent of the plaintiffs, and after they had refused to receive the cattle, carried the remainder of the herd to pastures in Lyon County, Kansas, where they were held until about the tenth of July following, when they were forwarded by the railway company on the original billing to Atchison, Kansas, and from thence to the place of destination over the Burlington and St. Paul roads.

With these undisputed facts in mind let us briefly consider the contentions relied upon to establish the liability of the railway company, in order to determine whether there was any evidence of negligence adequate to have justified the submission of the case to the jury.

1. It is urged that the company was negligent in detaining the cattle at Wellington and Strong City, and in not carrying them promptly by way of Topeka to Atchison and there delivering them to the Burlington. The undisputed facts which we have stated concerning the prompt arrival of the cattle at Wellington and Strong City, the early initiation of their movement forward as routed, the information as to the washouts on the Burlington line and of the bad condition of the track of the Atchison company, the unloading and reloading, and the final impossibility of sending the cattle forward by way of

Topeka to Atchison, we think completely answers the proposition, and leaves room for no other conclusion than that it would have been the duty of the court to set aside any verdict which had been rendered upon the contrary hypothesis.

2. It is insisted that, even if there was no proof of negligence on the part of the company because of its failure to move the cattle by way of Topeka to Atchison, they should have been detained at the Strong City and Wellington feeding stations "until the flood, which had been on in the Kaw River, had subsided." And, although argued as a separate proposition, involved in and connected with the contention just stated, it is urged that the railway company was negligent in deviating the shipments to Kansas City, thereby taking the cattle into the lowlands at the mouth of the river in front of the approaching flood. But we think these contentions are disposed of by the statement of the undisputed facts which we have heretofore made. Whether, irrespective of negligence, the railway company, as a matter of law, was without the lawful power when the break in the lines occurred to seek to discharge its duty to forward promptly, by sending the cattle via Kansas City, is a subject which we shall hereafter separately consider. The propositions we are now considering are, therefore, to be tested solely by considering whether there was any proof tending to show negligence in sending the cattle via Kansas City. That the stock yards at Kansas City under ordinary conditions were a fit connecting point to send the cattle, in view of the break in the line of connection to Atchison via Topeka, cannot be disputed. The propositions therefore reduce themselves to the contention that the flood conditions were such that it was negligence on the part of the carrier to send the cattle to Kansas City, because the railroad officials knew, or should have known, that it would be unsafe to send them to that point. We are of opinion, however, that the undisputed facts which we have recited, concerning the eligibility and safety of the stock yards at Kansas City under normal conditions, and the unexpected and unprecedented character of the flood which subsequently

engulfed those parts, entirely dispose of the contention. But the want of merit in the proposition does not alone depend upon these general considerations, as we think that the record abundantly shows that there was no reasonable ground whatever for the contention that the officers of the Atchison company were in any way lacking in diligence in endeavoring to ascertain the flood conditions and the probability as to a further rise in the river, which might render it hazardous to take the cattle to Kansas City. This is also indisputably shown by the negotiations with the Burlington and Missouri Pacific roads in respect to receiving the cattle at Kansas City as it is manifest that those officials, like all others concerned in the vast interests which were destroyed by the flood in question, had not the slightest suspicion, or reason to indulge in the suspicion, that a flood of such unprecedented and injurious proportions would come upon Kansas City. These considerations and those which we have previously stated effectually also dispose of the last contention as to acts of alleged negligence on the part of the railway company, viz., that the railway company was negligent in failing to move or cause to be moved the cattle from their position of peril in the stock yards at Kansas City before the arrival of the climax of the flood.

It remains only to consider the proposition that, irrespective of the absence of all negligence, the railway company was as a matter of law responsible, because of an alleged wrongful deviation, caused by carrying the cattle via Kansas City instead of via Topeka to Atchison, for delivery there to the Burlington road. No express agreement was shown to carry the cattle to Atchison via Topeka. But as that route was the usual and most direct one for such shipments, and as the owners were to be subjected to the expense of feeding en route, we shall assume, for the sake of argument, the best possible view for the plaintiffs, viz., that the duty of the railway company, under normal conditions, was to transport the cattle by that route. But this general duty, assumed though it be, was in the very nature of things restrained and limited by the right

of the carrier, in case of necessity, especially in order that it might carry on the operations of its road, to resort to such other reasonably direct route as was available under existing conditions to carry freight of this character to destination. By the admiralty law, a departure from the regular course of a shipment when done under the usage of trade is no deviation. *Hostetter* v. *Park*, 137 U. S. 31, 40. So, also, in *Constable* v. *National S. S. Co.*, 154 U. S. 52, it was said: "In the law maritime a deviation is defined as a 'voluntary departure without necessity or any reasonable cause, from the regular and usual course of the ship insured.'" As we think the undisputed proof to which we have referred not only established the existence of the necessity for the change of route, but also, beyond dispute, demonstrated that there was an entire absence of all negligence in selecting that route, we are clearly of opinion that no liability was entailed simply by reason of the change, even if that change could in law be treated as a concurring and proximate cause of the damages which subsequently resulted.

Affirmed.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY *v.* DONOHUE.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 440. Submitted January 10, 1908.—Decided May 4, 1908.

A homesteader who initiates a right to either surveyed or unsurveyed land and complies with the legal requirements may, when he enters the land, embrace in his claim land in contiguous quarter-sections if he does not exceed the quantity allowed by law and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice as to the extent of his claim. *Ferguson* v. *McLaughlin*, 96 U. S. 174, distinguished.

Under the land grant act of August 5, 1892, 27 Stat. 390, chap. 382, the right of the railway company to select indemnity lands, non-mineral and not reserved and to which no adverse right or claim had attached or been initiated, does not include land which had been entered in good faith by a homesteader at the time of the supplementary selection, and on a re-

linquishment being properly filed by the homesteader the land becomes open to settlement and the railway company is not entitled to the land under a selection filed prior to such relinquishment.

101 Minnesota, 239, affirmed.

THE facts are stated in the opinion.

Mr. Thomas R. Benton for plaintiff in error:

The right of Hickey under the homestead laws had not attached or been initiated to the land in controversy prior to and at the time of the selection of the land by the railway company under the act of August 5, 1892.

Hickey never in fact settled or resided upon, occupied or improved, or in any manner indicated an intention to claim the land in controversy under the homestead law, or otherwise, prior to the selection thereof by the railway company.

Hickey's settlement, improvement and occupation of lot 15 of section 4, was not a settlement, improvement or occupation of the land in dispute and was not a bar to the railway company's selection of the latter.

A settlement upon any part of a quarter-section is in legal effect a settlement upon that entire quarter section, *Quinby* v. *Conlan*, 104 U. S. 420, but a settlement on part of one quarter section is not in legal effect a settlement upon another quarter section or another section. *Ferguson* v. *McLaughlin*, 96 U. S. 174; *Reynolds* v. *Cole*, 5 L. D. 556; *Brown* v. *Cent. Pac. R. R. Co.*, 6 L. D. 151; *U. Pac. R. R. Co.* v. *Simmons*, 6 L. D. 172; *Hemsworth* v. *Holland*, 7 L. D. 76; *Pooler* v. *Johnson*, 13 L. D. 134; *Staples* v. *Richardson*, 16 L. D. 248; *Peasley* v. *Whitney*, 18 L. D. 356; *Perry* v. *Haskins*, 23 L. D. 50; *Kenny* v. *Johnson*, 25 L. D. 394.

Hickey's homestead claim was not presented to the district land officers until after the allowance of the railway selection. It was subsequently relinquished and canceled and was not, therefore, a bar to the railway selection. *Northern Pacific R. R. Co.* v. *Dean*, 27 L. D. 462; *Northern Pacific R. R. Co.* v. *Fly*, 27 L. D. 464; *Oregon &c. R. R. Co.* v. *United States*, 190 U. S. 186; *Shepley* v. *Cowan*, 91 U. S. 330; *Sturr* v. *Beck*, 133 U. S. 541

The entry of the land in controversy by Hickey's heirs was never completed and did not operate to cancel the railway company's selection. *Whitney* v. *Taylor*, 158 U. S. 85; *Norton* v. *Evans*, 82 Fed. Rep. 804; *Wagstaff* v. *Collins*, 97 Fed. Rep. 5.

The allowance of the Hickey homestead entry by the district land officers did not operate to cancel the railway company's selection which was still pending. *Northern Pacific R. R. Co.* v. *Reed*, 27 L. D. 651, cited by the court below, discussed and distinguished.

The abandonment and relinquishment of the Hickey homestead entry did not restore the land in controversy to the public domain and open it to entry by defendant in error under the timber and stone land law. The railway selection was pending and undetermined at the time of the relinquishment and cancellation of the Hickey entry. The land was not, therefore, open to entry by the defendant in error. *New Orleans* v. *Payne*, 147 U. S. 261, 266.

Mr. John R. Donohue, defendant in error, *pro se:*

The right of Hickey under the homestead laws of the United States had attached and was initiated to the land in controversy prior to and at the time of the attempted selection of said land by the railway company under the act of August 5, 1892.

The question of Hickey's settlement and occupation was at issue in the Land Department, and was by it found in favor of Hickey; giving to this the most favorable construction possible for the railway company, it was at best a mixed finding of fact and law, and as such was conclusive and controlling upon the court. *Gertgens* v. *O'Connor*, 191 U. S. 237; *Vance* v. *Burbank*, 101 U. S. 514; *Moore* v. *Robbins*, 96 U. S. 530; *Carr* v. *Fife*, 156 U. S. 494; *Stewart* v. *McHarry*, 159 U. S. 643; *Aurora Hill Con. Co.* v. *Mining Co.*, 34 Fed. Rep. 515; *Jefferson* v. *Hun*, 11 Pac. Rep. 351; *Calhoun* v. *Violet*, 47 Pac. Rep. 179.

By reason of Hickey's settlement and the completion of entry by him and his heirs, the land in controversy was segregated from the mass of public land, and was not open for selec-

tion by the railway company, and upon subsequent relinquishment filed, did not inure to the benefit of the railway company, but reverted to the government as public lands open for entry. *Kansas & Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629; *H. & D. Ry. Co.* v. *Whitney*, 132 U. S. 357; *Wilcox* v. *Jackson*, 3 Peters, 498; *Sturr* v. *Beck*, 133 U. S. 541; *Witherspoon* v. *Duncan*, 4 Wall. 210; *United States* v. *Turner*, 54 Fed. Rep. 228; *Fish* v. *N. P. Ry. Co.*, 23 L. D. 15.

The doctrine that a tract of land lawfully appropriated becomes thereafter severed from the mass of public lands, and if relinquished or abandoned reverts to the government, applies as well to indemnity lands as it does to granted lands. See *Nelson* v. *Nor. Pac. Ry.*, 188 U. S. 108; *Oregon Ry.* v. *United States*, 189 U. S. 103; *DeLacy* v. *Nor. Pac. Ry.*, 72 Fed. Rep. 726; *Fish* v. *Nor. Pac. Ry.*, 23 L. D. 15; *Northern Pacific Ry.* v. *Loomis*, 21 L. D. 398; *St. P. & Omaha Case*, 21 L. D. 423; *H. & D. Ry.* v. *Christianson*, 22 L. D. 257; *State of California* v. *So. Pac. Ry.*, 27 L. D. 542; *Prince Inv. Co.* v. *Eheim*, 55 Minnesota, 36; *St. Paul & Sioux City R. Co.* v. *Ward*, 47 Minnesota, 40.

The status of the railway company having been fixed and established at the time of its attempted selection, the lands were not affected by such selections because having been previously segregated, the effect of the relinquishment was not to revive or make valid any claim under the original attempted selection, but upon such relinquishment being filed the land became restored to the great mass of public land and was subject to entry from that time, unaffected by the previous attempted selection by the railway company. *H. & D. Ry.* v. *Whitney*, 132 U. S. 357; *Kansas Pac. Ry.* v. *Dunmeyer*, 113 U. S. 629; *Johnson* v. *Towsley*, 13 Wallace, 72; *United States* v. *Turner*, 54 Fed. Rep. 328; *Perkins* v. *Cent. Pac. Ry.*, 11 L. D. 357; *M., K. & T. Ry.* v. *Troxel*, 17 L. D. 122.

MR. JUSTICE WHITE delivered the opinion of the court.

Jerry Hickey, having the legal qualifications, in March, 1893,

settled upon unsurveyed public land of the United States, situated in the Duluth land district, Minnesota. The land was within the territory in which plaintiff in error, hereafter called the railway company, was entitled to make indemnity selections. This right, however, was limited to land as to which, at the time, "no right or claim had attached or been initiated" in favor of another. Act of August 5, 1892, c. 382, 27 Stat. 390. In the land office of the district aforesaid, two years and eight months after the settlement by Hickey, that is, in December, 1895, the railway company made indemnity selections, embracing not only the land upon which Hickey had built his residence, but all the unsurveyed land contiguous thereto, which under any contingency could have been acquired by Hickey in virtue of his settlement. Seven months after—on July 22, 1896—the official plat of survey of the township in which the lands were situated was filed. On that day Hickey made application to enter the tract, under the homestead laws. This application embraced five contiguous lots, located, however, in different quarter-sections, viz., one lot (No. 12) in section 3, and four lots (Nos. 9, 10, 14 and 15) in section 4. The whole five lots contained in all about one hundred and sixty acres, because lots 14 and 15 were fractional. The improvements made by Hickey were on lot 15.

On the day Hickey filed his application the railway company presented a supplementary list of its selections, conforming them to the survey of the township. Because of the conflict between the claim of Hickey and that of the railway company, a contest ensued. It is unnecessary to recite the vicissitudes of the controversy, the death of Hickey pending the contest, the substitution of his mother as his sole heir, and the proceedings by which the claim of the railway company came to be limited to the lots outside of the fractional quarter-section on which the improvements of Hickey had been made. Suffice it to say that ultimately the Secretary of the Interior decided in favor of the Hickey claim. It was held that the effect of the settlement was to initiate a homestead right as to all the

land claimed in the application to enter, and therefore under the terms of its grant the railway company was precluded from making a selection of the lands in dispute. In reaching this conclusion the Secretary found as a fact that in making his homestead settlement Hickey had plainly manifested his intention to embrace within his homestead the land which he subsequently sought to enter, in such manner as to cause it to be well known to all in the community, as early as 1893, the year of the settlement, what were the boundaries of the tract for which he intended to obtain a patent. 32 Land Dec. 8. In consequence of this final decision the mother of Hickey made a homestead entry for the five lots. Subsequently, in the Cass Lake land district, Minnesota, to which the land had been transferred, the mother of Hickey filed in the local land office a relinquishment of her claim to the entire tract. Simultaneously, Donohue, the defendant in error, filed an application to enter the land under the timber and stone act, and his claim was allowed. The railway company, however, contested, as to the lots other than 14 and 15 in section 4, on the ground that the effect of the relinquishment by the heir of Hickey was to cause the selections which had formerly been rejected to become operative as against the entry of Donohue as to the land outside of the quarter-section on which the improvements of Hickey had been constructed. The contest thus created was finally decided by the Secretary of the Interior in favor of the railway company, and a patent issued to it for the lots in dispute. This proceeding was then commenced in the courts of Minnesota by Donohue to hold the railway company liable as his trustee, upon the ground of error in law committed by the Secretary of the Interior in refusing to sustain his entry. The court below decided in favor of Donohue. 101 Minnesota, 239. Upon this writ of error the correctness of its action is the question for decision.

The errors assigned and the arguments at bar rest upon two contentions: First. That the original decision of the Secretary of the Interior in favor of the Hickey homestead entry was

wrong as a matter of law, because Hickey by his settlement had power to initiate a claim to land only in the fractional quarter-section within which his improvements had been placed, and, therefore, that all the other lands outside of such quarter-section, although embraced in the application for entry, were subject to selection by the railway company, because unappropriated public land of the United States, against which no claim had been initiated. Second. Because even if the decision of the Land Department in favor of the Hickey application was not erroneous as a matter of law the court below erred in not giving effect to the ruling of the department in favor of the railroad company and against the Donohue entry.

To dispose of the first contention requires us to take into view the legislation concerning the right to acquire public lands by preëmptors and homesteaders.

The act of September 4, 1841, c. 25, 5 Stat. 455, together with the supplemental act of March 3, 1843, c. 85, 5 Stat. 619, superseded all earlier statutes, and were the basis of the preëmption laws in force on the repeal of those laws in 1891. The act of September 4, 1841, was entitled "An act to appropriate the proceeds of the sale of the public lands, and to grant preëmption rights," and §§ 10–15 dealt with the subject of preëmption. By § 10 it was provided that one who possessed certain qualifications and made settlement in person upon surveyed public lands subject to be so settled, and who should inhabit and improve the same, and who had or should erect a dwelling thereon, might enter with the register of the land office for the district in which such land might lie, "by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, . . ." This provision of the statute of 1841 was substantially reënacted in § 2259 of the Revised Statutes. Under the law of 1841 claims to public land might be initiated, prior to record notice, by settlement upon surveyed land subject to private entry, thirty days being allowed the settler within which to

file his declaratory statement with the register of the proper district. Act of September 4, 1841, c. 16, s. 15, 5 St. 457, Rev. Stat. § 2264. Subsequently, where the land settled upon had not been proclaimed for sale the settler was allowed three months in which to file his claim. Act of March 3, 1843, c. 86, s. 5, 5 Stat. 620, Rev. Stat. 2265.

It was not, however, until 1862, that preëmptions were allowed, under proper restrictions, on the unsurveyed public lands generally. Act of June 2, 1862, 12 Stat. 418. By § 7 of that act the settler on unsurveyed lands was not required to make his declaratory statement until three months from the date of the receipt at the district land office of the approved plat of the township embracing his preëmption settlement.

From the beginning the Land Department has construed the preëmption laws as conferring an alternative right either to select a regular quarter-section of 160 acres or the same quantity of land embraced in two or more contiguous legal subdivisions, although in different quarter sections. See circular of September 15, 1841 (1 Lester Land Laws, p. 362). The practice of the Land Office is illustrated in a case passed upon by the Attorney General in 1871. Copp, Land Laws, p. 309. One Shaw filed a declaratory statement embracing tracts situated not alone in different quarter-sections, but in different townships, and aggregating more than 195 acres. From a ruling of the commissioner requiring the preëmptor to select which of the legal subdivisions he would omit from his entry so as to include his principal improvements, preserve the contiguity of the land remaining and approximate to 160 acres, Shaw appealed, and the Secretary of the Interior requested the advice of the Attorney General. In recommending that the decision of the commissioner be affirmed, after calling attention to the fact that the technical quarter-section, through the unavoidable inaccuracy of surveys in adjusting meridians, etc., often exceeded or fell below 160 acres, it was said:

"The preëmption settler has the right under the act of 1841 to enter either one hundred and sixty acres in legal subdivisions

lying contiguous to each other without reference to the quarter-section lines, or he has the right to enter a quarter-section as such, in which case he can take the amount of land contained therein as shown by the official survey. In entering a 'quarter-section,' he cannot, of course, depart from the ascertained lines, but must take one hundred and sixty acres or less, as the case may be.

"In the case under consideration, Shaw claims by legal subdivision, but not according to the lines of a quarter-section. Part of the land is in one township, in sec. 2, and part in another township, in sec. 35. He should be allowed to enter any number of the legal subdivisions contiguous to each other and including his dwelling so that the whole shall not in amount exceed one hundred and sixty acres, but he cannot under the act take more than that amount because the land claimed does not constitute what is legally known as a 'quarter section.' "

On May 15, 1874, the right of a qualified preëmptor to locate a preëmption claim upon land lying in two adjoining townships was expressly recognized in *Preëmption claim of William McHenry*, Copp, Land Laws, p. 295. And these principles, as will hereafter be seen, governed equally as to settlements on unsurveyed as on surveyed land.

The homestead law was enacted on May 20, 1862, c. 75, 12 Stat. 392. By that act, differing from the preëmption law, the rights of the settler only attached to the land from the date of the entry in the proper land office. *Maddox* v. *Burnham*, 156 U. S. 544, 546. The text of that act, afterwards embodied in Rev. Stat. §§ 2289 *et seq.*, makes it obvious that it was contemplated that as under the settled rule applied in the enforcement of the preëmption laws the homesteader was not to be confined to a particular regular quarter-section tract in order that he might receive 160 acres, but was authorized to make up the allotted quantity by joining contiguous legal subdivisions.

This is further illustrated by the text of § 2306, Rev. Stat., which provides that every person entitled to enter a soldier's and sailor's homestead, who had previously entered, under the

homestead laws, a quantity of land less than one hundred and sixty acres, was authorized "to enter so much land as, when added to the quantity previously entered, should not exceed one hundred and sixty acres."

It was not until May 14, 1880 (c. 89, 21 Stat. 141), that a homestead entry was permitted to be made upon unsurveyed public land. The statute which operated this important change moreover modified the homestead law in an important particular. Thus, for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the Land Office. These results arose from § 3 of the act, reading as follows:

"SEC. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the preëmption laws."

See *Maddox* v. *Burnham, supra*

It cannot be doubted that at the inception the Land Office considered that under the homestead law a settler was entitled to take his 160 acres not alone from a regular quarter-section, but to make up, as was the case under the preëmption law, the quantity allowed by law, by taking adjoining and contiguous legal subdivisions, and that such has continued to be the rule by which the statute has been enforced to this time, both as respects settlements upon unsurveyed as well as surveyed lands. See circular October 30, 1862 (2 Lester, p. 248); departmental instructions as to entries on public lands, contained in bound volumes published in 1899 and 1904; circular August 4, 1906, 35 L. D. pp. 187–200.

Both under the preëmption law and under the homestead law, after the act of 1880, the rights of the settler were initiated by settlement. In general terms it may be said that the preemption laws (Rev. Stat. §§ 2257–2288), as a condition to an entry of public lands, merely required that the appropriation should have been for the exclusive use of the settler, that he should erect a dwelling house on the land, reside upon the tract, and improve the same. By the homestead law residence upon and cultivation of the land was required. Under neither law was there a specific requirement as to when the improvement of the land should be commenced or as to the nature and extent of such improvement, nor was there any requirement that the land selected should be inclosed.

As under both the preëmption and homestead laws, whether the settlement was made upon surveyed or unsurveyed land, the law did not make it necessary to file or record a claim in respect to the land until a considerable period of time had elapsed after the initiation of the right by settlement, it necessarily came to pass that controversies arose, from rights asserted by others to land upon which a settlement had been made, but as to which no exact specification appeared upon the records of the Land Office of the location and extent of the land claimed. In the administration of the land laws, in the endeavor to protect the rights of third parties acting in good faith, and at the same time to give effect to the rights arising from a settlement and the relation back of the claim when filed to its initiation by settlement, the decisions of the Land Office, while consistent in the interpretation of the statutes, perhaps present, from the nature of the subject, some lack of precision in the appreciation of the facts involved in particular cases. It is certain, however, that, viewing comprehensively the rulings of the Land Department, the subject has been considered in two aspects—first, the sufficiency of acts done by a settler upon or after initiating a claim to give notice of the extent of his claim to another settler; and, second, the sufficiency of like acts to entitle to a patent for the land as against the Government. In both

of the classes it is undoubted that the administrative rule has been, as to surveyed and unsurveyed lands, that the notice effected solely by improvements upon the land is confined to land within the particular quarter-section on which the improvements are situated. 5 L. D. 141. And this ruling was predicated upon the assumed import of the decision in *Quinby* v. *Conlan*, 104 U. S. 420.

In the first class of cases, however, that is, in contests between settlers, where the claim of the first settler embraced not only land within the legal subdivision on which the improvements had been placed, but contiguous land lying in another quarter-section, the ruling has ever been that any conduct of the first settler adequate to convey actual or constructive notice to a subsequent settler that the claim had been initiated not only to the land upon which the improvements were situated but as to contiguous land, even though in another quarter-section, sufficed to preserve the rights of the first settler. The scope of the rulings on this subject is illustrated by a decision of the Secretary of the Interior made in 1893, in *Sweet* v. *Doyle*, 17 L. D. 197. In that case the Secretary maintained the homestead right of Sweet to land lying in different sections. In doing so, reviewing previous decisions, attention was called to the fact that it had been ruled that the original settler might defeat an attempted settlement by another before the time when record notice was required, in any of the following modes: 1, as to a technical quarter-section by the settlement upon and placing of improvements thereon; 2, as to all of a tract, although lying in different quarter-sections, by improvements on each subdivision of the land outside of the quarter-section on which he had settled; 3, by actual notice to an intruder of the extent of the settlement claim. Two cases decided in 1887 (*Brown* v. *Central Pacific R. R. Co.*, 6 L. D. 151, and *Union Pacific R. R. Co.* v. *Simmons*, 6 L. D. 172) illustrate the recognition by the Land Department of a right in a qualified preëmptor to settle upon unsurveyed land, although lying in more than one quarter-section.

As to the second aspect, that is, the nature and character of the acts of the settler essential to initiate and preserve a claim to land as against the Government, the rulings of the Land Department have been liberal towards the settler, and his good faith and honest purpose to comply with the demands of the statute have primarily been considered, thus carrying out the injunction of this court in *Tarpey* v. *Madsen*, 178 U. S. 220, and cases there cited, to the effect that regard should be had in passing on the rights of settlers to the fact that "the law deals tenderly with one who, in good faith, goes upon the public lands with the view of making a home thereon." The general course of the Land Department on the subject is illustrated by two decisions, *Findley* v. *Ford*, 11 L. D. 173, and *Holman* v. *Hickerson*, 17 L D. 200.

As a result of this review of the legislation concerning preemptions and homesteads and of the settled interpretation continuously given to the same, we think there is no merit in the proposition that a homesteader who initiates a right as to either surveyed or unsurveyed land, and complies with the legal regulations, may not, when he enters the land, embrace in his claim land in contiguous quarter-sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract and that he does such acts as put the public upon notice of the extent of his claim

Conclusive as is the text of the statutes and the long-continued administrative construction which has enforced them, it is nevertheless insisted that a contrary rule must be applied because of the decision in *Ferguson* v. *McLaughlin*, 96 U. S. 174. That case concerned a special act applicable alone to California, giving a right to preëmpt unsurveyed lands, and the special act governed the rights of the settler by the general rules controlling under the preëmption law of 1841, which, it is insisted, by the act of 1880 is made determinative of the right of a homesteader in respect to a settlement on unsurveyed land. The argument rests upon a misconception of the effect

of the decision in the cited case, or in any event assumes that expressions found in the opinion must be now held to govern a question not arising on the record in that case.

Without going into great detail, the material facts of the case, as shown by the file record and the statement of facts contained in the opinion, were these: Two persons settled on two distinct and separate but contiguous parcels of unsurveyed public land. Ferguson bought the rights of both these parties. On one of the tracts there was a dwelling and other valuable improvements, and Ferguson resided on that tract and cultivated and pastured both tracts. In March, 1866, by virtue of an act of the legislature of California, extending the limits of the town of Santa Clara, the parcel upon which was situated the residence of Ferguson, the possessory right to which had been acquired by him, came to be included within the limits of the town of Santa Clara. By a plat of the United States survey, filed on May 19, 1866, it was shown that the tract, the possessory right to which had been acquired by Ferguson, and which was outside of the corporation limits of the town referred to, lay in township 6. Thereafter Ferguson filed his declaratory statement, claiming the right to enter this parcel under the preemption laws. Subsequently, in October, 1866, the United States plat of survey of township 7, which embraced the town of Santa Clara, and therefore the residence tract of Ferguson, was filed. Ferguson then sought to amend his former declaratory statement so as to embrace the parcel of land situated in the town of Santa Clara, in township 7, upon which his residence and other improvements stood. The register and receiver, however, refused to allow this to be done, and required Ferguson to make a separate declaratory statement for that parcel. Subsequently, in virtue of a provision of an act of Congress, Ferguson, as the possessor of the lot and improvements referred to as situated in township 7, became the owner of that parcel by deed from the town. A contest ensued in the Land Office between Ferguson and a railway company claiming by statutory grant, which contest related solely to a portion

of the land in township 6 and upon which he filed his first declaratory statement. No controversy was had as to the land included in the second declaratory statement, which related to the land in the town of Santa Clara, because Ferguson had acquired that land from the town in conformity to the act of Congress. The local land officers decided that Ferguson was not entitled to the land in township 6, which he claimed as a preëmptor, "upon the sole and exclusive ground" that his dwelling was not upon the land so claimed. This action was affirmed by the Commissioner of the General Land Office and the Secretary of the Interior, it being further found that by reason of sales of portions of the land after filing Ferguson could not be regarded as a *bona fide* settler. A patent issued to the railway company for the land which it claimed, and a transferee of the company brought ejectment against Ferguson in a state court of California to obtain possession of the land, and Ferguson, under the practice in California, by way of cross complaint, challenged the legal correctness of the ruling of the Land Department, and asserted that the railroad and its transferee held the land as his trustee. The trial court, as did the Supreme Court of California, sustained the correctness of the ruling of the Land Department, and the case came to this court. Here the action of the court below was affirmed, the court, in its opinion, declaring that the ruling of the Land Department, rejecting the claim because the residence of Ferguson was not on any part of the Congressional subdivision "to which the land belonged," was not only correct, but was also an expression of the well-established rule of the Land Department. True it is that in the course of the opinion expressions were used which permit of the construction that it was intended to be decided that a homestead settler could only acquire land within a regular quarter-section, on which must be his improvements. But the decision must be confined to the question before the court, which was the right of a settler to claim a tract of 160 acres of land under the homestead law, when on no part of the land for which the patent was claimed had the improve-

ments required by the statute been made. Not only the issues in the case make this clear, but this also results from the statement of the court, that its conclusion was in accord with and was intended to uphold and apply the rulings of the Land Department from the beginning. This must follow, because if the language of the opinion relied upon in the argument were to be given the meaning now attributed to it it would result that the opinion, instead of giving sanction to and maintaining the rulings of the Land Department, would have overthrown the entire administrative construction of the act enforced from the beginning. For whilst it is true, as has been shown, that the Land Department had always held that there must be compliance with the statutory requirements as to a dwelling and improvements on the tract settled upon and claimed, those rulings went *pari passu* with the consistent and settled rule by which a settler was allowed to take the land which he claimed from different quarter-sections if he had given adequate notice of the extent of his claim both within and without the legal subdivision in which his improvements were situated. And this view of the true meaning of the decision in the *Ferguson case*, irrespective of general expressions found in the opinion, is fortified by the fact that, since that case was decided, in not one of the rulings of the Land Department has the case been referred to as changing the settled rule then prevailing, and which has been continued without interruption. Indeed, when the settled construction of the Land Department is taken into view and the unbroken application of that rule by it is borne in mind, the conclusion necessarily follows that Congress in enacting the act of 1880 clearly must have had in mind the settled rule of the Land Department which the *Ferguson case* declared the court affirmed.

If we could bring ourselves to disregard the settled administrative construction prevailing for so many years, impliedly, if not expressly, recognized by Congress, and should look at the subject as an original question, it cannot be doubted that even upon the hypothesis that statements in the opinion in

Ferguson v. *McLaughlin* justify the assumption now based upon them, such assumption would cause the decision in that case, if applied to the issue here presented, to be destructive of the rights of settlers to initiate claims, both as to surveyed and unsurveyed land, prior to the time of making formal application to enter the land. This is said, because it is apparent that the right given by the statute would be destroyed if it be that a homesteader who settles upon surveyed land, and locates his residence in an eligible situation upon a quarter-quarter-section, relying upon fertile land, in other quarter-sections to enable him to make his settlement fruitful, can, after having given public manifestation of his intention as to the boundaries of his claim, have all the land, except only the quarter-quarter-section on which he resides, taken away from him by some one else before the time arrives when by law the homesteader is required to make application to enter. And the same thing is more cogently true of unsurveyed land. No more apt illustration of the unjust result referred to could be given than is disclosed by this very case, for as we have said, the claim of Hickey embraced among other land two lots forming a fractional quarter-section. This was occasioned by the existence of a body of water which controlled the survey and caused the fractional quarter-section, consisting solely of the two lots referred to. It was upon this quarter-section, bordering upon the water, that Hickey erected his dwelling. It is apparent that the right given by statute would be unavailing if it were to be held that Hickey had not the legal power to initiate any claim to the contiguous land, thus confining him to the fractional lots bounded by the water, in effect cutting off the only land which could possibly have made the settlement beneficial, although immediately on such settlement, as found by the Land Department, Hickey had manifested to the whole community his purpose to claim the land which he afterwards applied to enter, in order to make up his 160 acres.

Concluding from the foregoing that the Land Department was right in its original decision as to the right of Hickey to

enter the land as a homestead, we are brought to consider the second proposition, that is, whether the department was right in rejecting the timber entry of Donohue and awarding the land to the railroad company. When that question is considered in its ultimate aspect it will be apparent not only that it is related to the question of the validity of the settlement of Hickey, but it necessarily follows that the validity of that settlement in effect demonstrates the error of law committed by the department in its ruling as to the Donohue entry.

The decision of the Secretary of the Interior, which finally sustained the application of Hickey, and directed that upon the completion of the entry the selection of the railway company should be cancelled, was made on February 11, 1903. Mrs. Hickey, as the heir of her son, completed the entry in June following. About a month afterwards, however, she filed a written relinquishment of the entry in the local land office, and on the same day Donohue made a timber and stone application for the land and was allowed to enter the same. On report by the local land office of the relinquishment of Mrs. Hickey, the General Land Office in February, 1904, accepted the relinquishment and cancelled the homestead entry. At the same time, however, the Commissioner instructed the local land officers as follows:

"This releases from suspension the selection by the St. Paul, Minneapolis and Manitoba Railway Company under act of August 5, 1892, of lot 12, sec. 3, and lots 9 and 10, sec. 4—lots 14 and 15 not appearing to be within the company's original selection.

"You will inform Mrs. Hickey of the above action, and also advise the company thereof, and that thirty days' preference right will be allowed it in which to perfect its selection of said lot 12, sec. 3, and lots 9 and 10, sec. 4, in accordance with its Duluth list 7 (supplemental to list 5) filed July 22, 1896."

In March, 1904, the Commissioner, writing to the local land officers in regard to a report by them of the allowance of Donohue's timber culture entry, said:

"This entry should not have been allowed; the contest for this land was between the railway company and the heirs of Jerry Hickey; but before the final action on the case, and the rejection of the company's application to select, the claim of the heirs of Hickey was relinquished and their homestead cancelled, which left the land subject to the application of the company.

"You will, therefore, notify the company in accordance with instructions of February 18, allowing it thirty days from notice in which to perfect its selection.

"The entry of Donohue will be held suspended, subject to the action of the company; and should it perfect the selection, the entry will be held for cancellation."

The railway company perfected its selection of the lands in controversy, and the "entry of Donohue was held for cancellation, subject to appeal." Donohue appealed; but in an opinion dated December 16, 1904, the action of the Commissioner was approved, and this decision was reaffirmed in an opinion dated March 17, 1905, ruling adversely upon a motion to review. The selection made by the railway company was approved by the Secretary of the Interior, and a patent was issued for the land.

The Secretary of the Interior, in ruling upon the effect of the relinquishment of Mrs. Hickey and in passing upon the claim of Donohue proceeded upon the hypothesis that the controversy presented by the appeal of Donohue was really a prolongation or extension of the original contest, and that the relinquishment of Mrs. Hickey constituted an abandonment of the homestead application, and, being made during the contest, conclusively established that the settlement of Hickey was not made in "good faith," and that such relinquishment operated to make the settlement of Hickey inefficacious to initiate a claim to the land, thereby validating the selection made by the railway company.

But the assumptions upon which these conclusions were based clearly disregarded the fact of the long possession by Hickey and his heir of the land during the pendency of the

contest and disregarded the previous and final ruling of the Secretary, made in February, 1903, which maintained the validity of the settlement of Hickey and decided that by such settlement he had validly initiated a claim to the land. When this is borne in mind it is clear that the ruling rejecting the Donohue claim and maintaining the selection of the railway company was erroneous as a matter of law, since by the terms of the act of August 5, 1892, c. 382, 27 Stat. 390, the railway company was confined in its selection of indemnity lands to lands non-mineral and not reserved, "and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection. . . ." When the selection and supplementary selection of the railway company was made the land was segregated from the public domain and was not subject to entry by the railroad company. *Hastings & Dakota Ry. Co.* v. *Whitney*, 132 U. S. 357; *Whitney* v. *Taylor*, 158 U. S. 85; *Oregon & California R. R. Co.* v. *United States*, 190 U. S. 186.

Further, the decision refusing recognition to the Donohue entry, and awarding the land to the railway company, disregarded the statutory right of Mrs. Hickey to relinquish and of Donohue to make application for the land conferred by the first section of the act of May 14, 1880, c. 89, 21 Stat. 140, reading as follows:

". . . when a preëmption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BREWER and MR. JUSTICE MOODY dissent.

GAZLAY *v.* WILLIAMS, TRUSTEE OF BROWN, BANKRUPT.

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

No. 164. Argued March 11, 1908.—Decided May 18, 1908.

Where the trustee can only sell a lease subject to the claim of the lessors that the transfer of the bankrupt's interest in the lease gives a right of reëntry under a condition therein, the bankruptcy court has jurisdiction of a proceeding, initiated by the trustee and to which the lessors are parties, to determine the validity of the lessor's claim and remove the cloud caused by the lessor's claim.

The passage of a lease from the bankrupt to the trustee is by operation of law and not by the act of the bankrupt nor by sale, and a sale by the trustee of the bankrupt's interest is not forbidden by, nor is it a breach of, a covenant for reëntry in case of assignment by the lessee or sale of his interest under execution or other legal process, where, as in this case, there is no covenant against transfer by operation of law.

147 Fed. Rep. 678, affirmed.

JUNE 16, 1902, W. A. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn entered into a written agreement as lessors with one J. D. Kueny, whereby, in consideration of the rents to be paid and the covenants to be performed by said lessee, his heirs and assigns, they leased to said Kueny certain premises situate on the east side of Vine street, south of Sixth street, Cincinnati, Ohio, for a period of ten years, with the privilege of ten years additional.

The lease contained the following condition:

"Provided, however, that if said lessee shall assign this lease or underlet said premises, or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had, or if said lessee or assigns shall fail to keep any of the other covenants of this lease by

said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to reënter and the same to have again, repossess and enjoy as in their first and former estate, and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed, shall cease, determine, and be utterly void."

On the ninth of April the lessors filed a petition in the Superior Court of Cincinnati, Ohio, against J. D. Kueny for the recovery of rent due under the lease. In their petition the lessors asked that a receiver be appointed to take charge of all the property of said J. D. Kueny, including said leasehold estate, and that said leasehold premises and the unexpired term be sold, "subject, however, to all the terms, covenants and conditions contained in the lease from said plaintiffs to said J. D. Kueny." The court thereupon appointed receivers to take charge of and manage said property, and later made an order directing said receivers to sell all of the personal property of said J. D. Kueny, including the leasehold estate, and under said order all of said property, including said leasehold estate, was sold to H. D. Brown, who took possession of the same, made extensive improvements thereon and paid to the lessors the rent reserved under said lease, from the time he took possession, July, 1905, to January, 1906, when proceedings were begun against him in the District Court of the United States for the Southern District of Ohio, Western Division, to have him adjudged a bankrupt.

Pending the adjudication, a receiver was appointed, who took charge of all of Brown's property, including said leasehold estate, and who, as such receiver, paid to said lessors the rent reserved in said lease for the month of January, 1906.

In February, 1906, the appellee herein, Fletcher R. Williams, was elected as trustee in bankruptcy of the estate and effects of said Brown, and on March 1, 1906, he filed in the bankruptcy proceedings an application for the sale of said leasehold estate, making the lessors parties thereto, and asking that they be required to set up any claim they might have upon the same.

Process was issued and served upon all but one of the lessors on March 5, 1906, and on that one on March 9, 1906.

On March 6, 1906, said trustee paid to W. A. Gazlay rent for the month of February, 1906, the amount paid being the monthly sum named in the said lease. Thereupon said lessors, coming in for the purposes of the motion only, filed a motion to be dismissed from the proceedings on the ground that the court had no jurisdiction over their persons, which motion was overruled by the referee in bankruptcy. Thereupon the lessors filed an answer "and without intending to enter their appearance herein, but acting under protest and the direction of the court," alleged that the lease contained the condition, among others, "that if said lessee should assign the lease or underlet said leased premises or any other part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assign should fail to keep any of the other covenants of the lease by lessee to be kept, it should be lawful for said lessors, their assigns or heirs, into said premises to reënter and the same to have again, repossess and enjoy, as in the first and former estate; and thereupon this lease and everything therein contained on said lessor's behalf to be done and performed, should cease, determine and be utterly void. They further say that said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only, and that said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein. That at the time of filing of the application herein, so far as they know or are informed, the said lessors had no claim in said leasehold premises adverse to said trustee in bankruptcy."

The case was submitted to the referee upon these pleadings, an agreed statement of facts, and the arguments and briefs of counsel.

The referee found that the trustee being in lawful possession of said leasehold estate, the court had jurisdiction of the persons and subject-matter of the suit; that the claim of the lessors, assuming that they had one and that it would be enforcible only after a sale, nevertheless was in the nature of a cloud upon the title of the trustee to said leasehold estate, and, as such, could be determined in this proceeding in advance of its happening, and he thereupon held that the lessors had no right, as against the trustee in bankruptcy herein, to forfeit the lease in the event of a sale by him under the court's order and ordered the trustee to sell the same free from any claim or right on the part of the lessors to forfeit the same. To these findings and this judgment of the referee the lessors took exception and filed a petition for a review of the same in the District Court in Bankruptcy. The referee certified his proceedings to the District Court, where, upon a hearing on the pleadings and facts, the findings and judgment of the referee were affirmed and the petition dismissed.

From this judgment the lessors took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. There the cause was again submitted upon the same pleadings and facts as in the District Court, and that court affirmed the judgment of the District Court, and held that the clause in said lease providing for its forfeiture in case of a sale of the same under execution or other legal process, without the lessors' written consent thereto, had no application to a sale by the trustee in bankruptcy, and that, therefore, the lessors could not forfeit the lease in case the trustees herein should sell the same. 147 Fed. Rep. 678.

From this judgment the present appeal was taken.

Mr. Oscar W. Kuhn for appellants:

As between the original parties to this lease, the condition, that if lessee's interest should be sold under execution or other legal process without the lessors' written consent, it might be forfeited by the lessors, was a lawful and valid condition

and, in the event of such a sale, would have rendered the lease voidable in the hands of the purchaser. *Farnum* v. *Heffner*, 79 California, 575; *Rex* v. *Tapping*, McClel. & Y. 544; *Davis* v. *Eyton*, 4 M. & P. 820; *Doe* v. *Clark*, 8 East, 185; *In re Ells*, 98 Fed. Rep. 967; Tiffany on Real Property, p. 106; 1 Taylor, Landlord and Tenant, 409.

The lessors have the right to forfeit this lease in the event of its sale by the trustee herein under his application for an order of the court to do so. That is to say, the above condition is still in force as between the lessors and the trustee in bankruptcy. The purchaser, Brown, took the leasehold estate subject to all of the terms, covenants and conditions of the lease. *Kew* v. *Trainor*, 150 Illinois, 150.

The lease contains no provision for its forfeiture in the event of the bankruptcy of the lessee, therefore Brown's bankruptcy was not a violation of any of the provisions of the lease. Nor was the passing of Brown's title to his trustee in bankruptcy a violation of any of the provisions of the lease relating to an assignment or sale of it, because this passing of the title to the trustee was accomplished not by a voluntary assignment nor by a sale under execution or other legal process, but solely by force of the bankrupt act, § 70*a* and therefore the lessors had no right to forfeit the lease in the hands of the trustee. *Watson* v. *Merrill*, 14 Am. Bank. Rep. 453, 458; *In re Curtis*, 9 Am. Bank. Rep. 286; *In re Pennewell*, 9 Am. Bank. Rep. 490; *Farnum* v. *Heffner*, 79 California, 575.

But since, as has been shown, Brown held the leasehold estate subject to all of the terms, covenants and conditions of the lease, which made it liable to be forfeited in the event of its sale under legal process without the written consent of the lessors, and since the title of the trustee in bankruptcy is the same as that of the bankrupt, Brown, it follows that the trustee holds the title to the leasehold estate subject to all of the terms, covenants and conditions of the lease, and a sale of it by him under legal process without the lessors' written consent will make it liable to be forfeited in the hands of any

purchaser at such a sale. *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; Bankruptcy Act, § 70*a*.

Mr. Province M. Pogue and *Mr. Walter A. De Camp* for appellee:

If the District Court had jurisdiction, then the lessors have lost their right of forfeiture, if a sale is made by the trustee in these proceedings, by reason of the action instituted by the lessors, the appellants, in the Superior Court of Cincinnati, in which the leasehold estate of Kueny was sold at public auction without limit or reserve by that court to Brown, the bankrupt, who took possession and paid rent. *Dumpor's Case*, 4 Coke, 119; *S. C.*, 1 Smith's Leading Cases, 95, 117; Taylor on Landlord and Tenant, §§ 287, 497, 498; *Murray* v. *Harway*, 56 N. Y. 339; *Lloyd* v. *Crispe*, 5 Taunton, 249, 253; *McGlynn* v. *Moore*, 25 California, 384; *Deaton* v. *Taylor*, 90 Virginia, 219, 295; *Conger* v. *Duryea*, 90 N. Y. 599; *Brumell* v. *Macpherson*, 14 Ves. Jr. 175, 176.

After the receiver in bankruptcy took hold, after the trustee had been chosen by the creditors and qualified, after the trustee had elected to take absolutely the leasehold estate for the purposes of sale, and after these very proceedings had been instituted to quiet the title preparatory to a sale, the lessors received rent from the bankrupt estate through Williams, trustee, without objection. Thereby they waived their right of forfeiture, and the trustee can sell free from such right of forfeiture. Taylor on Landlord & Tenant, §§ 497, 498; *Wilder* v. *Eubank*, 21 Wend. 587; *Garnhart* v. *Finney*, 40 Missouri, 449; *The Elevator Case*, 17 Fed. Rep. 200; *Warner* v. *Cochran*, 128 Fed. Rep. 553; *Hasterlik* v. *Olson*, 75 N. E. Rep. 1002 (Illinois); *Fleming* v. *F. H. Co.*, 61 Atl. 157.

There is no provision in the lease for a right of forfeiture by reason of a sale in bankruptcy, and, therefore, even though all other provisions of the lease were preserved, this sale would not entitle them to forfeit if the trustee sold.

By a person being declared a bankrupt, under the terms of the lease, whose provisions have been heretofore quoted, the lease is not forfeited. *In re Ells*, 98 Fed. Rep. 967.

Under the foregoing decision the court says there is no distinction between the old bankruptcy law and the new bankruptcy law on this subject. While there is a diversity of opinion on this subject, the weight of authority seems to be that the lease is not terminated, unless the trustee does not desire to hold it as a part of the estate or unless the landlord has the property turned over to him voluntarily, either through his own act or the act of the trustee. *In re Pennewell*, 119 Fed. Rep. 139 (C. C. A.); Loveland on Bankruptcy, 165 and authorities cited therein; *In re Houghton*, 1 Lowell, 554; *Farnum* v. *Heffner*, 79 California, 580; *Smith* v. *Putman*, 3 Pickering, 221; *Doe* v. *Bevan*, 3 M. & S. 353; *The Elevator Cases*, 17 Fed. Rep. 200; *Gregg* v. *Landis*, 21 N. J. Eq. 494, 501.

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

The passage of the lessee's estate from Brown, the bankrupt, to Williams, the trustee, as of the date of the adjudication, was by operation of law and not by the act of the bankrupt, nor was it by sale. The condition imposed forfeiture if the lessee assigned the lease or the lessee's interest should be sold under execution or other legal process without lessors' written consent.

A sale by the trustee for the benefit of Brown's creditors was not forbidden by the condition and would not be in breach thereof. It would not be a voluntary assignment by the lessee, nor a sale of the lessee's interest, but of the trustees' interest held under the bankruptcy proceedings for the benefit of creditors. Jones in his work on Landlord and Tenant lays it down (§ 466) that "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, but the covenant may be so

drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law." The covenant here is not of that character.

The doctrine of *Dumpor's Case*, 4 Rep. 119; *S. C.*, 1 Smith's Leading Cases, *85, is that a condition not to alien without license is determined by the first license granted, and District Judge Thompson expressed the opinion that it was applicable here, and that the sale to Brown, under the order of the Superior Court of Cincinnati entered on the petition of these lessors for the recovery of rent, set the leasehold free from the forfeiture clauses, especially as that court did not direct that the sale be subject to the terms, covenants and conditions of the lease, as prayed for in the petition. Moreover the lessors, in their answer in these proceedings, stated that "said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only, and that said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein."

In respect of the lessors Brown may be treated, then, as if he were the original lessee, and the sale by his assignee in bankruptcy, under order of the bankruptcy court, was not a breach of the condition in question. The language of Bayley, J., in *Doe* v. *Bevan*, 3 M. & S. 353, cited by the Court of Appeals, is applicable.

The premises in question in this case, being a public house, were demised by Goodbehere to one Shaw for a term of years, and Shaw covenanted that he, his executors, etc., should not nor would during the term assign the indenture, or his or their interest therein, or assign, set or underlet the messuage and premises, or any part thereof, to any person or persons whatsoever, without the consent in writing of the lessor, his executors, etc. Proviso, that in case Shaw, his executors, etc., should part with his or their interest in the premises, or any part thereof, contrary to his covenant that the lessor might

reënter. Afterwards Shaw deposited this lease with Whitbread & Company as a security for the repayment of money borrowed of them; and, becoming bankrupt, and his estate and effects being assigned by the commissioners to his assignees, the lease was, upon the petition of Whitbread & Company, directed by the Lord Chancellor to be sold in discharge of their debt, and was, accordingly, sold to the defendant, and, without the consent of Goodbehere, assigned to the defendant by the assignees, and he entered, etc. The trial judge ruled that this was not a breach of the proviso not to assign without consent, etc., inasmuch as the covenant did not extend to Shaw's assignees, they being assignees in law; wherefore he directed a nonsuit. The rule to set aside the nonsuit was discharged on argument before Lord Ellenborough, C. J.; LeBlanc, J.; Bayley, J., and Danforth, J. (delivering concurring opinions), and Bayley, J., said:

"It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it be not, what act has the lessee done to avoid it? All that has followed upon his bankruptcy is not by his act, but by the operation of law transferring his property to his assignees. Then shall the assignees have capacity to take it, and yet not to dispose of it. Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors, for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

Decree Affirmed.

REUBEN QUICK BEAR *v.* LEUPP, COMMISSIONER OF INDIAN AFFAIRS.

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

No. 569. Argued February 26, 27, 1908.—Decided May 18, 1908.

A statutory limitation on expenditures of the public funds does not, in the absence of special provision to that effect, relate to expenditures of treaty and trust funds administered by the Government for the Indians.

The provisions in the Indian Appropriation Acts of 1895, 1896, 1897, 1898 and 1899 limiting and forbidding contracts for education of Indians in sectarian schools relate only to appropriations of public moneys raised by general taxation from persons of all creeds and faith and gratuitously appropriated and do not relate to the disposition of the tribal and trust funds which belong to the Indians—in this case the Sioux Tribe—themselves, and the officers of the Government will not be enjoined from carrying out contracts with sectarian schools entered into on the petition of Indians and to the *pro rata* extent that the petitioning Indians are interested in the fund.

A declaration by Congress that the Government shall not make appropriations for sectarian schools does not apply to Indian treaty and trust funds on the ground that such a declaration should be extended thereto under the religion clauses of the Federal Constitution.

35 Washington Law Reporter, 766, affirmed.

THE appellants filed their bill in equity in the Supreme Court of the District of Columbia, alleging that:

"1. The plaintiffs are citizens of the United States, and members of the Sioux tribe of Indians of the Rosebud Agency, in the State of South Dakota, and bring this suit in their own right as well as for all other members of the Sioux tribe of Indians of the Rosebud Agency.

"2. The defendants are citizens of the United States and residents of the District of Columbia, and are sued in this action as the Commissioner of Indian Affairs, the Secretary of the Interior, the Secretary of the Treasury, the Treasurer of

the United States, and the Comptroller of the Treasury respectively.

"3. That by article VII of the Sioux treaty of April 29, 1868 (15 Stat. 635, 637), continued in force for twenty years after July 1, 1889, by section 17 of the act of March 2, 1889, c. 405, 25 Stat. 888, 894–5, the United States agreed that for every thirty children of the said Sioux tribe who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher.

"4. That for the purpose of carrying out the above provision of the said treaty during the fiscal year ending June 30, 1906, the following appropriation was made by the act of March 3, 1905, section 1 (33 Stat. 1048, 1055):

"'For support and maintenance of day and industrial schools, including erection and repairs of school buildings in accordance with article seven of the treaty of April twenty-nine, eighteen hundred and sixty-eight, which article is continued in force for twenty years by section seventeen of the act of March second, eighteen hundred and eighty-nine, two hundred and twenty-five thousand dollars.'

"The fund so appropriated is generally known as the Sioux treaty fund.

"5. That section 17 of the said act of March 2, 1889, further provides as follows:

"'And in addition thereto there shall be set apart out of any money in the Treasury not otherwise appropriated, the sum of three million dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest of which, at five per centum per annum, shall be appropriated, under the direction of the Secretary of the Interior to the use of the Indians receiving rations and annuities upon the reservations created by this act, in proportion to the numbers that shall

so receive rations and annuities at the time that this act takes effect, as follows: one-half of said interest shall be so expended for the promotion of industrial and other suitable education among said Indians, and the other half thereof in such manner and for such purposes, including reasonable cash payments *per capita* as, in the judgment of said Secretary, shall, from time to time, most contribute to the advancement of said Indians in civilization and self-support.'

"This fund of three million dollars is generally known as the Sioux trust fund.

"6. That the interest on the said Sioux trust fund is paid annually by the United States in accordance with the provisions of the second clause of the act of April 1, 1880, c. 41, 21 Stat. 70, reading as follows:

" 'And the United States shall pay interest semi-annually, from the date of the deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.'

"7. That the act of June 7, 1897, c. 3, § 1, 30 Stat. 62, 79, contains the following provision:

" 'And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school.'

"8. That, in violation of the said provision of the act of June 7, 1897, the said Francis E. Leupp, Commissioner of Indian Affairs as aforesaid, has made or intends to make, for and on behalf of the United States, a contract with the Bureau of Catholic Indian Missions of Washington, D. C., a sectarian organization, for the care, education, and maintenance, during the fiscal year ending June 30, 1906, of a number of Indian pupils of the said Sioux tribe, at a sectarian school on the said Rosebud Reservation, known as the St. Francis Mission Boarding School, and in the said contract has agreed to pay or intends to agree to pay to the said Bureau of Catholic Indian

Missions of Washington, D. C., a certain rate per quarter as compensation for every pupil in attendance at the said school under the said contract, the said payment (which, as the plaintiffs are informed and believe, will amount to the sum of twenty-seven thousand dollars), to be made either from the said Sioux treaty fund or from the interest of the said Sioux trust fund or from both.

"9. That all payments made to the said Bureau of Catholic Indian Missions of Washington, D. C., under the said contract, either out of the said Sioux treaty fund or out of the interest of the said Sioux trust fund, will be payments for education in a sectarian school, and will be unlawful diversions of funds appropriated by Congress, and in violation of the above-recited provision of the act of June 7, 1897, and such payments will seriously deplete the interest of said Sioux trust fund, to the great injury of the plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud Agency, and will unlawfully diminish the amount of money which should be expended out of the said Sioux treaty fund and the interest of the said Sioux trust fund for lawful purposes, for the benefit of the said plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud Agency, and will also unlawfully diminish the cash payments which the said plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud Agency are entitled to receive *per capita* out of the interest of the said Sioux trust fund.

"10. That the plaintiffs have never requested nor authorized the payment of any part of the said Sioux treaty fund, or of the interest of the said Sioux trust fund, to the said Bureau of Catholic Indian Missions of Washington, D. C., or any other person or organization whatever, for the education of Indian pupils of the said Sioux tribe in the said St. Francis Mission Boarding School, or any other sectarian school whatever, but have on the contrary protested against any use of either of the said funds, or the interest of the same, for the purpose of such education.

"11. That the plaintiffs have no remedy at law.

"Wherefore the plaintiffs ask relief, as follows:

"I. That a permanent injunction issue against the said Francis E. Leupp, Commissioner of Indian Affairs, to restrain him from executing any contract with the said Bureau of Catholic Indian Missions of Washington, D. C., or any other sectarian organization whatever, for the support, education, or maintenance of any Indian pupils of the said Sioux tribe at the said St. Francis Mission Boarding School, or any other sectarian school on the said Rosebud Reservation or elsewhere, and that a permanent injunction issue against the said Francis E. Leupp, Commissioner of Indian Affairs, and the said Ethan Allen Hitchcock, Secretary of the Interior, to restrain them from paying or authorizing the payment of, either by themselves or by any of their subordinate officers or agents whatever, any moneys of either the said Sioux treaty fund or the interest of the said Sioux trust fund, or any other fund appropriated, either by permanent appropriation or otherwise for the uses of the said Sioux tribe, to the said Bureau of Catholic Indian Missions of Washington, D. C., or to any other sectarian organization whatever, for the support, education, or maintenance of any Indian pupils of the said Sioux tribe, at the said St. Francis Mission Boarding School or any other sectarian school on the said Rosebud Reservation or elsewhere."

II. And for a permanent injunction against the drawing, countersigning and paying "any warrants in favor of the said Bureau of Catholic Indian Missions of Washington, D. C., or any other sectarian organization whatever, for the support, education, and maintenance of any Indian pupils of the said Sioux tribe at the said St. Francis Mission Boarding School, or any other sectarian school on the said Rosebud Reservation or elsewhere, payable out of any money appropriated, either by permanent appropriation or otherwise, for the uses of the said Sioux tribe."

III. And for general relief.

The defendants answered, 1. Admitting "that the plaintiffs are citizens of the United States, and members of the Sioux tribe of Indians, but aver that the said Indians are only nominal plaintiffs, the real plaintiff being the Indian Rights Association, who have had this suit brought for the purpose of testing the validity of the contract hereinafter referred to."

2. Admitting "that they are residents of the District of Columbia, and are sued in this action as Commissioner of Indian Affairs, the Secretary of the Interior, the Secretary of the Treasury, the Treasurer of the United States, and the Comptroller of the Treasury, respectively. These defendants, as officers of the Government of the United States, have no interest in the controversy raised by the bill, except to perform their duties under the law, and they, therefore, as such officers, respectfully submit the validity of the contract hereinafter referred to, and the payments thereunder, to the judgment of this honorable court. The real defendant in interest is the 'Bureau of Catholic Indian Missions,' a corporation duly incorporated by chapter 363 of the Acts of Assembly of Maryland for the year 1894, for the object, *inter alia*, of educating the American Indians directly and also indirectly by training their teachers and others, especially to train their youth to become self-sustaining men and women, using such methods of instruction in the principles of religion and of human knowledge as may be best adapted to these purposes.

"As the object of the bill filed is to test the validity of a contract made between the Commissioner for Indian Affairs and the said 'Bureau of Catholic Indian Missions,' and the validity of the payment of the money thereunder, this answer will set forth the facts and the statutes of the United States under which it is contended that such contract and the payment of money thereunder are valid."

This the answer then did at length, and inasmuch as the case was submitted on bill and answer with certain statements of the Commissioner of Indian Affairs, it is thought that the an-

swer should be given substantially in full as it is in the margin.[1]

The case was heard on the bill, the answer and "certain

[1] "3. These defendants admit the allegations of paragraph 3 of the bill, but the pertinent part of the Sioux treaty of April 29, 1868, is only partially stated therein. The full statement of that part of the Sioux treaty will be hereinafter made.

"4. These defendants admit the allegations of paragraph 4 of the bill.

"5. These defendants admit the allegations in paragraph 5 of the bill, but aver that though the provision from section 17 of the act of March 2, 1889, is correctly stated, as far as it goes, there are other portions of said act which should be called to the attention of the court, which is accordingly done hereafter in this answer.

"6. These defendants admit the allegations in paragraph 6 of the bill, but aver, that although clause 2 of the act of April, 1880, is correctly stated, as far as it goes, there are other provisions of law to be called to the attention of the court in this connection, which is accordingly done in the subsequent part of this answer.

"7. These defendants admit the allegations in paragraph 7 of the bill, but aver that, although the provision in the act of June 7, 1897, sec. 1, is correctly stated as far as it goes, the section is not fully stated, nor are other parts of the act referred to which bear directly on the question raised by the bill.

"8. These defendants admit that within the meaning of the acts of Congress the 'Bureau of Catholic Indian Missions' is a sectarian organization, and the industrial school known as the 'St. Francis Mission Boarding School,' on the Rosebud Reservation, is a sectarian school.

"These defendants further say that a contract was made by and between F. E. Leupp, Commissioner of Indian Affairs, for and on behalf of the United States of America, and the 'Bureau of Catholic Indian Missions,' for the care, education, and maintenance during the fiscal year ending June 30, 1906, of 250 Indian pupils of the Sioux tribe of Indians, at the industrial school known as St. Francis Mission Boarding School, on the Rosebud Reservation, and by such contract it was agreed that there should be paid to the 'Bureau of Catholic Indian Missions' twenty-seven dollars ($27) per quarter for every pupil in attendance, provided there should not be paid under the contract a sum aggregating more than twenty-seven thousand dollars ($27,000). This amount, according to the contract, was to be paid from either or all of the funds of the Sioux tribe of Indians, designated technically as 'Interest on Sioux Fund,' 'Education Sioux Nation,' and 'Support of Sioux of different tribes, subsistence, and civilization,' all of which, however, are embraced in the two funds stated in the bill, to wit, the 'Sioux Treaty Fund,' described in paragraph 4 of the bill and the 'Sioux Trust Fund,' described in paragraph 5 of the bill.

"This contract has been fully performed by the 'Bureau of Catholic In-

proofs, consisting of replies made by the Commissioner of Indian Affairs to certain questions asked in behalf of the plaintiffs, and also of certain statements in the reports of the

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dian Missions' and there is due to it thereunder from the said funds the total amount of twenty-seven thousand dollars ($27,000) if the said contract was legally made. This contract was approved by the Acting Secretary of the Interior, Mr. Jesse E. Wilson, by direction of the President of the United States, but, by the same direction, no payments have been made under it in order that the validity of the contract might be determined by the courts of the United States. The circumstances under which this contract was entered into and approved are hereinafter more fully stated.

"These defendants deny the allegation in paragraph 8 of the bill that this contract was made in violation of the act of June 7, 1897, or in violation of any other act of Congress.

"9. These defendants admit that payments under this contract will be payments for education in a sectarian school, as the term 'sectarian school' is defined in the acts of Congress, but they deny that said payments will be in violation of the act of June 7, 1897, and they further deny that such payments will deplete the interest of said 'Sioux Trust Fund' to the injury of the plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud Agency; and they further deny that such payments will unlawfully diminish the amount of money which should be expended out of the said 'Sioux Treaty Fund,' and the interest of the 'Sioux Trust Fund' for lawful purposes for the benefit of the plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud Agency; and they further deny that said payments will also unlawfully diminish the cash payments which the said plaintiffs and other members of the said Sioux tribe of Indians of the Rosebud Agency are entitled to receive per capita out of the interest of the said 'Sioux Trust Fund,' as alleged in paragraph 9 of said bill; all of which will more fully and at large appear by the detailed statements in this answer hereinafter made.

"10. These defendants admit that the plaintiffs, to wit, the three Indians whose names appear as plaintiffs in the caption of this bill, have never requested or authorized the payment of any part of the Sioux treaty or trust fund to the said 'Bureau of Catholic Indian Missions,' or any other person or organization whatever for the education of Indian pupils of the said Sioux tribe in said 'St. Francis Mission Boarding School,' or any other sectarian boarding school whatever, but on the contrary, these defendants admit that the said plaintiffs protest against any use of either of the said funds, or the interest of the same, for the purpose of such education, as stated in paragraph 10 of the bill.

"11. But now these defendants further answering say, that although they have answered in terms all the allegations in all the paragraphs of the bill contained, it is necessary for a full understanding of the rights of the parties, that all the pertinent facts connected with the use of money under

Commissioner of Indian Affairs for the years 1895 and 1906, inclusive," and was argued by counsel, and upon consideration an injunction was decreed from "paying or authorizing the payment of, either by themselves or by any of their subordinate

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the contract of the United States for the education of the Indians in contract schools which are sectarian within the meaning of the acts of Congress should be stated, so that in the light of all these facts, only a few of which are stated in the bill, the legality of the contract assailed may be judicially determined.

"12. The Catholic Missions schools were erected many years ago at the cost of charitable Catholics, and with the approval of the authorities of the Government of the United States, whose policy it was then to encourage the education and civilization of the Indians through the work of religious organizations. Under the provisions of the act of 1819, ten thousand dollars ($10,000) were appropriated for the purpose of extending financial help 'to such associations or individuals who are already engaged in educating the Indians,' as may be approved by the War Department.

"In 1820, twenty-one schools conducted by different religious societies were given eleven thousand, eight hundred and thirty-eight dollars ($11,838), and from that date until 1870, the principal educational work in relation to the Indians was under the auspices of these bodies, aided more or less by the Government. For a long time the different denominational schools referred to were aided by the Government without any formal contract.

"In 1870, an act of Congress was passed appropriating one hundred thousand dollars ($100,000) for the support of Indian schools among Indian tribes not otherwise provided for, *i. e.*, among tribes not having treaty stipulations providing funds for educational purposes, and these appropriations continued until 1876. Contracts were made annually with the mission schools of the different denominations payable out of this appropriation for the education of Indian pupils. As to the tribes having funds for educational purposes under treaty stipulations, contracts were also made with the mission schools of the different denominations payable out of the treaty funds. In 1876, Congress began the general appropriation 'for the support of industrial schools and other educational purposes for the Indian tribes,' and these annual appropriations from the public moneys of the United States have been—from that time until the present. These appropriations always were put in the appropriation acts under the heading 'Support of Schools'—and from these public funds, and, in the discretion of the Commissioner of Indian Affairs, from the tribal funds hereinafter explained, were paid the amounts due under the contracts made by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, with the various denominational schools for the education of Indian pupils.

"Some time before 1895 opposition developed to these contracts with denominational schools, on the ground that the public moneys of the United

officers or agents whatever, any moneys of the Sioux treaty fund, referred to in the said bill and answer, appropriated for the uses of the Sioux tribe of Indians, to the Bureau of Catholic Indian Missions, at Washington, D. C., for the support, edu-

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States raised by taxation should not be used for education in sectarian institutions; and also for other reasons.

"Accordingly there is found in the appropriation act of 1894, ch. 290 (28 Statutes at Large, p. 311) approved August 15, 1894, in that part of the act appropriating the public moneys for the support of Indian schools and under the heading 'Support of Schools,' the following:

"'That the expenditure of money appropriated for school purposes under this act shall be at all times under the supervision and direction of the Commissioner for Indian Affairs and in all respects in conformity with such conditions, rules, and regulations as to the conduct of and methods of instruction and expenditure of money as may, from time to time, be prescribed by him, subject to the approval of the Secretary of the Interior.

"'Provided, that the Secretary of the Interior is hereby directed to inquire into and investigate the propriety of discontinuing contract schools and whether, in his judgment, the same can be done without detriment to the education of Indian children, and that he submit to Congress at the next session the result of such investigation, including an estimate of the annual cost, if any, of substituting Government schools for contract schools, together with such recommendations as he may deem proper.'

"In his annual report for the fiscal year ending June 30, 1894, the Secretary of the Interior said:

"'The contract schools are now the subject of general discussion. I agree fully with those who oppose the use of public money for the support of sectarian schools. But this question should be considered practically. The schools have grown up. Money has been invested in their construction at a time when they were recognized as wise instrumentalities for the accomplishment of good. I do not think it proper to allow the intense feeling of opposition to sectarian education, which is showing itself all over the land, to induce the department to disregard existing conditions. We need the schools now, or else we need a large appropriation to build schools to take their place.

"'It would scarcely be just to abolish them entirely—to abandon instantly a policy so long recognized. My own suggestion is that they should be decreased at the rate of not less than 20% a year. Thus, in a few years more, they would cease to exist, and during this time the bureau would be gradually prepared to do without them, while they might gather strength to continue without Government aid. This is the policy which is now controlling the department, and, unless it is changed by legislation, it will be continued. The decrease in the appropriation for the present fiscal year is 20%.'

"Congress, in pursuance of this recommendation, introduced for the first

cation or maintenance of any Indian pupils of the said Sioux tribe, at the St. Francis Mission Boarding School on the Rosebud Reservation in the State of South Dakota, as provided

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time in the appropriation act of 1895, ch. 188 (28 Stat. at Large, 888), a limitation on the use of public money in sectarian schools.

"The act appropriates, under the heading 'Support of Schools,' of the public moneys of the United States 'for the support of Indian day and industrial schools and for other purposes (. . . $1,164,350. . . .).

"'Provided, that the Secretary of the Interior shall make contracts, but only with the present contract schools, for the education of Indian pupils during the fiscal year ending June 30, 1896, to an extent not exceeding 80% of the amount so used in the fiscal year 1895, and the Government shall, as early as practicable, make provision for the education of Indians in Government schools.' (See 28 Stat. at Large, 903.)

"Congress, in the Indian appropriation act of 1896, ch. 398, appropriated from the public moneys of the United States, under the head 'Support of Schools,' 'for support of Indian day and industrial schools and for other educational purposes, . . . $1,235,000, . . .' and then as a qualification upon the appropriation, and following immediately thereupon, under the same heading, 'Support of Schools,' occurs the following language in the act:

"'And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school. Provided, that the Secretary of the Interior may make contracts with contract schools and apportioning, as near as may be, the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year 1897, but shall only make such contracts at places where non-sectarian schools cannot be provided for such Indian children, and to an amount not exceeding 50% of the amount so used for the fiscal year 1895.' (See 29 Stat. at Large, p. 345.)

"Congress, in the Indian Appropriation Act of 1897, ch. 3, appropriated from the public moneys of the United States, under the head of 'Support of Schools,' 'for support of Indian day and industrial schools, and for other educational purposes . . . $1,200,000 . . .' and then as a qualification upon this appropriation, and following immediately thereupon, under the same heading, 'Support of Schools,' occurs the following language:

"'And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school. Provided, the Secretary of the Interior may make contracts with contract schools, apportioning as near as may be the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year 1898, but shall only make such contracts at places where non-sectarian schools cannot be provided for such Indian children, and to an amount not exceeding 40% of the amount so used for the fiscal year 1895.' (See 30 Stat. at Large, p. 79.)

in the contract referred to in said bill and answer, and that the defendants be further restrained from drawing, countersigning and paying any warrants in favor of the said Bureau of Catholic

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"Congress, in the Indian Appropriation Act of 1898, ch. 545, appropriated from the public moneys of the United States, under the head of 'Support of Schools,' for 'support of Indian day and industrial schools, and for other educational purposes . . . $1,100,000 . . . Provided, that the Secretary of the Interior may make contracts with contract schools, apportioning as near as may be the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year of 1899, but shall only make such contracts at such places where nonsectarian schools cannot be provided for such Indian children, and to an amount not exceeding 30% of the amount so used for the fiscal year 1895.' (See 30 Stat. at Large, p. 587.)

"Congress, in the Indian Appropriation Act of 1899, ch. 324, appropriated from the public moneys of the United States, under the head of 'Support of Schools,' 'for support of Indian day and industrial schools, and for other educational purposes, . . . $1,100,000 . . . Provided, that the Secretary of the Interior may make contracts with contract schools, apportioning as near as may be the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year 1900, but shall only make such contracts at places where nonsectarian schools cannot be provided for such Indian children, and to an amount not exceeding 15% of the amount so used for the fiscal year 1895, the same to be divided proportionately among the said several contract schools, this being the final appropriation for sectarian schools.' (See 30 Stat. at Large, p. 942.)

"The several Indian annual appropriation acts since 1899, to wit, beginning with 1900 to the present time, contain under the head of 'Support of Schools' simply a general appropriation of public moneys 'for the support of Indian and industrial schools, and for other educational purposes,' without any proviso in any of them respecting contracts with sectarian schools, or without any statement in any of them of the policy of the Government with respect to sectarian schools.

"It will be observed that the phrase, 'and it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school,' which is cited and relied on in paragraph 7 of the bill, is found only in the Indian appropriation acts of 1896 and 1897, and in no prior or subsequent acts of Congress; that in these two acts it is a limitation on the appropriation of public moneys, and is found only under the heading 'Support of Schools,' under which the money of the United States is appropriated for support of Indian schools, and does not occur in any other part of these acts of Congress. These defendants, therefore, submit, that this statement of policy, in so far as it can now have any legal effect, was intended only to apply to appropriations of public

Indian Missions, for the purpose aforesaid, payable out of the said Sioux treaty fund; and

"It is further ordered, adjudged and decreed that so much of the prayer of the said bill as asks that an injunction issue

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moneys for education in sectarian schools, and inasmuch as the appropriation of public moneys for these purposes was being reduced from year to year by a percentage which would make the last appropriation to be for the fiscal year ending June 30, 1900, there was no necessity for repeating the phrase containing the policy of the Government in any acts after 1897. The cessation of the appropriation from the public moneys for education in the sectarian schools, was treated as the accomplishment of the purpose contained in the statement of the policy found in the acts of 1896 and 1897.

"The above paragraph contains all the matter pertinent to the appropriation of public moneys for the support of education in sectarian schools. These appropriations ceased with the Indian appropriation act of 1899, have never been made since, nor is any one asking that they should be made, or that any public moneys of the United States raised by taxation should be employed for such purposes.

"13. But these defendants, further answering, say that entirely separate and apart from the public moneys which, as stated in paragraph 12 of this answer, were appropriated until 1899 for education in sectarian schools, there are other funds known as 'Tribal Funds' which may be applied for these purposes. These funds these defendants respectfully submit, are not public moneys, but really belong to the Indians themselves, and it is the purpose of this paragraph of this answer to give a general account of these funds, and a particular account of the 'Tribal Funds' of the Sioux Indians which are directly in controversy in this case will be given in the next paragraph.

"These 'Tribal Funds' may be roughly grouped into two classes: (*a*) Where cessions of land or other property have been made by the Indians, and in consideration thereof a certain sum of money is deposited in the Treasury of the United States, which is used for the Indians in the discretion of the Secretary of the Interior. These are called 'Trust Funds.' (*b*) Where cessions of land or other property have been made by the Indians under treaties, and in consideration therefor the Government of the United States has by treaty bound itself to furnish money for the civilization and education of the Indians. These are called 'Treaty Funds.'

"Examples of these funds are as follows:

"Menominee Fund: Interest, $7,651.96 per annum (Treaty of 1848, Art. 5, 9 Stat. at Large, 952).

"Menominee Log Fund: Interest, $76,313.98 per annum (Act of March 22, 1882, 22 Stat. at Large, 30; Act of June 12, 1890, 26 Stat. at Large, 146).

"Osage Fund: Interest, $416,371.95 per annum (Treaty 1865, Art. 2, 14 Stat. at Large, 687; Act July 15th, 1870, 16 Stat. at Large, 362; Act of June 16, 1880, 21 Stat. at Large, 292).

against the defendants restraining them from paying or authorizing the payment of any of the interest of the Sioux trust fund to the said Bureau of Catholic Indian Missions under the said contract, be refused; and

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"Osage Fund: Interest on $69,120, 5% (Treaty Jan. 2d, 1825, for educational purposes per Senate resolution, Jan. 9, 1838, 7th Stat. at Large, 242).

"The yearly amounts provided for the Indians under treaties are annually appropriated in the Indian appropriation acts, not in that part of the act under the title 'Support of Schools' which appropriated the public money of the United States, but under the heading 'Fulfilling Treaty Stipulations with and support of Indian Tribes,' for although formally appropriated the moneys are not regarded as the moneys of the United States, but moneys belonging to the Indians, due to them under treaties in consideration of their cession of lands and other rights.

"But inasmuch as according to Indian custom, the property is held in common, and inasmuch as the Indians are regarded as wards of the Nation, the money is not distributed *per capita*, but is expended for them, and for their benefit and advantage, under the discretion of the Secretary of the Interior. For some of the laws conferring this discretion, see 14th Stat. 687; 16 Stat. 362; 21 Stat. 292; 22 Stat. 30; 25 Stat. 895; 26 Stat. 146, 344.

"14. As to the 'Sioux funds' directly in controversy, the facts are as follows:

"On March 2, 1889, the act of Congress of 1889, ch. 405, was approved. This was entitled 'An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations, and to secure the relinquishment of the Indian tribe to the remainder.' Under this act, the Indians made certain cessions of land, and in partial consideration therefor it was provided in section 17 of the act as follows:

"'And in addition thereto, there shall be set apart out of any sum in the Treasury not otherwise appropriated, the sum of three million dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest on which at five per cent. per annum shall be appropriated under the direction of the Secretary of the Interior to the use of the Indians receiving rations and annuities upon the reservations created by this act in proportion to the number that shall so receive rations and annuities at the time that this act takes effect, as follows: One-half of said interest shall be so expended for the promotion of industrial and other suitable education among the said Indians, and the other half for such purposes, including reasonable cash payments *per capita*, as in the discretion of such Secretary, shall, from time to time, most contribute to the advancement of said Indians in civilization and self-support.' 25 Stat. at Large, 895.

"This is the fund called the 'Sioux Trust Fund' in the fifth paragraph of this bill.

"It is further ordered and adjudged that each party pay the respective costs by each incurred."

Each party prayed an appeal from so much of the decree as was adverse to them. It was stipulated "that the amount

"The method of the payment of the interest on this fund was changed in 1880 by the act of 1880, chapter 41, as follows:

"'The Secretary of the Interior be, and he is hereby authorized to deposit in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds or other stocks and securities belonging to the Indian trust fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits in lieu of investments, and the United States shall pay interest semi-annually from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties, or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.'

"This provision is partially cited in the bill in paragraph 6.

"15. Under a treaty between the United States and different tribes of Sioux Indians made on April 29, 1868 (15 Stat. at Large, 635), these Indians made large cessions of land and other rights, and in partial consideration therefor the United States agreed with them as follows:

"'Art. VII. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of those as are or may be settled on said agricultural reservations, and they therefore, pledge themselves to compel their children, male and female, between the ages of six and sixteen years to attend school, and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with, and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of our English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. This provision of this article to continue for not less than twenty years.'

"By the act of Congress of February 28, 1877, ch. 72 (19 Stat. at Large, 254–6), ratifying an agreement with bands of Sioux Nation, in consideration of further land cessions, it was provided:

"'In consideration of the foregoing cession of territory and rights and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization to furnish to them schools and instructions in mechanical and agricultural arts as provided by the treaty of 1868.'

which was to have been paid from the Sioux treaty fund under the contract in regard to which this suit is brought is approximately $24,000."

"By the seventeenth section of the act of 1889, ch. 405 (25 Stat. at Large, 894), it was provided—

"'that the 7th article of the said treaty of April 29, 1868, securing to said Indians the benefit of education, subject to such modifications as Congress shall deem most effective to secure said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the act shall take effect.'

"By the act of 1905, ch. 1479 (33 Stat. at Large, p. 1048), entitled—

"'An act making appropriations for current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30th, 1906, and for other purposes'—

"it was provided under the heading 'Fulfilling Treaty Stipulations with and Support of Indian Tribes' as follows:

"'For support of and maintenance of day and industrial schools, including erection and repairs of school buildings in accordance with art. 7 of the treaty of April 29th, 1868, which article was continued in force for twenty years by sec. 17 of the act of March 2, 1889, $225,000.'

"A similar appropriation has been annually made for many years back in the Indian appropriation acts.

"This is the 'Treaty Fund' in dispute, referred to in the 4th paragraph of the bill.

"These defendants respectfully represent that this 'Treaty Fund' does not differ from the 'Trust Fund,' in the main point that it is money belonging to the Indians and not public money of the United States.

"Both funds arise from cessions made by the Indians of lands and other rights. The one is a specific sum of which the United States is a trustee for the Indians; the other is an obligation payable in installments under the agreement of a treaty.

"These defendants, therefore, respectfully submit that as to both of these funds there is nothing to prevent the Secretary of the Interior from using them in his discretion, and especially from using them as the real owners thereof desire and request.

"16. Prior to 1900 the sectarian schools were aided by appropriations from the public moneys, and in the discretion of the Secretary of the Interior, from the tribal funds just described.

"In 1900, not only the public appropriations ceased, as has been heretofore shown, but all aid from the tribal funds also ceased, except as to the Osage Treaty and trust funds hereinbefore referred to. At the request of the Osage Indians, their treaty funds have been annually and uninterruptedly applied to the Catholic mission schools under annual contract with the Commissioner of Indian Affairs, approved by the Secretary of the In-

The case was submitted on record and briefs, and the court affirmed the decree below in respect of the income of the "Trust Fund," and reversed the injunction against the payment from the "Treaty Fund," and remanded the case with directions to dismiss the bill at the cost of the complainants, whereupon the case was brought to this court on appeal.

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terior. With the exception of the Osage funds, no 'Tribal Funds' were applied to education in denominational schools from 1900 to 1904.

"In the meantime application was made to President McKinley by the 'Bureau of Catholic Indian Missions' for the revocation of the 'Browning Ruling' and the use of 'Tribal Funds' for the education of the Catholic Indian children in Catholic schools.

"On September 30, 1896, the then Commissioner of Indian Affairs, D. M. Browning, in answer to the question, 'whether parents of Indian children have the right to decide where their children shall attend school,' said:

"'It is your duty first to build up and maintain the Government day schools, as indicated in your letter, and the Indian parents have no right to designate which school their children shall attend.'

"This was the 'Browning ruling.' It was ordered abrogated by President McKinley in 1901, and some eight months after, to wit, January 17, 1902, it was formally abrogated by the Commissioner of Indian Affairs with the approval of the Secretary of the Interior.

"The question of the use of the 'Tribal Funds' was referred by President McKinley to the Secretary of the Interior, and by him to the Commissioner of Indian Affairs, who decided adversely to the appropriation on February 12, 1901.

"17. On or about January 1, 1904, the matter of the application for the use of 'Tribal Funds' for the education of Indian children in Mission Schools was brought to the attention of President Roosevelt by the 'Bureau of Catholic Indian Missions,' who urged that the Indians should be allowed to use their own money in educating their own children in the schools of their choice.

"President Roosevelt took up the matter on January 22, 1904, at a meeting in the executive office of the White House, at which were present the Attorney General (Mr. Knox) and Mr. Russell, of the Department of Justice, and Secretaries Hitchcock, Cortelyou and Wilson, and Postmaster General Payne. The President was legally advised that, notwithstanding the declaration of Congressional intent not to make appropriations in the future of public moneys of the American people for sectarian institutions, the previous laws giving the Secretary of the Interior discretion to use certain moneys of the Indians held in trust in any way that he might see fit, including assistance to sectarian schools, were not repealed, and consequently his discretion remained.

"The President decided that inasmuch as the legal authority existed to

Mr. Charles C. Binney and *Mr. Hampton L. Carson*, with whom *Mr. N. Dubois Miller* was on the brief, for appellants:

The term "contract schools," used in the Indian Appropriation Act for the fiscal year 1895, directing an investigation, and in the similar acts for the years 1896–1900, inclusive, imposing gradually increasing limitations upon the Secretary of

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grant the request of the Indians, they were entitled as a matter of moral right to have the moneys coming to them used for the education of their children at the schools of their choice.

"A full and detailed statement of the action of the President in 1904 is set forth in his letter of February 3, 1905, which, with its enclosure, is herein set out at length:

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"'This new request was submitted to the Department of Justice, and the department decided, as set forth in the accompanying report, that the prohibition of the law as to the use of public moneys for sectarian schools did not extend to moneys belonging to the Indians themselves, and not to the public, and that these moneys belonging to the Indians themselves might be applied in accordance with the desire of the Indians for the support of the schools to which they were sending their children. There was, in my judgment, no question that, inasmuch as the legal authority existed to grant the request of the Indians, they were entitled as a matter of moral right to have the moneys coming to them used for the education of their children at the schools of their choice. Care must be taken, of course, to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled. But if these two conditions are fulfilled, it is, in my opinion, just and right that the Indians themselves should have their wishes respected when they request that their own money —not the money of the public—be applied to the support of certain schools to which they desire to send their children. The practice will be continued by the department unless Congress should decree to the contrary, or, of course, unless the courts should decide that the decision of the Department of Justice is erroneous.'

"This communication enclosed a letter from the Attorney General setting forth at length the grounds for the conclusion 'that, notwithstanding the declaration of Congressional intent not to make appropriations in the future of public moneys of the American people for sectarian institutions, the previous laws giving the Secretary of the Interior discretion to use certain moneys of the Indians held in trust in any way that he might see fit, including assistance to sectarian schools, were not repealed, and consequently his discretion remained. For some of these laws, see 14 Stat. 687; 16 Stat. 362; 21 Stat. 292; 22 Stat. 30; 25 Stat. 895; 26 Stat. 146; *id.* 344.'

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the Interior's power to contract, included the schools for which the contracts were then payable out of Indian treaty and trust funds.

When Congress in 1894 directed the Secretary of the In-

"Accordingly the following contracts were made by the United States with various sectarian organizations for the education of Indian children from 'Tribal Funds' for the fiscal year ending June 30, 1906:

Name of School.	Denomination.	Pupils.	Tribe.	Rate per annum.	Total per year.
St. Joseph	Catholic	170	Menominee	$108	$18,360
St. Louis	Catholic	75	Osage	125	9,375
St. John	Catholic	65	Osage	125	8,125
Immaculate Conception	Catholic	65	Sioux	108	7,020
Holy Rosary	Catholic	200	Sioux	108	21,600
St. Francis	Catholic	250	Sioux	108	27,000
St. Labre	Catholic	60	Northern Cheyenne.	108	6,480
St. Mary	Catholic	10	Quapaw	50	500
Zoas' Boarding School	Lutheran	40	Menominee	108	4,320
Total		935			$102,780

"In June, 1905, the Commissioner of Indian Affairs was notified by the 'Bureau of Catholic Indian Missions' that it was prepared to care for and educate during the fiscal year ending June 30, 1906, Indian pupils at the several schools carried on by it among the Sioux, Menominee, Osage, Northern Cheyenne, and Quapaw tribes upon the same terms and conditions as stipulated in its contracts for carrying on these schools for the fiscal year 1905, and requested that it be granted a renewal of the contracts in question, payable in each case from the trust and treaty funds of the tribe among which the school is located for the twelve months beginning July 1, 1905.

"To this application the Commissioner replied that the request would receive careful consideration; that the applicability of the trust and treaty funds had been submitted to the proper authorities for a definite determination, and indicated how petitions should be prepared, and the safeguards under which the signatures of the Indians should be made. Petitions were duly filed, signed under all the safeguards, by the Catholic Indians.

"In the meantime the schools were opened at the usual time and instruction given to the required number of pupils, in the confidence that the contracts applied for would be renewed.

"The Attorney General not having rendered any decision in the matter, the President, by a letter dated December 23, 1905, addressed to the Commissioner of Indian Affairs, after quoting a part of his letter of February 3, 1905, hereinbefore referred to, said:

"'There are two kinds of Indian funds involved in this matter. One is the trust fund, which requires no appropriation by Congress, and which clearly is to be administered as the Indians themselves request. As regards this fund, you will treat it on the assumption that the Indians have the right to say how it shall be used, so far as choosing the schools to which

terior "to inquire into and investigate the propriety of discontinuing contract schools and whether, in his judgment, the same can be done without detriment to the education of Indian children, and that he submit to Congress, at the next

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their children are to go is concerned; and each Indian in a tribe to be credited with his *pro rata* share of the funds which you will apply for him to the Government school where that is the school used, or to the church school where that is the school used, instead of segregating any portion of the fund for the support of the Government school and prorating the balance.

"'The other fund consists of moneys appropriated by Congress in pursuance of treaty stipulations. As to these moneys it is uncertain as to whether or not the prohibition by Congress of their application for contract school applies—that is, whether or not we have the power legally to use these moneys as we clearly have the power to use the trust funds. It appears that certain of the contract schools are now being run in the belief that my letter quoted above authorized the use of the treaty funds. It would be a great hardship, in the absence of any clearly defined law on the subject, to cut them off at this time arbitrarily, and inasmuch as there is a serious question involved, I direct that until the close of the fiscal year these schools be paid for their services out of the moneys appropriated by Congress in pursuance of treaty obligations, on the same basis as the schools paid out of the trust funds—always exercising the precautions directed in my letter of February 3d, 1905, 'to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled.' But no new contracts are to be entered into for such payments after the close of the present fiscal year, unless there is authorization by Congress or some determination by the courts.'

"Accordingly, the contracts for the fiscal year ending June 30, 1905, hereinafter set forth, were renewed for the fiscal year ending June 30, 1906, the new contracts being executed as of July 1, 1905.

"The services have been performed under all these contracts and the money paid in all of them, except under the contract with the 'Bureau of Catholic Indian Missions' for the education of 250 Indian pupils at St. Francis Mission School on the Rosebud Reservation. The payment of the $27,000 which is due under this contract has been withheld pending the decision by this honorable court as to validity of the contract and the appropriation of tribal funds for such purposes.

"18. And these defendants, specifically answering as to the contract in dispute, say:

"That it is a contract made between F. E. Leupp, Commissioner of Indian Affairs, for and on behalf of the United States of America, and the 'Bureau of Catholic Indian Missions,' executed as of July 1, 1905, for the care, education and maintenance of 250 Indian pupils at the St. Francis Mission School, Rosebud Reservation, South Dakota, at $108 per capita,

session, the result of such investigation, including an estimate of the annual cost, if any, of substituting Government schools for contract schools," and when the Secretary reported, suggesting a plan for gradually doing away with the contract schools, making no distinctions among them, both Congress and the Secretary referred to the contract schools in general, and not merely to those of them which were supported from the appropriations expressly made by Congress for Indian education, to the exclusion of the contract schools supported from Indian treaty and trust funds.

After the close of the fiscal year 1900 the Secretary of the Interior could not legally make or authorize any contract, in behalf of the United States, for the education of Indian pupils in any sectarian school.

Considering the direction to the Secretary of the Interior in 1894 to investigate the propriety of discontinuing contract schools, and to report the cost of substituting Government schools for contract schools; his report advocating a gradual reduction in the contract schools during a short period of years, during which period the Government should prepare to do without them; the adoption of the system advocated by him, successively restricting more and more his authority to con-

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per annum, amounting to $27,000. The contract was approved by Jesse E. Wilson, Acting Secretary of the Interior.

"Application for the contract was made by the 'Bureau of Catholic Indian Missions' on June 6, 1905.

"On March 26, 1906, a petition duly signed and genuinely signed by 212 members of the Sioux tribe of Indians of the Rosebud Agency, South Dakota, was filed, asking that the said contract applied for be entered into with the bureau.

"The payments under the contract were to be made from the 'Sioux Trust Fund' and the 'Sioux Treaty Fund,' as hereinbefore described, in the discretion of the Commissioner of Indian Affairs.

"There are 4,986 Indians on the rolls of the Rosebud Reservation, and the amount of tribal income applicable to education, in the discretion of the Commissioner, is—

"$250,047.90, or a per capita of $50.15.

"The 212 petitioners represent 669 shares, or $33,550.35, and of this they ask that $27,000 be used for the education of their children in St. Fran-

tract with such schools; the declarations in the acts of 1896 and 1897 that, subject to the restricted authority granted by those acts, it was "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school"; the declaration in the act of 1899 that the appropriation there made was "the final appropriation for sectarian schools"; and the fact that since 1899 no statute has granted the Secretary any authority to contract with sectarian schools for the education of Indian pupils; the conclusion is irresistible that Congress decided to abolish the entire system of Government aid to such schools, and to do so by depriving the Secretary of all authority to make any more such contracts.

Moreover, as it has been shown above that the term "contract schools" was officially used as including contract schools supported from Indian treaty and trust funds, the conclusion is irresistible that Congress made no distinction between contracts as to which the money was to come from the appropria-

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cis Mission School. The following table will represent the *pro rata* shares in these tribal funds, and the per capita shares:

4,986 Indians, 669 shares	$250,047.90 Tribal Funds $50.15 per capita.
Petitions, 4,317 Petitions (non-petitions)	33,550.35 Tribal Funds $50.15 per capita.
4,986	$250,047.90 Tribal Funds $50.15 per capita.

"The cost of the Government school for the fiscal year was about $76,830. Since the shares of the petitioning Indians amount to $33,550.35, and the sum asked for the school is only $27,000 out of this share, and the petitions were genuinely signed, the terms of the executive order of President Roosevelt of February 3d, 1905, *e. g.*, 'to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled,' have been strictly carried out.

"The services under this contract have been fully performed to the satisfaction of the Commissioner of Indian Affairs, and the twenty-seven thousand dollars ($27,000) agreed to be paid is due and payable, if this honorable court determines that it is legally payable out of the 'Sioux Trust Fund' and the 'Sioux Treaty Fund.' "

* * * * * * * * *

tion for the support of schools, and contracts as to which the money was to come from Indian treaty and trust funds. In either case the Government was the disburser of the money—the hand which directly dispensed the aid—and the money was disbursed under a contract. To deprive the Secretary of the power to make such contracts altogether was the only effectual means of preventing him from using Indian treaty and trust funds for sectarian schools, and it would operate just as effectually in regard to such funds as in regard to funds derived from the appropriation for the support of schools.

The Secretary's power to make such a contract was taken away altogether, and not merely as regards contracts where the money was to be paid out of appropriations by Congress expressly for the support of Indian schools.

As regards the taking away of the Secretary's power to make such a contract, no distinction can be drawn between money expressly appropriated by Congress for the support of Indian schools and money appropriated by Congress in fulfillment of Indian treaties and available for education.

As regards use under contracts with sectarian schools, no distinction can be drawn between money expressly appropriated by Congress for the support of Indian schools and money paid by the Government as interest on Indian funds held in trust by it.

While in the case of the Sioux trust fund the appropriation is made by a different system from that pursued with the Sioux treaty fund, there is still an appropriation within the meaning of the acts of 1896 and 1897, declaring it to be "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school," and the act of 1899 which said, "this being the final appropriation for sectarian schools." The word "appropriation," used as it is here, in statutes of the class known as "appropriation acts," is necessarily technical. It means an appropriation by Congress of money in the Treasury of the United States. Restricted as this meaning is, however, the whole phrase,

"make no appropriation whatever," is as broad a phrase as the limits of that meaning will possibly permit, and it refers to any and every kind of appropriation that Congress can make, without regard to the method of such appropriation. "No appropriation *whatever*" is a phrase that can have no limits but those which necessarily restrict the word "appropriation" itself.

The appropriations of funds in the United States Treasury are of two kinds, viz., those made for each successive fiscal year, and permanent annual appropriations. The latter are provided for in §§ 3687–3689, Rev. Stat., and cover a number of matters (the cost of revenue collection, payment of interest on the public debt, etc.), which are expected to recur every year, either indefinitely or for a considerable period, so that it is held inadvisable to make a special appropriation for them every year. When the Revised Statutes were compiled, the Indian trust funds were all invested (under §§ 2095, 2096), and the income received was paid to the Indians or expended for them, and this system was not changed until the act of April 1, 1880, c. 41, 21 Stats. 70. That act, providing for the payment of interest upon Indian trust funds deposited in the Treasury to the credit of Indian tribes, such payment to "be made in the usual manner, as each may become due, without further appropriation by Congress," really constitutes a permanent annual appropriation of such interest. Had that change been made before the Revised Statutes were compiled, the interest on the Indian trust funds would presumably have been included in the permanent annual appropriation system. The words "*without further* appropriation by Congress" clearly show that the provision of the act of 1880 constituted an appropriation once for all, or in other words a permanent annual appropriation.

The Solicitor General and *Mr. Edgar H. Gans*, with whom *The Attorney General* was on the brief, for appellees:

There is no constitutional question. For eighty years Con-

gress extended aid out of the public funds to mission schools of various denominations, finally withdrawing it because of opposition among the people at large and because the time had thus arrived for establishing distinctive government schools. If there were a valid constitutional objection to the earlier course, it is probable that it would have been discovered during that period of eighty years. The Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." A religious establishment, however, is not synonymous with an establishment of religion. See *Bradfield* v. *Roberts*, 175 U. S. 291, upholding an appropriation for a Roman Catholic hospital. A school, like a hospital, is neither an establishment of religion nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in morality and religion, just as in a hospital there would be religious ministrations.

But opposing counsel advance a line of suggestion similar to that made by the complainant in *Bradfield* v. *Roberts*, viz.: that the contract involved a principle and a precedent contrary to the Article of the Constitution, and tended to obliterate the essential distinction between civil and religious functions and injured the complainant and all other citizens and taxpayers of the United States, and was contrary to the Constitution and declared policy of the Government. But the court passed all such contentions, merely referring to them as statements of complainant's opinion.

The question here is wholly of statutory construction. The aid of the public funds was gradually diminished and then wholly withdrawn with the declaration in the acts of 1896 and 1897 that thereafter the policy of the Government would be to make no appropriation for sectarian schools, and the reference to the appropriation of 1899 as final, 29 Stat. 345; 30 Stat. 79 and 942. These declarations of policy would not prevent the present or a future Congress from resuming the appropriation and renewing the aid. The pro

hibition must be restricted to the particular kind of appropriations in which the declaration of policy appears, namely, to those under the heading "Support of Schools" which are altogether appropriations of public funds for Indian education; it is not intended to apply to the "tribal funds," as contended by the appellants, which are dealt with in an entirely different and separated portion of the appropriation acts. It is a case where the proviso or exception relates only to the particular paragraph or distinct portion of the statute where it occurs, and is not to be extended to the whole statute or other portions of it. *Savings Bank* v. *Collector*, 3 Wall. 495; *Henderson's Tobacco*, 11 Wall. 658; *Dollar Savings Bank* v. *United States*, 19 Wall. 227.

The "treaty funds" are manifestly funds belonging to the Indians, just as much in the case of the treaty funds which are the annual payment by installment of obligations to the Indians incurred under treaties, as with the trust funds which are the lump sums paid in settlement of such obligations, upon which the income is expended for the benefit of the Indians. In each case there is an "appropriation," annual or permanent, made, not as the ordinary appropriation applying public funds, but simply as an authority or mandate to the executive agents and the trustee to apply the avails of the fund as usual every year for the benefit of the *cestui que trust*.

There is no injustice in permitting an Indian to select a school for his children under the auspices of the church to which he is attached, and allowing on that account a portion of the tribal funds or a portion of the annuities or rations to be applied. Why should not one Indian or a group of Indians benefit by their strict proportionate share of the tribal funds and be permitted to determine, always within the scope of the Secretary's discretion, how their proportion of the funds should be expended? It is significant that Congress has refused to direct otherwise, laying on the table a bill forbidding trust and treaty funds to be so applied (H. R. 7067, 59th Cong., 1st sess.).

As to the related point that payments out of the treaty fund will diminish the amount of money which should be expended for the benefit of the entire tribe, the fact is that while the money arising from such funds is not systematically distributed *per capita*, it is nevertheless expended for *the benefit and advantage* of the Indians under a liberal exercise of the Secretary's discretion. The Indian may have no individual *locus standi* to compel payment in hand to him, but that does not prohibit the Secretary from applying a proper share of the funds for his individual benefit, especially when the Secretary's discretion is exercised by giving the same benefit to a collective group of individual Indians. That the treaty funds are intended by the law to provide for the Indians as individuals is evident from the heading "Subsistence and Civilization," under which the appropriation acts go on to provide for fulfilling treaty obligations, and from the long established practice of distributing food and clothing out of treaty funds. An examination of examples of such funds in the treaties and statutes shows that the entire application of the proceeds of such tribal funds is committed to the Secretary's discretion with little limitation. Treaty of 1848, art. 5, 9 Stat. 952; treaty of 1865, art. 2, 14 Stat. 687; act July 15, 1870, c. 296, 16 Stat. 362; act June 16, c. 252, 21 Stat. 292; act March 22, 1882, c. 46, 22 Stat. 30; act June 12, 1890, c. 418, 26 Stat. 146. In short, it is evident that while in a certain sense these funds and their revenue are to be administered for the benefit of the tribe, the aggregate community, the determination of that matter also is committed to the Secretary, and he is plainly authorized to administer the funds proportionately for the benefit of smaller groups or of individuals and in the way of benefiting them with any educational or civilizing influence.

It would be unjust to withhold from an Indian or community of Indians the right, within reasonable limits, in good faith, and under the safeguards provided by the President's instructions, to choose their own school and to choose it frankly because the education therein is under the influence of the

religious faith in which they believe and to which they are attached, and to have the use of their proportion of tribal funds applied under the control of the Secretary's discretion to maintain such schools. Any other view of the case perverts the supposed general spirit of the constitutional provision into a means of prohibiting the free exercise of religion.

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

We concur in the decree of the Court of Appeals of the District and the reasoning by which its conclusion is supported, as set forth in the opinion of Wright, J., speaking for the court. Washington Law Rep., v. 35, p. 766.

The validity of the contract for $27,000 is attacked on the ground that all contracts for sectarian education among the Indians are forbidden by certain provisos contained in the Indian Appropriation Acts of 1895, 1896, 1897, 1898 and 1899. But if those provisos relate only to the appropriations made by the Government out of the public moneys of the United States raised by taxation from persons of all creeds and faiths, or none at all, and appropriated gratuitously for the purpose of education among the Indians, and not to "Tribal Funds," which belong to the Indians themselves, then the contract must be sustained. The difference between one class of appropriations and the other has long been recognized in the annual appropriation acts. The gratuitous appropriation of public moneys for the purpose of Indian education has always been made under the heading "Support of Schools," whilst the appropriation of the "Treaty Fund" has always been under the heading "Fulfilling Treaty Stipulations and Support of Indian Tribes," and that from the "Trust Fund" is not in the Indian Appropriation Acts at all. One class of appropriations relates to public moneys belonging to the Government; the other to moneys which belong to the Indians and which is administered for them by the Government.

From the history of appropriations of public moneys for education of Indians, set forth in the brief of counsel for appellees and again at length in the answer, it appears that before 1895 the Government for a number of years had made contracts for sectarian schools for the education of the Indians, and the money due on these contracts was paid, in the discretion of the Commissioner of Indian Affairs, from the "Tribal Funds" and from the gratuitous public appropriations. But in 1894 opposition developed against appropriating public moneys for sectarian education. Accordingly, in the Indian Appropriation Act of 1894, under the heading of "Support of Schools," the Secretary of the Interior was directed to investigate the propriety of discontinuing contract schools and to make such recommendations as he might deem proper. The Secretary suggested a gradual reduction in the public appropriations on account of the money which had been invested in these schools, with the approbation of the Government. He said: "It would be scarcely just to abolish them entirely—to abandon instantly a policy so long recognized," and suggested that they should be decreased at the rate of not less than twenty per cent a year. Thus in a few years they would cease to exist, and during this time the bureau would be gradually prepared to do without them, while they might gather strength to continue without Government aid.

Accordingly Congress introduced in the appropriation act of 1895 a limitation on the use of public moneys in sectarian schools. This act appropriated under the heading "Support of Schools" "for the support of Indian and industrial schools and for other purposes . . . $1,164,350, . . . provided, that the Secretary of the Interior shall make contracts, but only with the present contract schools for the education of Indian pupils during the fiscal year ending June 30, 1896, to an extent not exceeding eighty per cent of the amount so used in the fiscal year 1895, and the Government shall as early as practicable make provision for the education of the Indians in Government schools."

This limitation of eighty per cent was to be expended for contract schools, which were those that up to that time had educated Indians through the use of public moneys, and had no relation and did not refer to "Tribal Funds."

In the appropriation act of 1896, under the same heading, "Support of Schools," the appropriation of public money of $1,235,000 was limited by a proviso that contracts should only be made at places where non-sectarian schools cannot be provided for Indian children to an amount not exceeding fifty per cent of the amount so used for the fiscal year 1895, and immediately following the appropriation of public money appears the expression, "and it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." This limitation, if it can be given effect as such, manifestly applies to the use of public moneys gratuitously appropriated for such purpose, and not to moneys belonging to the Indians themselves. In the appropriation act of 1897 the same declaration of policy occurs as a limitation on the appropriation of public moneys for the support of schools, and the amount applicable to contract schools was limited to forty per cent of the amount used in 1895. In the act of 1898 the amount applicable to contract schools was limited to thirty per cent, and in the act of 1899 the amount so applicable was limited to fifteen per cent, these words being added: "this being the final appropriation for sectarian schools." The declaration of the settled policy of the Government is found only in the acts of 1896 and 1897, and was entirely carried out by the reductions provided for.

Since 1899 public moneys are appropriated under the heading "Support of Schools" "for the support of Indian and industrial schools and for other educational purposes," without saying anything about sectarian schools. This was not needed, as the effect of the legislation was to make subsequent appropriations for education mean that sectarian schools were excluded in sharing in them, unless otherwise provided.

As has been shown, in 1868 the United States made a treaty with the Sioux Indians, under which the Indians made large cessions of land and other rights. In consideration of this the United States agreed that for every thirty children a house should be provided and a teacher competent to teach the elementary branches of our English education should be furnished for twenty years. In 1877, in consideration of further land cessions, the United States agreed to furnish all necessary aid to assist the Indians in the work of civilization and furnish them schools and instruction in mechanical and agricultural arts, as provided by the Treaty of 1868. In 1889 Congress extended the obligation of the treaty for twenty years, subject to such modifications as Congress should deem most effective, to secure the Indians equivalent benefits of such education. Thereafter, in every annual Indian appropriation act, there was an appropriation to carry out the terms of this treaty, under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes."

These appropriations rested on different grounds from the gratuitous appropriations of public moneys under the heading "Support of Schools." The two subjects were separately treated in each act, and, naturally, as they are essentially different in character. One is the gratuitous appropriation of public moneys for the purpose of Indian education, but the "Treaty Fund" is not public money in this sense. It is the Indians' money, or at least is dealt with by the Government as if it belonged to them, as morally it does. It differs from the "Trust Fund" in this: The "Trust Fund" has been set aside for the Indians and the income expended for their benefit, which expenditure required no annual appropriation. The whole amount due the Indians for certain land cessions was appropriated in one lump sum by the act of 1889, 25 Stat. 888, chap. 405. This "Trust Fund" is held for the Indians and not distributed *per capita*, being held as property in common. The money is distributed in accordance with the discretion of the Secretary of the Interior, but really belongs to

the Indians. The President declared it to be the moral right of the Indians to have this "Trust Fund" applied to the education of the Indians in the schools of their choice, and the same view was entertained by the Supreme Court of the District of Columbia and the Court of Appeals of the District. But the "Treaty Fund" has exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the Government. The only difference is that in the "Treaty Fund" the debt to the Indians created and secured by the treaty is paid by annual appropriations. They are not gratuitous appropriations of public moneys, but the payment, as we repeat, of a treaty debt in installments. We perceive no justification for applying the proviso or declaration of policy to the payment of treaty obligations, the two things being distinct and different in nature and having no relation to each other, except that both are technically appropriations.

Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be. *Roberts* v. *Bradfield*, 12 App. D. C. 475; *Bradfield* v. *Roberts*, 175 U. S. 291. But it is contended that the spirit of the Constitution requires that the declaration of policy that the Government "shall make no appropriation whatever for education in any sectarian schools" should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the Government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the Government is necessarily undenominational, as it cannot make any law respecting an

establishment of religion or prohibiting the free exercise thereof. The Court of Appeals well said:

"The 'Treaty' and 'Trust' moneys are the only moneys that the Indians can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended, for their benefit and in part for their education; it seems inconceivable that Congress should have intended to prohibit them from receiving religious education at their own cost if they so desired it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians, and such would be the effect of the construction for which the complainants contend."

The *cestuis que trust* cannot be deprived of their rights by the trustee in the exercise of power implied.

Decree affirmed.

BROWN *v.* FLETCHER'S ESTATE.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 220. Argued April 30, 1908.—Decided May 18, 1908.

The full faith and credit clause of the Federal Constitution does not preclude the courts of a State in which the judgment of a sister State is presented from inquiry as to jurisdiction of the court by which the judgment is rendered, nor is this inquiry precluded by a recital in the record of jurisdictional facts.

Every State has exclusive jurisdiction over property within its borders, and where testator has property in more than one State each State has jurisdiction over the property within its limits and can, in its own courts, provide for the disposition thereof in conformity with its laws.

There is no privity between the executor and an administrator with the will annexed appointed in another State which makes a decree in a court of such State against the latter binding under the full faith and credit clause of the Federal Constitution upon the former in the courts of the State in which such executor is appointed.

Where a party dies pending a suit which is subsequently revived against an administrator with the will annexed appointed in the State in the courts of which the suit is pending, the judgment is binding only upon the parties against which it is revived and who are within the jurisdiction of the court, and the courts of another State are not bound under the full faith and credit clause of the Federal Constitution to give effect to such judgment against the executors of such deceased party; and this applies to a judgment entered on an arbitration had in pursuance of a stipulation that it should be conducted under control of the court and that it should continue notwithstanding the decease of either party.

Quære as to the effect of the death of either party on an arbitration under a contract of submission made independently of judicial proceedings where the contract provides that the arbitration shall in such event continue and the award be binding upon the representatives of the deceased party.

146 Michigan, 401, affirmed.

On April 24, 1874, a bill of complaint in a suit for an accounting was filed in the Supreme Judicial Court of Massachusetts, sitting in equity, against George N. Fletcher, of Detroit, Michigan. The latter personally appeared and defended the suit. Without going into the details of the protracted litigation in Massachusetts, or showing how the plaintiff in error became at last the plaintiff in whose favor the Massachusetts court entered judgment, it is enough to say that on April 4, 1892, an agreement was made between the parties for submitting to arbitration all the claims and demands either party might have against the other; providing that the arbitration should be under rule of court, and that it should not operate as a discontinuance of the suit. It was further stipulated that the decease of either party should not terminate the submission, but that the arbitration should continue, and his successors and legal representatives should be bound by the final award therein. On October 18, 1893, the Hon. William L. Putnam was selected as arbitrator. On May 22, 1894, he filed a preliminary award. After this, and before a final award, Fletcher died, leaving a will, which was probated in the Probate Court of Wayne County, Michigan. Letters testamentary were issued to his executors, citizens of Michigan, who qualified as such, and took possession of the decedent's estate in Michi-

gan. His principal estate, as well as his domicil, was in Michigan, but he owned two small tracts in Massachusetts. The Probate Court of Middlesex County, Massachusetts, by proceedings, regular in form, appointed Frank B. Cotton, a citizen of that State, administrator with the will annexed. The Massachusetts property was afterwards sold by that administrator for $350.

After the death of Fletcher the principal suit was revived, the administrator entered his appearance therein, and an order was made by the Massachusetts court that the executors and the children and residuary legatees of the decedent be notified to appear, and that in default thereof the arbitration proceed. They were notified by personal service of the order in the State of Michigan, but did not appear. The arbitration proceeded in their absence and a final award was made. It should also be stated that on his death Fletcher's counsel withdrew their appearance in the case. On April 14, 1903, the Massachusetts Supreme Judicial Court confirmed the awards of the arbitrator, and adjudged that Albert W. Brown recover from Frank B. Cotton, administrator with the will annexed, the sum of $394,372.87 and $4,495.85 as interest and the costs of suit, afterwards taxed as $5,385.40. It was further adjudged and decreed that the Michigan executors of the last will were bound by the final award of the arbitrator and liable to pay to Albert W. Brown the aforesaid sums; that the legal representatives of George N. Fletcher were likewise bound by the award and liable for any deficiency. Thereafter the decree of the Massachusetts court was filed in the Probate Court of Wayne County, Michigan, as evidence of a claim against the estate. It was disallowed by that court, and on appeal to the Supreme Court of Michigan the disallowance was affirmed. 146 Michigan, 401. Thereupon the case was brought here on error.

Mr. Harrison Geer and *Mr. John Miner* for plaintiff in error: The Massachusetts court in equity having had jurisdiction

in Fletcher's lifetime over the subject-matter and the parties to the suit, and on his death the suit having been duly revived, the decree is conclusive evidence of debt in this proceeding.

The death of a party to a suit in equity does not amount to a determination of the suit, but merely suspends the proceedings until new parties are brought before the court. When the suit is revived, the cause proceeds to its regular determination. 5 Am. & Eng. Ency. of Pl. & Pr. 790, 791; Story's Equity Pl. & Pr. § 354; *Clarke* v. *Mathewson*, 12 Pet. 171; *Mellus* v. *Thompson*, 1 Cliff. 129; *Hoxie* v. *Carr*, 1 Sumn. (U. S.) 178.

While the right of the Massachusetts court to proceed in the suit was suspended by Fletcher's death, the court was not thereby divested of jurisdiction. It retained the jurisdiction possessed by it in the lifetime of Fletcher until the cause was finally determined. 2 Black on Judg. § 912; Freeman on Judg. § 142; *Sanford* v. *Sanford*, 28 Connecticut, 6; *Evans* v. *Black*, 5 Arkansas, 429; *Quarl* v. *Abbott*, 102 Indiana, 239, 240; *Gray* v. *Bowles*, 74 Missouri, 419; *Nations* v. *Johnson*, 24 How. 202. See also *Smith* v. *Engle*, 44 Iowa, 265; *Laing* v. *Rigney*, 160 U. S. 531; *Fitzsimmons* v. *Johnson*, 90 Tennessee, 416; *Field* v. *Judge*, 124 Michigan, 68.

The court having possessed jurisdiction of the cause until it was finally determined, its exercise of that jurisdiction cannot be questioned in a collateral proceeding like the one at bar. There is a marked distinction between the jurisdiction of a court and its exercise of that jurisdiction. If it has no jurisdiction, any judgment rendered by it is absolutely void, and may be attacked in a collateral proceeding. If it has jurisdiction, but exercises it wrongfully, its judgment may be reversed on appeal, but it cannot be questioned in a collateral proceeding. 17 Am. & Eng. Ency. of Law (2d ed.), 1042; *Paine* v. *Mooreland*, 15 Ohio, 435; *Chase* v. *Christianson*, 41 California, 255; *Laing* v. *Rigney*, 160 U. S. 531; *Babb* v. *Bruere*, 23 Mo. App. 606; *Hagerman* v. *Sutton*, 91 Missouri, 519.

The suit having been properly revived against the administrator with the will annexed, and the court having retained the jurisdiction that it possessed in Fletcher's lifetime until the cause was finally determined, the decree against such administrator is valid and conclusive evidence of debt in this proceeding against his estate in Michigan.

Even if the suit had not been revived after Fletcher's death the decree would be merely voidable, and not void, nor subject to attack in a collateral proceeding like the case at bar. While a court ought to cease the exercise of its jurisdiction over a party on his death, its failure to do so can only be corrected in a direct proceeding. The court having possessed jurisdiction in the lifetime of the party, and having retained such jurisdiction until the final determination of the suit, its exercise of that jurisdiction, even after the death of a party, is not subject to collateral attack. 2 Black on Judg. § 200; Freeman on Judg. §§ 140–153; 17 Am. & Eng. Ency. of Law (2d ed.), 1070; *New Orleans* v. *Gaines, Admr.*, 138 U. S. 612; *Reid* v. *Holmes*, 127 Massachusetts, 326; *Collins* v. *Mitchell*, 5 Florida, 364; *Neale* v. *Utz*, 75 Virginia, 480; *Yaple* v. *Titus*, 41 Pa. St. 195; *Carr* v. *Townsend's Ex'rs*, 63 Pa. St. 202; *Swasey* v. *Antram*, 24 Ohio St. 87; *Claflin's Ex'r* v. *Dunne*, 129 Illinois, 241; *Mitchell* v. *Schoonover*, 16 Oregon, 211; *Hayes* v. *Shaw*, 20 Minnesota, 405; *Stocking* v. *Hanson*, 22 Minnesota, 542; *Watt* v. *Brookover*, 29 Am. St. Rep. 816*n*; *Webber* v. *Stanton*, 1 Mich. N. P. 97.

Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding.

Both the executors and the administrator with the will annexed are in privity with their testator, Fletcher. 23 Am. & Eng. Ency. of Law (2d ed.), 101; Words and Phrases, Vol. 6, pp. 5606–5611; 1 Greenl. Ev. § 523; *Litchfield* v. *Goodnow*, 123 U. S. 549; *Williams* v. *Barkley*, 58 N. E. Rep. 768; *Pennington* v. *Hunt*, 20 Fed. Rep. 195; *Hill* v. *Tucker*, 13 How.

458; *Goodall* v. *Tucker*, 13 How. 469; *Latine* v. *Clements*, 3 Kelly (Georgia), 426.

Mr. Henry M. Campbell for defendant in error:

The contention that the administrator with the will annexed, appointed by the Probate Court of Suffolk County, Massachusetts, at the instance of the plaintiff, was in privity with the executors appointed by the Probate Court for the County of Wayne, Michigan, under the will, so that a decree in Massachusetts against the Massachusetts administrator with the will annexed, is binding upon the Michigan executors, is without support in principle or authority. *Campau* v. *Gillett*, 1 Michigan, 417; Gary, Probate Law, § 9; Story, Conflict of Laws, §§ 512, 513, 514; *Lafferty* v. *People's Savings Bank*, 76 Michigan, 35; *Am. Missionary Ass'n* v. *Hall*, 138 Michigan, 247; *Low* v. *Bartlett*, 8 Allen, 262; *Vaughn* v. *Northrop*, 15 Peters, 5; *Aspden* v. *Nixon*, 4 How. 467; *Stacey* v. *Thrasher*, 6 How. 58; *McLean* v. *Meek*, 18 How. 16; *Johnson* v. *Powers*, 139 U. S. 156.

The covenants contained in the agreement of submission could not confer upon the Massachusetts court the power, which it did not otherwise possess, to render a judgment against the Michigan executors over whom it had no authority and who had not been brought within its jurisdiction by legal process. *Woodbury* v. *Proctor*, 9 Gray, 19; *Wily* v. *Durgan*, 118 Massachusetts, 64; *Seavy* v. *Beckler*, 132 Massachusetts, 203; *Mussina* v. *Hettzog*, 5 Binn. (Pa.) 387.

An agreement that the Massachusetts court shall have authority to enter a decree which shall be binding upon persons not lawfully brought before it and upon an estate situated without its jurisdiction, is legally impossible. The State of Massachusetts, itself, is without power to confer such authority upon its courts, and the Michigan laws expressly prohibit the adjustment of claims against estates within its jurisdiction in any other way than that designated by its own laws. Cooley's Constitutional Limitations, 491; *Spear* v. *Carter et al.*, 1 Michi-

gan, 19, 23; *Youngblood* v. *Sexton*, 32 Michigan, 406, 409; *Allen* v. *Carpenter*, 15 Michigan, 25, 32; *Thompson* v. *Michigan Mutual Benefit Assn.*, 52 Michigan, 522, 524; *Kirkwood* v. *Hoxie*, 95 Michigan, 62; *Santom* v. *Ballard*, 133 Massachusetts, 465; *Batchelder* v. *Currier*, 45 N. H. 460, 463; *State* v. *Richmond*, 26 N. H. 232; *Dudley* v. *Mayhew*, 3 N. Y. 9; *Morrison* v. *Weaver*, 4 S. & R. (Pa.), 190; *Agee* v. *Dement*, 1 Humph. (Tenn.) 332; *Judy, Adm'r*, v. *Kelly*, 11 Illinois, 211; *Greer* v. *Ferguson*, 56 Arkansas, 324; *Flandrow* v. *Hammond*, 13 N. Y. App. Div. 325; *Sloan* v. *Sloan*, 21 Florida, 589–596; *Elling* v. *First Nat'l Bank*, 173 Illinois, 368, 387; Freeman on Judgments, § 120, and cases cited; *Foster* v. *Durant*, 2 Cush. 544; *Woodbury* v. *Proctor*, 9 Gray, 18; *Hubbell* v. *Bissell*, 15 Gray, 551; 17 Am. & Eng. Ency. of Law (2d ed.), 1060.

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

The Federal question presented is, whether the Michigan courts gave force and effect to the first section of Article IV of the Federal Constitution, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." That this is a Federal question is not open to doubt. *Huntington* v. *Attrill*, 146 U. S. 657, 666, and cases cited.

The constitutional provision does not preclude the courts of a State in which the judgment of a sister State is presented from inquiry as to the jurisdiction of the court by which the judgment was rendered. See the elaborate opinion by Mr. Justice Bradley, speaking for the court, in *Thompson* v. *Whitman*, 18 Wall. 457. That opinion has been followed in many cases, among which may be named *Simmons* v. *Saul*, 138 U. S. 439, 448; *Reynolds* v. *Stockton*, 140 U. S. 254, 265; *Thormann* v. *Frame*, 176 U. S. 350. Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts. *Knowles* v. *Gaslight &c. Co.*, 19 Wall.

58, 61; *Pennoyer* v. *Neff*, 95 U. S. 714, 730; *Cooper* v. *Newell*, 173 U. S. 555, 566.

Every State has exclusive jurisdiction over the property within its borders. *Overby* v. *Gordon*, 177 U. S. 214. We make this extract from the opinion of Mr. Justice White in that case, p. 222:

"To quote the language of Mr. Chief Justice Marshall, in *Rose* v. *Himely*, 4 Cranch, 241, 277: 'It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*.'

"As said also in *Pennoyer* v. *Neff*, 95 U. S. 714, 722: 'Except as restrained and limited by the Constitution, the several States of the Union possess and exercise the authority of independent States, and two well-established principles of public law respecting the jurisdiction of an independent State over persons and property are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. Any exertion of authority of this sort beyond this limit, says Story, is a mere nullity, and incapable of binding such persons or property in any other tribunals. Story, Confl. Laws, s. 539.' "

Fletcher at the time of his decease was the owner of property, some of it situated in Massachusetts and some in Michigan. Each State had jurisdiction over the property within its limits, and could in its own courts, in conformity with its laws, provide for the disposition thereof. Massachusetts exercised its jurisdiction over the property within its limits and disposed of it by legal proceedings in its courts. The contention now is that the proceedings in the Massachusetts court can be made operative to control the disposition of the property in Michigan. In support of this contention counsel for plaintiff in error state two propositions:

"The Supreme Judicial Court in Equity for Suffolk County, Massachusetts, having had jurisdiction in Fletcher's lifetime over the subject-matter and the parties to the suit, and on his death the suit having been duly revived, the decree is conclusive evidence of debt in this proceeding.

"Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding."

Considering first the latter proposition, we are of opinion that there is no such relation between the executor and an administrator with the will annexed appointed in another State as will make a decree against the latter binding upon the former, or the estate in his possession. While a judgment against a party may be conclusive, not merely against him, but also against those in privity with him, there is no privity between two administrators appointed in different States. *Vaughan* v. *Northrup*, 15 Pet. 1; *Aspden* v. *Nixon*, 4 How. 467; *Stacy, Adm'r*, v. *Thrasher*, 6 How. 44. In this latter case, on page 58, it was said:

"Where administrations are granted to different persons in different States, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contempla-

tion of law, there is no privity between him and the other administrator. See Story, Confl. of Laws, § 522; *Brodie* v. *Bickley*, 2 Rawle, 431."

See also *McLean* v. *Meek*, 18 How. 16; *Johnson* v. *Powers*, 139 U. S. 156, in which the question is discussed at some length by Mr. Justice Gray. This doctrine was enforced in Massachusetts. *Low* v. *Bartlett*, 8 Allen, 259, where a judgment had been recovered in Vermont against an ancillary administrator appointed in that State, whose appointment had been made at the request of the executor under the will probated in Massachusetts, and it was held that the administrator was not in privity with the executor, because the two were administering two separate and distinct estates, the court saying, p. 262:

"If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to that court; is accountable to it for all his proceedings; makes his final settlement in it and is discharged by it, in conformity with the statutes of this Commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator. Nor does the authority of the administrator extend to the property here, or to the doings of the executor. When the plaintiff commenced his suit against the administrator, the executor had no right to go there and defend it. If he had been found in Vermont he could not have been sued there. The judgment rendered in the suit was not against him, or against the testator's goods in his hands; but was simply against the administrator and the testator's goods in his hands. The courts of Vermont had no jurisdiction of the executor or of the goods in his hands, any more than our

courts would have over the administrator and the goods in his hands. It is this limitation of state jurisdiction that creates a necessity for an administration in every State where a deceased person leaves property; and each State regulates for itself exclusively the manner in which the estate found within its limits shall be settled."

The Massachusetts statutes proceed along this line. Secs. 10, 11 and 12, c. 136, Mass. Rev. Laws, 1902, provide for the probate of foreign wills in Massachusetts. Sec. 12 reads:

"After allowing a will under the provisions of the two preceding sections, the probate court shall grant letters testamentary on such will or letters of administration with the will annexed, and shall proceed in the settlement of the estate which may be found in this Commonwealth in the manner provided in chap. 143 relative to such estates."

With reference to the first contention of counsel, we remark that, while the original suit against Fletcher in the Massachusetts court was revived after his death, yet the revivor was operative only against the administrator with the will annexed. Neither the executors nor the residuary legatees were made parties, for it is elementary that service of process outside of the limits of the State is not operative to bring the party served within the jurisdiction of the court ordering the process. Such also is the statutory provision in Massachusetts. Section 1, ch. 170, Mass. Rev. Laws, 1902, reads:

"A personal action shall not be maintained against a person who is not an inhabitant of this Commonwealth unless he has been served with process within this Commonwealth or unless an effectual attachment of his property within this Commonwealth has been made upon the original writ, and in case of such attachment without such service the judgment shall be valid to secure the application of the property so attached to the satisfaction of the judgment, and not otherwise."

The Massachusetts court, therefore, proceeded without any personal jurisdiction over the executors and legatees, who

were all domiciled in Michigan, did not appear, and were not validly served with process.

The argument of plaintiff in error is that by personal appearance during his lifetime the Massachusetts court acquired jurisdiction of the suit in equity against Fletcher; that his death prior to a decree did not abate the suit, but only temporarily suspended it until his representative should be made a party; that if a decree had been rendered against him in his lifetime it would have established, both against himself and after his death against his estate, whatever of liability was decreed; that while the suit was pending the parties entered into a stipulation for an arbitration; that that arbitration did not abate, nor was it outside the suit, but in terms made under rule of court and not to operate as a discontinuance of the suit. Provision was also made in the stipulation for the contingency of death, its terms being "that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that . . . the legal representatives of said Brown and said Fletcher shall be bound by the final award therein;" so that there is not merely the equity rule that a suit in equity does not abate by the death of the defendant, and that the jurisdiction of the court is only suspended until such time as the proper representatives of the deceased are made parties defendant, but also a special agreement in the submission to arbitration that it shall be made under a rule of court, and that the death of either party shall not terminate the arbitration proceedings, but that they shall continue until the final award. It is urged that on the death a revivor was ordered; that the representative of the decedent's estate in Massachusetts, to wit, the administrator, was made a party defendant and appeared to the suit, and notice was given by personal service upon the executors and legatees in Michigan of the fact of the revivor, and that they were called upon to appear and defend.

But it must be borne in mind that this arbitration was made under a rule of court. Not only that, but special provision

was made for the action of the court in deciding questions of law arising upon the report of the arbitrator, so that the arbitration was not an outside and independent proceeding, but simply one had in court for the purpose of facilitating the disposition of the case. And we may remark in passing that we do not have before us the case of a simple arbitration contract, executed independently of judicial proceedings, and express no opinion as to the rights and remedies of one party thereto in case of the death of the other. The validity of the decree must depend upon the proceedings subsequent to the death of Fletcher. On his death the jurisdiction of the Massachusetts court was not wholly destroyed, but suspended until the proper representative of Fletcher was made a party. The Massachusetts administrator was made a party and did appear, and the decree rendered unquestionably bound him, but the executors, the domiciliary representatives of the decedent's estate, did not appear and were not brought into court. The Massachusetts administrator was not a general representative of the estate, and could not bind it by any appearance or action other than in respect to the property in his custody. If the home estate was to be reached it had to be reached by proceedings to which the home representatives were parties. The agreement of the parties that the arbitration should continue in case of the death of either, and that the legal representatives of the party should be bound by the final award, was an agreement made in the course of judicial proceedings of the suit in the Massachusetts court. It did not operate to make the home representatives of the decedent parties to the suit on the death of Fletcher. It did not bring his general estate into court. We concur in the views expressed by the Supreme Court of Michigan in the close of its opinion that—

"It must be held that the proceedings in the Massachusetts court abated with the death of Mr. Fletcher, that its revivor was possible only because there was brought into existence, by the exercise of the sovereign power of the State, a represen-

tative of the decedent, clothed with certain powers with respect to the estate of the decedent within the State, and that the decree thereafter rendered in the suit so revived is without effect save upon the administrator of the estate who was in accordance with the law of the place brought upon the record."

We are of opinion that the Supreme Court of Michigan did not fail to give "full faith and credit" to the decree of the Massachusetts Supreme Court, and therefore the judgment is

Affirmed.

LA BOURGOGNE.[1]

ON WRIT AND CROSS WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 33. Argued November 1, 1907.—Decided May 18, 1908.

The decree of the District Court in a proceeding for limitation of liability adjudging that the petitioner is entitled to the limitation and declaring that one class of claims cannot be proved against the fund and remitting all questions concerning other claims for proof prior to final decree is interlocutory and an appeal to the Circuit Court does not lie therefrom, but from the subsequent decree adjudicating all the claims filed against the fund.

This court will not disturb the concurrent findings of fact of both the courts below unless so unwarranted by the evidence as to be clearly erroneous, and a finding that the rate of speed of a vessel on the high seas during a fog was immoderate under the international rules, will not be disturbed because based on the conceptions of immoderate speed prevailing in the United States courts and not on those prevailing in the courts of the country to which the vessel belonged.

In a proceeding to limit liability instituted by the owners of a foreign vessel lost on the high seas the right to exemption must be determined by the law as administered in the courts of the United States.

In a proceeding for limitation of liability the remedy of claimants against the fund for the failure of the petitioners to produce log books ordered

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[1] Docket title, No. 33, George Deslions, W. C. Perry, Administrator of Kate M. Perry *et al.*, Petitioners, *v.* La Compagnie Générale Transatlantique, Owner of the Steamship La Bourgogne.

to be produced by the court is to offer secondary evidence or ask for dismissal of the proceeding; they cannot proceed and ask the court to decide the case, not according to the proof but on presumption of wrongdoing and suppression of evidence.

Under the circumstances of this case the fault of the officers and crew of the steamship La Bourgogne resulting in collision and loss of the vessel and its passengers, crew and cargo was not committed with the fault and privity of its owner, so as to deprive it of the right to a limitation of liability under §§ 4282, 4289, Rev. Stat.

Mere negligence of the officers and crew of a vessel, pure and simple and of itself, does not necessarily establish the existence on the part of the owner of the vessel of privity and knowledge within the meaning of the limited liability act of 1851 as reënacted in §§ 4282–4287, Rev. Stat. *The Main*, 152 U. S. 122, distinguished.

Under § 4405, Rev. Stat., the regulations of the supervising inspectors and the supervising inspector general when approved by the Secretary of the Treasury in regard to carrying out the provisions of §§ 4488, 4489, Rev. Stat., have the force of law, and the owner of a foreign vessel is required to comply therewith by the act of August 7, 1882, c. 441, 22 Stat. 346, and, even if such regulations are inconsistent with the statute, compliance therewith does not amount to a violation of the statute and deprive the owner of the right to a limitation of liability on account of privity with the negligence causing the loss.

In the case of a foreign vessel making regular trans-oceanic trips the freight for the voyage to be surrendered by the owner in a proceeding for limitation of liability when the vessel is lost on the return trip is that for the distinct sailing between the regular termini and does not include the freight earned on the outward trip.

Notwithstanding that where a contract of transportation is unperformed and no freight is earned no freight is to be surrendered, such freight and passage money as are received under absolute agreement that they shall be retained by the carrier in any event must be surrendered by the owner of a vessel seeking to limit his liability under the provisions of §§ 4283–4287, Rev. Stat.

An annual subsidy contract made by a foreign government and a steamship company for carrying the mails was held under its conditions not to be divisible, and no part thereof constituted freight for the particular voyage on which the vessel was lost which should be surrendered by the owner in a proceeding for limitation of liability.

Where the law of the State to which a vessel belongs gives a right of action for wrongful death occurring on such vessel while on the high seas, such right of action is enforceable in the admiralty courts of the United States against the fund arising in a proceeding to limit liability, *The Hamilton*, 207 U. S. 398; and the law of France does give such right of action for wrongful death.

In determining whether claims for wrongful death are enforceable against the fund in a limited liability proceeding, notwithstanding the right to

enforce such claims is based on the right of action given by the law of the country to which the vessel belongs, the question of whether the vessel was in fault and the fund liable must be determined by the law of the United States courts. The duty to enforce the cause of action given by the foreign law does not carry with it the obligation to give the proof the same effect as it would have in the courts of that country if the effect is different from that which such proof would have in the courts of the United States.

Where there is an honest controversy as to what the pending freight for the voyage includes, and in the absence of contumacious conduct, a limitation of liability should not be refused because the petitioner has not, pending the determination of such controversy, actually paid over to the trustee the entire amount of the pending freight as finally adjudicated.

Where on writ and cross writ of certiorari the judgment is affirmed neither party prevails and each must pay his own costs in this court.

144 Fed. Rep. 781, affirmed.

THE facts are stated in the opinion.

Mr. J. Parker Kirlin, with whom *Mr. Robert D. Benedict, Mr. Edward G. Benedict* and *Mr. A. Gordon Murray* were on the brief, for petitioners for writ of certiorari:

The statute under which the limitation of liability is asked being in derogation of the rights which the claimants would otherwise have under the common law, should therefore be strictly construed. *The Main,* 152 U. S. 122, and cases there cited.

The allegation that the loss occurred without the privity or knowledge of the petitioner must be affirmatively proved. It cannot be established without proving the negative of any matter of privity or knowledge that is put in issue. The petitioner must prove not only the ultimate fact, but also such subsidiary facts as may be necessary to found the conclusion that is to be established.

The Court of Appeals, in ruling that there could not be any direct privity on the part of the petitioner because none of its officers was on board the vessel, places too narrow a construction on the word privity. The petitioner would be in privity with the cause of damage, if it encouraged, consented to or connived at the kind of navigation that led to the disaster.

Craig v. *Continental Ins. Co.*, 141 U. S. 638; *Butler* v. *Steamship Co.*, 130 U. S. 527, 553; *The Rio Janiero*, 130 Fed. Rep. 76; *S. C.*, 195 U. S. 632; *Parsons* v. *Empire Trans. Co.*, 111 Fed. Rep. 202, 208; *S. C.*, 183 U. S. 699; *McGill* v. *Mich. S. S. Co.*, 144 Fed. Rep. 788; *S. C.*, 203 U. S. 593; *Quinlan* v. *Pew*, 56 Fed. Rep. 111.

In order to obtain the limitation provided for by statute the petitioner has the burden of proof, and is bound to show, by a fair preponderance of the evidence, that the loss in respect of which the limitation is desired, has been "done, occasioned, or incurred without the privity or knowledge of such owner." Unless it has established that condition affirmatively, it cannot have a limitation of its liability. *Quinlan* v. *Pew*, 56 Fed. Rep. 111, 118; *The Colima*, 82 Fed. Rep. 665, 669; *McGill* v. *Mich. S. S. Co.*, 144 Fed. Rep. 788, and cases cited; *The Wildcroft*, 201 U. S. 378.

That the petitioner encouraged, sanctioned and knowingly tolerated, and was thus in privity with the kind of navigation that resulted in the loss of the Bourgogne is shown by circumstances which are not in substantial dispute. The facts show that the Bourgogne was lost and the damages suffered by the claimants were occasioned by the negligent act of the petitioner's servants in running the steamer at an immoderate rate of speed in a dense fog, and further that petitioner did not issue and enforce sufficient instructions to its captains to run its steamers at moderate speed in fog. Hence petitioner should be held to be in privity with the improper navigation of the Bourgogne, if such navigation could have been prevented by the petitioner by the promulgation and enforcement of reasonable rules for navigation under such circumstances. *Doing* v. *N. Y., Ontario & Western Ry.*, 151 N. Y. 579, 583; *Abel* v. *Delaware & Hudson Canal Co.*, 103 N. Y. 585; *Whittaker* v. *Del. & Hudson Canal Co.*, 126 N. Y. 549; *Cooper* v. *Iowa Central Ry.*, 45 Iowa, 134; *Chicago &c. Ry Co.* v. *Taylor*, 60 Illinois, 461; *Thomas* v. *Cincinnati &c. Ry.*, 97 Fed. Rep. 251; *Northern Pacific Ry.* v. *Nickels*, 50 Fed. Rep. 718.

Knowledge of the practice of its steamers to run at immoderate speed in fog may fairly be imputed to the petitioner from its experience in previous cases of collision of its own steamers. *Thorbjorsen* v. *Compagnie Générale Transatlantique*, Record p. 1171; aff'd, Court of Appeals of Rouen, Record p. 1179; *The Normandie and the Charlotte Webb*, 58 Fed. Rep. 427. Knowledge of the custom may, under the authorities, be inferred from such circumstances. *The George W. Roby*, 111 Fed. Rep. 601; *District of Columbia* v. *Armes*, 107 U. S. 519; *Chicago* v. *Powers*, 42 Illinois, 169; *Quinlan* v. *City of Utica*, 11 Hun, 217; *S. C.*, 74 N. Y. 603; *Carpenter* v. *Boston &c. R. R.*, 97 N. Y. 949; *Snow* v. *Fitchburg R. R. Co.*, 136 Massachusetts, 522; *Galloway* v. *Chic. &c. R. R.*, 56 Minnesota, 346.

The disobedience of the order of the court requiring the production of the log books of the Bourgogne and of other steamers navigated by Captain Deloncle, for two years prior to the collision, creates a presumption adverse to the petitioner which corroborates the claimants' proof that the petitioner's steamers were habitually run at immoderate speed in fog. *Blatch* v. *Archer*, Cowp. 63; 1 Starkie on Evidence, p. 54; *Commonwealth* v. *Webster*, 5 Cushing, 295, 316; *McDonough* v. *O'Niel*, 113 Massachusetts, 92; *People* v. *McWhorter*, 4 Barb. 438; *Railway Co.* v. *Ellis*, 54 Fed. Rep. 481; *Clifton* v. *United States*, 4 Howard, 242; *Kirby* v. *Tallmage*, 160 U. S. 379, 383; *The New York*, 175 U. S. 187, 204; *Wylde* v. *Northern R. R. Co. &c.*, 53 N. Y. 156; *A Quantity of Distilled Spirits*, 3 Benedict, 70.

The petitioner was operating the Bourgogne in violation of § 4488 of the Revised Statutes, which required her to have such numbers of life boats and life rafts as would best secure the safety of all persons on board in case of disaster. She carried 714 persons but had boat and raft capacity for only 658.

The reasonable construction of § 4488, is that a foreign steamship carrying passengers from a port in the United States,

must be provided with such number of life-boats and life-rafts as will float all the persons on board in case the ship sinks. If every boat and life-raft that the Bourgogne carried had been successfully launched and fully laden with the passengers and the crew, fifty-six or fifty-eight persons would necessarily have been left to sink with the ship. It seems too plain for argument that under those circumstances she was not fitted with such number of boats and rafts as would best secure the safety of all persons on board as the law required.

The freight for the voyage was never transferred to the trustee, nor was any bond for it given. The court below erred in granting the petitioner a limitation of its liability without having secured possession of the fund to which it assumed to limit the rights of the claimants. *In re Morrison*, 147 U. S. 35; *Norwich* v. *Wright*, 13 Wall. 104, 124; *Ex parte Slayton*, 105 U. S. 451, 452; *O'Brien* v. *Miller*, 168 U. S. 287.

The voyage of the Bourgogne on which she was sunk was a round voyage from Havre, her home port, out to New York and back to Havre, and the "freight for the voyage," within the meaning of the limitation of liability acts, is all the freight received for the whole round voyage, and not merely the freight for the half voyage, or passage back from New York to Havre. Parsons on Shipping and Admiralty, p. 307; *In re George Moncan*, 8 Sawyer, 353; *Friend* v. *Gloucester Insurance Co.*, 113 Massachusetts, 326, 332; *Whitcomb* v. *Emerson*, 50 Fed. Rep. 128; *The Giles Loring*, 48 Fed. Rep. 463; *Williamson* v. *London Assurance Co.*, 1 M. & S. 318; *S. C.*, 14 R. R. 441; *The Progress*, Edward's Admiralty Reports, 210, 218; *Moran* v. *Jones*, 7 E. & B. 523; *The Brig Mary*, 1 Sprague, 17.

The court below erred in holding that the proportion of the annual mail subsidy paid by the French government to the petitioner for the operation of the mail service in respect of the voyage on which the Bourgogne was lost was not "freight," and need not be accounted for in this proceeding. *The Main*, 152 U. S. 122, 129; *O'Brien* v. *Miller*, 168 U. S. 287, 304; Kent's Commentaries (7th ed.), Vol. III, p. 279.

Mr. Edward K. Jones and *Mr. William G. Choate*, with whom *Mr. Joseph P. Nolan* was on the brief, for respondent, La Compagnie Générale Transatlantique and petitioners on cross writ:

The decree of Judge Townsend of March 22, 1902, was a final decree.

(1) So far as it determined that the petitioner should be granted a decree limiting its liability, and (2) that claims for loss of life were disallowed and not to be brought before the commissioner for consideration, and (3) that each of the three specified items of prepaid passage money, prepaid freight and an aliquot part of the French subsidy were not pending freight; and (4) as the appeal was not taken by the claimants within the statutory period of six months after the entering of Judge Townsend's decree, the Circuit Court of Appeals had no jurisdiction to hear the appeal in respect to these questions, or either of them. 26 St., p. 826, c. 517; *Ray* v. *Law*, 3 Cranch, 179; *Forgay* v. *Conrad*, 6 How. 201; *Thompson* v. *Dean*, 7 Wall. 342; *St. Louis, I. M. & S. R. R. Co.* v. *Southern Exp. Co.*, 108 U. S. 24, at 29; *Bronson* v. *Railroad Co.*, 2 Black, 524; *Bank* v. *Shedd*, 121 U. S. 74, 84, 85; *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180; *Lewisburg Bank* v. *Sheffey*, 140 U. S. 445.

A decree sustaining the petition for a limitation of liability has always been considered and treated as a final decree for the purposes of an appeal, irrespective of any further proceedings which may be necessary to distribute the fund. *The Annie Faxon*, 66 Fed. Rep. 575; *S. C.*, 75 Fed. Rep. 312; *Parsons* v. *Empire Transportation Co.*, 111 Fed. Rep. 202; *Gleason* v. *Duffy*, 116 Fed. Rep. 298; *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, 550.

The District Court and the Circuit Court of Appeals correctly decided on the proofs made that the petitioner should be granted the limitation of liability provided by § 4283 of the Revised Statutes.

The purpose of the act has been many times explained by

this court to have been the encouragement of shipbuilding and of investment in ships, and the intent being plain, the act should be liberally construed to accomplish the purpose aimed at. *Moore* v. *American Transportation Co.*, 24 How. 1; *Norwich Co.* v. *Wright*, 13 Wall. 104; *The Benefactor*, 103 U. S. 239; *The Scotland*, 105 U. S. 24, 33; *The Northern Star*, 106 U. S. 17; *Providence & N. Y. Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *The City of Norwich*, 118 U. S. 468; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527. The case of *The Main*, 152 U. S. 122, discussed and distinguished.

To establish that the loss or injuries were caused with the knowledge or privity of the owners, the knowledge must be shown to be actual and not merely constructive. *Quinlan* v. *Pew*, 56 Fed. Rep. 111, 117; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578.

The points relied upon to show that this collision happened with the knowledge or privity of the petitioner or that it should not be granted limitation of its liability, are not sustained by the evidence.

Even if it were shown that the captains of this line, to the knowledge of the petitioner, navigated their ships in fog at a speed in excess of that recognized by this country as moderate, but within the limit of speed recognized by the French law as moderate, the petitioner's right to a limitation of its liability would not be thereby impaired or forfeited. A person who embarks himself or his goods on a French ship, certainly casts in his lot for certain purposes with the ship on which he embarks. To a certain extent, at least, he voluntarily submits himself to the French law. The petitioner ought to be judged by the law of France, to which the other party to the controversy appeals. *Regina* v. *Anderson*, L. R. 1 Cr. Cas. Revd. 161.

The finding of the district judge that the petitioner was entitled to a limitation of liability, concurred in by the Circuit Court of Appeals, will not, under the rulings of this court, be disturbed, inasmuch as the same involves essentially a question of fact. *Compania La Flecha* v. *Braver*, 168 U. S. 104;

Stuart v. *Hayden*, 169 U. S. 1; *Baker* v. *Cummings*, 169 U. S. 189; *The Carib Prince*, 170 U. S. 655; *Morewood* v. *Enequist*, 23 How. 491; *The Conqueror*, 166 U. S. 110, 136; *Illinois* v. *Illinois Central R. R. Co.*, 184 U. S. 77; *Towson* v. *Moore*, 173 U. S. 17, 24.

The amount received by the petitioner from the French government, as a subsidy, is not pending freight, and the petitioner was not required to surrender the same to the trustee.

The petitioner was not required to surrender to the trustee the freight and passage money received by it for the passage from Havre to New York. *The Alpena*, 8 Fed. Rep. 280; *Gokey* v. *Fort*, 44 Fed. Rep. 364; *The Rose Culkin*, 52 Fed. Rep. 328; *The U. S. Grant*, 45 Fed. Rep. 642; *The Doris Eckholf*, 30 Fed. Rep. 140.

Mr. Justice White delivered the opinion of the court.

On July 4, 1898, in the Atlantic Ocean, about sixty miles off Sable Island, as the result of a collision between the British ship Cromartyshire and the French steamship La Bourgogne, bound from New York to Havre, La Bourgogne was hopelessly injured, sank in a short time, and most of her passengers, her captain, other principal officers, and many of the crew went down with the ship. Numerous suits in admiralty and actions at law were brought in various Federal and state courts against La Bourgogne, or her owners, to recover damages for loss of life, loss of baggage, and other personal effects. These claims aggregated a very large sum. In May, 1900, La Compagnie Générale Transatlantique, a French corporation, the owner of La Bourgogne, petitioned the United States District Court for the Southern District of New York seeking to obtain the benefit of the laws of the United States limiting the liability of ship owners. It was averred that the collision was caused solely by the fault of the Cromartyshire, but even if there was fault on the part of La Bourgogne it was without the privity or knowledge of the company. The interest of

the company in the steamship and her pending freight was alleged to be only about one hundred dollars, the value of articles saved from the wreck. A list of the pending suits was annexed. It was prayed that a trustee be appointed, to whom the interest of the company in the steamship and her pending freight might be transferred. A monition warning all persons having claims by reason of the collision to prove the same, within a time to be fixed, was asked, as also that a commissioner be appointed to take such proof, and that the prosecution of all other actions because of the collision be restrained. Finally it was prayed that the company be decreed not to be liable for the loss of La Bourgogne, or, if responsible, its liability in conformity to the statute be limited to the property surrendered.

The court directed the company to transfer to a named trustee its interest in the steamship and her pending freight, and following this order a formal transfer was executed. There were, however, actually surrendered to the trustee only certain life-boats and life-rafts. A monition and a preliminary injunction were ordered, and a commissioner was named to take proof of claims within a time fixed. In conformity with a rule of the court relating to the procedure to limit liability, which is in the margin,[1] the commissioner in a short while

[1] Rule No. 78 of the District Court of the United States for the Southern District of New York:

"Proof of claims presented to the commissioner shall be made by or before the return day of the monition by affidavit specifying the nature, grounds and amount thereof, the particular dates on which the same accrued, and what, if any, credits were given thereon, and what payments, if any, have been made on account; with a bill of particulars giving the respective dates and amounts, if the same consists of several different items. Such proof shall be deemed sufficient, unless within five days after the return day of the monition, or after interlocutory decree in case of issue joined by answer to the petition, or within such further time as may be granted by the court, the allowance of the claim shall be objected to by the petitioner or by some other creditor filing a claim, who shall give notice in writing of such objection to the commissioner and to the proctors of the claim objected to, if any. Any claim so objected to must be established by further legal *prima facie* proof on notice to the objecting party, as in ordinary cases;

reported that claims aggregating more than two million dollars had been presented. Most were for losses occasioned by death and the others were for personal injuries and for loss of baggage or other personal effects.

Disregarding the technical attitude of the parties on this record we shall speak of La Compagnie Générale Transatlantique, owner of La Bourgogne, as the petitioner and the adverse parties as claimants.

Without stating details, it suffices to say that the petitioner challenged the validity and amount of the claims reported. The claimants traversed the petition for limitation of liability, charging that the collision had been solely caused by the fault of La Bourgogne in going at an immoderate rate of speed in a dense fog, and that such fault was with the privity and knowledge of the petitioner. This latter was based on averments that the petitioner had negligently failed to make and enforce adequate regulations to prevent its steamers being run at an immoderate speed in a fog, that it had knowledge that its steamers were habitually so run, and because La Bourgogne was not fully manned and equipped as required by law, had no watertight bulkheads, and was not furnished with boats or proper disengaging apparatus, as required by the laws of the United States. It was further charged that the petitioner was not entitled to a limitation of liability, because it had not actually surrendered the freight pending, and besides had not surrendered the sum of a subsidy given by the French government for carrying the mails and for other services.

Pending action upon the report the case proceeded as to the general questions of fault for the collision and the right to a limitation of liability. During the proceedings, in answer

but any creditor desiring to contest the same upon any specific defense must, with his notice of objection, or subsequently, if allowed by the commissioner or the court, state such defense, or be precluded from giving evidence thereof; and the unsuccessful party to such contest may be charged with the costs thereof. The commissioner shall, on the return day of the monition, file in open court a list of all claims presented to him."

to interrogatories propounded on behalf of certain of the claimants, the petitioner admitted that it had received the following sums:

From the French government for the carriage of mails, etc., between Havre and New York during the year 1898, being for fifty-two trips between Havre and New York, going and returning.....	5,473,400.00 francs
For passage money on the last trip from Havre to New York.....	44,480.70 "
For freight collected on the same sailing...	14,088.95 "
For passage on the trip from New York to Havre, in which La Bourgogne was lost .	100,703.08 "
For freight on the same sailing.....	12,716.43 "

The trustee named by the court thereupon demanded the actual surrender of one fifty-second part of the annual subsidy and all the freight and passage money above referred to. The petitioner refusing to comply, in April, 1901, the trustee and some of the claimants asked an order directing the payment of said amounts with interest from the date of the collision. On May 11, 1901, the court declined to make the order, and reserved the matter for further consideration.

In the autumn following, in October, 1901, the case came on for trial before Townsend, District Judge. After taking testimony in open court for several days an order was entered directing that any further testimony be taken out of court. This being done, the case in its then stage was heard. The court (Townsend, District Judge) expressed its opinion as to fault for the collision, as to whether an adequate surrender had been made of the interest of the petitioner in the steamship and her pending freight, as to whether the petitioner was entitled to a limitation of its liability, and as to whether claims resulting from loss of life were under any circumstances entitled to be established against the fund. No opinion was expressed as to the legal merit of or the amount of the other

claims against the fund. The conclusions of the court were thus by it summed up (117 Fed. Rep. 261):

"First, that the prayer for limitation should be granted; second, that claims for loss of life should be excluded from consideration in this proceeding; third, that the Bourgogne was to blame for the collision; fourth, that claims other than those for loss of life be referred to the commissioner 'to take testimony as to the amount of such claims and report the same to this court, together with his opinion, with all convenient speed;' fifth, that the petitioner has duly surrendered its interest in the Bourgogne and her pending freight by the transfer made to the trustee, and that the value of such interest extends no further than the value of the life-boats and life-rafts."

A decree was entered conformably to these views. A few weeks thereafter the court permitted the S. S. White Dental Company to file a claim for the value of certain merchandise shipped under a bill of lading alleged to be of the value of $17,108.40.

The commissioner heard testimony concerning the validity and the amount of the respective claims. On May 9, 1904, the commissioner filed his report. The claim of the S. S. White Dental Company was disallowed on the ground that La Bourgogne was in all respects seaworthy at the time of her sailing on the voyage on which she was lost, and that in consequence of the provisions of the Harter Act, the claim in question being for merchandise shipped as freight under a bill of lading, no recovery could be had. The remaining claims, noted in the margin,[1] were allowed upon the theory that recovery might be had as for baggage lost by the sinking of the steamship.

[1] To Pauline Henuy, as administratrix of Juliette Cicot, deceased, $2,802, for loss of money and personal effects.

To Henry Hyer Knowles, as administrator of Gertrude Lalla Rookh Knowles, deceased, $2,000, for loss of personal effects.

To William C. Perry, as administrator of Kate M. Perry, deceased, $5,277.50, for loss of money and personal effects.

To William C. Perry, as administrator of Florence Perry, deceased, $1,050, for loss of money and personal effects.

In thus deciding the commissioner followed the ruling of the Circuit Court of Appeals for the Second Circuit made in *The Kensington*, 94 Fed. Rep. 885, in which it was held that the exemption from liability conferred by the Harter Act did not embrace baggage when not shipped as cargo. Obviously, also, the commissioner was of the opinion, for like reasons, that Rev. Stat., § 4281—exempting a master and the owner of a vessel from liability for the value of precious metals, jewelry, etc., unless written notice of the character of such articles be given and the same be entered on a bill of lading—was also inapplicable. The petitioner excepted to so much of the report as allowed the claims, and the S. S. White Dental Company excepted to the disallowance of its claim. These exceptions were overruled, and the report was confirmed.

In July, 1904, a decree was signed by District Judge Thomas. It was adjudged that all claims favorably reported upon should be paid out of the fund, and conformably to this conclusion a specific decree in favor of each of the claimants was awarded, with interest from the date of the collision to the date of the decree. The adverse action of the commissioner upon the claim of the S. S. White Dental Company was affirmed. Giving effect to the previous ruling made by Judge Townsend it was adjudged "That all claims which have been filed in this proceeding on behalf of persons for damages for negligence resulting in loss of life caused by said collision be and the same are hereby disallowed and excluded from the consideration of the commissioner in this proceeding."

On the main issues—that is, the fault of La Bourgogne—

To William C. Perry, as administrator of Sadie Perry, deceased, $1,050, for loss of money and personal effects.

To John Perry, as next of kin of Katherine Perry and Albert Perry, deceased, $350, for loss of personal effects.

To Lewis Delfonti $432, for loss of personal effects and for damages for personal injuries.

To Henri Cirri, $1,018, for loss of personal effects and as damages for personal injuries.

To George Deslions, $25,000 for loss of property as baggage.

the right of the petitioner to a limitation of liability, and the amount of the pending freight, it was decreed as follows:

"That the steamer La Bourgogne . . . was in fault and to blame in reference to the collision in question, in that she was proceeding at an immoderate rate of speed in a fog, contrary to law, and that the petitioner La Compagnie Générale Transatlantique is liable 'for the damages caused by the said collision to each of the claimants whose claims have been reported upon' and which have been 'confirmed in the amount so reported.' "

It was further recited in the decree:

"That the petitioner is entitled to limit its liability for such damages as are decreed as aforesaid to the amount of the value of the said steamer and her freight for the voyage, and that there is not to be included as going to make up said amount either the freight or passenger money received by the petitioner for the trip of said steamer La Bourgogne from Havre to New York, or for the trip from New York to Havre, during which voyage said collision occurred, or the amount of the money paid to the petitioner by the government of France under the contract proved between the petitioner and said government for the voyage on which the Bourgogne was lost."

The costs incurred in determining whether the petitioner was at fault were given to the claimants, while the costs incurred in determining whether the petitioner was entitled to a limitation of liability were awarded to it and made "payable, primarily, out of any fund herein that is or may come into the hands of the trustee." The prosecution of other actions and suits was perpetually enjoined. The following indorsement was made on the back of the decree:

"(Endorsed.)—Final decree.—This decree substantially follows the practice of both the Eastern and Southern Districts of New York as regards the question of an interlocutory judgment and is in other respects deemed correct.—E. B. T., U. S. J."

Those whose claims were allowed appealed from so much

of the decree as granted the limitation of liability and as determined the *quantum* of pending freight to be surrendered. The S. S. White Dental Company and various death claimants appealed from the disallowance of their claims. The petitioner also appealed from so much of the decree as held the La Bourgogne at fault and allowed recovery in favor of the various claimants.

These two classes of appeals were heard separately in the Circuit Court of Appeals. Those of the claimants were decided on June 23, 1905. Before passing on the merits the court was required to consider a motion to dismiss, made by the petitioner on the ground that the claimants had not appealed within the statutory time. This was based on the contention that the final decree was not that entered by Judge Thomas in 1904, from which the appeals were taken, but the one entered by Judge Townsend in 1902. The court held that Judge Townsend's decree of 1902 was but interlocutory and that of Judge Thomas was final.

On the merits, it was decided that it had been rightly held that La Bourgogne was in fault for going at an immoderate speed in a fog, but that such fault was not committed with the privity or knowledge of the petitioner. In these respects, therefore, the decree below was affirmed. As the Cromartyshire was not present, the court expressly refrained from stating any opinion as to any concurring fault on her part, remarking that her presence was not necessary, as with the allowance of death claims even one-half of the damage found in this proceeding would greatly exceed the sum transferred to the trustee in limitation of liability. It was further decided that the court below was right in rejecting the claim of the S. S. White Dental Company. It was held, however, that the court erred in excluding the claims for damage caused by loss of life, and therefore it was ordered that proof as to their amount should be taken to the end that they might participate in the fund. On the question of pending freight it was decided that the court below had correctly held that no part of the

freight and passage money collected for the sailing from Havre to New York, or of the subvention paid by the French government, should be surrendered as freight pending, yet that error had been committed in deciding that the freight and passage-money collected for the sailing from New York to Havre should not be paid over as a part of the pending freight. 139 Fed. Rep. 433.

On December 14, 1905, the appeal on behalf of the petitioner, in so far as not already passed upon, came on for hearing. The claimants objected to the hearing because the petitioner had not actually paid over to the trustee the sum of the freight and passage money for the last sailing from New York to Havre, which the court had held to be pending freight to be surrendered under the law for limitation of liability. The court, without referring to the subject, passed upon the appeal. In disposing of the merits while observing that in view of the large amount of the death claims which the claimants were at liberty to establish as a result of the previous decision, the petitioner was really without any substantial interest to dispute the correctness of the awards in favor of the various claimants, nevertheless, in consequence of the possibility that its ruling on that subject might not be final, the court considered the various awards and decided that no error had been committed in respect to any of them, Wallace, Circuit Judge, dissenting, however, as to the allowance made to the claimant Deslions. 144 Fed. Rep. 781.

As the case is before us not only because of the allowance of a writ of certiorari applied for by the claimants, but also on a cross writ asked on behalf of the petitioner, all the questions presented by the record are open and, as far as they are essential, must be disposed of. Primarily, the question impliedly passed upon by the Circuit Court of Appeals, concerning the timely taking of the appeals to that court, requires attention. To dispose of the subject we must decide whether the decree entered by Judge Townsend in 1902 or that entered by Judge Thomas in 1904 was the final decree.

The authorities concerning the distinction between interlocutory and final decrees were cited in the opinion in *Keystone Manganese & Iron Co.* v. *Martin*, 132 U. S. 91, and the subject was fully reviewed in *McGourkey* v. *Toledo O. C. R. Co.*, 146 U. S. 536. The rule announced in these cases, for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties, and illustrations of the application of the rule are found in the late cases of *Clark* v. *Roller*, 199 U. S. 541, 546, and *Ex parte National Enameling Co.*, 201 U. S. 156. Now the case in the trial court primarily involved the right to a limitation of liability. The case further involved the nature and amount of the claims which were to be allowed against the fund. When the proceedings were commenced all the questions concerned in this latter subject were referred to a commissioner, to receive formal proof and make report. When the commissioner reported the aggregate amount of the claims, objections were filed on behalf of the petitioner. No action, however, was immediately taken by the court on these objections, but the case proceeded as to the right to a limitation of liability. When that subject was ready for action it was impossible to finally dispose of the case as an entirety by passing upon the contests which had arisen concerning the claims, because no other than formal proof in regard thereto had been made. Under these circumstances the court, for the purpose of furthering the progress of the cause, so that a final decree might be reached with reasonable celerity, passed upon the questions which were ripe for its action, that is, whether the petitioner was entitled to the limitation of liability and the sum of the pending freight. It also passed upon the claims for loss of life, because it was deemed that their generic character rendered it impossible to prove them against the fund. All questions concerning the other claims, both as to law and fact, were remitted for proof as an essential prelude to a final decree. Under these conditions the case, we think, may be likened to one where a decree of foreclosure is entered

concerning the sale of mortgaged property, but without a determination as to the amount due by the mortgage debtor, in which case, as pointed out in *Keystone Manganese Iron Co.* v. *Martin, supra,* referring to the case of *Ray* v. *Law,* 3 Cranch, 179, the decree of foreclosure would be but interlocutory and not susceptible of being appealed from as a final decree. Besides, as pointed out in the *McGourkey case,* if the court below has treated a decree as interlocutory, and there is doubt on the subject, that doubt should be resolved in favor of the correctness of the conceptions of the lower court. It may not be doubted on the very face of the decree of 1902, especially in view of the indorsement made upon the final decree by Judge Thomas that it was considered both by Judge Townsend and Judge Thomas, that the decree of 1902 was merely interlocutory. And such was, undoubtedly, the contemporaneous view taken by all the parties, since, except by an inadvertent notice of appeal given by the clerk of a proctor for several claimants, no appeal was taken from the decree of 1902, while all parties treated the decree of 1904 as the final decree and appealed therefrom.

We are thus brought to the merits of the case, and shall consider separately the various contentions.

1. *Was La Bourgogne at fault for the collision?* For the reasons which caused the Circuit Court of Appeals to decline to consider whether there was fault on the part of the Cromartyshire, we put that question out of view. The District Court, after a careful review of the evidence, found that, although the navigation of La Bourgogne was in other respects faultless, that navigation was clearly negligent, because there was a failure to moderate her speed in the dense fog which prevailed at the time of the collision, which undue speed was the sole cause of the collision, it being found that there was no fault on the part of the Cromartyshire. The court found, after making all possible allowances, that the steamship must have been running at about ten knots an hour when she was struck by the Cromartyshire. While not considering whether there was

fault on the part of the Cromartyshire, the Circuit Court of Appeals concurred in the finding of the District Court as to fault on the part of La Bourgogne, because of her immoderate speed. On this subject the court said:

"A careful examination of all the testimony produced here has satisfied us that although there may have been a reduction, she was certainly not going any slower and was probably going faster than ten knots. It is unnecessary to rehearse the evidence, the statement in the opinion below is sufficient indication of the grounds for this conclusion; the character and extent of the wound received by the 'Bourgogne' are suggestive of a high speed on her part. Undoubtedly the fog was exceedingly dense, that fact is uncontradicted, and the steamer had not 'reduced her speed to such a rate as would enable her to stop in time to avoid collision after an approaching vessel came in sight, provided such approaching vessel were herself going at the moderate speed required by law.' *The Chattahoochee*, 173 U. S. 540. We are emphatically of the opinion that such a speed under the circumstances was excessive, and since it probably prevented an earlier foghorn blast being heard from the 'Cromartyshire,' it cannot be held not to have been a proximate cause of the collision."

We may not disturb the concurrent findings of both the courts below as to the density of the fog and the rate of speed of the steamship at the time of the collision, unless we are of opinion that those findings were so unwarranted by the evidence as clearly to be erroneous. *The Carib Prince*, 170 U. S. 655, 658; *The Wildcroft*, 201 U. S. 378, 387. As our examination of the record does not enable us to reach such a conclusion, we accept the findings below as to fog and speed for the purpose of determining the question of fault of the steamship. That upon the facts found both courts were correct in holding La Bourgogne at fault, because she was moving at a rate of speed prohibited by the international rule as interpreted by the decisions of this court, is too clear for anything but statement. This, in effect, is not disputed by the petitioner, since

the contention is not that error was committed in finding the vessel at fault if the conceptions of immoderate speed prevailing in the courts of the United States be applicable, but that the error consisted in not applying the conceptions on the subject entertained by the French courts, which, it is urged, are less rigorous as to what constitutes undue speed in a fog. Thus counsel say:

"It is not claimed by the petitioner that upon the facts so found this conclusion would be erroneous, if this question between the claimants and the petitioner [steamship company] is properly to be determined by our rule and by the test which our courts apply as to what constitutes moderate speed in a fog."

From this premise it is argued first, that as La Bourgogne was a French ship, and as all the claims arose exclusively because of damage done to persons or property on board the steamship, the fault of that vessel should be tested by the theory which would be applied in the courts of France; and, second, that accepting the conditions as to fog and the rate of speed found by the courts below, if the international rule as enforced in the French courts be applied it would follow that the rate of speed was moderate, and therefore the steamship was not at fault.

It was settled in *The Scotland*, 105 U. S. 24, that a foreign ship is entitled to obtain in the courts of the United States the benefit of the law for the limitation of liability of shipowners. But it was also decided in the same case (p. 29) that "if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would, *prima facie*, determine them by its own law, as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having

different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein, would properly furnish the rule of decision. In all other cases each nation will also administer justice according to its own laws. And it will do this without respect to persons, to the stranger as well as to the citizen."

The contention we are now considering does not appear to have been made below, as among the errors assigned on behalf of the petitioner in the Circuit Court of Appeals was one to the effect that the District Court had erred in not holding that the ship Cromartyshire was solely in fault for the collision, an alleged error which could not have been based upon the contemplation that the test was to be that of the French law alone. Be this as it may, however, we are of the opinion that we must decide the case before us by the international rule as interpreted in the courts of the United States, and not by the practice under that rule prevailing in the French courts, if there be a difference between the two countries. The petitioner is here seeking the benefits conferred by a statute of the United States, which it could not enjoy under the general maritime law. Strictly speaking, the application for a limitation of liability is in effect a concession that liability exists, but, because of the absence of privity or knowledge, the benefits of the statute should be awarded. It is true that under the rules promulgated by this court the petitioner is accorded the privilege not only of seeking the benefits of the statute, but also of contesting its liability in any sum whatever. This does not, however, change the essential nature of the proceeding. As the petitioner called the various claimants into a court of admiralty of the United States to test whether, in virtue of the laws of the United States, it should be relieved in part at least of liability from the consequences of the acts of its agents, and, as the international rules have the force of a statute, we think the issues presented were of such a character as to render it essential that the right to exemption should be

tested by the law as administered in the courts of the United States, and not otherwise.

2. *The collision having been caused by the fault of the servants of the petitioner, was that fault committed with its privity or knowledge?*

As both courts held that there was no privity or knowledge, and as that question primarily is one of fact the rule which we have hitherto applied as to the effect to be given to the concurrent findings of fact made by two courts might well be adequate to dispose of this subject. But it is elaborately insisted that the cause before us as to this particular subject does not come within the rule, because the courts below, while reaching a like conclusion, did so on different conceptions. As, in any event, the duty would devolve upon us of determining whether the findings of the courts below were clearly unsustained by the proof, and as we think, moreover, it is not clear that the courts below rested their conclusions solely upon common findings of fact, we propose, as briefly as may be, to consider the propositions relied upon to demonstrate that error was committed by both courts in deciding that there was an absence of privity or knowledge. Before doing so, however, we must dispose of a contention, greatly pressed in argument, that whether there was privity or knowledge is not to be tested solely by the proof, but is to be adjudged against the petitioner because of a legal presumption asserted to arise from a suppression of evidence alleged to have been by it committed.

Without amplification, the circumstances are these: Shortly after the inception of the cause at various times the testimony of captains of several of the steamships of petitioner was being taken out of court. In the course of doing so questions were addressed to the witness or witnesses concerning the contents of a log book or books in his or their possession. These questions the witnesses were instructed by the counsel for the petitioner not to answer. The matter was taken to the court, District Judge Brown presiding, and he ordered the questions

to be answered. Some months afterwards, when one of the captains was being examined out of court, there was a refusal to answer certain questions propounded, and the subject was again taken to the court for determination. The court said: "I think he [the witness] ought to answer this question. . . . There is a direction for the production of books, and in one way or another the thing is postponed and postponed, and defeated and defeated, under one argument and another argument, so that no progress is made. . . . I cannot understand your proceeding here. While you are contumacious, it does not make much difference whether it is your captain or your company. If you are contumacious I must dismiss the proceeding." Upon the protestation of counsel for the petitioner that no contumacy was intended, and that any book ordered to be produced which could be found would be forthcoming, the proceedings before the commissioner were resumed. In April, 1901, the claimants applied for an order directing the production by the petitioner of certain log books alleged to be in its possession. The court modified the request, and on May 15, 1901, entered the following order:

"That the petitioner produce on or before the trial of this case all logs kept on board the steamship La Bourgogne during the period of two years previous to the collision in the petition mentioned, and also all logs kept on any other steamer of the petitioner running between Havre and New York for the same time of which the same captain who was captain of the Bourgogne at the time of the collison was then master."

As we have stated, in October, 1901, the case came on for trial before Judge Townsend. The counsel for the claimants directed the attention of the court to the fact that the order for the production of the log books had not been complied with. Thereupon the counsel for the petitioner declared, in open court, that he had transmitted the order to the company and had a letter from it, stating that the log books for the period covered by the order had not been preserved and could

not be produced. Objections being made to this letter, the court remarked, concerning it: "That is not evidence. The logs may be lost, and then you have got to prove it. You have got to put somebody on the stand to prove it, to testify." Subsequently, during the examination of an official of the petitioner, a further effort to introduce the letter was made, but the court observed: "It is hearsay. It is simply a letter." In the course of the proceeding, consequent upon the order that the further testimony be taken out of court, the letter was offered before the commissioner, and, subject to an objection, was marked as an exhibit. No further direct action of the court on the subject was thereafter invoked by the claimants, and neither the trial court nor the Circuit Court of Appeals referred to the subject in their opinions. Under these circumstances we think the contention here made, that it is our duty to decide the case, not according to the proof, but upon a presumption of wrongdoing and suppression of evidence, is without merit. We say this because we are of opinion that if the claimants deemed that the letter explaining the reason for the non-production of the log books was not admissible, or that there had been contumacious suppression of evidence, it was clearly their duty, before or at the hearing, to have made an attempt to offer secondary evidence, or, in the event of the impossibility of so doing, to have asked at the hands of the court a dismissal of the proceedings, if such action was appropriate, or such other action for the alleged contumacy as the case required, and, if necessary, have saved an exception to an adverse ruling.

The fault on the part of La Bourgogne being established, it becomes necessary, before considering the contention that there was privity and knowledge on the part of the petitioner, to develop the nature and character of the acts which would constitute privity and knowledge within the intendment of the law relating to the limitation of liability of ship-owners.

The law on the subject is now embodied in §§ 4282 to 4287 of the Revised Statutes. Summarily stated, the first of these

sections gives an absolute exemption to a ship-owner for losses sustained by fire, unless the fire was caused by the design or neglect of such owner. The second section does not give an unlimited exemption, since the exemption which it accords does not embrace "the amount or value of the interest of such owner respectively in such vessel and her freight then pending," and accords the limited exemption from liability upon the condition that the loss has occurred "without the privity or knowledge" of the owner or owners. The remaining sections we need not now consider, as they relate to the mode of apportionment of the loss where there are joint owners or concern the administrative features of the law.

These sections are a substantial reënactment of the act of March 3, 1851, c. 43, 9 Stat. p. 635. The purpose of the act of 1851 in according to ship-owners the right to limit their liability in whole or in part, and the meaning of that act, as well as the purpose and meaning of the sections of the Revised Statutes embodying the provisions of the act of 1851, have been often before this court and have been conclusively adjudicated. *Moore* v. *American Transportation Co.*, 24 How. 1; *Norwich Co.* v. *Wright*, 13 Wall. 104; *The Benefactor*, 103 U. S. 239; *The Scotland*, 105 U. S. 24; *The North Star*, 106 U. S. 17; *Providence & N. Y. Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *The City of Norwich*, 118 U. S. 468; *Butler* v. *Boston Steamship Co.*, 130 U. S. 527.

In *Moore* v. *American Transportation Co.*, Mr. Justice Nelson, delivering the opinion of the court, thus stated the purpose of the limitation of liability which the act granted (24 How. 39): "The act was designed to promote the building of ships and to encourage persons engaged in the business of navigation and to place that of this country on a footing with England and on the continent of Europe."

In the *Hill case*, 109 U. S. 598, after summarizing the various provisions of the act of 1851 and calling attention to the rules previously adopted by this court to enforce the same, concerning the general purpose of the act the court said (p. 588):

"In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations, as before stated, will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

In that case, briefly, the facts were these: Freight was shipped from Providence to New York by the Oceanus, a steamer belonging to the steamship company. The goods were destroyed by fire while on board the steamer. An action was brought in a state court of Massachusetts against the steamship company to recover the value of the goods burned, on the ground of the negligence of the company. In its answer the steamship company claimed the benefit of the limitation of liability statute, averring that if the loss was occasioned by negligence the same was without its privity or knowledge. Pending this action proceedings for limitation of liability were commenced by the steamship company in a District Court of the United States. These proceedings were pleaded by an amendment to the answer in the state court. A trial was commenced, but the jury was discharged and the case was reserved to the Supreme Judicial Court of Massachusetts, which held that if the fire happened through the negligence of the steamship company it necessarily followed that it had occurred with

its privity or knowledge, and, therefore, the case was not within the act of Congress limiting the liability of ship-owners. Subsequently the steamship company set up the final decree of the District Court in the limitation of liability proceedings barring the claim in question. Thereafter a trial was had in the state court and there was verdict and judgment against the steamship company, and the judgment was affirmed by the Supreme Judicial Court of Massachusetts. This court held that the proceedings for a limitation of liability excluded the jurisdiction of the state court. In determining the case it became necessary to decide whether, if there was negligence of the owner of a vessel in case of fire within the meaning of the first section of the act of 1851, such negligence was the necessary equivalent of privity and knowledge of the owner, as expressed in the third section of the act. It was held that the two provisions were not necessarily coterminous, that negligence under the first section of the act might exist so as to prevent the unqualified limitation given by that section, and yet the owner of the vessel be entitled to the more limited exemption given by the third section, which depended upon the absence of privity or knowledge. In other words, it was decided that although a loss might have happened by the negligence of the owner of the vessel, such loss might yet not have been occasioned with the knowledge or privity of such owner.

Without seeking presently to define the exact scope of the words privity and knowledge, it is apparent from what has been said that it has been long since settled by this court that mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute. And nothing to the contrary is properly to be deduced from the case of *The Main*, 152 U. S. 122, so much relied upon in argument, for that case did not purport in the slightest degree to overrule or qualify the previous decisions, and was concerned, not with the meaning of the words privity and knowledge, but with the rule to be applied in determining

what constituted pending freight within the meaning of the law for the limitation of liability. And this is also true of the English cases which were cited in the opinion in that case. It may be that there are general expressions found in some cases in the lower Federal courts, decided both before and after the *Hill case*, which lend color to the assumption that privity and knowledge as defined in the statute is but the equivalent of mere negligence. Such of the cases relied upon, however, as were decided before the authoritative interpretation of the statute in the *Hill case*, were necessarily overruled by that decision, and so far as those decided since may be inconsistent with the previous rulings of this court, they are clearly not entitled to weight.

We come to consider the various contentions pressed to sustain the proposition that the fault of immoderate speed which occasioned the collision was committed with the privity and knowledge of the petitioner.

a. It is argued that there was a positive duty on the part of the petitioner to make regulations directing that its steamers be not run at an immoderate rate of speed in a fog, and, as there was a failure to perform this duty, privity and knowledge was established. But both the courts below found the proposition of fact upon which this contention rests to be without foundation, and we think they were clearly right in so finding.

As early as December, 1884, the company made an order as follows:

"Our board of directors, having seriously in mind the numerous collisions which daily occur at this season in the parts frequented by our steamers, we come to beg you to recall to all our captains, individually, the recommendations which we have always made to them, to use the greatest prudence in their navigation, and to never hesitate in certain doubtful cases to adopt the most suitable measures to assure the safety of their steamers, even if a loss of time should result from so doing.

"You will insist upon it with them that in times of fogs

the most active watch be kept on board their vessels and that all the prescriptions indicated in the rule as to collisions be strictly observed, as well by day as by night."

And prior to 1891 the substance of this order was contained in the permanent regulations, which were expressed in the rules prevailing in 1891, as follows:

"Article 293. When the company's vessels are in localities frequented by vessels, especially in foggy weather and during the night, the engineer on watch and the necessary men for maneuvering must be within reach of the apparatus for changing the speed. The order is given by the officer of the watch to the engine room, and mention is made in the ship's log and in that of the engineer of the hour at which that order was given and received."

"Article 394. The company's vessels conform to the international rules for the purpose of preventing collisions. A printed copy of said rule is posted up in a conspicuous place in order that the officers may take notice of it.

"The prescriptions of said rule, relative to phonic signals to be caused to be heard in foggy weather, must be rigorously observed; besides, in said circumstances, a man must be placed aloft on lookout.

"Article 395. In conformity with the rules of international regulations, having for object the prevention of collisions, all vessels under steam which approach each other so that there may be risk of collision, must diminish their speed, or stop or go backwards, if necessary. All vessels under steam must, during foggy weather, preserve a moderate speed.

"The captain, under these circumstances, must diminish the speed of his engines, and, in agreement with the agent of posts, the captain must make known by proces verbal delays which such maneuver may have occasioned."

While it is true that the proof does not establish that the circular letter of 1881 was brought to the notice of all the captains who were in the service at the time of the collision, nevertheless the purpose of the company to secure a compliance

with the law is demonstrated by the issuance of the circular. The elaborate argument indulged in to establish that article 395, which in terms stated and commanded compliance with the international regulations, was a subterfuge, intended to enable the captains to violate those regulations, rests upon mere surmise, and, we think, finds no support in the record. The contention that the rules, as promulgated, were not sufficiently explicit is also without merit. The regulation in terms reiterated the international rule and called for compliance with its provisions. It could not, in the nature of things, have been made more explicit. This was aptly pointed out by Townsend, District Judge. He said:

"It is not clear that any further precautions than those established by the orders and regulations, quoted above, would have been practicable.

"The question of rate of speed in a fog is one which cannot be determined by set rules, but must be left largely to the discretion of the officers of the ship. They are entrusted with the responsibility of the carriage of mails, freight and passengers, at the greatest speed which is consistent with safety. Their own lives, as well as those of the passengers and crew, are at stake.

"The determination of the question, therefore, as to what is to be done in all the varying stages between a light haze and a dense fog, rests upon a great variety of circumstances and conditions, all looking toward the question of what is a moderate rate of speed in existing conditions."

b. That however full may have been the compliance by the petitioner with the duty to make regulations, it was necessarily in privity and knowledge with the immoderate speed which caused the collision, as it knowingly encouraged or tolerated the violation of its regulations, because it knew of the constant habit on the part of its captains to navigate at an immoderate rate of speed in a fog, and did not prevent the illegal practice. This involves primarily a question of fact, and was adversely found against the claimants by both the

courts below, and from the consideration which we have given to each and all of the arguments urged in many forms of statement to demonstrate that the findings made on the subject were clearly wrong, we are not only not satisfied that such was the case, but, on the contrary, are convinced that the findings of the courts below were clearly right. It is insisted, however, that the record does not show that there were findings on the subject by both the courts below. This is rested upon the assertion that the Circuit Court of Appeals did not, in substance, affirmatively find on the subject, but erroneously rested its conclusion solely upon a presumption in favor of the petitioner, which it deemed to be controlling. This is based upon an isolated passage in the opinion of the Circuit Court of Appeals, where it was said:

"Upon the proof as it stands we cannot find that the petitioner's officers knowingly tolerated or encouraged the running of its steamers at excessive speed in fogs, or were negligent in failing to enforce the rules; certainly they used due diligence in securing officers of experience and ability. We concur in the conclusion that the disaster was done, occasioned or incurred without the privity or knowledge of the owners."

But the passage thus relied upon was preceded by a reference to the evidence, which the claimants asserted tended to establish that the infractions of the moderate speed rule had been so constant as to bring home knowledge to the petitioner that its rules were being habitually violated, and by a finding that the proof was not adequate to so show. Even, however, if the passage in the opinion sustained the inference sought to be deduced from it, we think no error was committed, especially in view of the meaning of the words privity and knowledge as expounded by the previous decisions of this court. The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a willful departure from

their requirements was indulged in, and was brought home to or countenanced by the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence.

And the considerations which we have stated also completely dispose of the contention not referred to in the opinion of either of the courts below and apparently not brought to the notice of the trial court or assigned as error in the Circuit Court of Appeals, viz., that privity and knowledge as to the fault which caused the collision was necessarily to be inferred from the terms of the contract for subsidy made by the petitioner with the French government. The contract in question was executed in virtue of a statute authorizing the same. The French government agreed to give to the petitioner a gross annual sum by way of subsidy for the operation of a weekly line "from Havre to New York, that is, fifty-two voyages, going and returning, a year." Among other things, in consideration of the payment of the subsidy, the petitioner engaged "to transport gratuitously all the mails upon the line from Havre to New York," and, "furthermore, to transport gratuitously all gold, silver and copper coins for the use of the state, and to undertake the carrying of postal packages," upon conditions fixed by law.

The contract was voluminous and minute. To secure the use of steamers of the standard required it exacted that no steamer already built should enter upon the service until it was inspected by officers of the French government and certified to be in all respects completely up to the standard and thoroughly equipped in every particular, as required by the French law, and that the steamers thereafter to be built for the service should come up to the requirements of construction exacted by the contract, and should also, before being permitted to enter the service, be inspected and certified as being properly constructed and equipped in every respect. To maintain the standard of efficiency the contract contained abundant regulations. It established also regulations as to

the manning and operation of the steamers, and moreover was replete with provisions tending to secure the safety and comfort of passengers and crew. To secure compliance a governmental commission was created, under the supervision of the Minister of Posts and Telegraphs, full power being conferred upon the commission thus created to take cognizance of the operation of the steamers, to examine their logs and other documents, and to enforce in every particular the performance of the contract requirements. There was a clause, moreover, authorizing the presence on each steamer of an agent of the postal department and a delegation of authority in respect to the operations of the line under the contract to the consul general of France at New York. The law authorizing the contract also required that the steamers should at their trial develop a speed of seventeen and one-half knots, with the privilege of forced draught, and should maintain under the contract a mean annual speed "of at least fifteen knots an hour at the ordinary rate," and the requirement as to the fifteen knots an hour minimum average speed was expressed in the contract. The payment of the subsidy was stipulated also in article 49, as follows:

"The payment of the subsidy shall be ordered at the end of the term by the Department des Postes et des Telegraphes from month to month and by twelfths, subject to the deduction of the sums retained, which may have been pronounced in the cases provided in these specifications.

"The payments shall take place at Paris or at Havre at the option of the contractor."

The deductions referred to in this provision evidently contemplated the system of fines and premiums concerning speed, contained in article 45 of the contract, as follows:

"In the case that the mean annual speed fixed in article 20 above shall be exceeded, there shall be allowed to the contractor a premium calculated at the rate of 12 francs a ton gross gage and by the tenth of a knot of increase of speed over the required rate. If the mean annual speed is not obtained, the

contractor shall be subject to a retention calculated, at the rate of 8 francs a ton gross gage and by the tenth of a knot under the required rate.

"At the end of each annual period, including an aggregate of fifty voyages, going and returning, there shall be prepared a report of the result of each crossing. The total of these partial results shall establish the figure of the mean speed and consequently of the premium which shall be accorded for employing it to the contractor, or of the retention which ought to be imposed upon him, save an account being kept in this last case of circumstances of *vis major* duly authenticated.

* * * * * * * *

"In no case shall the amount of the premium for the year exceed twelve hundred thousand francs (1,200,000 fr.). Art. 6 of the law of June 24th, 1883.

"When one of the steamers employed in the service shall not attain the mean speed of fifteen knots for ten consecutive voyages, going and returning, it shall be rejected as unfit. It may be presented for new trial after modifications, or it shall be replaced by a new boat within a maximum delay of thirty months."

The contention is, that as the steamships were only required to develop under forced draft a maximum speed of seventeen and one-half knots, and yet in operation were obliged to maintain a mean average annual speed of fifteen knots, it must have been known that the contract could not be performed unless the steamers were run at an immoderate speed in a fog, and hence plainly shows that the petitioner must have had privity or knowledge of the habit of running at an immoderate speed. Ultimately considered, the proposition but asserts that the contract on its face manifested a clear purpose on the part of the French government and the petitioner to violate the international rule. We think to state the contention is to demonstrate its want of merit. It invites us without proof to conjecture as to the prevalence and duration of the conditions of fog which might be encountered during many ocean

crossings, and from such surmise to decide not only that the petitioner, but the government of France, entered into a contract having for its purpose the violation of the international rule, which it was not only the duty but, as shown by the contract, was the manifest purpose of the government on the one side to enforce and of the petitioner on the other to obey. It moreover asks us, without proof, to assume that a contract which was evidently carefully drawn to attain the permanency of the service and secure the efficiency and safety of the ships engaged in such service, and of the lives and interests of all those who might take passage on such ships, was in effect intended to accomplish a contrary and disastrous result. But it is argued, however conclusive these considerations may be as to the purpose of the French government in making the contract, they are without weight when the privity and knowledge of the petitioner as to immoderate speed is alone considered. This proceeds upon the assumption that, as the contract required an average speed of fifteen knots, and gave a reward for exceeding that speed, and imposed a penalty for a failure to maintain it, therefore the petitioner had a direct incentive to operate its steamers at an immoderate speed, and, as the subsidy was earned, the petitioner must have known that its vessels were being operated in fogs in violation of law. This, however, again but invites us into the region of mere conjecture. Besides, it disregards the fact that the contract, in terms exempted from the operation of the penalty clause a falling below the average speed caused by *vis major*. It moreover disregards the express terms of the contract, by which complete governmental supervision over the operation of the steamers was provided, and the full power to investigate documents and papers concerning every crossing, which was reserved to the government officials, a power retained obviously for the purpose of securing not only the speedy but the safe operation of the steamers. Besides, the contention presupposes that the incentive which the contract afforded of a comparatively small premium to be earned in the opera-

tion of a half dozen or more valuable steamships must, as a matter of legal presumption, be treated as having been a sufficient motive to induce the petitioner to sanction conduct by its captains, which not only was in direct violation of law, but recklessly endangered the lives and property of those on board, as well as hazarded the loss of the great sums invested in the steamships. And these considerations also dispose of the argument based upon the fact that a small part of the premium, if earned, was allowed by the company to the captains of its steamers.

It is insisted that, as it was shown that La Bourgogne was not fully equipped with the life boats, life rafts and disengaging apparatus required by the laws of the United States, therefore the limitation of liability should not have been accorded. We do not stop to consider the deduction drawn from the premise of fact which the proposition assumes, because we think that premise is devoid of foundation. There can be no question that La Bourgogne was fully equipped in every particular as required by the law of France. By Rev. Stat., § 4488, made applicable to foreign vessels by the act of August 7, 1882, c. 441, 22 Stat. 346 it is required that—

"Every steamer navigating the ocean . . . shall be provided with such numbers of life boats, floats, rafts, life preservers, and drags, as will best secure the safety of all persons on board such vessel in case of disaster; and . . . shall have the life boats required by law, provided with suitable boat-disengaging apparatus, so arranged as to allow such boats to be safely launched while such vessels are under speed or otherwise, and so as to allow such disengaging apparatus to be operated by one person, disengaging both ends of the boat simultaneously from the tackles by which it may be lowered into the water."

And in the same section it is provided that "the board of supervising inspectors shall fix and determine, by their rules and regulations, the kind of life boats, floats, rafts, and life preservers, and drags that shall be used on such vessels," etc.

By Rev. Stat. § 4489 it is provided that—

"The owner of any such steamer who neglects or refuses to provide such life boats, floats, rafts, life preservers, drags, pumps or appliances as are, under the provisions of the preceding section, required by the board of supervising inspectors, and approved by the Secretary of the Treasury, shall be fined one thousand dollars."

Rev. Stat. § 4405 makes it the duty of the supervising inspectors and the supervising inspector general to meet once a month as a board and to "establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law."

Exercising the authority thus conferred upon them, the board fixed the total capacity of life boats and life rafts on steamers navigating the ocean of the tonnage of La Bourgogne at 5,670 cubic feet. It is not questioned that La Bourgogne was equipped with life boats and life rafts to the capacity of 6,600 cubic feet, nearly a thousand feet more than the regulations having the force and effect of law required. Nor is it disputed that the vessel was duly inspected under the law and received the certificate of complete equipment required by the statute, and was certified to be entitled to carry 1,019 passengers, many more than were on the steamer at the time she was lost. And, indeed, the supervising inspector and assistant testified that La Bourgogne had complied with all the requirements imposed.

The argument is that although all the things just stated be true, yet as the statute, when closely considered, required a greater capacity of life boats and rafts than was exacted by the regulations, the statute, and not the regulations, must be considered in determining the sufficiency of the equipment. But we think this is completely answered by the context of the statute, and especially by § 4405, which gives to the regulations of the board the effect of law. The contention that the section is inapplicable is without merit. It proceeds upon

the assumption that the act of August 7, 1882, which subjected certain foreign steam vessels to the requirements as to equipment and to the inspection laws of the United States, and brought them under the authority of the board of supervising inspectors, did not cause the rules of the board to be law as to such foreign vessels, although it made them law as to every other vessel subject to the statute.

As originally enacted, the first chapter of Title 52 of the Revised Statutes related generally to the subject of inspection of steam vessels. The second section (4400) excluded from the operation of the title "vessels of other countries," and therefore all the sections of that chapter, as well as of the following chapter, relating to the same subject, had no relation to such vessels. When the amending act of 1882 was enacted its initial words amended and enlarged § 4400 by adding at the end of such section the following words: " . . . And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of" seventeen enumerated sections. When the sections thus enumerated are examined it becomes apparent that they were particularly designated because the amendment of their context was deemed especially appropriate to the fruition of the general purpose of the statute, which was to bring foreign steam vessels under the sway of the requirements of the laws of the United States as to equipment, inspection, etc., hitherto applicable only to domestic vessels. Because § 4405, which gave to the duly enacted rules and regulations of the board of supervising inspectors the force and effect of law, was not specially enumerated in the amendatory act, does not support the proposition that it was not intended that the provisions of that section should have application to foreign steam vessels. To so hold would be but to say that although the regulations were made applicable to foreign vessels and the owners of such vessels were commanded to obey the same, yet such command was not made obligatory, thus frustrating the very purpose of the amendatory act and

rendering its requirements entirely nugatory. Aside, however, from this impossible conclusion, the contention is wholly devoid of merit, because both §§ 4488 and 4489 were among the sections especially enumerated in the amendatory act of 1882. The effect of this was to make beyond all peradventure those sections applicable to foreign steam vessels, and, therefore, to subject the owners of such vessels to the duty of complying with the rules and regulations made by the board of supervising inspectors as to life boats and other equipment, under the pain of incurring the penalty provided by the statute. And the reasons just given dispose of the contention concerning the boat disengaging apparatus. There is no question, as found by both courts, that the apparatus in use on La Bourgogne was that required by the board, and the officers of the board testified that the apparatus in use was adopted in compliance with their requirements and was the best and only apparatus suitable for the purpose. Again, the contention that the regulations of the board are inconsistent with the statute, we think when the statute is considered as a whole, is without merit. Even, however, if it were otherwise, as compliance on the part of the petitioner with the regulations adopted by the board was compelled by law, it cannot be that upon it was cast the duty of disobeying the regulation at its peril, thus, on the one hand, subjecting it in case of non-compliance to the infliction of penalties, and on the other hand, if it fully complied with the regulations, imposing a liability upon the assumed theory that there had been a violation of law.

3. Concluding, as we have, that the petitioner was entitled to the benefit of the act limiting liability on making the surrender exacted by the statute, we are brought to consider the controversies as to what constituted the freight then pending within the meaning of the law for limitation of liability.

Both courts below agreed that petitioner was not obliged to surrender the passenger and freight receipts earned on the sailing from Havre to New York, because such receipts were

not freight then pending within the meaning of the statute. As §§ 4283 and 4284, Revised Statutes, are *in pari materia*, the two must be considered together, and therefore the freight then pending, referred to in § 4283, is freight then pending for "the same voyage," or "for the voyage," as these words are used in § 4284. The vessels of petitioner made trips from Havre to New York and from New York to Havre without any intermediate stops. It is clear that, in common parlance, each of these trips was a separate voyage. Undoubtedly the word voyage may have different meanings under different circumstances, depending on the subject to which it relates or the context of the particular contract in which the word is employed. This is illustrated by the use of that word in the subsidy contract, where the word is used as signifying a sailing from Havre to New York and the return trip to Havre. But we need not now concern ourselves with what may be the meaning of the word voyage under all possible circumstances, or what was its significance as used in the subsidy contract, since we are now called upon only to fix the meaning of the word as applicable to the case before us in virtue of the sections of the Revised Statutes referred to. That significance must be ascertained by considering the context of the sections and the remedy which they were intended to afford; in other words, their obvious intent and purpose. The intimate relation between the provisions of the two sections, which were both in the act of 1851, was pointed out in considering that act in *Norwich Company* v. *Wright*, 13 Wall. 104, and, concerning the purpose and intent of the statute, it was observed in that case (p. 111):

"The phrase is added 'on the same voyage' to confine the participation in the apportionment to the freighters of a single voyage and not to permit the ship owner to bring into the compensation losses sustained on the prior or other voyages."

The statute thus confining those who are entitled to participate in the pending freight to be surrendered to the persons whose lives or property were at risk in the common adventure or voyage in which the freight was earned, and excluding those

who may have suffered loss from a previous voyage or trip, it follows that, as applied to the case before us, the then pending freight for the same voyage embraced only the distinct sailing between the definite termini, New York and Havre, and therefore did not include freight earned on the previous sailing from Havre to New York. This leads to the conclusion that both courts were right in not requiring the surrender of the freight earned on the sailing from Havre to New York, and requires us only to consider whether the Circuit Court of Appeals was right in reversing the ruling of the trial court, to the effect that there was no obligation to surrender the sums which had been prepaid for freight and passage on the sailing from New York to Havre upon which the vessel was lost. As pointed out in *Norwich Co.* v. *Wright, supra,* where a vessel is lost on a voyage, and thereby contracts of transportation are unperformed, it may be that there will be no freight earned and none to be surrendered. But in the case before us it is unquestioned that the freight and passage money which was received by the petitioner for the voyage was paid to it under absolute agreements that the sums so paid were in any event to belong to the petitioner, which were tantamount to stipulations that although such freight and passage moneys might be only partially earned, the right to the whole amount was contractually complete. Under these circumstances, in view of the decision in *The Main,* 152 U. S. 122, holding that the duty to surrender pending freight to entitle to a limitation of liability must be liberally construed against the ship-owner, we are of opinion that the Circuit Court of Appeals was right in holding that the petitioner was under the obligation to surrender the sums in question. See *O'Brien* v. *Miller,* 168 U. S. 287, 303; *Pacific Coast Co.* v. *Reynolds,* 114 Fed. Rep. 877.

And the reasoning just stated disposes of the contention, as to which both courts decided adversely, that there was a duty to surrender as pending freight one fifty-second part of the annual subsidy paid by the French government, covering the period of the voyage during which La Bourgogne was lost,

since if one fifty-second part under the contract embraced the round trip from Havre to New York and back, only one-half of that sum, at the best, would be applicable on account of the voyage or trip from New York to Havre. But both the courts below were right, we think, in deciding that, in view of the nature and character of the contract of subsidy and the state of the proof, no part of the gross sum paid as subsidy for the year could be properly treated as freight earned and then pending for the voyage in which the vessel was lost. We say in view of the nature and character of the contract, because when all the obligations imposed by that instrument are considered, and the power with which it endowed the French government as to deductions for fines and penalties is borne in mind, we think it cannot rightfully be said that a particular portion of the annual subsidy was so dedicated to a particular trip as to cause any portion of the subsidy to become freight earned for that trip, and pending within the meaning of the statute. The provision as to the fifty-two voyages was in a measure distributive of the total annual payment. But when the whole contract is taken into view we think the annual subsidy was substantially indivisible and the solidarity begotten by the terms of article 45 of the contract between all the voyages and the gross amount of the subsidy excludes the conception that the result of one trip may be isolated and treated as pending freight for that voyage. We have said, also, in view of the nature of the proof, because the evidence is merely that a certain sum was paid for the year, which was less than the maximum amount of the annual subsidy fixed by the contract, and no means is afforded for determining whether any deduction was made on account of the failure of La Bourgogne to complete the last voyage, or whether such proportionate amount was earned by the substitution of another vessel.

4. The action of the courts below concerning the claims against the fund remain only to be considered.

We first dispose of the claims based upon loss of life which

the trial court disallowed and which the Circuit Court of Appeals held were entitled to be proved against the fund.

It was settled in *The Harrisburg*, 119 U. S. 199, that no damages can be recovered in admiralty for the death of a human being on the high seas, or on the waters navigable from the seas, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving the right of action therefor. As said in *Butler* v. *Boston Steamship Co.*, 130 U. S. 555, the maritime law of this country, at least, gives no such right. But in *The Hamilton*, 207 U. S. 398, it was also settled that where the law of the State to which a vessel belonged—in other words, the law of the domicil or flag—gives a right of action for wrongful death if such death occurred on the high seas on board of the vessel, the right of action given by the law of the domicil or flag will be enforced in an admiralty court of the United States as a claim against the fund arising in a proceeding to limit liability. As La Bourgogne was a French vessel, the question is, therefore, did the law of France give a right of action for wrongful death caused by the collision in question?

Article 1382 of the Napoleon Code provides as follows: "Every act whatever of man, that causes damage to another, obliges him, by whose fault it happened, to repair it." The text of this article is found in article 2294 of the Louisiana Code, and in substantially the same form was found in the Spanish law. *Hubgh* v. *New Orleans & C. R. R. Co.*, 6 L. An. 495. While as lucidly shown by Chief Justice Eustis, in delivering the opinion in the case just cited, the provision in question did not, under the law of Spain or Louisiana, in the absence of express statute to that effect, confer a right of action for a wrongful death, it may not be doubted that in France, as also pointed out in the same case, such right of action has been constantly recognized and enforced from the date of the enactment of the Code Napoleon. See the decisions of the French courts collected under article 1382 of the Code Napoleon, in the Fuzier-Herman annotated edition of that code, Paris,

1896, vol. 3, page 766, No. 688 *et seq.* Indeed, under the settled interpretation of the article of the Code Napoleon the right to recovery for wrongful death is not dependent upon heirship or other relationship by consanguinity or affinity, but upon the ability to prove the existence of damage to the claimant arising from wrongful death. The doctrine is thus stated: "The action brought to repair the damage caused by an accident, especially by an accident which has been followed by death may be brought, not only by the heir of the victim but also by any one, whether heir or not, who has been directly injured by the consequences of the accident." See decisions collected under No. 688, and the immediately following paragraphs in the Annotated Code just previously cited. Indeed, in controversies in the French courts concerning injuries asserted to have been suffered by loss of life caused by the sinking of La Bourgogne, the right to recover for loss by death was impliedly conceded to exist, although relief was denied in the particular cases, on the ground that the steamer was not, under the proof, at fault for the collision.

Such being the law of France, it follows, under the doctrine of the *Hamilton case*, the Circuit Court of Appeals rightly held the claims for loss of life to be provable against the fund created in the limited liability proceeding, unless it be that some exception takes the case out of the general rule. It is insisted that such an exception obtains, even although the French law allows recovery upon claims of that nature, because under the facts found as to the speed of La Bourgogne the vessel would not have been held by the French courts to have been negligent, and therefore no recovery could have been had in France. But it is not denied that the international rule governs in the French courts, and hence the same legal duty as to moderate speed in a fog is exacted by law in both this country and France. The proposition then is this, that the right of action allowed by the French law may not, for the purposes of the limitation of liability, be allowed by the courts of the United States, unless such courts abdicate their functions by

declining to draw their own inferences from the proof as to negligence, and, to the contrary, make such inferences as they assume would be drawn by a French court if the proof was before such court. The duty to enforce the cause of action given by the French law does not carry with it the obligation to disregard the proof by declining to give it that effect to which it is entitled under the law as administered in the courts of the United States. Moreover, as we have said previously, as the petitioner is here an actor, seeking to avail of the benefits of a statute of the United States, it becomes the duty of the courts of the United States to determine the question of fault by the international rule as they interpret it. And in the nature of things it cannot be that the vessel which seeks the benefit of the law of the United States can be held to be in fault and not in fault concerning the same act or acts.

The conclusions hitherto expressed as to the want of privity and knowledge, and the adequacy of the equipment of the steamship, dispose of the contention that the claim of the S. S. White Dental Company was erroneously disallowed. The contentions made to establish that error was committed by both courts in allowing the other claims rest ultimately upon mere questions of fact, and are therefore without merit, since we cannot in any event say that the proof clearly shows error. But passing this, as there is no contest between the claimants and the sum of the claims enormously exceeds the fund for distribution, we do not think the petitioner's interest is such as to require an investigation of the sufficiency of the reasons which caused the courts below to allow the claims. Finally, we consider the proposition that it was error to have allowed the limitation of liability, because the petitioner had not actually paid over to the trustee the amount of the pending freight. But there was an honest controversy whether there was any pending freight to be surrendered. The trial court, when its attention was called to the failure to surrender any sum as pending freight, refused to direct such surrender, and reserved the subject for future action. The final decree

which that court made held there was no pending freight, and therefore nothing to be surrendered. While the Circuit Court of Appeals differed with the trial court as to one item—the freight from New York to Havre—we do not think that court was required, as a condition for affirming the grant of limitation of liability, to exact the payment of the disputed money into court, or the giving of bond therefor, until the possibility of the review of its action was at an end. Of course, where in proceedings for limitation of liability the petitioner contumaciously refuses to put the court in actual or constructive possession of the fund to be distributed, relief might properly be withheld and the petition for limitation of liability be dismissed. But where, as here, a *bona fide* controversy existed as to whether particular moneys were or were not pending freight, and there also existed no question as to the solvency of the petitioner, the court did not err in declining to impose conditions upon the granting of relief tantamount to an assumption that the claim of the petitioner was untenable, in advance of a final determination of the disputed issue. We have confined the foregoing opinion to those general propositions which we deem essential to dispose of the case. We have hence refrained from expressly noticing many minor points pressed in the voluminous argument submitted at bar. Because we have so done, we have not overlooked but have considered them all, indeed have disposed of them all, as the reasons we have given, when ultimately considered, conclude every contention made. As neither party has prevailed in this court each must pay his own costs in this court.

Affirmed.

FARRELL *v.* LOCKHART.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 170. Submitted March 9, 1908.—Decided May 18, 1908.

Ground embraced in a mining location may become part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor if, at the time when the second location is made, there has been an actual abandonment of the claim by the first locator.

Lavignino v. *Uhlig*, 198 U. S. 443, qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim.

Where three mining locations cover the same ground and the senior locator after forfeiture does not adverse, the burden of proof is on the third locator to establish the invalidity of the second location.

31 Utah, 155, reversed.

THE facts are stated in the opinion.

Mr. Charles C. Dey and *Mr. A. L. Hoppaugh* for plaintiff in error.

Mr. Wilson I. Snyder, *Mr. George Sutherland* and *Mr. Bismarck Snyder* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

In the month of February, 1905, James Farrell, plaintiff in error, as owner of the Cliff lode mining claim, situated in the Uintah mining district, Summit County, Utah, made application in the United States land office at Salt Lake City for a patent, and published the notice required by law. The defendant in error, as the administrator of the estate of John G. Rhodin, filed an adverse claim based upon the location by Rhodin of the ground as the Divide lode mining claim. There-

after, pursuant to Rev. Stat., § 2326, this action was brought in a court of the State of Utah by the administrator of Rhodin in support of said adverse claim.

In the complaint filed by the administrator the right of Rhodin to the Divide was asserted to have been initiated by a location duly made on January 2, 1903. Farrell in his answer asserted a paramount right by reason of his ownership of the Cliff claim, averring that it had been initiated by a location made on August 1, 1901, seventeen months prior to the location of the Divide by Rhodin. To the affirmative matter pleaded in the answer of Farrell a general denial was interposed, and it was also averred as follows: Plaintiff "alleges that at the time and date of the attempted location of the said Cliff patented mining claim the ground therein contained was not any part of the open and unclaimed mineral land of the United States, but, on the contrary, the whole thereof, including the point and place of discovery of said alleged Cliff mining claim, was then embraced and included and contained in a valid and subsisting mining claim, called the South Mountain, then and there the property and in the possession of the predecessors of this plaintiff's intestate; and for the reason that the discovery of said alleged Cliff mining claim was not placed upon unoccupied and unclaimed land of the United States, the alleged location based thereon became absolutely void."

The case was tried by the court, and it was specifically found that the Cliff, the Divide and the South Mountain claims, as located, covered substantially the same ground, and that the place of discovery of the Cliff was within the boundaries of the alleged South Mountain mining claim. It was further specifically found by the court that upon the trial of the action "plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode claim) tending to show that during the month of August, 1900, the ground in controversy herein was

located by W. I. Snyder and Thomas Roscamp, respectively, citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made and notice of location posted, and the boundaries of said claim marked so that the same could be readily traced, and that said notice was in due form, and was duly recorded in the office of the county recorder of Summit County, State of Utah. That no work was ever done on said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work thereon, on December 21, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim. That on or about the thirteenth day of October, 1902, said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain lode mining claim to said John G. Rhodin."

When it decided the case, the court found that Farrell initiated his ownership of the Cliff claim on August 1, 1901, and performed all the acts required by law in addition to the annual labor required by statute, and that Rhodin initiated on January 2, 1903, his Divide claim. The court decided in favor of the defendant Farrell, and entered a decree adjudging that he was the owner, in possession of the premises in controversy, and entitled to the possession, except as against the paramount title of the United States. The court treated the proof offered on behalf of the plaintiff as to the location of the South Mountain claim for the same ground embraced in the Cliff, made a year prior to the location of the latter claim, as immaterial and irrelevant. Plaintiff duly excepted and appealed to the Supreme Court of the State. That court, in disposing of the appeal, considered solely what it termed the "decisive question" presented by the record, viz., "whether the appellant, as owner of the Divide claim, who, as such, adversed the application for patent, is in position to show and assert that at the time of the location of the Cliff claim the ground located was covered by the South Mountain, a then

valid and subsisting claim; that the discovery point of the Cliff was within the boundaries of the South Mountain; and that, therefore, the locator of the Cliff did not discover a vein or lode on, or make a valid location of, unappropriated and unoccupied mineral lands of the United States, and because thereof his location is and was void, not only against the locators of the South Mountain, but all the world." In deciding this question the court deemed that it was called upon to consider and apply the ruling in *Lavignino* v. *Uhlig*, 198 U. S. 443. Doing so it was recognized that the reasoning in the opinion in that case was broad enough to maintain where on an adverse claim the first or senior locator did not appear to oppose the application for a patent made by a second locator, whose rights in the same ground had been initiated prior to the forfeiture of the senior location, for failure to perform the annual labor required by the statute, a third locator could not be heard to complain that the second locator had inititated his claim upon mining ground which was not at the time open to location. While thus conceding the court considered that the reasoning in question ought to be restricted, because not to do so would cause *Lavignino* v. *Uhlig* to be in conflict with cases decided prior to the decision in that case, and, moreover, would establish a rule in conflict with the practice which had long prevailed in the mining districts, and would therefore create great confusion and uncertainty in respect to mining claims and unsettle rights of property of great value. The court did not at all doubt that *Lavignino* v. *Uhlig* had been correctly decided in view of the issues in that case; but, for the reasons which we have just stated, it held that the ruling in *Lavignino* v. *Uhlig* must be considered as narrowed, so as to apply only to a case where the second location did not embrace the discovery point of the first, but was a mere overlap. Thus applying the ruling in *Lavignino* v. *Uhlig*, the court held that as the location by Farrell of the Cliff claim was made upon substantially the same ground embraced by the South Mountain, and the statutory period for the forfeiture of the South

Mountain claim had not expired, the Cliff claim was not located on ground subject to location, and was void; that as the Divide had been located or relocated after the lapsing of the South Mountain claim, the Divide claim was located on land subject to be appropriated, and was therefore paramount to the second or Farrell location. The judgment of the trial court was therefore reversed and a decree was made in favor of the administrator of Rhodin. 31 Utah, 155. Farrell thereupon sued out this writ of error.

In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining States or in Territories of the United States where mining prevails—*Nash* v. *McNamara* (Nevada), 93 Pac. Rep. 405, and cases cited—which, in considering the reasoning of *Lavignino* v. *Uhlig*, also attributed to that reasoning, broadly construed, the serious and unfavorable consequences on rights of property suggested by the court below in its opinion. It may not be doubted, unless the reasoning in the *Lavignino case* is to be restricted or qualified, that the grounds upon which the court below rested its conclusions were erroneous. Not doubting at all the correctness of the decision in the *Lavignino case*, especially in view of the issue as to long possession and the operation of the bar of the statute of the State of Utah, which was applied by the court below in that case, and whose judgment was affirmed, we do not pause to particularly reëxamine the reasoning expressed in the opinion in *Lavignino* v. *Uhlig* as an original proposition. We say this, because whatever may be the inherent cogency of that reasoning, in view of the experience of the courts referred to concerning the practice which it was declared had prevailed, in reliance upon what was deemed to be the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice, and taking into view the prior decisions referred to, especially *Belk* v. *Meagher*, 104 U. S. 279, as also the more recent case of *Brown* v. *Gurney*, 201 U. S. 184, we think the opinion in the *Lavignino case* should be qualified

so as to not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim. It is to be observed that this qualification but permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. It does not, therefore, include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if at the time of such second location there had been an actual abandonment of the original senior location. We say this because—taking into view *Belk* v. *Meagher*, *Lavignino* v. *Uhlig*, and *Brown* v. *Gurney*—we are of the opinion, and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.

In *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, summing up as to the character of the right which is granted by the United States to a mining locator, after observing that no written instrument is necessary to create the right, and that it may be forfeited by the failure of the locator to do the necessary amount of work, it was said (p. 450):

"(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

"An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. *Snell* v. *Levitt*, 110 N. Y. 595, and cases cited at p. 603 of the opinion of Earl, J.; *White* v. *Manhattan Railway Co.*, 139 N. Y. 19. If the locator remained in possession and failed to do the work provided for by statute, his interest would terminate, and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances. . . ."

It remains only to test the correctness of the conclusions of the court below in the light of the principles just announced. Now, it was found by the trial court that the evidence offered tended to show that the South Mountain lode claim was located in August, 1900, *and that no work was ever done on said claim*, and that it became forfeited for want of the annual labor required by the statute on December 31, 1901. Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory forfeiture of the South Mountain would have resulted. The offer of proof, therefore, made by the administrator of Rhodin, to show that the South Mountain was a valid and subsisting location when Farrell made the location of the Cliff, tended to show that during the year that had intervened between the location of the South Mountain and the location by Farrell of the Cliff no work of any character whatever was done by the locators of the South Mountain, and that this was also true from the time the Cliff was located to the expiration of the period when a statutory forfeiture would have been occasioned. As all rights of the locators of the South Mountain were, in any aspect, at an end by their failure to adverse, and as the Cliff was prior in time to the Divide, and therefore the burden of proof was on the Divide to establish that the Cliff location was not a valid one, we think that the burden would not have been sustained by the proof offered. To the contrary, we are of opinion that

the proof which was so offered on behalf of the Divide tended, when unexplained, to show that the location of the South Mountain was not made in good faith, and that the claim had actually been abandoned when Farrell made his location. The Supreme Court of Utah should therefore have remanded the cause, so that it might be determined whether or not the South Mountain had been abandoned by the locators of that claim when Farrell made his location; and error was therefore committed in entering judgment in favor of Lockhart, the administrator of Rhodin, decreeing to him possession of the ground in controversy.

The judgment of the Supreme Court of Utah must therefore be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

KEALOHA *v.* CASTLE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 230. Submitted April 28, 1908.—Decided May 18, 1908.

The courts of Hawaii having prior to the annexation construed the statute of May 24, 1866, legitimatizing children born out of wedlock by the subsequent marriage of the parents as not applicable to the offspring of adulterous intercourse, and the organizing act of the Hawaii territory having continued the laws of Hawaii not inconsistent with the Constitution or laws of the United States, this court adopts the construction of the Hawaiian statute given by the courts of that country.

While in different jurisdictions statutes legitimatizing children born out of wedlock by the subsequent marriage of the parents have been differently construed as to the application thereof to the offspring of adulterous intercourse, in construing such a statute of a Territory this court will lean towards the interpretation of the local court.

The construction of a statute affixed thereto for many years before territory is acquired by the United States should be considered as written into the law itself.

An *ex parte* and uncontested proceeding construing a statute and directing payments in accordance with such construction cannot be pleaded as *res judicata* in a subsequent contested proceeding.
17 Hawaii, 45, affirmed.

By the last will of Joshua R. Williams, duly admitted to probate by the proper court of the Hawaiian Islands on July 30, 1879, William R. Castle, the appellee, was appointed trustee to collect and manage the estate of said Williams. After the decease of Williams, Castle duly qualified and entered upon the performance of the trust. He was charged with the duty of paying the income of the estate to named beneficiaries during life, and on the decease of any of such beneficiaries the share was to be paid to the children, and the distribution of the principal of the estate was postponed to a remote period. One of the named beneficiaries was a son, John. He married, and his wife bore him a son, Othello. While John was living in lawful wedlock another woman bore him two children, Annie, born in 1879, and a son, Keoni, born in 1883. Some years subsequent to 1883, his first wife having died, John married the mother of his two illegitimate children. John died about 1891, leaving his second wife surviving him, as also the child Othello by the first wife and the two illegitimate children referred to. One of these, Annie, married one Kealoha, and in 1905, after she and her brother Keoni had reached their majority, they filed in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, a bill against Castle for an accounting, in which substantially the facts above stated were set forth. It was also averred that although, on an application by the trustee, he had in 1891 been instructed by a justice of the court to make payment to the said Annie and Keoni of their shares, on the theory that they had been legitimated by the marriage of their parents, the trustee had ceased to make said payments and denied that they were entitled to receive any portion of the income or to share in the principal of the estate. It was prayed that the trustee might be ordered to render an account and be compelled to make payment of the

portion of the income to which it might appear the petitioners were entitled. A demurrer was filed to the bill, and the question whether the demurrer should be sustained was reserved to the Supreme Court of the Territory, it being stated in the certificate that the following question of law was raised by the demurrer, upon which the court was in doubt, viz:

"Whether or not said demurrer should be sustained or overruled, which involves the construction of section 2288, Revised Laws of Hawaii, and its application to the facts as alleged in the bill herein; that is to say, were the petitioners made legitimate by the marriage of their parents subsequent to their birth and thereby rendered capable of inheriting from their father, J. R. Williams, deceased."

The Supreme Court held that the demurrer ought to be sustained, and upon remittitur the Circuit Court entered a decree sustaining the demurrer and dismissing the petition with costs. This decree having been affirmed by the Supreme Court of the Territory, the case was brought here by appeal. 17 Hawaii, 45.

Annie Kealoha and *Keoni Williams*, appellants, for themselves.

Mr. A. G. M. Robertson and *Mr. David L. Withington* for appellee.

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

The assignments of error assailing the action of the Supreme Court of the Territory propound two questions for our consideration:

1. Was it error to hold that, as the appellants were the issue of an adulterous relation between their father and mother at a time when the father was the lawful husband of another, they were not made legitimate by the marriage of their father

and mother after the death of their father's first lawful wife, and by force of the statutes of Hawaii?

2. Was it error to hold that the instruction given to the appellee in 1891, to make payment to the appellants of a portion of the income of the trust property, the title to which is in dispute, in this suit, on the theory that they had become legitimate by the subsequent intermarriage of their parents, did not make the matters in dispute *res judicata* during the entire administration of the said trust property?

As to the first question. The law in force at the time of the death of the testator Williams, in 1879, which, on the marriage of the parents, legitimated children born out of lawful wedlock was passed on May 24, 1866 by the legislative assembly of the Hawaiian Islands, and appears as the first statute in the session laws for 1866–67. It is also contained in Comp. Laws, 1884, p. 427, and Civil Laws of 1897, § 1876. The statute was carried into the Revised Laws of 1905 as § 2288, in similar phraseology, and reads as follows:

"All children born out of wedlock are hereby declared legitimate on the marriage of the parents with each other, and are entitled to the same rights as those born in wedlock."

In the year 1880, in *Kekula* v. *Pioeiwa*, 4 Hawaii, 292, the proper interpretation of the act of 1866 was directly involved. The action below was in ejectment. Plaintiff was the issue of a woman by a man not her husband, he being then married to another. The wife having died, the father married the mother of the plaintiff. The right of the plaintiff to recover depended upon the fact of his constructive legitimacy. It was held, however, that the act of 1866 did not apply to the case of an adulterous intercourse, and that the offspring of such intercourse could not inherit from the father. While it was observed in the opinion that to enforce a contrary doctrine would be opposed to good morals, it is plain that the conclusion reached was that the statute was adopted by the legislative department of the Hawaiian government with the intention that it should have the restrictive effect given to it by the court. In other

words, it was decided that the statute should not be broadly construed, as was claimed on behalf of the plaintiff. The statute was not afterwards modified, the decision in the *Kekula case* has never been disapproved or doubted by the court which rendered it, it has undoubtedly become a rule of property, and was followed in the instant case. On the coming of the Hawaiian Islands under the sovereignty of the United States this statute was in force, with the construction given to it by the highest court of the country, and its continued enforcement was in effect ordained by the organic act, which, in § 6, provided, "That the laws of Hawaii, not inconsistent with the Constitution or laws of the United States or the provisions of this act, shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

In Kentucky, in 1887 (*Sams* v. *Sams*, 85 Kentucky, 396, where the facts were somewhat similar to those in the instant case), it was held:

"Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse."

In other jurisdictions, however, statutes of similar character have been given a broad construction, and where exceptions have not been stated none have been implied. *Brewer* v. *Blougher*, 14 Pet. 178; *Hawbecker* v. *Hawbecker*, 43 Maryland, 516; *Ives* v. *McNicoll*, 59 Ohio St. 402. And see *Carroll* v. *Carroll*, 20 Texas, 732; *Munson* v. *Palmer*, 8 Allen, 551; *Adams* v. *Adams*, 36 Georgia, 236; *State* v. *Lavin*, 80 Iowa, 556. But, under the circumstances to which we have hitherto called attention, we do not think we may enter into a consideration of these conflicting decisions. Even in the case of a law adopted by an organized Territory of the United States at a time when it was subject to the control of Congress, the rule is that we

will lean towards the interpretation of a local statute adopted by the local court, and that where a statute of a Territory has been in existence for a considerable time, and been construed by the highest court of the Territory, even apart from its reenactment, weight attaches to the construction given by the local court. *Copper Queen Mining Co.* v. *Arizona Territory*, 206 U. S. 474. The case at bar, however, more cogently calls upon us not to disregard the construction given to the statute by the highest court of Hawaii. Here the law in question was passed while Hawaii was an independent government, and its meaning was declared by the court of last resort of that government, and, as we have said, that law as thus construed was given recognition by the organic act. The subject with which the law deals, the rights which may have come into existence during the more than forty years in which the statute has been in force, admonish us that we may not overthrow the meaning given by the court of last resort of Hawaii, and which has prevailed for so many years. Indeed, as the construction affixed to the statute many years before the islands were acquired was final, in effect that construction had entered into the statute at the time of acquisition and must by us be considered as if written in the law.

As to the question of res judicata. It was averred in the petition in the Circuit Court as follows:

"IV. That in the year 1891 the said respondent, being uncertain as to the propriety of paying over to the said children, or to any one in their behalf, their share or any portion of the income of the estate of said J. R. Williams, deceased, applied to the Supreme Court in probate, said court at that time having jurisdiction at chambers in matters of probate, for instructions as to the standing of said children, and that he was instructed and authorized by the Honorable Richard F. Bickerton, one of the justices of said court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents, and that thereafter said respondent, as trustee, duly made such pay-

ments to said Kahalauaola, the mother of said children, in their behalf, until within a year or two past, since which time respondent has utterly refused to make payments to the said children, or either of them, or to any one in their behalf, claiming that they were not, and are not now, entitled to receive any portion of the income, or to share in the principal of the said estate of J. R. Williams, deceased."

These averments cannot bear any other construction than that the application referred to was an *ex parte* proceeding. The Circuit Court of the Territory, we think, correctly disposed of the claim of *res judicata* by the following ruling:

"As to the instruction by Mr. Justice Bickerton, it does not appear that any notice was given of the proceedings, or that there was any contest or issue made concerning the legitimacy of children."

Affirmed.

BOSTON AND MAINE RAILROAD *v.* GOKEY.

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

No. 198. Argued April 14, 1908.—Decided May 18, 1908.

A defendant defeated on the merits after having specially assailed the jurisdiction of the Circuit Court because of defective writ and service is not bound to bring the jurisdictional question directly to this court on certificate under § 5 of the act of March 3, 1891; he may take the entire case to the Circuit Court of Appeals and on such appeal it is the duty of that court to decide all questions in the record; and, if jurisdiction was originally invoked for diversity of citizenship, the decision would be final except as subject to review by this court on certiorari.

Where the Circuit Court of Appeals has refused to decide a question, this court may either remand with instructions, or it may render such judgment as the Circuit Court of Appeals should have rendered, and where the new trial would, as in this case, involve a hardship on the successful party, it will adopt the latter course.

Where, under §§ 914, 918, Rev. Stat., the Circuit Court has adopted a rule of practice as to form and service of process in conformity with the state

practice, it is not bound to alter the rule so as to conform to subsequent alterations made in the state practice.

Under §§ 1109, 3948, 3949, Vermont Statutes, the service of process on a division superintendent in charge of the property attached belonging to a defendant railroad corporation *held*, to be sufficient.

THE plaintiff below, who is respondent in this court, was in the service of the railroad company, petitioner, and in November, 1901, was injured by being knocked off a freight car at a place called Lyndon, in the county of Caledonia and District of Vermont. The car was one of a freight train moving in the railroad yard and the plaintiff was struck, while on his car attending to the brake, by some portion of the iron switch staff, alleged to have been negligently built too high, and too near the railroad track. The injury made it necessary to amputate one of the legs of the plaintiff just above the ankle. He sought to recover damages for the injury and to that end this action was commenced by attachment in the Circuit Court of the United States for the District of Vermont.

The jurisdiction of the court was founded solely upon the diversity of citizenship, the plaintiff being a citizen of Vermont and the railroad being a citizen of Massachusetts, and operating, as lessee, the Connecticut and Passumpsic Rivers Railroad Company in the State of Vermont, on which road the accident occurred.

The service of the writ was made upon the division superintendent, at his office near Lyndon, in Vermont and the attachment was executed by attaching at that place two locomotives, the property of the railroad.

The defendant appeared only for the purpose of filing a motion to dismiss the writ because of its form, and also for the purpose of filing a plea in abatement on account of the alleged defective service of the writ. The defendant's motion to dismiss the writ was denied, and a demurrer to the plaintiff's replication to the defendant's plea in abatement was overruled, the result of the whole being that plaintiff's writ and its service were both allowed to stand.

The defendant then filed a plea to the merits, on which the parties went to trial, resulting in a verdict of $3,350 for the plaintiff.

The defendant took the case by writ of error to the Circuit Court of Appeals, where the judgment was affirmed; but that court refused to decide the question of jurisdiction of the Circuit Court, which had been argued before it at the same time with questions upon the merits, on the ground that the Circuit Court of Appeals had no jurisdiction to decide it.

On application, this court granted a writ of certiorari.

Mr. George B. Young, with whom *Mr. John Young* was on the brief, for petitioner:

The original writ in the suit of *John N. Gokey* v. *Boston & Maine Railroad*, returnable to the United States Circuit Court for the District of Vermont, was insufficient. Sec. 914, Rev. Stat.; Rules 7, 8, U. S. Circuit Court for Dist. of Vermont; Judiciary Act of Vermont, of March, 1797; Rev. Stat. Vermont, 1839, ch. 28, § 10; Gen. Stat. Vermont, 1863, ch. 33, § 19; Rev. Laws Vermont, 1880, § 868; Vermont Stat., 1894, §§ 1088, 1089, 1090; Laws of Vermont, 1898, No. 137.

The Boston and Maine Railroad, being a foreign corporation and a non-resident of Vermont, the Circuit Court could not acquire jurisdiction of the original action, nor of this petitioner, the defendant therein, except by a valid attachment of property of this petitioner in Vermont and a legal service of the original writ in accordance with the laws of the State of Vermont. No such service nor attachment was made and the Circuit Court for the District of Vermont acquired no jurisdiction of the original action nor of the defendant therein, the petitioner here. Statutes cited *supra* and *Hill* v. *Warren*, 54 Vermont, 73; *Folsom* v. *Conner*, 49 Vermont, 4; *Rollins* v. *Clement*, 49 Vermont, 98; *Clark & Freeman* v. *Patterson*, 58 Vermont, 676; *Amy* v. *Watertown*, 130 U. S. 301; *Harkness* v. *Hyde*, 98 U. S. 476; *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Alexandria* v. *Fairfax*, 95 U. S. 774; *Bors* v.

Preston, 111 U. S. 252; *Andrews* v. *Michigan Central R. R. Co.*, 99 Massachusetts, 534; *Desper et al.* v. *Continental Water Meter Co.*, 137 Massachusetts, 252; *Lewis* v. *Northern Railroad*, 139 Massachusetts, 294; *Mexican Cent. Ry. Co.* v. *Pinkney*, 149 U. S. 194.

The sufficiency of the service must be determined from the return of the marshal on the original writ, unaided by extraneous facts or presumptions. *Folsom* v. *Conner*, 49 Vermont, 4; *Hill* v. *Warren*, 54 Vermont, 73; *Clark & Freeman* v. *Patterson*, 58 Vermont, 676; *Alexandria* v. *Fairfax*, 95 U. S. 774; *Mexican Cent. Ry. Co.* v. *Pinkney*, 149 U. S. 194; *Bors* v. *Preston*, 111 U. S. 252; *Johnson* v. *Hunter*, 147 Fed. Rep. 133, 137; *Galpin* v. *Page*, 18 Wallace, 350, 366; *Settlemier* v. *Sullivan*, 97 U. S. 445, 448; *Cheeley* v. *Clayton*, 110 U. S. 701, 708.

The insufficiency of the original writ is apparent on the face of the record; consequently, the insufficiency of said writ was properly raised by the motion to dismiss. *Bent* v. *Bent*, 43 Vermont, 42; *Bennet* v. *Allen*, 30 Vermont, 684.

The insufficiency of the attachment and service was properly raised by the motion to dismiss; also by the plea in abatement. *Howard* v. *Walker*, 39 Vermont, 163; *Bliss* v. *Conn. & Pass. R. R. Co.*, 24 Vermont, 428; *Bennet* v. *Allen*, 30 Vermont, 684; *Bent* v. *Bent*, 43 Vermont, 42.

The plea in abatement was sufficient in form and substance. Vermont Stats., §§ 1109, 3948, 3949; *Pearson* v. *French*, 9 Vermont, 349; *Morse* v. *Nash*, 30 Vermont, 76; *Fogg* v. *Blair*, 139 U. S. 118, 127; *Kent* v. *Lake Superior Canal & Iron Co.*, 144 U. S. 75, 91; *Hill* v. *Warren*, 54 Vermont, 73; *Clark & Freeman* v. *Patterson*, 58 Vermont, 676; Gould's Pleadings, ch. 3, § 167; Stephen's Pleadings, p. 217; 1 Chitty's Pleadings, 13 Am. Ed. 611; *Carpenter et al.* v. *Briggs et al.*, 15 Vermont, 34, 41; *Murdock* v. *Hicks*, 50 Vermont, 683, 687; *Lyman* v. *Central Vt. Ry. Co.*, 59 Vermont, 167, 175; *Clement* v. *Graham*, 78 Vermont, 290, 308; *Toland* v. *Sprague*, 12 Peters, 309, 335; *Galpin* v. *Page*, 18 Wall. 350.

The replication to the plea in abatement was insufficient

and alleged not facts, but legal conclusions not sustained by facts.

The insufficiency of the original writ and service was properly raised on the record before the Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals had jurisdiction to determine and it was its duty to determine the sufficiency of the original writ and service, because upon that depended the jurisdiction of both the Circuit Court and the Circuit Court of Appeals. U. S. Statutes, ch. 517, March 3, 1891; Comp. Stats., 1901, p. 549; *Louisville Trust Co.* v. *Knott,* 191 U. S. 225; *Carter* v. *Roberts,* 177 U. S. 496; *American Sugar Rfg. Co.* v. *New Orleans,* 181 U. S. 277; *Grand Trunk Railway Co.* v. *Twitchell,* 59 Fed. Rep. 727; *King* v. *McLean Asylum,* 64 Fed. Rep. 325; *American Sugar Rfg. Co.* v. *Johnson,* 60 Fed. Rep. 503; *Texas & Pacific R. R. Co.* v. *Bloom,* 60 Fed. Rep. 979; *Sneed* v. *Sellers et al.,* 66 Fed. Rep. 371; *Coler* v. *Granger County et al.,* 74 Fed. Rep. 16; *Balt. & Ohio R. R. Co.* v. *Meyers,* 62 Fed. Rep. 367; *Rust* v. *United Water Works Co.,* 70 Fed. Rep. 129; *United States Freehold Co.* v. *Gallegos,* 89 Fed. Rep. 769; *McCord Lumber Co.* v. *Doyle,* 97 Fed. Rep. 22; *Kreider* v. *Cole,* 149 Fed. Rep. 647.

The Circuit Court of Appeals cannot properly affirm a judgment rendered by a Circuit Court when it appears on the record that the Circuit Court had no jurisdiction of the original action nor of the defendant therein. *Kreider* v. *Cole,* 149 Fed. Rep. 647, 649; *Ryder* v. *Holt,* 128 U. S. 525.

Mr. Herbert W. Hovey, with whom *Mr. Edwin A. Cook* and *Mr. Harland B. Howe* were on the brief, for respondent:

The original writ in this case is in accordance with the requirements of §§ 914 and 918 of the Revised Statutes of the United States, is in accordance with Rules 7 and 8 of the United States Circuit Court for the District of Vermont adopted at the May term, 1885, and is in accordance with the statutes of the State of Vermont relating to form, time of service, and

return of writs, which were in force when said rules of court were adopted. If any attempt had been made to make the original writ comply with the later statutory requirements of the State of Vermont, the writ would then have been insufficient because it would have been in direct violation of Rule 8 of the United States Circuit Court for the District of Vermont.

That Rule 8 of the United States Circuit Court for the District of Vermont should prevail over later state legislation is clear. *Shepard* v. *Adams*, 168 U. S. 618.

The service of the original writ was sufficient to give the United States Circuit Court for the District of Vermont jurisdiction of said action and of the defendant therein.

The marshal, in the service of this writ, was not obliged to follow §§ 3948 and 3949 of the Vermont Statutes, as those particular sections prescribe only one of several methods by which service could have been made on the petitioner. Section 3949 says: "Service may be made by leaving a copy of the process with a station agent." This statute is not mandatory. It merely furnishes an additional mode of service, and it does not require that service be made in that way.

The officer's return shows that service by attachment was made in accordance with § 1109 of the Vermont Statutes. Folsom was a "known agent" about the property attached, although he may not have been a strictly appointed person for service of the process. An "accredited agent and division superintendent" is certainly "a known agent." Leaving a copy in his hands, he having the custody of the property attached, was leaving it at the place where such goods and chattels were attached, in accordance with the requirements of § 1109. *Hill* v. *Warren*, 54 Vermont, 73.

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

The defendant endeavored in the Circuit Court to raise the jurisdictional question arising from the alleged defective form

and also from the alleged defective manner of service of the writ. It moved to dismiss the writ on account of its form, and pleaded in abatement that the service of the writ was not sufficient, and that the court obtained no jurisdiction over the defendant by reason of such defective service. When the court denied its motion to dismiss and overruled its demurrer to the replication to its plea in abatement, defendant then filed its plea to the merits and went to trial, and when the trial ended in a judgment against it the defendant sought to obtain a review of that judgment by the Circuit Court of Appeals on writ of error, including the question of jurisdiction as well as the other questions existing in the case.

The Circuit Court did not certify the sole question of jurisdiction directly to this court under § 5 of the Court of Appeals Act of March 3, 1891, assuming that it might have done so (*Shepard* v. *Adams*, 168 U. S. 618; *Remington* v. *Central Pacific Railroad Company*, 198 U. S. 95, 97, 99; *Board of Trade &c.* v. *Hammond Elevator Co.*, 198 U. S. 424, 434), but the plaintiff in error brought up the whole case by writ of error before the Circuit Court of Appeals, and contended that it had the right to argue before that court, among the other questions, that of the jurisdiction of the Circuit Court, and that the Circuit Court of Appeals ought to decide the same.

In this we think the defendant was right. The original jurisdiction of the Circuit Court was invoked upon the sole ground of diversity of citizenship. The defendant assailed the jurisdiction of that court because of an alleged defective writ, and also because of the alleged defective service of that writ. Such a question of jurisdiction could be brought by writ of error to the Circuit Court of Appeals along with other questions arising upon the trial of the merits of the case. The defendant was not bound to waive the other questions in the case and come directly to this court from the Circuit Court upon the sole question of jurisdiction of the character herein presented, the jurisdiction not resting upon the ground that the suit arose under the Constitution, laws or treaties of the United States,

but it had the right to go to the Circuit Court of Appeals and there argue the jurisdictional question of the character above mentioned, among the others, and it was the duty of the Circuit Court of Appeals to decide the whole case, and its decision of all questions appearing in this record, would be final, on account of the jurisdiction of the Circuit Court resting on diversity of citizenship alone, unless this court should review it by a writ of certiorari. This principle was decided in *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, 282, and cases cited.

As a certiorari was issued in this case, it is now before us on the return to that writ, and we have power to render such judgment as the Circuit Court of Appeals should have rendered, or we might reverse the judgment of affirmance by that court, and send the case back to it to decide the question of jurisdiction, which it had refused to pass upon. We think it would be an unnecessary hardship to the plaintiff to do the latter, because of the further delay that would thereby be caused. The accident occurred in 1901 and the trial resulted in a very moderate verdict, considering the injury, and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment.

The objections to the jurisdiction of the Circuit Court, as has been stated, were twofold, one regarding the form of the writ and the other the sufficiency of its service.

First, as to the form. The writ was one of attachment and was dated twenty-two days before, and made returnable on the first day of the following term, and was served fifteen days before the term by attaching the property as above stated.

Section 914 of the Revised Statutes of the United States requires that the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State.

By § 918 of those statutes it is provided that the several Circuit and District Courts may, from time to time, make rules and orders directing the returning of writs and processes, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings."

At the May term of the Circuit Court of the United States for the District of Vermont, held in 1885, Rules 7 and 8 (in accordance with the state practice) were adopted, reading as follows:

"Rule 7. The form of process and declaration shall be the same as is or may be provided by the laws of this State, and in cases not expressly provided for by such laws, in the form used in the county and Supreme Courts of the State, so far as they may be applicable to Federal courts.

"Rule 8. All process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof, according to the laws of this State, otherwise it shall be returnable to the next regular term thereafter; final process shall be returnable to the next regular term, or otherwise, if so specifically ordered by a judge."

Rule 13 provides that suits shall be docketed on the first day of the term to which they are returnable, and Rule 14 makes it necessary for defendant to enter his appearance on the first day of the term at which he is required to appear.

At the time of the adoption of these rules, and up to 1893, it was provided by § 868 of the Revised Statutes of Vermont that "every writ and process, returnable before the Supreme or county court, shall be served at least twelve days before the session of the court to which it is returnable, including the day of service, and excluding the return day. . . . A writ against a town, county, school district or other corporation shall be served at least thirty days before the session of the court to which it is made returnable. . . ."

This latter part of the section seems to have been construed as making provision for service upon corporations of a munici-

pal character and not private corporations, in regard to which the practice was to serve the writs upon them precisely as against individuals, that is to say, twelve days before the session of the court to which the writs were made returnable. This is said to have been the construction of the trial courts of Vermont, but the Supreme Court of the State never had occasion to pass upon the question. In 1893 the rule of the state court was altered by statute, and since that time process directed to an officer contains the direction "fail not but service and return make within twenty-one days from the date hereof," and the writs are to be served within twenty-one days from the date, and the defendant must enter an appearance within forty-two days. The return of the writ to the court at the first day of the ensuing term is no longer necessary.

Judge Wheeler, who had been for many years one of the judges of the Supreme Court of Vermont, and from 1877 until his death in 1906 a judge of the United States District Court for the District of Vermont, in deciding the question of jurisdiction in this case and in speaking of the change of the state law in regard to the time of service of the writ said: "In the state courts there are but two terms in a year having jurisdiction of such cases; and it appears to have been thought best to have writs returnable oftener; but this court has three regular terms in each year, and it has not been considered that to have writs returnable oftener would be advantageous for the advancement of justice or the prevention of delays. Therefore the rule requiring such process to be returnable at the regular terms has been retained without change. That this course is proper seems to appear, not only from the words of the statutes, but from *Shepard* v. *Adams*, 168 U. S. 618, where a summons made returnable according to a rule of the Federal court, and not in conformity with a changed state statute, was, after full examination of the subject, upheld. Upon this view this writ appears to be regular and good; and the defendant's motion to dismiss must be overruled."

In accordance with the views expressed in the above ex-

tract from Judge Wheeler's opinion, he, as district judge, had not altered the rule which had been first adopted in 1885 in conformity with the practice of the state court, existing at the time of its adoption. *Shepard* v. *Adams*, *supra*, seems to be a sufficient authority for the refusal of the judge to alter the rule of the Circuit Court so as to be in conformity with the alteration made by the state statute in 1893.

The writ complied with the requirements of the rule of the Federal court and was served more than twelve days before the session of the court to which it was returnable, as provided in § 868 of the Revised Laws of Vermont of 1880, and it was served by attaching the property of the defendant. By virtue of the two sections above cited (914 and 918 of the Revised Statutes of the United States) and in accordance with the holding in *Shepard* v. *Adams*, *supra*, the rules of the Circuit Court were sufficient, and the form of the writ was proper.

It is also urged that while Rule 8 remains, which requires that all process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term (which by Rule 13 is the first day of the term), if the process thus returnable must also contain the direction provided for in the statute since 1893, "fail not, but service and return make within twenty-one days from the date hereof," then there would be but a few days in the year in which a writ could be lawfully issued in the Circuit Court for the District of Vermont, viz., the days between the twenty-first and the twelfth days before each of the three terms of the Circuit Court.

Such an objection shows, at least, the difficulty attending the matter of service of process, on the theory contended for by plaintiff in error, unless the Circuit Court should abandon altogether the old rule making provision for returning process to any particular term of court, and make a new rule following the new method provided by the state statute. We think this unnecessary. The Federal judge was justified, by the statutes above quoted and by the decision of this court in *Shepard* v. *Adams*, *supra*, in refusing to alter the rules of the Circuit Court,

which, when made, were in conformity to the state court practice, and the objection to the form of the writ is therefore without merit.

Second, in regard to the service. Section 1109 of the statutes of Vermont, in providing for the service of an attachment, says that a copy of the attachment and list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, and if such person is not an inhabitant of the State, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached. This extends and applies to bodies corporate and public. The service in this case was made by attaching the locomotives, as already stated, and by leaving a true and attested copy of the writ in the hands of H. E. Folsom, agent and division superintendent of the railroad, at his office in Lyndonville, in the district.

It is objected by the defendant that Folsom was not a proper party on whom to serve the writ. Sections 3948 and 3949 of the Vermont statutes are cited to that effect. It is provided by § 3948 that the lessee of a railroad, not resident in that State shall appoint a person resident in the State upon whom service of process may be made, and by § 3849 if the lessee do not appoint such agent then the service may be made by leaving a copy of the process with a station agent or depot master, in the employment of such trustee or lessee. It is therefore contended that if the lessee had failed to appoint, then the service of process could not be made upon any agent other than a station agent or depot master, in the employment of the lessee; and there was no pretense that Folsom, the division superintendent, had been appointed by the railroad as the person upon whom service of process might be made, and there was no averment or proof that he was a station agent or depot master.

Those sections evidently refer to the ordinary cases of service of process without an attachment, and do not refer to the

manner of serving an attachment and the process connected therewith. That is provided for by § 1109, *supra*. Folsom, the division superintendent, was certainly a known agent of the defendant.

Upon this question Judge Wheeler well said:

"The known agent of a non-inhabitant with whom the copy of an attachment and a list of the articles attached may be left, may not be a person upon whom, by appointment, service of process generally may be made. Folsom may have been such an agent about this property attached, and not such an appointed person for service of process upon. And leaving a copy in the same custody as that of the goods or chattels attached would be leaving it at the place where they were attached, although the custodian may have no other agency. *Hill* v. *Warren*, 54 Vermont, 78.

"The division superintendent of the railroad of the defendant designating the locomotives attached as its property might well be taken to be the known agent, or the accredited agent as styled by the marshal, of the defendant about the custody of those articles, and leaving a copy of the attachment and a list of them with him would be a leaving with a known agent of the defendant within the meaning of the statute, or at the place where they were attached within the same meaning.

"The statute provides, Vermont Stat. § 3949, that on failure to appoint such a person for receiving service of process it 'May be made by leaving a copy of the process with a station agent or depot master in the employment of,' the lessee. The plea alleges that the defendant had at the time of the service many station agents and depot masters in its employment in this State, to wit, twenty-five, with whom a copy may have been left, and that Folsom was not one of them. But this statute only furnishes an additional mode of service, generally, and does not require service of an attachment to be made upon station agents or depot masters, nor supersede service of such process in the mode otherwise provided."

The plaintiff, in his replication to the plea in abatement,

averred that the said Folsom, upon whom the process was served, was on the day of the service of the original writ in this cause, to wit, on the second day of May, A. D. 1904, a person residing within the State of Vermont, upon whom service of process issued against the defendant might be legally made, to wit, an agent of this defendant. To this replication the defendant demurred. The demurrer was overruled. Without going into the question whether the motion to dismiss, and also the demurrer, were not waived by pleading to the merits after the motion had been denied and the demurrer overruled, we think the facts sufficiently appear that Folsom, the division superintendent, was an agent within the Vermont statute upon whom attachment process, such as was issued in this case, might be regularly served. Accordingly, a valid service upon the principal, within the law of Vermont, was duly made, and jurisdiction was acquired by that service.

The judgment of the Circuit Court of Appeals is

Affirmed.

SANDERSON *v.* UNITED STATES AND THE CHEYENNE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 208. Argued April 22, 23, 1908.—Decided May 18, 1908.

The provisions of § 1088, Rev. Stat., relative to new trials in Court of Claims cases are applicable to cases brought under the Indian Depredations Act of March 3, 1891, 26 Stat. 851.

The motion for new trial on behalf of the United States in Court of Claims cases under the provisions of § 1088, Rev. Stat., may be made any time within two years after final disposition of the claim, and, if so made, the motion may be decided by the court after the expiration of the two years period.

While ordinarily a court has no power to grant a new trial after the adjournment of the term if no application was made previous to the adjournment, the power so to do can be given by statute, and where a government consents to be sued, as the United States has in the Court

of Claims, it may attach whatever conditions it sees fit to the consent and give to itself distinct advantages, such as right to apply for new trial after the term, although such right is not given to claimants.

On the eighth of June, 1891, the appellant herein filed his petition in the Court of Claims, under the Indian Depredations Act, approved March 3, 1891, c. 538, 26 Stat. 851, to recover for losses of property sustained by the firm, of which, at the time of filing the petition, he was the surviving partner, from the depredations committed by members of a tribe of Cheyenne Indians in the year 1867, in or near the State of Kansas.

The petition contained the averments that the firm was at the time of the depredations engaged in the business of operating the Southern Overland Mail and Express Route, between the then terminus of the Union Pacific Railway and the city of Santa Fé, New Mexico, and was carrying the mails of the United States between those points.

Subsequently to such depredations two of the members of the firm died, and at the time of the filing of the petition the petitioner was left as the sole surviving partner.

The depredations were committed by taking unlawfully and by force or stealth from the possession of the firm, and in or near the State of Kansas, some thirty-seven mules and six horses, used by the firm in the operation of its business.

Under certain acts of Congress of March 3, 1885, c. 341, 23 Stat. 362, 376, and May 15, 1886, c. 333, 24 Stat. 29, 44, the claim of the firm for the recovery of the losses thus sustained was submitted to the investigation of the Secretary of the Interior, and, after investigation, the Secretary reported to Congress on December 7, 1886, finding that the firm had a just and equitable claim upon the United States for the amount of $7,740, the value of the animals as ascertained by the Secretary, who recommended the payment of that sum. Congress never appropriated anything for the payment of any part of the sum recommended. The amount awarded was not as large as the firm claimed was the value of the property de-

stroyed, but, for reasons stated in the petition to the court, it was not attempted to correct the injustice by reopening the question of the value upon the trial of the case before the Court of Claims.

The petition also contained an allegation that the tribe to which the Indians belonged who committed the depredations was at the time the loss occurred in amity with the United States.

After the filing of the petition the parties agreed on the facts, and, among others, it was agreed that the Indians took and destroyed the property belonging to the claimant without just cause or provocation, and that the Indians who took the property were members of the Cheyenne tribe, which was at the time of the commission of the depredations in amity and treaty relations with the United States.

The case was submitted to the court on the thirtieth day of June, 1892, and on the eleventh day of October, 1892, judgment was entered in favor of the claimant for the sum of $7,740, being the amount which had theretofore been reported to Congress by the Secretary of the Interior.

On the sixth day of October, 1894, the Assistant Attorney General filed in the clerk's office of the Court of Claims, while the court was in recess, a motion for a new trial in accordance with the provisions of § 1088 of the Revised Statutes of the United States, the ground of such motion being that in awarding judgment in favor of the claimant wrong and injustice had been done to the United States, because the defendant, the Cheyenne Indians, were not in amity with the United States at the time of the depredations which form the basis of the suit.

The Court of Claims on the thirteenth day of April, 1896, granted the motion for a new trial, and upon the new trial which was thereafter had the court found as a fact that at the time of the several depredations alleged in the petition the defendant Indians were hostile, and, as a conclusion of law, the court decided that the petition should be and the same

was dismissed, and judgment upon such finding and conclusion was entered in the court on the twenty-third day of April, 1906.

The claimant, on the seventeenth day of September, 1906, moved to vacate the judgment entered upon the new trial, and asked that the original judgment entered on the eleventh of October, 1892, should be reinstated and affirmed. The motion was denied, and on the twenty-fourth day of December, 1906, the claimant appealed to this court.

Mr. Jackson H. Ralston and *Mr. William E. Richardson*, with whom *Mr. Frederick L. Siddons* was on the brief, for appellant:

The Court of Claims had no power, under § 1088 of the Revised Statutes of the United States, to vacate a judgment by granting a motion for new trial four years after the judgment was entered.

The Supreme Court will review this issue on appeal from final judgment after the motion for new trial has been granted as it is only by means of such appeal that this court can act. *Young, Trustee*, v. *United States*, 94 U. S. (4 Otto) 258, and 95 U. S. (5 Otto) 641.

The Court of Claims made an erroneous ruling in the *Bellocq case*, 13 C. Cls. 195, which it relies upon to sustain the granting of the new trial in this case. The theory upon which the *Bellocq case* proceeded, namely, that in the absence of an express statutory prohibition, the Court of Claims may grant a motion for a new trial at any time, and that the statute in question, because it employs the term "may grant" within two years, does not forbid the granting of the motion after that period, was directly refuted by the opinion of this court in *Belknap* v. *United States*, 150 U. S. 588.

By the rule of the common law the trial court was required to dispose of the motion during the term. *Belknap* v. *United States*, 150 U. S. 588; *Buckner* v. *Conly*, 17 Ky. (1 T. B. M.) 3; *Truett* v. *Legg*, 32 Maryland, 149.

By examination of the judicial systems of many States, it is found that although the majority merely require the motion for new trial to be presented within a limited time, a large number have not fixed any time for the filing of the motion, but have statutes similar to the one under consideration, determining the period within which the court may grant a new trial.

The identical question raised here was decided in favor of appellants' contention in *Vaughan* v. *O'Connor*, 12 Nebraska, 478.

The principal other decisions in the several States having similar statutes upon this subject either requiring the motion to be determined within a fixed number of days, or within the term, or within the next succeeding term after judgment, all of which support the claimant's contention in this case, are as follows: *Ex parte Highland Avenue & Belt R. Co.*, 105 Alabama, 221; *Hundley* v. *Yonge*, 69 Alabama, 89; *Fitzpatrick's Admr.* v. *Hill*, 9 Alabama, 783; *Ruff* v. *Hand* (Arizona, 1890), 24 Pac. Rep. 257; *Walker* v. *Jefferson*, 5 Arkansas, 23; *Redman* v. *Reynolds*, 114 Indiana, 148; *Crews* v. *Ross*, 44 Indiana, 481 (487); *Hays* v. *May*, 35 Indiana, 427; *Ferger* v. *Wesler*, 35 Indiana, 53; *Buckner* v. *Conly*, 17 Kentucky, 3; *England* v. *Duckworth*, 75 S. Car. 309; *Clements* v. *Buckner* (Texas, 1904), 80 S. W. Rep. 235; *Lightfoot* v. *Wilson*, 11 Tex. Civ. App. 151; *S. C.*, 32 S. W. Rep. 331; *Laird* v. *State*, 15 Texas, 317; *McKean* v. *Zillner*, 9 Texas, 58.

It cannot be said that the appellant waived any rights by proceeding to trial after the granting of the motion for new trial. There was no right of appeal from the order, and it was his duty to participate in the new trial, and bring up this question on appeal from final judgment. *United States* v. *Young*, 94 U. S. 258.

Mr. Assistant Attorney General John G. Thompson, with whom *Mr. Lincoln B. Smith*, Assistant Attorney, was on the brief, for appellees.

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

The sole question in this case arises from the action of the Court of Claims in granting, upon the application of the Government, a new trial, April 13, 1896, more than two years subsequent to the entry of judgment in favor of the claimant on the eleventh day of October, 1892, although the application for such new trial had been filed October 6, 1894, which was less than two years after the entry of that judgment. The order was made under § 1088 of the Revised Statutes of the United States, which reads as follows:

"SEC. 1088. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

The motion was made pursuant to instructions contained in the act of Congress, approved August 23, 1894, c. 307, 28 Stat. 424, 476, which made appropriations to pay the judgments of the Court of Claims in this case, and 258 other Indian depredation cases. The provision in the last part of § 1 of that act is as follows:

"That no one of the said judgments shall be paid until the Attorney General shall have certified to the Secretary of the Treasury that he has caused to be examined the evidence heretofore presented to the Court of Claims in support of said judgment and such other pertinent evidence as he shall be able to procure as to whether fraud, wrong, or injustice has been done to the United States, or whether exorbitant sums have been allowed, and finds upon such evidence no grounds

sufficient in his opinion to support a new trial of said case; or until there shall have been filed with said Secretary a duly certified transcript of the proceedings of the Court of Claims denying the motion made by the Attorney General for a new trial in any one of said judgments."

The Attorney General examined the evidence therefore presented to the Court of Claims, and filed a motion for a new trial in this and many other cases. The motions in this case, and the others, were filed within two years from the dates of the respective judgments, but it is admitted that none of them was acted upon by the Court of Claims within that period. The Court of Claims was not in session when the statute of August 20, 1894, was passed nor when the motions for a new trial were filed in the clerk's office of that court, and it did not convene after the summer vacation until October 22, at which date more than two years had elapsed since the rendition of the judgment in this case.

It has been held by the Court of Claims (and, as we think, correctly) that § 1088 is applicable to the Indian Depredations Act of 1891 (26 Stat. 851). *McCollum* v. *United States*, 33 C. Cl. 469, 472.

The appellant contends that the statute must be so construed as to require the decision of the motion for a new trial within two years after the final disposition of the case, and hence that the motion should have been not only filed in the clerk's office, but decided by the court on or before October 11, 1894. The Government contends that as the motion was filed within the two years subsequent to the entry of the judgment, the court obtained jurisdiction over the motion, and it might be decided after the expiration of the two years. Upon the theory of the appellant the accident of an adjournment of the court some months *before* and its failure again to meet until a few days *after* the expiration of the two years subsequent to the entry of the judgment, deprived the court of the jurisdiction to hear and decide the question of the application for a new trial, although such application was

filed in its clerk's office within the two years limited by the statute.

Ordinarily a court has no power to grant a new trial after the adjournment of the term if no application has been made previous to the adjournment and no continuance granted. *Belknap* v. *United States*, 150 U. S. 588. This act, however, is a peculiar one. It grants distinct advantages to the United States. *United States* v. *Ayres*, 9 Wall. 608; *Henry* v. *United States*, 15 Ct. Cl. 162. These advantages Congress was competent to grant. The Government consents to be sued in regard to claims of this nature, and may attach such conditions to its consent as to it may seem proper. Among other conditions as to the finality of the judgments of the court it has empowered such court to grant a new trial on motion of the United States, pursuant to the section named.

The facts agreed upon on the first trial did not prevent the court from granting a new trial under that section. Indeed, the act of 1894, *supra*, really directs the court to grant a new trial if the facts are sufficient to bring the case within the provisions of § 1088.

We think the motion for a new trial may be made or filed at any time within the two years as provided for, and it is not necessary that the court should decide the motion within that time. If the Government has the whole two years in which to apply (and there is certainly nothing in the statute which limits the time to less than two years) it could not reasonably be held that an application made near the end of the two years must, nevertheless, be decided within that time. The motion might be filed at the last moment before the expiration of the two years, and if so, the court should have time to thereafter act upon it, or else the two-year limitation in which to file the motion is practically denied. If the motion must be decided within the two years, it must, of course, be filed sufficiently long before the expiration of that period to allow the court what it may regard as a sufficient time to decide it

intelligently within the limitation. How long that time may be it is impossible to say. It would be for the court to determine in each case. The result of such a construction is that there is no certain and definite time within which the motion for a new trial must be made, but it must be long enough before the expiration of the two years to give the court the time it may require in which to act upon the motion. This uncertainty we do not think was intended, nor is it the proper construction of the statute. When it limits the time to two years it is a limitation of the time for filing the motion and not a limitation of the time for making a decision, if the motion has been filed within the two years.

There is not much assistance to be obtained by referring to decisions of the state courts in relation to statutes of a somewhat similar nature, applicable to the ordinary law courts of the State. They depend very much upon the special language of the various statutes, all of which differ somewhat from the one under discussion. In addition to that, however, the peculiar nature of the Court of Claims itself must be considered. Congress created it for the sole purpose of permitting certain classes of claims against the Government to be presented to and passed upon by it, under the conditions which Congress might from time to time prescribe. The statute must therefore be so construed as to give full effect to such various conditions which Congress imposes upon the claimant for the privileges accorded him. A right on the part of the United States to move for a new trial should be so construed as not to limit the right by any technical or narrow reasoning, but the whole two years should be allowed in which to make the motion. Some States have enacted statutes limiting the time within which applications of this nature may be made, and they have been held complied with if the application is made within the time limited, although the decision is made subsequently. In other States the courts have regarded the time limitation as applicable to the time when the decision of the question submitted is rendered. We do not regard it as nec-

essary to cite them. The statutes differ, and the reasoning of the courts also.

The question of the construction of this particular act has heretofore been before the Court of Claims in *Bellocq* v. *United States*, 13 C. Cl. 195. The court there held that the limitation referred to the time of making the motion, and not to the time of its decision. We think the reasoning of Chief Justice Drake in that case is sound. See, also, *Mitchell* v. *Overman*, 103 U. S. 62; *McCollum* v. *United States*, 33 C. Cl. 469. Having two years in which to file its motion for a new trial the Government was in time in this case when it filed its motion with the clerk of the court, the court itself being then in recess, and it could thereafter hear and decide the case at its convenience.

The judgment of the Court of Claims dismissing the petition is

Affirmed.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *v.* PORTER.

ERROR TO DIVISION NUMBER TWO OF THE APPELLATE COURT OF THE STATE OF INDIANA.

No. 213. Argued April 27, 1908.—Decided May 18, 1908.

It is within the legislative power of a State to create special taxing districts and to charge the cost of local improvements, in whole or in part, upon the property in said district either according to valuation or area, and the legislature may also classify the owners of property abutting on the improvement made and those whose property lies a certain distance back of it, and if all property owners have an equal opportunity to be heard when the assessment is made the owners of the "back lying" property are not deprived of their property without due process of law or denied the equal protection of the laws.

The Barrett paving law of Indiana, the constitutionality of which was sustained by this court as to abutting property owners in *Shœffer* v. *Werling*, 188 U. S. 516; *Hibben* v. *Smith*, 191 U. S. 310, sustained also as to back lying property owners following *Voris* v. *Pittsburg Plate Glass Co.*, 163 Indiana, 599.

38 Ind. App. 226, affirmed.

THIS case involves the legality of a tax for street improvements imposed on the property of plaintiff in error, herein called the railway company.

The tax was imposed under a law of the State called the Barrett law. The law makes the amount of the assessment a lien upon the property improved and gives to the contractor or his assignees the right to "foreclose such assessment as a mortgage is foreclosed." Successive suits may be brought if the judgment in the first suit fails to satisfy the assessment and costs.

The defendants in error were the contractors for the improvement and brought this suit in the Circuit Court of Boon County, Indiana, and alleged in their complaint the adoption under the law by the common council of the city of Lebanon, where the property proceeded against is situated, of a declaratory resolution providing for the grading and paving of Main street and constructing sidewalks and lawns thereon. The complaint alleged the steps taken by the council of the city as prescribed by the law; the assessment against the several lots and parcels of ground abutting on the street; that one Mary Kelly was the owner of a tract of unplatted land abutting on the street, which was assessed the sum of $588.56; her refusal to pay the assessment, and that suit was brought against her and her husband to foreclose the lien of the assessment. And it is alleged that after proceedings had a decree was entered for the sum of $650, being the amount of the assessment and costs. That sale of the property was made under the decree for the sum of $75, which was its fair cash value, and that there is still due thereon $581.32, with interest. That the railway company was the owner of a tract of land immediately back of the real estate of Mary Kelly, "from the street so improved," that is, that her real estate was situate immediately between the street so improved and the real estate of the railway company, which real estate was within one hundred and fifty feet of the line of the street. A demand for the amount of the balance due on the assessment was alleged. Judgment was

demanded for that sum and the foreclosure of the lien of the assessment against the real estate of the company and for an order of sale.

A second paragraph of the complaint alleged a like assessment against the property of one John T. Walton, the foreclosure of the lien thereon and the sale of the property, the balance due, and that the property of the railway was situated immediately back of it. The like judgment was prayed as in the first paragraph.

The only parts of the answer with which we are concerned are the allegations that the land of the railway company did not abut upon the street improvement, but lay back of lands owned by others which abutted upon the street, and "that in the proceedings of the common council of the city of Lebanon, in any action taken by the civil engineers of said city, in any notice to property owners, in any assessment of property had, given or done with reference to said improvement, this defendant's tracts were not named, described nor referred to, nor was either of them; that neither of said tracts was assessed for said improvement, neither of said tracts was considered with reference to any assessment for said improvement, neither of said tracts was benefited by said improvement; that the defendant did not appear before said council or any committee of said council, either actually or constructively, with reference to either of its said tracts, and the records of the proceedings of the city of Lebanon as to said improvements do not disclose any such appearance by or notice to this defendant, or the consideration or assessment of either of said tracts for such improvement."

The third paragraph of the answer is as follows:

"For third and further answer to the amended complaint and each of the paragraphs thereof separately the defendant says that the acts of the general assembly of the State of Indiana under and by virtue of which it is claimed and assumed that the liens respectively sued upon have accrued and attach to the respective tracts of the defendant is unconstitutional

and void, in that it makes no provision for a notice to or a hearing from the property owner whose property does not abut upon the street to be improved; it denies due process of law, denies the equal protection of the laws, and takes private property for public use without compensation."

Judgment was rendered against the company, which was affirmed by the Appellate Court on the authority of *Voris* v. *Pittsburg Plate Glass Co.*, 163 Indiana, 599.

Mr. Frank L. Littleton, with whom *Mr. Leonard J. Hackney* was on the brief, for plaintiff in error:

The statute of Indiana, Burns' Rev. Stat., 1894, §§ 4288–4299, both inclusive, under and pursuant to which the alleged assessment involved in this case was made, is unconstitutional because it does not give, or purport to give, a property owner whose lands are located back of property abutting upon the street improved any hearing or opportunity to be heard upon the amount of the assessment levied against such owner's property. There is no hearing as to the special benefits at any stage of the proceedings, and the amount of the assessment against the back-lying property is arbitrarily determined by subtracting from the original assessment against the abutting owner the amount his property sells for on foreclosure. This is clearly a denial of due process of law. *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 27; *Security Trust Company* v. *Lexington*, 203 U. S. 323; *Boyd* v. *United States*, 116 U. S. 616; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581; *Village of Norwood* v. *Baker*, 172 U. S. 269; *Wright* v. *Davidson*, 181 U. S. 371; *Bauman* v. *Ross*, 167 U. S. 548; *Spencer* v. *Merchant*, 125 U. S. 345; *Walston* v. *Nevin*, 128 U. S. 578; *Hibben* v. *Smith*, 191 U. S. 310; *Schœffer* v. *Werling*, 188 U. S. 516; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 541; *Beebe* v. *Magoun* (Iowa), 97 N. W. Rep. 986; *Lathrop* v. *City of Racine*, 97 N. W. Rep. 192; *State* v. *Pillsbury* (Minn.), 85 N. W. Rep. 175; *McKee* v. *Town of Pendleton*, 154 Indiana, 652; *Dexter* v. *City of Boston*, 176 Massachusetts, 247; *Charles*

v. *City of Marion*, 100 Fed. Rep. 538; *Kuntz* v. *Sumption*, 117 Indiana, 1.

The statute of Indiana, Burns' Rev. Stat. 1894, §§ 4288–4299, under and pursuant to which the alleged assessment involved in this case was made, is unconstitutional and denies the back-lying property owner the equal protection of the laws because it gives the abutting property owner a hearing, or opportunity to be heard, on the question as to whether the proposed assessment exceeds the special benefits to his property, and denies such hearing or opportunity to the property owner whose property does not abut upon the street improved. *Ex parte Drayton*, 153 Fed. Rep. 986; *Gulf &c. R. Co.* v. *Ellis*, 165 U. S. 150; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 541; *Beebe* v. *Magoun* (Iowa), 97 N. W. Rep. 986; *Chicago &c. R. Co.* v. *Swanger*, 157 Fed. Rep. 783.

Mr. George H. Gifford, with whom *Mr. Glen J. Gifford* was on the brief, for defendants in error:

The statute of Indiana, Burns' Rev. Stat. 1894, §§ 4288–4299, in pursuance to which the assessments herein were made is in harmony with § 1 of the Fourteenth Amendment for the reason that said law furnished the plaintiff in error due process of law and equal protection of law guaranteed by said § 1 of that Amendment. *Shæffer* v. *Werling*, 188 U. S. 516; *Fall Brook Irrigating Co.* v. *Bradley*, 164 U. S. 168; *Hibben* v. *Smith*, 191 U. S. 321; *Voris* v. *Pittsburg &c. Co.*, 163 Indiana, 599.

Assessments made for the construction of public improvements are in the nature of a tax and are subject to summary procedures the same as state, county and municipal taxation, and the law does not contemplate that there should be a decree or order of court to make such assessment valid, but it is sufficient if there is a tribunal or committee created by the statute to hear and determine the correctness of such assessment and a provision for due notice to the parties of such hearing, it is a full and complete compliance with the constitutional

provision of § 1 of the Fourteenth Amendment. *Cass Farm Co.* v. *Detroit*, 181 U. S. 396; *Detroit* v. *Parker*, 181 U. S. 399; *Webster* v. *Fargo*, 181 U. S. 394; *French* v. *Barber Asphalt Co.*, 181 U. S. 324.

In matters of taxation and assessment for local improvements where there is a taxing district established by the statute under which such proceedings are being prosecuted, a notice to all interested without setting out the name of the party owning the real estate and without setting out the description of the property taxed is a sufficient notice. *Lent* v. *Tilson*, 72 California, 404; *Ottawa* v. *Macy*, 20 Illinois, 412; *Voris* v. *Pittsburg &c. Co.*, 163 Indiana, 599.

It is the province of the legislature to fix the notice to be given in matters of public improvements. *Hiland, Aud.*, v. *Brazil B. Co.*, 128 Indiana, 340; *Ottawa* v. *Macy*, 20 Illinois, 413; *Schœffer* v. *Werling*, 188 U. S. 516.

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

There is no question of the regularity of the proceedings. The controversy, therefore, is over the statute. Does it afford due process of law? A review of it is necessary to the determination of the question. It provides that upon the petition to the common council of two-thirds of the whole line of lots bordering on any street or alley, consisting of a square between two streets, and if the council deem the improvement necessary, it shall declare by resolution the necessity therefor, describing the work, and shall give two weeks' notice thereof to the property owners in a newspaper of general circulation published in the city, stating the time and place when and where the property owners can make objections to the necessity of the improvement.

If the improvement be ordered notice is to be given for the reception of bids. When the improvement has been made and completed according to the terms of the contract therefor

made the common council shall cause a final estimate to be made of the total cost thereof by the city engineer, and shall require him to report the full facts, the total cost of the improvements, the average cost per running foot of the whole length of the part of the street improved, the name of each property owner and the number of front feet owned by him, with full description of each lot or parcel of ground bordering on the street improved, the amount due upon each lot, which shall be ascertained and fixed by multiplying the average cost price per running foot by the number of running front feet of the several lots or parcels of ground respectively.

Upon the filing of this report the council is required to give notice of two weeks in a newspaper of the time and place, when and where, a hearing can be had before a committee appointed by the council to consider such reports. The committee is required to report to the council recommending the adoption or alteration of the report, and the council may adopt, alter or amend it and the assessments therein. Any person feeling aggrieved by the report shall have the right to appear before the council and shall be accorded a hearing. The council assesses against the several lots or parcels of land the several amounts which shall be assessed for and on account of the improvement.

It is provided that the owner of lots bordering on the street, or the part thereof to be improved, shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots to the whole improved line of the improvement, and that the assessment shall be upon the ground fronting or immediately abutting on such improvement, back to the distance of one hundred and fifty feet from such front line, and the city and contractor shall have a lien thereon for the value of such improvements.

It is further provided that where the "land is subdivided or platted the land lying immediately upon and adjacent to the line of the street and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement,

and should that prove insufficient to pay such cost then the second parcel and other parcels, in their order, to the rear parcel of said one hundred and fifty feet, shall be liable in their order."

This statute, as to abutting property owners, was sustained by this court, following the decisions of the Supreme Court of Indiana. *Schœffer* v. *Werling*, 188 U. S. 516; *Hibben* v. *Smith*, 191 U. S. 310. It was sustained as to "back-lying" property owners in *Voris* v. *Pittsburg Plate Glass Co.*, 163 Indiana, 599, and upon that case, as we have seen, the judgment in the case at bar is based.

It will be observed by referring to the statute that property owners are given notice of the proposed improvement and opportunity to object to its necessity, and when the improvement is completed they are also given notice of the filing of the report of the engineer and an opportunity to be heard upon it before a committee, which the statute requires shall be appointed to consider it. The latter notice, the Supreme Court in *Voris* v. *Pittsburg Glass Company*, decided, gives the common council complete jurisdiction over the person of every landowner in the taxing district of the improvement, whether the same abuts on the improvement or not, and that they are required to take notice that their real estate in the taxing district will be subject to the lien of special benefits assessed against it. And the court further decided that all such owners of real estate within the taxing district, "whether back lying or abutting," have the right "to a hearing on the question of special benefits, which the law requires said common council or board of trustees to adjust so as to conform to the special benefits accruing to said abutting real estate." The contention, however, of the railway company is that in no stage of the proceeding has the back-lying owner a hearing, or an opportunity to be heard, as to the amount to be assessed against his property. As we have seen, the opportunity to be heard is given to back-lying owners as to other owners, and the amount of the assessment against the latter is the amount of the assessment against the former. This amount is definitely fixed, and

measures the lien upon the back-lying real estate and the burden to which it may be subjected if the abutting property fails to satisfy the assessment.

It may be, however, that the railway company means by its contention that the back-lying owner is given no opportunity to be heard by the statute on the amount of the assessment against him, that he is given no opportunity to be heard on special benefits to him from the improvement. This was one of the questions presented in *Voris* v. *Pittsburg Glass Company*. Certain cases were cited as sustaining an affirmative answer. The court, however, replied that the question was not involved in those cases, and what was said in one of them (*Adams* v. *City of Shelbyville*, 154 Indiana, 467), to the effect that a law which makes no provision for a hearing on the question of special benefits was in violation of the Fourteenth Amendment to the Constitution of the United States, was clearly *obiter dicta*. And the court decided, following *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, and the cases immediately succeeding it, and, quoting from *Tonawanda* v. *Lyon*, 181 U. S. 389, " 'That it is within the power of the legislature of the State to create special taxing districts, and to charge the cost of local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or average. . . .' " Other cases were also cited sustaining the conclusion.

It will be observed, therefore, that the Supreme Court of the State decided that a taxing district is created by the legislature of the property along the line of the improvement and extending back therefrom one hundred and fifty feet, and that back-lying property—that is, property fifty feet distant from the street and within one hundred and fifty feet—is so far benefited that it shall be made liable if the abutting fifty feet "prove insufficient" to pay the cost of the improvement. In other words, that lands within one hundred and fifty feet of the improvement are so far benefited by the improvement that they may be made a taxing district, and subject to the cost of

the improvement. We think, under the cited cases, this was within the power of the legislature to provide.

The railway company also contends that the statute is unconstitutional, for the reason that it does not give the back-lying property owner the equal protection of the laws. The ground of this contention is as the one just disposed of, that the abutting owner is, and the back-lying owner is not, given an opportunity to be heard. To express it differently, and as the counsel express it, that a specific assessment is made against the abutting owner, and he is given an opportunity to challenge the assessment, but the back-lying owner has an assessment made against him years afterwards, and is given no opportunity whatever to challenge it. This, as we have seen, is a misapprehension of the statute. The amount of the assessment is fixed for both owners at the same time. The abutting owner is made primarily liable for it; the back-lying owner contingently so. He may never be called upon to pay. Implied in this contention, however, though not expressed, there may be the element of a hearing upon benefits, but, if so, it is disposed of by what has been said. If it was in the power of the legislature to make the taxing district, as we have decided that it was, it was within its power to classify the property owners, and there is certainly no discrimination between the members of the classes.

Judgment affirmed.

MR. JUSTICE HOLMES took no part in the decision.

MOBILE, JACKSON AND KANSAS CITY RAILROAD COMPANY *v.* STATE OF MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 218. Argued April 29, 1908.—Decided May 18, 1908.

The creation of a board of railroad commissioners and the extent of its powers; what the route of railroad companies created by the State may be; and whether parallel and competing lines may consolidate, are all matters which a State may regulate by its statutes and the state courts are the absolute interpreters of such statutes.

Where the contention of plaintiff in error that a charter right has been impaired by subsequent state action was disposed of by the state court on the non-Federal ground that if any such right ever existed plaintiff in error was estopped by its own conduct from asserting it, this court cannot review the judgment on the alleged Federal ground of impairment of the contract.

A decree of a state court requiring a railroad company which does an interstate business to construct its lines within the State in accordance with the provisions of its charter and the directions of the state railroad commission is not an interference with interstate commerce because compliance therewith entails expense or requires the exercise of eminent domain.

How a state statute should be construed, whether a contract is created thereby, and whether the statute is constitutional under the state constitution, are not, in the absence of any claim that the contract, if any, has been impaired by subsequent state action, Federal questions.

89 Mississippi, 724, affirmed.

THIS is a bill in equity, brought by the State of Mississippi and the Railroad Commission of that State, to require the railroad companies to construct their railroad through the county seat of Pontotoc County, State of Mississippi, and to restrain them from abandoning a portion of the narrow gauge railroad formerly operated by the Gulf and Chicago Railroad Company, which ran to the town of Pontotoc.

The following is a summary of the bill: The Railroad Commission exists under the laws of the State of Mississippi, and is, under the laws, charged with the duty of supervising railroads and other common carriers, and also with the duty of

enforcing the observance of the laws by such companies and other carriers. The Gulf and Chicago Railway Company was organized in 1903, under the laws of Mississippi, with authority to construct a railroad from the town of Decatur, Miss., in a general northerly direction, through the county of Pontotoc, and through the State of Mississippi to the Tennessee line. At the time of the organization of such railway company there was in existence from the town of Pontotoc, Miss., to the town of Middleton, Tenn., a narrow gauge road, which was operated by the Gulf and Chicago Railroad Company, a corporation under the laws of Mississippi. The railroad company was bound to continue and preserve intact throughout its entire length the narrow gauge road, and the Gulf and Chicago Railway Company and its lessee, the Mobile, Jackson and Kansas City Railroad Company, hereafter called the Mobile Company, were in turn bound to so continue and preserve intact the said line, "broadened and standardized as was stipulated in the articles of consolidation hereinafter set forth." Prior to the sixth of July, 1903, the Gulf and Chicago Rail*way* Company and the Gulf and Chicago Rail*road* Company, with other railroad companies, were consolidated under the name of the Gulf and Chicago Railway Company, and on that day a petition was presented to the Railroad Commission, praying the approval of the consolidation. It was stipulated in the petition, and by the granting of it by the Commission it was agreed, that the consolidated corporation should broaden and standardize the narrow gauge road running from the town of Pontotoc, "as it then existed and was being operated," and that when broadened and standardized it should be a part of the main line of the Gulf and Chicago Railway Company extending from Decatur, Miss., to Jackson, Tenn. The petition and order were made part of the bill. On or about the time of the consolidation, approved as aforesaid, the Gulf and Chicago Railway Company leased to the Mobile Company all of its railroad property then constructed and operated, and that thereafter to be constructed, including the narrow gauge road from Pon-

totoc to Middleton, and including its entire proposed line from Decatur to Jackson, and since the execution of the lease the Mobile Company has been in control and operation of the narrow gauge road. The Gulf and Chicago Railway Company, in violation of the terms and in disregard of the representations contained in its petition to the Commission, has broadened and standardized the narrow gauge road to a point one mile and a half from the end of the line in Pontotoc County and is operating the same. The remaining part, which is the most important part of the road, extending through a thickly populated district in the principal portion of Pontotoc, has been abandoned. It was a material consideration, in passing on the petition for consolidation, and the consolidation would not have been approved but for the representation that the company would standardize and broaden the line extending into the town.

The narrow gauge road was constructed in 1887 by the Gulf and Ship Island Railroad Company. When it was extended into Pontotoc a right of way was obtained by purchase, by the exercise of the right of eminent domain and by donations by the community, and when the right of way was selected it was with the view of extending the road south through the town. The town was built and established, and the town has been building for the last twenty years with reference to the line of railroad then so located. The interests of the public are involved in the change of road; the convenience and comfort of more than 1,000 people are involved; the change of road would disturb established conditions, and practically break up a prosperous community for the benefit of the defendants and a few property owners in another part of the town, recently added thereto, and through which it is proposed to run the new line of railroad. The original town of Pontotoc is the county seat of Pontotoc County, as fixed by the legislature of the State, and § 187 of the constitution of the State provides that no railroad thereafter constructed in the State "shall pass within three miles of any county seat without passing through the same and estab-

lishing and maintaining a depot therein, unless prevented by natural obstacles; provided such town or its citizens shall grant the right of way through its limits and sufficient grounds for ordinary depot purposes." The Gulf and Chicago Railway Company is constructing its new line within three miles of Pontotoc without passing through the same. There are no natural obstacles in the way. The citizens stand ready to grant the right of way through the limits of the town and sufficient grounds for depot purposes. In fact, the company owns a right of way through a large part of the town and sufficient ground for depot purposes. The conduct of the company is in violation of the constitution, and in willful disregard of the law and of the order of the Commission and the rights of the public.

The inadequacy of the remedy at law is alleged.

The injunction prayed was against the construction of the line of road proposed and to command the defendant to broaden and standardize the line of road extending through the town of Pontotoc, and to compel its operation into the said county seat as a part of the line built and to be built from Decatur, Mississippi, to Jackson, Tennessee, and to extend the said line on through to the said county seat, as required by said § 187 of the constitution of the State of Mississippi, and as required by law and by the order of the complainant, the Mississippi Railroad Commission. General relief was also prayed.

The answer of the defendant companies, in addition to traversing the allegations of fact of the bill, alleges the following: Prior to the filing of the petition, seeking the approval of the Railroad Commission of the State to the consolidation of the railroads, the officers of the companies had caused surveys to be made through the town of Pontotoc, with the view to best serve the interest of the people of that community in the location of the line of railroad and the establishing of its depot in the town, and it became apparent that it would be impossible to utilize that portion of the narrow gauge line extending north about one mile from the depot. This was submitted to the

people of the town prior to the application for consolidation, in a meeting called for that purpose, and, by an overwhelming majority, the position taken by the officers of the companies was acquiesced in and approved. Before the filing of the bill the companies had located and constructed their line as proposed at such public meeting, had purchased a depot site and erected a handsome and commodious depot on the site, into which it is now operating a standard gauge road. And all of this done before the filing of the bill.

The Railroad Commission made an order in the month of June, 1904, requiring the companies to build a depot on that part of the line of the narrow gauge road since abandoned, and upon the old site of the depot used by that road, and outside of the original town of Pontotoc, the enforcement of which was enjoined by the United States Circuit Court for the Southern District of Mississippi, which suit is now pending. The Commission is still insisting upon the order and resisting the efforts of the companies to enjoin its enforcement. Such order, it is alleged, is inconsistent with the bill in this case.

The line of road now being constructed by the Gulf and Chicago Railway Company from Decatur to Jackson is being constructed upon a different scheme of grades from that upon which the narrow gauge line was constructed, and necessarily adopted to enable the company to transact its business with the least expense and with the view of enabling it to successfully meet the competition of other lines. If the grades of the narrow gauge road had been adopted it would have been practically impossible for the railway company to operate successfully, because of the heavy grades, and would have caused an additional cost of construction of $90,000; would have lengthened the road, increased the fixed charges of maintaining the property, increased the cost of operation, and the cost to the company of transacting all interstate commerce business from Mobile, Ala., to Tennessee.

By amendments subsequently made to the answer it was alleged that when the consolidation of the companies was had

it was the purpose (which was well known to the Railroad Commission) of making the consolidated company a through trunk line of railroad for interstate commerce and the transmission of the mails, and that one of the vital objects to be attained was to shorten the line in every way possible. It is further alleged that a refusal to permit the execution of such purpose "will impose unnecessary and unreasonable burdens upon the interstate commerce and will violate in letter and spirit § 8, Article I, of the Constitution of the United States. And, it is alleged, that the southern end of the old narrow gauge road line runs into deep hollows and ends in a cluster of big hills, which, to cut through, would cause great expense and entail long delay; that the line would thereby be lengthened, and it would be hampered and prevented from doing an interstate business in successful competition with other lines."

The case, on petition of the railroads, was removed to the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi, and was subsequently remanded to the state court on motion of the defendants in error.

A temporary injunction was granted, enjoining and commanding the Mobile Company and the Gulf and Chicago Railway Company to "absolutely refrain from constructing and operating a certain line of railroad from Decatur, Mississippi, to Middleton, Tennessee, or any other line of railroad from any point whatsoever to any other point passing within three miles of the county seat of Pontotoc County, Mississippi, as the said county seat was originally laid out, marked and established, without passing through the said county seat . . ."

Upon motion of the companies and after proofs submitted a decree was entered dissolving the injunction, the decree reciting that all of the relief prayed for by the bill could be obtained by a mandatory injunction if the allegations of the bill should be sustained upon the final hearing; and further reciting that "the public interests of the county north and south of the town of Pontotoc, along the line of said railroad, as well as the

interests of the railroad, will suffer by reason of the continuance of the temporary injunction." All other questions were reserved until the final hearing.

The Supreme Court of the State reversed the decree, reinstated the injunction and remanded the case to the Chancery Court. 86 Mississippi, 172.

After a trial upon the merits the Chancery Court entered a decree, making the injunction perpetual. The decree was affirmed by the Supreme Court. 89 Mississippi, 724. Other facts will appear in the opinion.

Mr. William Hepburn Russell for plaintiffs in error:

The Federal questions presented by the record in this case confer jurisdiction upon this court to review the decision of the Supreme Court of Mississippi.

The record clearly shows claims of rights under the Constitution of the United States expressly made by plaintiffs in error in the court below, any one of which, if sustained, would have required the Supreme Court of Mississippi to reverse the decree of the Chancery Court of Pontotoc County. *C., B. & Q. Ry. Co.* v. *Drainage Com.*, 200 U. S. 561; *Grand Rapids Ry. Co.* v. *Osborn*, 193 U. S. 17; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 142; *Yazoo &c. R. Co.* v. *Adams*, 180 U. S. 1, 15.

The decree of the Supreme Court of Mississippi, although avowedly placed upon a non-Federal ground, actually deprives the plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws by conferring upon the state Railroad Commission powers and authority not granted to it by the statutes of the State of Mississippi.

It sustains a claim of power and authority exercised by the state Railroad Commission compelling the plaintiffs in error to abandon their line of railway through the town of Pontotoc, as located, graded and in operation, and their depot as built and in use, and to acquire rights of way and locate and construct a new line through said town. The Railroad Commission of the

State of Mississippi "is a mere administrative agency of the State." *Mississippi R. R. Comn.* v. *Illinois Central*, 203 U. S. 335, 341. It has no powers beyond those given it by statute and is strictly limited in its exercise of power by the laws creating it. *Commissioners* v. *Oregon Ry. Co.*, 17 Oregon, 65; *Nashville R. R. Co.* v. *State*, 137 Alabama, 439.

The statutes of Mississippi forbid the consolidation of parallel and competing lines of railroad and forbid the Railroad Commission to consent to the consolidation of such lines and confer no power upon the Commission to enter into contracts whereby such a consolidation of competing lines can be effected. The orders of railroad commissioners are not contracts. *New Haven &c. R. Co.* v. *Hammersly*, 104 U. S. 1.

The decision of the Supreme Court of Mississippi deprives, without due process of law, the Gulf and Chicago Rail*way* Company, plaintiff in error, of its vested contract rights under chapter 143 of the laws of Mississippi of 1906, which was a valid exercise of legislative power constituting a contract between the State and the plaintiff in error. *Blake* v. *McClung*, 172 U. S. 239; *Ex parte Virginia*, 100 U. S. 339; *Scott* v. *McNeill*, 154 U. S. 34, 45; *Douglas* v. *County of Pike*, 101 U. S. 677, 686, 687; *Edwards* v. *Kerzey*, 96 U. S. 595; *Gelpke* v. *Dubuque*, 1 Wall. 175, 206, 207; *Rowan* v. *Runnells*, 5 How. 134, 139; *Thompson* v. *Lee County*, 3 Wall. 327; *Olcott* v. *Supervisors*, 16 Wall. 678; *Guthrie National Bank* v. *Guthrie*, 173 U. S. 528, 533.

The Gulf and Chicago Rail*way* Company having located its line through the town of Pontotoc and established its station therein in strict conformity to § 187 of the constitution of Mississippi and in accordance with its line between its terminal points as established by its charter, the state Railroad Commission, and the courts of Mississippi are without power to compel it to abandon that line and that station and establish a different line over a different route and a different station at a different point.

This proposition having been thus judicially established in *Mississippi* v. *Mobile, Jackson & Kansas City R. Co.*, 86 Mis-

sissippi, 172, the power of the state Railroad Commission over the line and station of the Gulf and Chicago Rail*way* Company in the town of Pontotoc was exhausted and the Supreme Court of Mississippi, upon the final appeal, by its decision and decree affirming the decree of the Chancery Court of Pontotoc County, deprives the plaintiffs in error of their property without due process of law, because although the proceeding was conducted under the guise of a judicial controversy, neither the State of Mississippi nor its Railroad Commission had authority to invoke the judicial power in confiscation of the property rights of the plaintiffs in error.

Statutes providing for enforcement by proceedings in chancery of the orders of the Commission, refer solely to the duties and powers enumerated in the statutory provisions under which a railroad commission is created and exists. *Nashville &c. Ry. Co.* v. *State*, 137 Alabama, 439.

The Supreme Court of Mississippi in its final opinion in this case rests its decree entirely upon an alleged contract in the order of consolidation. As such a contract was beyond the power of the Railroad Commission to enter into, the decree of the Supreme Court predicated upon it is a taking of property without due process of law and a denial of the equal protection of the laws to the plaintiffs in error.

The laws of Mississippi creating the state Railroad Commission and conferring powers upon it, if such powers go to the extent established by the opinion of the Supreme Court of Mississippi in this case, are laws impairing the obligation of contracts in this, that § 8 of the "Act to Incorporate the Ripley Railroad Company" conferred upon that company and upon the Gulf and Chicago Railroad Company as its legal successor the right to change the location of its line through the town of Pontotoc and under the decision of the Supreme Court of Mississippi holding that the Railroad Commission under the Railroad Commission laws had power to abrogate this right, the laws creating the Railroad Commission as so construed are laws impairing the obligations of contracts.

Mr. R. V. Fletcher, Attorney General of the State of Mississippi, and *Mr. Hannis Taylor*, for defendants in error:

There is no Federal question presented by the record in this cause for the consideration of the court. The record shows that no right or question arising under the Fourteenth Amendment was claimed or raised until after the final judgment of the Supreme Court of Mississippi. It was raised for the first time in the petition for writ of error. Under the decisions of this court, this was too late. *Montana* v. *Rice*, 204 U. S. 291; *Corkran Oil &c. Co.* v. *Arnaudet*, 199 U. S. 182; *Dewey* v. *Des Moines*, 173 U. S. 193; *Osborne* v. *Clark*, 204 U. S. 565.

The contention that the court has violated the clause of the Federal Constitution which prohibits a State from passing any law impairing the obligation of a contract, was raised for the first time in the assignment of errors filed in the Supreme Court of Mississippi on the second or final appeal of the case, and it is clear that this contention was rejected by the Mississippi court, if for no other reason than because is was raised too late. *Cox* v. *Texas*, 202 U. S. 446. See also, *Chi., I. & L. Ry. Co.* v. *McGuire*, 196 U. S. 127; *Jacobi* v. *Alabama*, 187 U. S. 131; *Eastern Bldg. & Loan Assn.* v. *Welling*, 181 U. S. 47.

Since the Supreme Court of Mississippi has declined to consider this assignment of error, solely upon the ground that it was not relied on in the Chancery Court, this court will respect the rules of practice in vogue in Mississippi, and will hold that the point was raised too late.

In any case, it is well settled that the prohibition of the Federal Constitution extends only to such judgments as give effect to statutes. *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18, 30, 31; *St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 124, 148; *M. & M. R. Co.* v. *Rock*, 4 Wall. 177; *M. & M. R. Co.* v. *McClure*, 10 Wall. 511; *Knox* v. *Exchange Bank*, 12 Wall. 379; *Lehigh Water Co.* v. *Easton*, 121 U. S. 338, 392; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 334.

The action of the Railroad Commission and the decisions of the Mississippi courts herein, do not constitute an interference

with interstate commerce. The commerce clause of the Federal Constitution cannot be applied to the location of a line of railway. *C., M. & St. Paul Ry. Co.* v. *Solan,* 169 U. S. 133; *Wabash, St. L. & P. R. Co.* v. *Illinois,* 118 U. S. 557; *Mo., Minn. & Pac. R. R. Co.* v. *Jackson,* 179 U. S. 287.

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

The defendant railroad companies in their motion to dissolve the temporary injunction urged as grounds thereof, among others, that the injunction imposed a direct and unnecessary burden upon and was an interference with interstate commerce and an interference with the carrying of United States mail. To those grounds the court did not apparently respond, and the Supreme Court did not refer to them in either of its opinions.

Counter contentions are urged. Plaintiffs in error contend that the Federal questions set up by them were evaded. Defendants in error contend that such questions were not involved and are not now presented for consideration.

The opinion of the Supreme Court on the first appeal was very elaborate, and we can only give a brief summary of the propositions decided. The court gives a summary of the facts of the bill, the averments of the petition to the Commission and the terms of its order, and says that "waiving minor considerations not sufficiently developed by the proof," and "passing at once to the very heart of the matter," the case divided into two main branches:

"1. What is the true interpretation to be given § 187 of our constitution and has it any application to the facts of this litigation? 2. What are the legal rights of the citizens of the town of Pontotoc and the duties of the appellees as to the narrow gauge road which was in use and active operation before and at the consolidation hereinbefore referred to and at the date of the leasing of its property by one appellee to the other?"

Under the first branch the court decided that appellants (defendants in error here) could, under the facts of the record, be "afforded no relief by the language or intendment of § 187 of the constitution." This branch of the case, therefore, needs no further consideration.

As elements in the discussion and decision of the second branch of the case, the court said that there had been no consolidation between the Gulf and Chicago Railroad Company and the Gulf and Chicago Railway Company, and if the latter company had constructed its road over the route in the direction specified in its application for incorporation, it would inevitably have been a parallel and a competing line with the narrow gauge line then in existence, and the consolidation of the roads would not have been permitted. "More than this," it was said, "an express grant of power by the legislature for the two companies to consolidate . . . would have been void, as being in contravention of the general statutory inhibition against consolidation or purchase of competing lines of railroads, which cannot, without violating § 87 of the constitution of the State, be suspended 'for the benefit of any individual or private corporation or association.'" And to sustain this proposition *Y. & M. V. Ry. Co.* v. *So. Ry. Co.*, 83 Mississippi, 746, was cited. It was deduced from § 3587 of the code of the State of 1892, that the statement in the petition that the roads were "in no way parallel or competing lines," were statements of jurisdictional facts, "upon the existence of which depended the power of the corporations to consolidate." And following *Lusby* v. *Railroad*, 73 Mississippi, 364, the court held that the Gulf and Chicago Railroad Company was without power to abandon or relocate any portion of its line, "except on the score of 'imperious necessity.'" An exception, it was said, not suggested by the facts of this record. These restraints and duties, it was further said, came to the consolidated corporation.

On the return of the case to the Chancery Court, and after a hearing on the merits, that court entered a decree making the

injunction perpetual. The decree recited that the court found "as a fact" that a valid contract existed between the Gulf and Chicago Railroad Company and the citizens of Pontotoc, which provided that the line of the railway of the company should be established and maintained where the same was established and maintained before the consolidation of that company with the other companies, and that the town had not given its assent to the abandonment of that line. The court further found "that no natural obstacles or imperious necessity prevented the said defendant companies from broadening and standardizing" the narrow gauge road "and making it a part of the main line of the proposed railroad, and no such obstacles or necessity existed to prevent the said companies from extending their said lines from the southern terminus of the said original line . . . and that the allegations of the bill have been sustained by the proof, and that the complainants are entitled to the relief prayed for." The Supreme Court affirmed the decree of the Chancery Court, repeating, with some modifications, the principles which it expressed on the first appeal of the case. It said that in a former opinion the court expressly held that "the consolidation was conditioned upon the broadening and standardizing the then existing narrow gauge railroad, and making it a part of the main line of railroad operated by the consolidated corporation." And it was alone, it was further said, upon the compliance of those conditions that the Railroad Commission consented to the consolidation, and without which the Commission would have had no power to authorize the consolidation, and without which the consolidation would not have been effected. So insistent was the condition, the court held, in view of the fact, that the roads would otherwise be parallel and competing roads, that the legislature could not relieve from it without violating § 87 of the constitution of the State.

The court expressed the law of the State to be that parallel and competing roads could not consolidate, and that other roads could only consolidate with the consent of the Railroad Commission. And it was also said that the roads recognizing

the law stated in their petition to the Commission "that their railroads were 'in no way parallel or competing lines,' and expressly pledged themselves to broaden and standardize the then existing narrow gauge railroad, and to make it a part of the main line and operated by the consolidated corporation. . . . And it is upon this ground, and this ground alone, that we now hold that the decree of the Chancellor should be affirmed." The court took pains to repeat this limitation. And, excluding other questions, the court said that it had nothing to do with the location of the depot, and that it dealt alone with the "obligation entered into" by the companies with the Commission, "that only," to quote the words of the court, "is the core of this contention and that, and *that precisely*, is what we deal with and decide in this case, to wit, that these appellants [plaintiffs in error here] are bound by their solemn obligations, deliberately entered into, as stated above, to broaden and standardize the narrow guage railroad and make it a part of the main line."

We have made these full quotations from the opinions and decrees of the state courts to clearly show what facts were found and what principles of law laid down that we might estimate the Federal questions which it is contended are involved in the case. We have seen that the Federal grounds invoked in the motion to dissolve the temporary injunction were that the injunction imposed a direct and unnecessary burden upon and was an interference with interstate commerce, and was an interference with the carrying of the United States mails. In the amended answer the same grounds were repeated with more circumstantiality and § 8, Article I, of the Constitution of the United States, was invoked.

The same grounds were practically repeated in the assignment of errors on the appeal to the Supreme Court of the State, and in addition the provision of § 10, Article I, which prohibits any State from inpairing the obligation of a contract was invoked on the ground that the decree of the Chancery Court impaired "the obligation of the contract right

to change the location of the narrow gauge road embodied in § 8 of the charter of the Ripley Railroad and in the articles of organization of the Gulf and Chicago Railroad Company."

In the assignments of error in this court the plaintiffs in error have for the first time invoked the Fourteenth Amendment to the Constitution of the United States. To sustain this assignment it is contended that the Supreme Court of the State, by directing the consolidated company "to operate the spur track as soon as completed, connecting the main line on the north with the town of Pontotoc," deprives plaintiffs in error of their property without due process of law. And a like result is produced, it is also contended, by the decision of the court holding the "Stegall Bill," so called, to be invalid. The latter ground will be referred to hereafter. Of the other, it is said, it arose for the first time upon the decree and opinion of the Supreme Court, as it is further said that the decree of the Chancery Court did not deny the rights of the companies under the Fourteenth Amendment. It is difficult to appreciate the contention. The decree of the Chancery Court recited, among other things, that no natural obstacles existed to prevent the companies from extending their line "from the southern terminus" of the original line, and enjoined the companies from building and operating any line that "did not include or comprise the original line of the Gulf and Chicago Railroad Company, as originally constructed and maintained," required them to broaden and standardize the entire line of the original narrow gauge railroad, and to construct their line of railway in such a way as to include as a part of the main line "all of the line of the narrow gauge line." And it was commanded that the work commence within thirty days and be finished within sixty days. The Supreme Court, in its opinion, said: "In view of the various interests here involved, we direct the appellant to operate *the spur* track as soon as completed, connecting the main line on the north with the town of Pontotoc." The court therefore accepted and approved what was already done and modified the decree of the Chancery Court in the interest of

the companies. And it besides extended the time for compliance with the decree from sixty days to six months. But aside from this, all of the contentions of the companies (except that based on the "Stegall Bill," which will be presently considered) depend upon the power of the Commission, the petition of the companies and the order of the Commission upon the petition. And these, we think, were all local questions the decisions of which we have no power to review. There is nothing in the statutes or Constitution of the United States which prevents a State from creating a board of railroad commissioners, and what powers the board shall have will depend upon the law creating them, of which the courts of the State are the absolute interpreters. Whether corporations shall remain separate or be permitted to consolidate is a matter of state regulation and provision. It is competent also for a State to prescribe the route of the railroad it creates and to provide that parallel and competing lines shall remain so. And this power was exercised by the State of Mississippi. It is not exactly clear whether this is disputed by the companies. It is, however, contended that the Commission is a mere administrative agency, and that its only real power or duty in the matter of consenting to consolidations is to determine that such consolidations are not of parallel or competing roads, and that the Commission has nothing whatever to do with the terms of the consolidation. And it is further contended that there was no agreement or contract of any kind between the companies and the Commission, that the order of the Commission was "merely an official finding that the two roads came within the necessary statutory requirements," and that the attempt of the Supreme Court to base its decision and decree upon the ground that the petition and order constituted a contract binding upon the plaintiffs in error was a "mere pretext intended to avoid the determination of the Federal questions arising in the case, and to place its decision on a non-Federal ground." We cannot assent to this view. The power of the Commission and the effect of its order were necessarily presented by the case.

They were grounds of suit. They became, therefore, the immediate and primary questions to be decided. The power of the Commission, and the effect of its order, depended upon the statutes of the State, and of them, as we have said, the Supreme Court is the absolute interpreter. The matter is exceedingly simple and is best explained by the reference to the opinion of the Supreme Court of the State. The court declared that the roads, but for their consolidation, would have been parallel and competing roads, and in order to make their consolidation—in order to give the Commission power to consent to their consolidation—the companies represented that the roads were not parallel and competing. Of course, they would not be if they were made parts of one line. And it was represented that they would be made parts of one line—to be made so by the broadening of the narrow gauge road, not by its abandonment in whole or in part. Upon this representation, upon this condition, the consent of the Commission was invoked and secured.

Much more discussion is unnecessary. It is enough to add to that which we have said, that the decree of the Supreme Court does not work an interference with or cast a direct burden upon interstate commerce. The case of the *Illinois Central R.R. Co.* v. *Illinois*, 163 U. S. 142; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514, and *Mississippi Railroad Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335, cited by the companies to sustain their contentions, are not apposite. In those cases there was an interference with interstate trains for local purposes, though local needs had been adequately supplied. In the case at bar there is the insistence of the operation of a particular road, which the companies themselves selected or represented that they had selected. That compliance will entail expense or require the exercise of eminent domain will not make it a burden upon interstate commerce. *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287. Besides, the comparative expense of roads, we must assume, was considered when the petition to the Commission was made.

It is further contended by the companies that they had the right, under § 8 of the charter of the Ripley Railroad Company, to change the location of its line through the town of Pontotoc, and that the charter constitutes a contract which is impaired, it is further urged, by the laws creating the Railroad Commission, as interpreted by the Supreme Court of the State. Section 8 of the charter provides that for the purpose of making the railroad provided for in § 2, "*or repairing or changing it afterwards*," the railroad shall have rights of entering upon adjoining land, etc., upon making compensation to the owners. What power this section confers may be open to dispute. It may be said that the right of "this repairing or changing" the railroad does not give the power to abandon it. However, the Supreme Court did not pass upon the meaning of § 8. The court said if that section gave the companies the power to change the line of the narrow gauge road as they desired, they waived it, and are estopped to revoke it by their obtaining the consent of the State through its Railroad Commission to broaden and standardize that line through its entire length. This was a question for the Supreme Court to decide. It was fairly presented to the court. We cannot question the motives of its judgment; indeed we cannot say that we dissent from it. At any rate, it is not reviewable. *Eustis* v. *Bolles*, 150 U. S. 361; *Weyerhauser* v. *Minnesota*, 176 U. S. 550; *Hale* v. *Lewis*, 181 U. S. 473; *Schœfer* v. *Werling*, 188 U. S. 516.

The final contention of plaintiff in error is based on the act of the legislature of the State, called the "Stegall Bill." This act was passed after the decree of the Chancery Court, and it is contended that it is an express legislative enactment which approved the location by the Gulf and Chicago Railway Company, as consolidated, of its railway through the town of Pontotoc, and authorized a continuance of the same on condition that it should broaden and standardize the track into the old town and to the site of the old station. These conditions, it is asserted, were performed, and a contract was hence entered into between the State and the railroad company, and that the

decision of the Supreme Court, "denying the obligation of this contract, is either, (*a*) a law impairing the obligation of a contract; or (*b*) a denial to the plaintiff in error of the equal protection of the laws; or (*c*) the taking of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."

The Supreme Court decided that the bill was unconstitutional, saying: "So far as the Stegall Bill is concerned, it is perfectly obvious, as already held in the former opinion, that this special act, which was in substance for the benefit of this particular corporation, was, under the general statute laws, which we have referred to with respect to consolidation, palpably and manifestly violative of § 87 of the constitution, and plainly null and void." This conclusion is attacked, and our construction is invoked of the constitutional provision against that made by the Supreme Court of the State.

We are unable to yield to the appeal. It is only when the judgment of a state court gives effect to a law subsequent to that (or it may be a constitution), which it is alleged constitutes a contract, that we may review the judgment and decide the question of contract. And this would involve the construction of the law. But the record presents no such case. The "Stegall Bill," it is true, is claimed to be a contract, but its validity is not asserted against a subsequent law. It is asserted against prior laws and the Constitution. The decision of the court, therefore, was of that kind that a court is often called to make under the laws and constitution of its State. To assert error in the decision or even to be able to demonstrate it does not invest us with the power of review. Nor do the other supposed consequences of the decision of the Supreme Court give us jurisdiction to review it. That it denies the companies the equal protection of the law, we may say, is without any foundation. No discrimination against them is pointed out, and to say that the decision takes their property without due process of law is only another way of saying that they had a contract, the obligation of which is impaired. Of course,

they assert rights under the "Stegall Bill," but in that they present a very common case within the exclusive jurisdiction of the state court.

Judgment affirmed.

OLD DOMINION COPPER MINING AND SMELTING COMPANY *v.* LEWISOHN.

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

No. 206. Argued April 16, 20, 1908.—Decided May 18, 1908.

A corporation remains unchanged and unaffected in its identity by changes in its members, nor does it change its identity by increasing its capital stock; and its legal action is equally binding on itself after such an increase as it was prior thereto.

A corporation should not be allowed to disregard its assent previously given in order to charge a single member with the whole results of a transaction to which the greater part—in this case thirteen-fifteenths—of its stock were parties for the benefit of the guilty and innocent alike.

148 Fed. Rep. 1020, affirmed.

THE facts are stated in the opinion.

Mr. Louis D. Brandeis and *Mr. Edward F. McClennen*, with whom *Mr. William H. Dunbar* was on the brief, for petitioner:

The sale was made by promoters to a corporation organized for the purpose and exclusively controlled and represented by them.

A corporation is entitled to relief against a sale made to it by promoters who themselves control the corporation unless all persons entitled to object acquiesce.

The rule is universal that if a vendor stands in a fiduciary relation to his vendee the sale is voidable, unless independently acquiesced in by the latter with full knowledge of all material

facts. *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658; *Thomas* v. *Peoria & R. I. R. Co.*, 36 Fed. Rep. 808; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26; *Aberdeen Railway Co.* v. *Blaikie*, 1 McQueen, 461.

A promoter stands in a fiduciary relation to the corporation he promotes, and is subject to this rule. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181; *Teiser* v. *U. S. Board & Paper Co.*, 107 Fed. Rep. 340; *Hayward* v. *Leeson*, 176 Massachusetts, 310; *Old Dominion Copper Co.* v. *Bigelow*, 188 Massachusetts, 315; *Central Trust Co.* v. *East Tenn. Land Co.*, 116 Fed. Rep. 743; *Yale Gas Stove Co.* v. *Wilcox*, 64 Connecticut, 101; *Chandler* v. *Bacon*, 30 Fed. Rep. 538; *Burbank* v. *Dennis*, 101 California, 90; *The Telegraph* v. *Loetscher*, 127 Iowa, 383; *Hinckley* v. *Sac Oil & Pipe Line Co.*, 132 Iowa, 396; *Camden Land Co.* v. *Lewis*, 101 Maine, 78; *Fred Macey Co.* v. *Macey*, 143 Michigan, 138; *South Joplin Land Co.* v. *Case*, 104 Missouri, 572; *Exter* v. *Sawyer*, 146 Missouri, 302; *Woodbury Heights Land Co.* v. *Loudenslager*, 55 N. J. Eq. 78; *S. C.*, 56 N. J. Eq. 411; *S. C.*, 58 N. J. Eq. 556; *First Avenue Land Co.* v. *Hildebrand*, 103 Wisconsin, 530; *Hebgen* v. *Koeffler*, 97 Wisconsin, 313; *Hitchcock* v. *Hustace*, 14 Hawaii, 232; *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 1218; *Gluckstein* v. *Barnes*, A. C. 240.

The liability of the promoter exists independently of any misrepresentation, of the issue of a prospectus, or of the particular method in which the transaction is carried out. *Gilman C. & S. R. R. Co.* v. *Kelly*, 77 Illinois, 426, 435; *Dutton* v. *Willner*, 52 N. Y. 312; *Hayward* v. *Leeson*, 176 Massachusetts, 310; *Salomon* v. *Salomon*, A. C. 22; *Tompkins* v. *Sperry*, 96 Maryland, 560.

The duty of the promoters extends to all persons whom they bring in as original subscribers for stock, whether before or after the transaction complained of. Morawetz on Private Corporations (2d ed.), § 294; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181; *Geiser* v. *U. S. Board & Paper Co.*, 107 Fed. Rep. 340, 348; *Chandler* v. *Bacon*, 30 Fed. Rep. 538; *Hayward* v. *Leeson*, 176 Massachusetts, 310, 320; *South Joplin Land Co.* v.

Case, 104 Missouri, 572, 579; *In re Leeds & Hanley Theatres*, 2 Ch. 809.

The subscribers for the twenty thousand shares issued for cash were persons interested, who did not acquiesce. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181.

The members of the Old Dominion Syndicate were persons interested, who did not acquiesce. *Arnold* v. *Searing*, 67 Atl. Rep. 831, 832; *Brewster* v. *Hatch*, 122 N. Y. 349.

There was clearly no disclosure and therefore no acquiescence if persons other than the promoters themselves were concerned. *Gluckstein* v. *Barnes*, A. C. 240, 249.

Mr. Eugene Treadwell, with whom *Mr. Edward Lauterbach* was on the brief, for respondents:

The company is without equity in the premises. There was no fraud on the company. Since at the date of the transaction sought to be rescinded, Bigelow and Lewisohn owned all the stock of the complainant, constituted the entire stockholding interest of the company and received all of the stock of the company issued, including the stock issued by the complainant for the property in question, there was no one who could in equity complain. *Foster* v. *Seymour*, 23 Fed. Rep. 65; *McCracken* v. *Robison*, 57 Fed. Rep. 375; *Stewart* v. *St. Louis &c. R. Co.*, 41 Fed. Rep. 736, 738; *Dupont* v. *Tilden*, 42 Fed. Rep. 87; *Wood* v. *Corry Water Works*, 44 Fed. Rep. 146, 149; *Fort Madison Bank* v. *Alden*, 129 U. S. 373, 378; *Barr* v. *N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263, 273; *Seymour* v. *Spring Forest Assn.*, 144 N. Y. 333; *Thornton* v. *Wabash Ry. Co.*, 81 N. Y. 462, 467; *Parsons* v. *Hayes*, 14 Abb. N. C. 419, 434; *King* v. *Barnes*, 109 N. Y. 267; *Insurance Press* v. *Montauk Wire Co.*, 103 App. Div. (N. Y.) 472; *Blum* v. *Whitney*, 185 N. Y. 232; *Higgins* v. *Lansingh*, 154 Illinois, 301, 331, 336; *Spaulding and Another* v. *North Milwaukee Town Site Co.*, 106 Wisconsin, 481, 488; *In re Ambrose*, L. R. 14 Ch. D. 390, 395, 399; *In re British Seamless Paper Co.*, L. R. 17 Ch. D. 467; *Salomon* v. *Salomon*, L. R. (1897) A. C. 22; Cook on Corpora-

tions (5th ed.) §§ 46, 47, 649; 1 Morawetz on Priv. Corp. (2d ed.) § 290; 3 Pomeroy on Eq. Jurisp. (3d ed.) § 1092.

The company was not injured by the exchange on July 11, 1895, for property duly received, of 130,000 of the 150,000 authorized shares of the capital stock, in the absence of any cash capital or other shares outstanding, either issued, contracted for or offered.

The company was not injured by the subsequent offer for sale on July 18, 1895, of the remaining 20,000 shares of its authorized capital stock at par for cash, as it duly received and always retained the entire amount, $500,000, in cash, no part ever going to Lewisohn or Bigelow in any form.

The company, therefore, suffered no injury.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the petitioner to rescind a sale to it of certain mining rights and land by the defendants' testator, or in the alternative to recover damages for the sale. The bill was demurred to and the demurrer was sustained. 136 Fed. Rep. 915. Then the bill was amended and again demurred to, and again the demurrer was sustained, and the bill was dismissed. This decree was affirmed by the Circuit Court of Appeals. 148 Fed. Rep. 1020; 79 C. C. A. 534. The ground of the petitioner's case is that Lewisohn, the deceased, and one Bigelow, as promoters, formed the petitioner that they might sell certain properties to it at a profit, that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public without disclosure of their profit, and that such an issue in fact was made. The Supreme Judicial Court of Massachusetts has held the plaintiff entitled to recover from Bigelow upon a substantially similar bill. 188 Massachusetts, 315.

The facts alleged are as follows: The property embraced in the plan was the mining property of the Old Dominion Copper Company of Baltimore, and also the mining rights and land

now in question, the latter being held by one Keyser, for the benefit of himself and of the executors of one Simpson, who with Keyser owned the stock of the Baltimore company. Bigelow and Lewisohn, in May and June, 1895, obtained options from Simpson's executors and Keyser for the purchase of the stock and the property now in question. They also formed a syndicate to carry out their plan, with the agreement that the money subscribed by the members should be used for the purchase and the sale to a new corporation, at a large advance, and that the members, in the proportion of their subscriptions, should receive in cash or in stock of the new corporation the profit made by the sale. On May 28, 1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate, in cash and notes of himself and Lewisohn, and in June Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of twenty-five dollars each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares, to be issued to Bigelow and himself. This also was accepted and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18, the 100,000 and 30,000

shares were issued, and it was voted to issue the 20,000 when paid for. The bill alleges that the property of the Baltimore company was not worth more than $1,000,000, the sum paid for its stock, and the property here concerned not over $5,000, as Bigelow and Lewisohn knew. The market value of the petitioner's stock was less than par, so that the price paid was $2,500,000, it is said, for the Baltimore company's property and $750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide.

Of the stock in the petitioner received by Bigelow and Lewisohn or their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares or the repayment of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out.

The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at least one court, and is stated at length in the decision. But the courts do not agree. There is no authority binding upon us and in point. The general observations in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, were *obiter*, and do not dispose of the case. Without spending time upon the many dicta that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

The difficulty that meets the petitioner at the outset is that

it has assented to the transaction with the full knowledge of the facts. It is said, to be sure, that on September 18, when the shares were issued to the sellers, there were already subscribers to the 20,000 shares that the public took. But this does not appear from the bill, unless it should be inferred from the ambiguous statement that on that day it was voted to issue those shares "to persons who had subscribed therefor," upon receiving payment, and that the shares "were thereafter duly issued to said persons," etc. The words "had subscribed" may refer to the time of issue and be equivalent to "should have subscribed" or may refer to an already past event. But that hardly matters. The contract had been made and the property delivered on July 11 and 12, when Bigelow, Lewisohn and some other members of the syndicate held all the outstanding stock, and it is alleged in terms that the sales were consummated before the vote of July 18 to offer the stock to the public had been passed.

At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. *Salomon* v. *Salomon & Co.* [1897], A. C. 22; *Blum* v. *Whitney*, 185 N. Y. 232; *Tompkins* v. *Sperry*, 96 Maryland, 560. If there was a wrong it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation *nunc pro tunc*, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters after starting their scheme had sold their stock before any subscriptions were taken, and then the purchasers of their stock with notice had invited the public to

come in and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now.

But it is said that from a business point of view the agreement was not made merely to bind the corporation as it then was, with only forty shares issued, but to bind the corporation when it should have a capital of $3,750,000; and the implication is that practically this was a new and different corporation. Of course, legally speaking, a corporation does not change its identity by adding a cubit to its stature. The nominal capital of the corporation was the same when the contract was made and after the public had subscribed. Therefore what must be meant is, as we have said, that the corporation got a new right from the fact that new men who did not know what it had done had put in their money and had become members. It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede.

But, if we are to leave technical law on one side and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers, all the stockholders, guilty as well as innocent, get the benefit. It is answered that the corporation is not precluded from recovering for a fraud upon it, because the party committing the fraud is a stockholder. *Old Dominion Copper Mining and Smelting Co.* v. *Bigelow*, 188 Massachusetts, 315, 327. If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery, and even might not be a suffi-

cient reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. *Stockton* v. *Anderson,* 40 N. J. Eq. 486. The same principle is thought to apply when innocent members are brought in later under a scheme. But it is obvious that this answer falls back upon the technical diversity between the corporation and its members, which the business point of view is supposed to transcend, as it must, in order to avoid the objection that the corporation has assented to the sale with full notice of the facts. It is mainly on this diversity that the answer to the objection of injustice is based in *New Sombrero Phosphate Co.* v. *Erlanger,* 5 Ch. D. 73, 114, 122.

Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement with them, as the petitioner believes, is immaterial to the corporation. The issue of the stock was apparent, we presume, on the books, so that it is difficult to suppose that at least some members of the syndicate, representing an adverse interest, did not know what was done. But all the members were engaged in the plan of buying for less and selling to the corporation for more, and were subject to whatever equity the corporation has against Bigelow and the estate of Lewisohn. There was some argument to the contrary, but this seems to us the fair meaning of the bill. Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. But that was a matter between them and the syndicate. The real estate was bought from Keyser by the syndicate, along with his stock in the Baltimore company, and was sold by the syndicate to the petitioner along with the Baltimore company's property, as part of the scheme. The syndicate was paid for it, whoever received the stock. And this means that two-fifteenths of the stock of the corporation, the 20,000 shares sold to the public, are to be allowed to use the name of the corporation to assert rights against Lewisohn's estate that

will enure to the benefit of thirteen-fifteenths of the stock that are totally without claim. It seems to us that the practical objection is as strong as that arising if we adhere to the law.

Let us take the business point of view for a moment longer. To the lay mind it would make little or no difference whether the 20,000 shares sold to the public were sold on an original subscription to the articles of incorporation or were issued under the scheme to some of the syndicate and sold by them. Yet it is admitted, in accordance with the decisions, that in the latter case the innocent purchasers would have no claim against any one. If we are to seek what is called substantial justice in disregard of even peremptory rules of law, it would seem desirable to get a rule that would cover both of the almost equally possible cases of what is deemed a wrong. It might be said that if the stock really was taken as a preliminary to selling to the public, the subscribers would show a certain confidence in the enterprise and give at least that security for good faith. But the syndicate believed in the enterprise, notwithstanding all the profits that they made it pay. They preferred to take stock at par rather than cash. Moreover, it would have been possible to issue the whole stock in payment for the property purchased, with an understanding as to 20,000 shares.

Of course, it is competent for legislators, but not, we think, for judges, except by a *quasi*-legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind, when the parties contemplate an invitation to the public to come in and join as original subscribers for any portion of the shares. It may be said that the corporation cannot be bound until the contemplated adverse interest is represented, or it may be said that promoters cannot strip themselves of the character of trustees until that moment. But it seems to us a strictly legislative determination. It is difficult, without inventing new and qualifying established doctrines, to go behind the fact that the corporation remains one and the same after once it really exists.

When, as here, after it really exists, it consents, we at least shall require stronger equities than are shown by this bill to allow it to renew its claim at a later date because its internal constitution has changed.

To sum up: In our opinion, on the one hand, the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it; the conception that a corporation remains unchanged and unaffected in its identity by changes in its members. *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273; *Salomon* v. *Salomon & Co.* [1897], A. C. 22, 30. On the other hand, if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which thirteen-fifteenths of its stock were parties, for the benefit of the guilty, if there was guilt in any one, and the innocent alike. We decide only what is necessary. We express no opinion as to whether the defendant properly is called a promoter, or whether the plaintiff has not been guilty of laches, or whether a remedy can be had for a part of a single transaction in the form in which it is sought, or whether there was any personal claim on the part of the innocent subscribers, or as to any other question than that which we have discussed.

The English case chiefly relied upon, *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming *S. C.*, 5 Ch. D. 73, seems to us far from establishing a different doctrine for that jurisdiction. There, to be sure, a syndicate had made an agreement to sell, at a profit, to a company to be got up by the sellers. But the company, at the first stage, was made up mainly of outsiders, some of them instruments of the sellers, but innocent instruments, and, according to Lord Cairns, the contract was provisional on the shares being taken and the company formed (p. 1239). There never was a moment when the company had assented with knowledge of the facts.

The shares, with perhaps one exception, all were taken by subscribers ignorant of the facts, 5 Ch. D. 113, and the contract seems to have reached forward to the moment when they subscribed. As it is put in 2 Morawetz, Corp. (2d ed.) § 292, there was really no company till the shares were issued. Here thirteen-fifteenths of the stock had been taken by the syndicate, the corporation was in full life and had assented to the sale with knowledge of the facts before an outsider joined. There most of the syndicate were strangers to the corporation, yet all were joined as defendants (p. 1222). Here the members of the syndicate, although members of the corporation, are not joined, and it is sought to throw the burden of their act upon a single one. *Gluckstein* v. *Barnes* [1900], A. C. 240, certainly is no stronger for the plaintiff, and in *Yeiser* v. *United States Board & Paper Co.*, 107 Fed. Rep. 340, another case that was relied upon, the transaction equally was carried through after innocent subscribers had paid for stock.

Decree affirmed.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY *v.* STATE OF TEXAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 207. Argued April 21, 22, 1908.—Decided May 18, 1908.

The statute of Texas of April 17, 1905, c. 141, imposing a tax upon railroad companies equal to one per cent of their gross receipts is, as to those companies whose receipts include receipts from interstate business, a burden on interstate commerce and as such violative of the commerce clause of the Federal Constitution. *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 followed; *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, distinguished, and held that the latter case did not overrule the former.

Neither the state courts nor the legislatures, by giving a tax a particular name, or by the use of some form of words, can take away the duty of this court to consider the nature and effect of a tax, and if it bears upon in-

terstate commerce so directly as to amount to a regulation it cannot be saved by name or form.
97 S. W. Rep. 71, reversed.

THE facts are stated in the opinion.

Mr. Maxwell Evarts and *Mr. Hiram M. Garwood*, with whom *Mr. Robert S. Lovett* was on the brief, for plaintiffs in error:

The tax to be levied directly upon the receipts from interstate and foreign transportation is a regulation of interstate and foreign commerce, contrary to the commerce clause of the Federal Constitution.

It cannot avail that the tax is arbitrarily declared an occupation tax. Constitutional limitations cannot be broken down or circumvented by the form in which a thing is done or attempted. The judiciary will look through the form to the substance and will invalidate any legislative act which in its substance is a breach of constitutional right.

To tax the occupation of an importer is to tax the import. *Brown* v. *Maryland*, 12 Wheat. 419. To tax the income of United States securities is to tax the securities themselves. *Western* v. *Charleston*, 2 Pet. 449. To tax an income from an official position is to tax the office itself. *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435. To tax a bill of lading is to tax the thing transported and the receipts therefrom. *Almy* v. *California*, 24 How. 169. A tax upon interest is a tax upon the bond. *Railroad Co.* v. *Jackson*, 7 Wall. 262. A tax upon the auctioneer is a tax upon the goods sold. *Cook* v. *Pennsylvania*, 97 U. S. 566. To tax the income of personal property and the rental of lands is to tax the property from which the income is derived. *Pollock* v. *Farmers' Trust Co.*, 157 U. S. 429. To compel the carrier to give information relative to an interstate transit is to burden and regulate interstate commerce. *Central of Georgia Ry. Co.* v. *Murphey*, 196 U. S. 194. In like manner to tax the receipts from interstate commerce is to regulate that commerce itself. While at an early stage of the decisions of this court it was thought that

the power of Congress to regulate commerce among the States was concurrent with that of the State, it has become universally accepted doctrine that the power of Congress to regulate commerce among the States is exclusive. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Fargo* v. *Michigan*, 121 U. S. 230; *W. U. Tel. Co.* v. *Pennsylvania*, 128 U. S. 39; *Ratterman* v. *W. U. Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Postal Tel. Co.* v. *Adams*, 155 U. S. 698.

It is contended that the *Steamship case* is not strictly applicable because in that case all of the receipts were interstate and foreign, while here, part of the receipts are domestic. This variance in the facts does not affect the principle or the result as a tax on interstate receipts cannot be sustained because the same tax is levied at the same time upon state receipts. *State Freight Tax Case*, 15 Wallace, 232; *W. U. Tel. Co.* v. *Texas*, 105 U. S. 460; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *W. U. Tel. Co.* v. *Alabama*, 132 U. S. 477; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Leloup* v. *Mobile*, 127 U. S. 648; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Brenan* v. *Titusville*, 153 U. S. 289; *Asher* v. *Texas*, 128 U. S. 132; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Stockard* v. *Morgan*, 185 U. S. 37.

If it should be held, however, that the tax here involved is an occupation tax, there remain four propositions, three of which at least must be decided against the contention of plaintiffs in error before this tax can be sustained.

1. An occupation, license, or privilege tax cannot be laid on the occupation or business of engaging in interstate commerce, although at the same time such a tax be laid on the same party engaged in intrastate commerce.

2. Assuming that the tax is imposed only on the intrastate occupation, the same is invalid, because:

The State in levying a tax on a state occupation cannot base

the same in whole or in part on the earnings of an interstate occupation, as the State cannot, in arriving at the amount of the tax, take as a basis those things which the State has no power to tax, for this would accomplish indirectly what the State may not do directly.

The assessment of the tax at a sum equal to one per cent of the gross interstate earnings in effect is an impediment and serious obstruction to, and therefore a burden upon interstate commerce, as the carrier, in fixing his interstate rate, will necessarily consider that from the earnings of every pound carried, he must give to the State one per cent. If it be admitted that the State can so demand one per cent, it may demand any larger percentage, and under this form of taxation the State may without practical limit, regulate the interstate commerce even to the extent of suppressing the same.

3. Though a tax be levied on the state occupation, where the burden of the same will necessarily fall on the interstate occupation and the party is not at liberty to decline the state occupation, such a tax cannot stand.

4. The tax is laid on both the occupation of doing a state and interstate business. There is no room left for construction upon this proposition. *Steamship Co.* v. *Port Wardens*, 6 Wall. 31; *Welton* v. *Missouri*, 91 U. S. 281; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 346; *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Robbins* v. *Shelby Taxing District*, 120 U. S. 496; *Corson* v. *Maryland*, 120 U. S. 502; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *L. & N. R. R. Co.* v. *Eubank*, 184 U. S. 27; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557. Cases cited by defendant in error, viz., *Gross Receipts Tax Case*, 18 Wall. 206; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, discussed and distinguished.

Mr. Robert Vance Davidson, Attorney General of the State of Texas, and *Mr. William Edward Hawkins*, for defendant in error:

The tax prescribed by chap. 141 of the acts of the twenty-

ninth legislature of Texas is an occupation tax. *Maine* v. *Grand Trunk Railway*, 142 U. S. 217; *State Railroad Tax Cases*, 92 U. S. 603; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Osborne* v. *Mobile*, 16 Wall. 479; *Nathan* v. *Louisiana*, 8 How. 73; Constitution of Texas, Art. 8, §§ 1, 2, 9 and 17; *State of Texas* v. *G., H. & S. A. Ry. Co.*, 97 S. W. Rep. 71; *Albrecht* v. *State*, 8 Texas App. 217; *Languille* v. *State*, 4 Texas App. 322, and cases cited; *State* v. *Stevens*, 4 Texas, 137; *Aulanier* v. *Governor*, 1 Texas, 664; *State* v. *Bock*, 9 Texas, 369; *Thompson* v. *State*, 17 Texas App. 258; *Texas Banking and Ins. Co.* v. *State*, 42 Texas, 637; *Galveston County* v. *Gorham*, 49 Texas, 289; *Blessing* v. *Galveston*, 42 Texas, 660; *Fahey* v. *State*, 27 Texas App. 161; *Higgins* v. *Rinker*, 47 Texas, 396; *Pullman Co.* v. *State*, 64 Texas, 274; *Cumberland R. R. Co.* v. *State*, 52 L. R. A. 756; *Capital City Water Co.* v. *Board of Revenue*, 107 Alabama, 303; Cooley on Taxation (3d ed.), 1094 *et seq.*

An occupation tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property. *Appeal of Bangor*, 109 Pa. St. 89.

A franchise is a particular privilege conferred by law, emanating from the sovereign power and vested in individuals, or a corporation. Webster's International Dictionary; 3 Words and Phrases, pp. 2929–2937.

A franchise to be a corporation is distinct from a franchise acquired and exercised by a corporation, to own, maintain and operate a railway. *People* v. *Commissioners*, 174 N. Y. 417.

Individuals, whether alone or when associated with others, have an inherent right to pursue some lawful occupation, subject, however, to such taxes as the State may impose. But a corporation is wholly a creature of the law in so far as its right to exist is concerned. Such right of a mere existence is a primary franchise, vesting, as we have seen, in the individuals who organize the corporation.

To the corporate entity so created the State grants the right

which the individual, or the association of individuals, inherently enjoy; viz., the right to do business within the State, or, in other words, to pursue a given occupation. *Memphis & Little Rock R. R. Co.* v. *Commissioners*, 112 U. S. 609; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 313; *People* v. *State Board*, 174 N. Y. 417; *Iron Silver Mining Co.* v. *Cowie*, 31 Colorado, 450; 3 Words and Phrases, 2929–2937.

The legislature of Texas has a perfect right to require those owning, operating, managing or controlling a railroad lying in whole or in part, within this State, to pay, not only an *ad valorem* tax, but also a tax for the privilege of the continued exercise of their franchises to do business within this State.

The mileage basis of apportionment, as applied by the Texas statute to the gross receipts of lines of railroad lying partly within and partly without the State of Texas, is constitutional, valid and fair, and correctly and justly determines what proportion of the entire receipts of such line of railroad results from business done within the State of Texas. *Michigan Central Ry. Co.* v. *Powers*, 201 U. S. 288; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 180; *W. U. Tel. Co.* v. *Taggart*, 163 U. S. 1; *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 552; *Cleveland &c. Ry. Co.* v. *Backus*, 154 U. S. 439; *Central Pacific Ry. Co.* v. *California*, 162 U. S. 91; *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Pittsburg &c. Ry. Co.* v. *Backus*, 154 U. S. 421; Cooley on Taxation (3d ed.), 163, 164.

A statute may affect interstate commerce without amounting to a regulation thereof. *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 50; *Ficklen* v. *Shelby Co.*, 145 U. S. 21; *Ouichita Packet Co.* v. *Aiken*, 121 U. S. 444; *State Tax on Railway Gross Receipts*, 15 Wall. 293; *Sherlock* v. *Alling*, 93 U. S. 99; *Smith* v. *Alabama*, 124 U. S. 465; *Western Union Tel. Co.* v. *James*, 162 U. S. 656.

The tax prescribed is not, in substance or effect, a tax, or a burden upon, or a regulation of interstate commerce. It is not upon articles of or receipts from interstate commerce, and such receipts are immaterial except in so far as they enter into

and become a part of the measure by which the amount of the tax is determined. *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 387; *Delaware Ry. Tax Case*, 18 Wall. 206; *Erie Ry. Co.* v. *Pennslyvania*, 21 Wall. 492; *New York, Lake Erie & Western Ry. Co.* v. *Pennsylvania*, 158 U. S. 431; *McHenry* v. *Alford*, 168 U. S. 651; *State Railroad Tax Cases*, 92 U. S. 575; *Nathan* v. *Louisiana*, 8 How. 73; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 315; *New York State* v. *Roberts*, 171 U. S. 664, and cases cited; *Pacific Express Co.* v. *Siebert*, 142 U. S. 350; *Lacy* v. *Packing Co.*, 200 U. S. 226; *Cumberland Railroad Co.* v. *State*, 52 L. R. A. 764.

The tax here levied is not "on" gross receipts, but "equal to" a given percentage "calculated on the gross receipts."

Lord Eldon held: Where the salesman has an amount of money equal to one-tenth of the profits this gives him no action of account, and, therefore, he is not a partner; but where he is to receive one-tenth of the profits, this gives him an action of account, and, therefore, makes him a partner. Parsons on Contracts (8th ed.), 160, citing Lord Eldon.

The word "equal," as used in the statute, means "having the same magnitude, the same value." Webster's International Dictionary.

"Equal" implies, not identity, but duality; the use of one thing as the measure of another. It is so understood in the plain language of the people. *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 59 Fed. Rep. 400; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. R. Co.*, 37 Fed. Rep. 624; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 63 Fed. Rep. 775.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action against certain railroads to recover taxes and penalties. The Supreme Court of the State held the penal-

ties to be void under the state constitution, but upheld the tax. 97 S. W. Rep. 71. The railroads bring the case here mainly on the ground that the law upon which the action is based is an attempt to regulate commerce among the States.

The act in question is entitled "An Act imposing a tax upon railroad corporations . . . and other persons . . . owning . . . or controlling any line of railroad in this State . . . equal to one per cent. of their gross receipts . . . and repealing the existing tax on the gross passenger earnings of railroads." It proceeds in § 1 to impose upon such railroads "an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State." In § 2 a report, under oath, of "the gross receipts of such line of railroad, from every source whatever, for the year ending on the thirtieth day of June last preceding," and immediate payment of the tax "calculated on the gross receipts so reported," are required. The comptroller is given power to call for other reports, and is to "estimate such tax on the true gross receipts thereby disclosed," etc. The lines of the railroads concerned are wholly within the State, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the State. In view of this portion of their business, the railroads contend that the case is governed by *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. The counsel for the State rely upon *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, and maintain, if necessary, that the later overrules the earlier case.

In *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites

the earlier cases to the same effect. Later ones are *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Pennsylvania*, 128 U. S. 39; *Western Union Telegraph Co.* v. *Seay*, 132 U. S. 472. See also *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 25; *Ficklen* v. *Taxing District of Shelby County*, 145 U. S. 1, 22; *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438; *McHenry* v. *Alford*, 168 U. S. 651, 670, 671; *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, 162. In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, the authority of the *Philadelphia Steamship Company case* was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court.

It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; *S. C.*, 166 U. S. 171; *Fargo* v. *Hart*, 193 U. S. 490, 499. So it has been held that a tax on the property and business of a railroad operated within the State might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the State the proportion of interstate business equal to the proportion between the road over which the business was carried within the State to the total length of the road over which it was carried. *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379.

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In *Wisconsin & Michigan Ry. Co.* v. *Powers*, *supra*, the measure of property by income purported only to be *prima facie* valid. But the extreme case came earlier. In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, "an annual excise tax for the privilege of exercising its franchise," was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company case*. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See *Ficklen* v. *Taxing District of Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *McHenry* v. *Alford*, 168 U. S. 651, 670, 671.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto; it is not open to attack as inconsistent with the Constitution." *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697. See *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Asbell* v. *Kansas*, 209 U. S. 251, 254, 256.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax "equal to" one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the State

that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

Of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State. We are of opinion that the judgment should be reversed.

Judgment reversed.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concurred, dissenting.

In my opinion the court ought to accept the interpretation which the Supreme Court of Texas places upon the statute in question. In other words, it should be assumed that, by imposing upon railroads and corporations owning, operating, managing or controlling any line of railroad in the State, for the transportation of passengers, freight or baggage, an annual tax "*equal* to one per centum of its gross receipts if such line of railroad lies wholly within the State, and if such line of railroad lies partly within and partly without the State, it shall pay a tax *equal* to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line," the State intended to impose only an occupation tax. Such is the construction which the state court places on the statute and that construction is justified by the words used. We have the authority of the Supreme Court of Texas for saying that the constitution of that State authorizes the imposition of occupation taxes upon natural persons and upon corporations, other than municipal, doing business in that State. The plaintiff in error is a Texas corporation, and it cannot be doubted that the State may impose an occupation tax on one of its own corporations,

provided such tax does not interfere with the exercise of some power belonging to the United States.

But it is said that the tax in question, even if regarded as an occupation tax, is invalid, as constituting a direct burden on interstate commerce, the regulation of which belongs to Congress. It is not, in my opinion, to be taken as a tax on interstate commerce in the sense of the Constitution; for its operation on interstate commerce is only incidental, not direct. A State, in the regulation of its internal affairs, often prescribes rules which in their operation, remotely or incidentally, affect interstate commerce. But such rules have never been held as in themselves imposing direct burdens upon such commerce, and on that ground invalid. The State in the present case ascertains the extent of business done by the corporation in the State, and requires an annual occupation tax "equal" to a named per centum of the amount of such business. It does not lay any tax directly upon the gross receipts as such, as was the case in *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. In that case the court said: "The tax was levied directly upon the receipts derived by the company from its fares and freights, for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels, which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. Here there is no levying upon receipts as such from interstate commerce. The State only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the State. Suppose the State as, under its constitution it might do, should impose an income tax upon railroad corporations of its own creation, doing business within the State, equal to a given per cent of all income received by the corporation from its business, would

the corporation be entitled to have excluded from computation such of its income as was derived from interstate commerce? Such would be its right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to this view.

If it did not delay an announcement of the court's decision longer, perhaps, than is desirable, I should be glad to go into this subject at large and present such a review of the adjudged cases as would show that the views expressed by me are in harmony with previous cases in this court. The present decision, I fear, will seriously affect the taxing laws of many States, and so impair the powers of the several States, in matters of taxation, that they cannot compel its own corporations to bear their just proportion of such public burdens as can be met only by taxation. I dissent from the opinion and judgment of the court.

MR. CHIEF JUSTICE FULLER, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in this dissent.

FAUNTLEROY *v.* LUM.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 215. Argued April 27, 28, 1908.—Decided May 18, 1908.

A judgment is conclusive as to all the *media concludendi*, and it cannot be impeached either in or out of the State, by showing that it was based on a mistake of law.

A judgment of a court of a State in which the cause of action did not arise, but based on an award of arbitration had in the State in which the cause did arise, is conclusive, and, under the full faith and credit clause of the Federal Constitution, must be given effect in the latter State, notwithstanding the award was for a claim which could not, under the laws of that State, have been enforced in any of its courts.

80 Mississippi, 757, reversed.

THE facts are stated in the opinion.

Mr. Shepard Barclay, with whom *Mr. Robert L. McLaurin, Mr. Amos A. Armistead, Mr. E. L. Brien, Mr. Garner Wynn Green* and *Mr. Marcellus Green* were on the brief, for plaintiff in error:

By allowing a plea to be interposed in the Mississippi courts in an action upon a Missouri judgment, which was not allowable in the courts of Missouri, both the Federal Constitution (Art. IV, § 1), and § 905, Revised Statutes of the United States were violated, in that full faith and credit to it were denied, and the faith and credit to which it was entitled in Missouri were not given to it in Mississippi. *Hampton* v. *McConnel,* 3 Wheat. 235; *McElroy* v. *Wagner,* 13 Pet. 324; *Christmas* v. *Russell,* 5 Wall. 301, and cases there cited; *Harding* v. *Harding,* 198 U. S. 317; *Haddock* v. *Haddock,* 201 U. S. 567, and cases cited; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, and *Provision Co.* v. *Davis,* 191 U. S. 374, discussed as not in conflict with the cases above cited.

The effect of this judgment in Missouri differs from that under the law in Mississippi, for while under the Missouri decisions in determining the effect of this transaction the Mississippi statutes would be looked to and would control, *Gaylord* v. *Duryee,* 95 Mo. Appeals (1902), 579, the effect of the Missouri judgment when rendered may be appealed from, and reversed, and what its effect is when suit is brought thereon in Missouri, and what pleas are sufficient answer thereto, are to be determined by the statutes and decisions of that State. *Wilkerson* v. *Whitney,* 7 Missouri, 296, and Rev. Stat. Mo., 1889, 1262, § 52, enacting that only judgments by confession shall be void when based on a gambling transaction, and that when rendered by default, or upon issue joined, there can be no second trial of that which was interposed in the first trial and decided adversely.

Under the Federal Constitution and § 905, Rev. Stat., as uniformly interpreted, the same effect as was shown to exist in Missouri under the laws and decisions thereof, the domicile of the rendition of the judgment, must, under the supreme law of the land, be given to it in Mississippi.

In Missouri the merits of the controversy, the nature of the consideration are forever concluded by the judgment herein there rendered. Under the rule in this court announced by Mr. Chief Justice Marshall, reiterated by Mr. Justice Story, and since integrated as a funadmental principle into constitutional law, the test of the effect vouchsafed to this judgment in Mississippi is its effect under the laws of Missouri. There is no qualification or exception. See *Draper* v. *Gorman*, 8 Leigh, 628.

Mr. T. C. Catchings and *Mr. O. W. Catchings*, for defendant in error, submitted:

No matter what may have been held, at one time, at present the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 286. The grant of judicial power was not intended to confer upon the courts of the United States jurisdiction over a suit or prosecution by one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all. The provisions of § 1, Art. IV, of the Constitution establish a rule of evidence rather than of jurisdiction, and while they make a record of a judgment rendered after due notice, in a State, conclusive evidence in the courts of another State or of the United States, of the matter adjudged they do not affect the jurisdiction either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 286; See also *Anglo-American Provision Co.* v. *Davis Provision Co.*, 62 N. E. Rep. 587; affirmed in this court, 191 U. S. 373.

The Constitution does not require a State to give jurisdiction against its will; it does not require a State to provide a court in which all causes of action may be tried; and it is only where the plaintiff can find a court in which he has a right to come that the effect of the judgment is fixed by the Constitution, and the act in pursuance of it, which Congress passed.

Where a State does provide a court to which its own citizens may resort in a certain class of cases, the right which citizens of other States would have to resort to it in cases of the same class would depend not upon § 1 of Art. IV (which is the only clause of the Constitution invoked and relied upon in this case by the plaintiff in error), but upon § 2, which entitles the citizens of each State to all privileges and immunities of citizens in the several States. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373.

Not only from the language of § 2117, Mississippi Code of 1892, but from the opinion of the Supreme Court of Mississippi, delivered in the present case, and from its opinion in the case in 71 Mississippi Reports arising under the statute of 1882, the contract involved was one which the courts of the State are expressly prohibited from enforcing. The present case, therefore, is controlled by *Anglo-American Provision Co.* v. *Davis Provision Co.*, *supra*, and see *Lemonius* v. *Mayer*, 71 Mississippi, 514. See also *Andrews* v. *Andrews*, 188 U. S. 14; *DeVaughn* v. *Hutchinson*, 165 U. S. 566; *Clarke* v. *Clarke*, 178 U. S. 186; *Stone* v. *Mississippi*, 101 U. S. 814; *Railroad Co.* v. *Husen*, 95 U. S. 470.

Mr. Justice Holmes delivered the opinion of the court.

This is an action upon a Missouri judgment brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay the loss; that the controversy was submitted to arbitration, the question as to the ille-

gality of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transaction, and that by the laws of Mississippi the same was illegal and void, but directed a verdict if the jury should find that the submission and award were made, and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. (The plaintiff in error is an assignee of the judgment, but nothing turns upon that.) The plea was demurred to on constitutional grounds, and the demurrer was overruled subject to exception. Thereupon replications were filed, again setting up the Constitution of the United States (Art. IV, § 1), and were demurred to. The Supreme Court of Mississippi held the plea good and the replications bad, and judgment was entered for the defendant. Thereupon the case was brought here.

The main argument urged by the defendant to sustain the judgment below is addressed to the jurisdiction of the Mississippi courts.

The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, "shall not be enforced by any court." Annotated Code of 1892, §§ 1120, 1121, 2117. The defendant contends that this language deprives the Mississippi courts of jurisdiction, and that the case is like *Anglo-American Provision Co.* v. *Davis Provision Co. No.* 1, 191 U. S. 373. There the New York statutes refused to provide a court into which a foreign corporation could come, except upon causes of action arising within the State, etc., and it was held that the State of New York was under no constitutional obligation to give jurisdiction to its Supreme Court against its will. One question is whether that decision is in point.

No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to

merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction of the court dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.

The case quoted concerned a statute plainly dealing with the authority and jurisdiction of the New York court. The statute now before us seems to us only to lay down a rule of decision. The Mississippi court in which this action was brought is a court of general jurisdiction and would have to decide upon the validity of the bar, if the suit upon the award or upon the original cause of action had been brought there. The words "shall not be enforced by any court" are simply another, possibly less emphatic, way of saying that an action shall not be brought to enforce such contracts. As suggested by the counsel for the plaintiff in error, no one would say that the words of the Mississippi statute of frauds, "An action shall not be brought whereby to charge a defendant," Code 1892, § 4225, go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt. See 191 U. S. 375. A stronger case than the present is *General Oil Co.* v. *Crain*, 209 U. S. 211, 216. We regard this question as open under the decisions below, and we have expressed our opinion upon it independent of the effect of the judgment, although it might be that, even if jurisdiction of the original cause of action

was withdrawn, it remained with regard to a suit upon a judgment based upon an award, whether the judgment or award was conclusive or not. But it might be held that the law as to jurisdiction in one case followed the law in the other, and therefore we proceed at once to the further question, whether the illegality of the original cause of action in Mississippi can be relied upon there as a ground for denying a recovery upon a judgment of another State.

The doctrine laid down by Chief Justice Marshall was "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court of the United States." *Hampton* v. *McConnel*, 3 Wheat. 234. There is no doubt that this quotation was supposed to be an accurate statement of the law as late as *Christmas* v. *Russell*, 5 Wall. 290, where an attempt of Mississippi, by statute, to go behind judgments recovered in other States was declared void, and it was held that such judgments could not be impeached even for fraud.

But the law is supposed to have been changed by the decision in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265. That was a suit brought in this court by the State of Wisconsin upon a Wisconsin judgment against a foreign corporation. The judgment was for a fine or penalty imposed by the Wisconsin statutes upon such corporations doing business in the State and failing to make certain returns, and the ground of decision was that the jurisdiction given to this court by Art. III, § 2, as rightly interpreted by the Judiciary Act, now § 687, Rev. Stat., was confined to "controversies of a civil nature," which the judgment in suit was not. The case was not within the words of Art. IV, § 1, and, if it had been, still it would not have and could not have decided anything relevant to the question before us. It is true that language was used which has been treated as meaning that the original claim upon which a judgment is based

may be looked into further than Chief Justice Marshall supposed. But evidently it meant only to justify the conclusion reached upon the specific point decided, for the proviso was inserted that a court "cannot go behind the judgment for the purpose of examining into the validity of the claim." 127 U. S. 293. However, the whole passage was only a *dictum* and it is not worth while to spend much time upon it.

We assume that the statement of Chief Justice Marshall is correct. It is confirmed by the Act of May 26, 1790, c. 11, 1 Stat. 122 (Rev. Stat. § 905), providing that the said records and judicial proceedings "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." See further *Tilt* v. *Kelsey*, 207 U. S. 43, 57. Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. *Pitts* v. *Fugate*, 41 Missouri, 405; *State* v. *Trammel*, 106 Missouri, 510; *In re Copenhaver*, 118 Missouri, 377. A judgment is conclusive as to all the *media concludendi*, *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law. Of course a want of jurisdiction over either the person or the subject-matter might be shown. *Andrews* v. *Andrews*, 188 U. S. 14; *Clarke* v. *Clarke*, 178 U. S. 186. But as the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. See *Godard* v. *Gray*, L. R. 6 Q. B. 139; *MacDonald* v. *Grand Trunk Ry. Co.*, 71 N. H. 448; *Peet* v. *Hatcher*, 112 Alabama, 514.

We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect. Mistakes

will be rare. In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood, and is not a matter to arouse the susceptibilities of the States, all of which are equally concerned in the question and equally on both sides.

Judgment reversed.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE MCKENNA and MR. JUSTICE DAY, dissenting.

Admonished that the considerations which control me are presumptively faulty, as the court holds them to be without merit, yet so strong is my belief that the decision now made unduly expands the due faith and credit clause of the Constitution, I state the reasons for my dissent.

By law the State of Mississippi prohibited certain forms of gambling in futures, and inhibited its courts from giving effect to any contract or dealing made in violation of the prohibitive statute. In addition, it was made criminal to do any of the forbidden acts. With the statutes in force two citizens and residents of Mississippi made contracts in that State which were performed therein, and which were in violation of both the civil and criminal statutes referred to. One of the parties asserting that the other was indebted to him because of the contracts, both parties, in the State of Mississippi, submitted their differences to arbitration, and on an award being made in that State the one in whose favor it was made sued in a state court in Mississippi to recover thereon. In that suit, on the attention of the court being called to the prohibited and criminal nature of the transactions, the plaintiff dismissed the case. Subsequently, in a court of the State of Missouri, the citizen of Mississippi, in whose favor the award had been made, brought an action on the award, and succeeded in getting per-

sonal service upon the other citizen of Mississippi, the latter being temporarily in the State of Missouri. The action was put at issue. Rejecting evidence offered by the defendant to show the nature of the transactions, and that under the laws of Mississippi the same were illegal and criminal, the Missouri court submitted the cause to a jury, with an instruction to find for the plaintiff if they believed that the award had been made as alleged. A verdict and judgment went in favor of the plaintiff. Thereupon the judgment so obtained was assigned by the plaintiff to his attorney, who sued upon the same in a court of Mississippi, where the facts upon which the transaction depended were set up and the prohibitory statutes of the State were pleaded as a defense. Ultimately the case went to the Supreme Court of the State of Mississippi, where it was decided that the Missouri judgment was not required, under the due faith and credit clause, to be enforced in Mississippi, as it concerned transactions which had taken place exclusively in Mississippi, between residents of that State, which were in violation of laws embodying the public policy of that State, and to give effect to which would be enforcing transactions which the courts of Mississippi had no authority to enforce. This court now reverses on the ground that the due faith and credit clause obliged the courts of Mississippi, in consequence of the action of the Missouri court, to give efficacy to transactions in Mississippi which were criminal, and which were against the public policy of that State. Although not wishing in the slightest degree to weaken the operation of the due faith and credit clause as interpreted and applied from the beginning, it to me seems that this ruling so enlarges that clause as to cause it to obliterate all state lines, since the effect will be to endow each State with authority to overthrow the public policy and criminal statutes of the others, thereby depriving all of their lawful authority. Moreover, the ruling now made, in my opinion, is contrary to the conceptions which caused the due faith and credit clause to be placed in the Constitution, and substantially overrules the previous decisions of this court

interpreting that clause. My purpose is to briefly state the reasons which lead me to these conclusions.

The foundation upon which our system of government rests is the possession by the States of the right, except as restricted by the Constitution, to exert their police powers as they may deem best for the happiness and welfare of those subject to their authority. The whole theory upon which the Constitution was framed, and by which alone, it seems to me, it can continue, is the recognition of the fact that different conditions may exist in the different States, rendering necessary the enactment of regulations of a particular subject in one State when such subject may not in another be deemed to require regulation; in other words, that in Massachusetts, owing to conditions which may there prevail, the legislature may deem it necessary to make police regulations on a particular subject, although like regulations may not obtain in other States. And, of course, such also may be the case in Louisiana or any other State. If it be that the ruling now made deprives the States of powers admittedly theirs, it follows that the ruling must be wrong. The inquiry whether the ruling does so becomes, therefore, directly pertinent, not merely from considerations of inconvenience, but as a matter of substantial demonstration. The due faith and credit clause it is now decided means that residents of a State may within such State do acts which are violative of public policy, and yet that a judgment may be rendered in another State giving effect to such transactions, which judgment it becomes the duty of the State whose laws have been set at defiance to enforce. It must follow, if one State by the mere form of a judgment has this power, that no State has in effect the authority to make police regulations, or, what is tantamount to the same thing, is without power to enforce them. If this be true the doctrine now upheld comes to this, that no State, generally speaking, possesses police power concerning acts done within its borders if any of the results of such acts may be the subject of civil actions, since the enforcement by the State of its po-

lice regulations as to such acts may be nullified by an exertion of the judicial power of another State. Indeed the principle, as understood by me, goes further than this, since it not only gives to each of the States in the cases suggested the power to render possible an evasion of the police laws of all the other States, but it gives to each State the authority to compel the other States, through their courts, to give effect to illegal transactions done within their borders. It may not be denied that a State which has lawfully prohibited the enforcement of a particular character of transaction and made the same criminal has an interest in seeing that its laws are enforced and will be subjected to the gravest humiliation if it be compelled to give effect to acts done within its borders which are in violation of its valid police or criminal laws. And the consciousness of the enforced debasement to which it would be subjected if compelled to enter a decree giving effect to acts of residents of Mississippi, done within that State, which were violative of the public policy of the State and which were criminal, was clearly shown in the opinion of the Supreme Court of the State in this case.

When the Constitution was adopted the principles of comity by which the decrees of the courts of one State were entitled to be enforced in another were generally known, but the enforcement of those principles by the several States had no absolute sanction, since they rested but in comity. Now it cannot be denied that under the rules of comity recognized at the time of the adoption of the Constitution, and which at this time universally prevail, no sovereignty was or is under the slightest moral obligation to give effect to a judgment of a court of another sovereignty, when to do so would compel the State in which the judgment was sought to be executed to enforce an illegal and prohibited contract, when both the contract and all the acts done in connection with its performance had taken place in the latter State. This seems to me conclusive of this case, since both in treatises of authoritative writers (Story, Conflict of Law § 609), and by repeated adjudications of

this court it has been settled that the purpose of the due faith and credit clause was not to confer any new power, but simply to make obligatory that duty which, when the Constitution was adopted rested, as has been said, in comity alone. Without citing the numerous decisions which so hold, reference is made to a few of the leading cases in which the prior rulings of this court were reviewed, the foregoing principle was stated and the scope of the due faith and credit clause was fully expounded: *Thompson* v. *Whitman*, 18 Wall. 457; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265; *Cole* v. *Cunningham*, 133 U. S. 107; *Andrews* v. *Andrews*, 188 U. S. 14. A more particular review of those cases will demonstrate why my conviction is that the decision in this case overrules the cases cited.

In *Thompson* v. *Whitman* it was directly held that when a judgment of one State is presented for enforcement in another the due faith and credit clause does not deprive the courts of the State in which it is sought to make the judgment effectual from inquiring into the jurisdiction of the court in which the judgment was rendered.

In *Wisconsin* v. *Pelican Insurance Co.*, a judgment was rendered in Wisconsin against an insurance company for a large amount of money. An original suit was brought in this court upon the judgment. Elaborately considering the authorities, it was held that the due faith and credit clause did not deprive the court of the right to go behind the face of the money judgment and ascertain the cause of action upon which it had been rendered. In other words, it was expressly decided that there was power to ascertain whether the cause of action was such as to give the Wisconsin court jurisdiction to render a judgment entitled to enforcement in other States. This having been determined, as the proof established that the judgment for money rendered in Wisconsin was for a penalty imposed by the statutes of that State, it was held that the judgment was not entitled to be enforced, because when the Constitution was framed no State ever enforced the penal laws of another State. Speaking of the grant of jurisdiction over

"controversies between a State and citizen of another State," it was said (p. 289):

"The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

Certainly if such was the purpose of the framers in regard to the clause referred to, a like purpose must have been intended with reference to the due faith and credit clause. If a judgment for a penalty in money rendered in one State may not be enforced in another, by the same principle a judgment rendered in one State, giving to the party the results of prohibited and criminal acts done in another State, is not entitled to be enforced in the State whose laws have been violated.

Nor do I think that the ruling in the *Pelican case* is at all qualified by a sentence, quoted in the opinion of the court now announced, taken from page 293 of the report of the *Pelican case*. On the contrary, when that sentence is read, in connection with its context, in my opinion, it has a directly contrary effect to that for which it is now cited. The passage in full is as follows, the sentence referred to in the opinion in this case being the part embraced in brackets as found in the original:

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action [while it cannot go behind the judgment for the purpose of examining into the validity of the claim], from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

It seems to me that the words "validity of the claim," used in the sentence in brackets, but pointed out the absence of power when a judgment is one which is entitled to be enforced

to relitigate the mere question of liability, and that the language which follows the bracketed sentence, declaring that the court is empowered "to ascertain whether the claim is really one of such a nature that the court is entitled to enforce it," leaves no room for the implication that the bracketed sentence was intended to destroy the very doctrine upon which the decision in the *Pelican case* was necessarily based and without which the decision must have been otherwise.

The decision in the *Peilcan case* has never been overruled or qualified; on the contrary, that decision has been affirmed and reaffirmed and approvingly cited in many cases. It was expressly approved in the review which was made of the doctrine in *Cole* v. *Cunningham*, an instructive case on the power of a State to restrain its citizens from prosecuting actions in other jurisdictions, when prosecuting such actions was a violation of the laws of the State of the domicil. So, also, the *Pelican case* was approvingly cited and commented upon in *Andrews* v. *Andrews*, 188 U. S. 14, where the doctrine now under consideration was involved. And the authoritative nature of the decision in the *Pelican case* was recognized in *Anglo-Am. Prov. Co.* v. *Davis Prov. Co.*, No. 1, 191 U. S. 373.

None of the cases to which I have referred conflict with the opinion of Mr. Chief Justice Marshall in *Hampton* v. *McConnel*, 3 Wheat. 234, since that case but determined the degree of effect which was to be given to a judgment which was entitled to be enforced, and therefore did not possibly concern the question here presented. It is by me conceded that if the judgment, whose enforcement is here in question, is one which the courts of Mississippi were bound to enforce under the due faith and credit clause, the courts of that State are obliged to give to the judgment, as declared by Chief Justice Marshall, in *Hampton* v. *McConnel*, the same effect and credit which it was entitled to receive in the State where rendered. But, in my opinion, the concession just stated does not in any way influence the question here involved, which solely is whether the judgment was such an one as to be entitled to any credit at all. In other

words, I do not see how the question, whether a judgment is without the due faith and credit clause, may be controlled by a decision pointing out the extent of the credit to be given to a judgment if it be within that clause.

In addition to the considerations just stated, in my opinion this case is controlled by *Anglo-Am. Prov. Co.* v. *Davis Prov. Co.*, No. 1, *supra*, cited in the opinion of the court. In that case it was held that a judgment rendered in the State of Illinois in favor of one corporation against another corporation, both foreign to New York, was not entitled to be enforced in the courts of New York under the due faith and credit clause, because the statutes of New York enumerating the cases in which jurisdiction might be exercised over actions between foreign corporations did not give jurisdiction of such action as was before the court. Now in this case, in considering the very language found in the statute here in question as contained in a prior statute of the same nature, the Supreme Court of the State held (*Lemonius* v. *Mayer*, 71 Mississippi, 514), "that by the second section of the act of 1882 the complainants were denied access to the courts of this State to enforce their demand . . . for the money advanced for the purchase of the 'futures' in cotton." The want of power in the courts of Mississippi under the local statute is therefore foreclosed in this court by the construction given to the statute by the state court of last resort. At all events, that construction should not be departed from in order to compel the courts of Mississippi to enforce obligations which took origin in that State as the result of the intentional violation of a prohibitory law manifesting the public policy of the State.

No special reference has been made by me to the arbitration, because that is assumed by me to be negligible. If the cause of action was open for inquiry for the purpose of deciding whether the Missouri court had jurisdiction to render a judgment entitled to be enforced in another State, the arbitration is of no consequence. The violation of law in Mississippi could not be cured by seeking to arbitrate in that State in order to fix

the sum of the fruits of the illegal acts. The ancient maxims that something cannot be made out of nothing, and that which is void for reasons of public policy cannot be made valid by confirmation or acquiescence, seem to my mind decisive.

I therefore dissent.

In re WOOD AND HENDERSON.

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

No. 167. Submitted March 6, 1908.—Decided May 18, 1908.

Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular court to administer the property, that court may, in some proper way, call upon all parties interested to appear and assert their rights.

The bankruptcy court, or its referee, in which the bankruptcy proceedings are pending, has jurisdiction under § 60*d* of the bankruptcy act to reexamine, on petition of the trustee, the validity of a payment or transfer made by the bankrupt in contemplation of bankruptcy to an attorney for legal services to be rendered by him, and to ascertain and adjudge what is a reasonable amount to be allowed for such services and to direct repayment of any excess to the trustee; and if the attorney is a non-resident of the district an order directing him to show cause or a citation or notice of the proposed hearing may be served without the district.

Jurisdiction to reëxamine such a transfer was not conferred upon any state court.

The trustee may not maintain a plenary suit instituted in the District Court where the bankruptcy proceeding is pending against such attorney upon service of process made on such attorney, if he is a non-resident of that district, outside of the district.

THE facts are stated in the opinion.

Mr. W. Scott Bicksler, Mr. Edmon G. Bennett and *Mr. George L. Nye* for petitioners.

Mr. Harvey Riddell for respondent.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon certificate from the Circuit Court of Appeals for the Eighth Circuit.

The facts certified are: R. H. Williams had been adjudicated a bankrupt on January 13, 1904, in the District Court of the United States for Colorado. On the seventeenth of May, 1905, it appears that the trustee in bankruptcy (following § 60*d*) petitioned the court, representing that the bankrupt in contemplation of filing the petition in bankruptcy did pay to certain counsel, the petitioners in this case, at Hot Springs, Arkansas, $5,000 in cash, and transfer to them a certificate of deposit for $3,000, and a certificate of deposit for $1,795; that said money and property were transferred to said counsel, Wood and Henderson, by said Williams in contemplation of the filing of a petition in bankruptcy against him, within four months of the filing thereof, for legal services to be rendered thereafter by said Wood and Henderson. They were thereupon ordered to appear at the office of the referee, in the city of Colorado Springs in the State of Colorado, on June 20, 1905, and show cause, if any they had, why an order should not be made determining and adjudicating the reasonable value of the services rendered by the said attorneys for the said bankrupt, and that in default of their appearance the referee would proceed to hear and determine the matter on the evidence presented. It was ordered that a copy of the citation, together with a copy of the petition, be served on Wood and Henderson at Hot Springs, Arkansas, at least twenty days before the day set for the hearing. On the first day of August, 1905, the referee in bankruptcy, holding a court of bankruptcy, made the following order:

"It appearing to the court from the evidence that a copy of this application, together with a copy of the order to show cause issued thereon, returnable on the twentieth day of June, A. D. 1905, was duly served on said J. B. Wood and Jethro P. Henderson on the twenty-sixth day of May, 1905; and that

the said J. B. Wood and J. P. Henderson, not having appeared on the said twentieth day of June, 1905, herein, or shown to this court any cause why this court should not proceed to re-examine the said transaction; and it further appearing to this court that the matter of the said hearing has been duly continued from the said twentieth day of June until the first day of August, 1905, and that due notice of such continuance has been served upon the said J. B. Wood and Jethro P. Henderson, and that the said J. B. Wood and Jethro P. Henderson are fully advised that this hearing would be duly had on this day; and the said J. B. Wood and Jethro P. Henderson not having shown cause against the said application, and the court having heard the evidence on the part of the said trustee in support of the said application, and the arguments of counsel thereon, and the court being fully advised as to all matters of law and fact arising herein, the court doth find and adjudge that the said R. H. Williams, in contemplation of the filing of a petition in bankruptcy against him did, on the fifth day of December, 1902, transfer to said J. B. Wood and Jethro P. Henderson, attorneys at law, for services to be rendered, the sum of $5,000, lawful money of the United States, and one certificate of deposit for the sum of $3,000, issued by the Security Bank of Hot Springs, Arkansas, to the said R. H. Williams, and one certificate of deposit issued by the Arkansas National Bank of Hot Springs, Arkansas, to R. H. Williams for the sum of $1,795, the said two certificates of deposit having since been collected by the said J. B. Wood and Jethro P. Henderson. And the court doth find on reëxamination of the said transaction that the sum of $800 is reasonable compensation for the services rendered the said bankrupt under the terms of the transaction by which said money and property were transferred to the said J. B. Wood and Jethro P. Henderson, and doth find and adjudge that the said transaction is valid to that extent only, which the court determines and adjudges to be the reasonable value for said services."

It was thereupon ordered and adjudged that the transaction

was valid as to the sum of $800, found to be the reasonable value of the services, and the trustee was ordered to proceed to recover the excess, being the sum of $8,995, from said Wood and Henderson. Thereupon, and after this order, Wood and Henderson appeared before the referee for the sole purpose of challenging his jurisdiction to make the foregoing order, upon the ground that neither the parties nor the subject-matter was within the jurisdiction of the District Court of Colorado. Thereafter the case was certified to the District Court, and in that court Wood and Henderson renewed their objection to the jurisdiction of the District Court, and that court affirmed the ruling of the referee; thereupon Wood and Henderson filed their petition in the Circuit Court of Appeals for a review of the order of the District Court, and challenged the jurisdiction of that court and the referee to make the order aforesaid, because they were citizens and residents of Arkansas; that the service of the notice of proceedings was made upon them at Hot Springs, in that State; that they had not appeared or submitted to the jurisdiction of the District Court except to raise the jurisdictional questions; that the subject-matter of the proceedings was certain transactions which took place wholly within the State of Arkansas. Thereupon the Circuit Court of Appeals certified three questions to this court, as follows:

"1. Has a District Court of the United States sitting in bankruptcy in which the proceedings in bankruptcy are pending, or its referee, jurisdiction under section 60*d* of the bankruptcy act to reëxamine, on petition of the trustee in bankruptcy, the validity of the payment of money or the transfer of property by the bankrupt, made in contemplation of the filing of a petition by or against him in bankruptcy, to an attorney or counsellor at law, for services to be rendered to him by such attorney or counsellor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services, and to direct that the excess may be recovered by the trustee for the benefit of the estate, in the instance where

such attorney or counsellor at the time of receiving such payment or property and at the time of the proceedings in question was a non-resident of the State, or of the district, in which the bankrupt court instituting such inquiry is located, and where the money or property was so paid to, and is held by, such attorney or counsellor outside of the district in which such court of bankruptcy sits, and the order to show cause, citation, or notice of the proposed hearing is served upon him without, and not within the district in which such court of bankruptcy sits?

"2. If a District Court sitting in bankruptcy has this jurisdiction, may it exercise it by means of an order and citation to show cause duly served on the attorney or counsellor outside of the district of the court of bankruptcy, such attorney or counsellor being a non-resident of the district in which the proceedings in bankruptcy are pending?

"3. May a plenary suit instituted by the trustee in bankruptcy against such attorney or counsellor in the District Court where the estate in bankruptcy is being administered be maintained upon service of process upon the attorney or counsellor, who is a non-resident of the district, outside of that district?"

An answer to these questions involves the construction of § 60*d* of the bankruptcy act of 1898, which reads:

"60*d*. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney or counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be rëexamined by the court on the petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

This section does not undertake to provide for a plenary suit, but for an examination and order in the course of the administration of the estate with a view to permitting only a

reasonable amount thereof to be deducted from it because of payments of money or transfers of property to attorneys or counsellors in contemplation of bankruptcy proceedings. There is no provision for the enforcement of this section in another court of bankruptcy, where the bankrupt may be personally served with process in a plenary suit; such court is not given authority to reëxamine the transaction. No other court has authority to determine the reasonable amount for which the transaction can stand. *Swartz* v. *Frank*, 183 Missouri, 439.

Section 60*d* added a feature to the bankruptcy act not found in former acts, regulating practice and procedure in bankruptcy, therefore adjudications upon other provisions of the bankruptcy act, or concerning the judiciary act giving jurisdiction to the courts of the United States have no binding effect in the construction of this section.

This is not a case of preference, where part of the estate is transferred to a creditor so as to give to him more of the estate than to others of the same class under § 60 of the bankruptcy act, nor is it a case of fraudulent conveyance under § 67. It is a transfer in consideration of future services, to be reduced if found unreasonable in amount. In *Furth* v. *Stahl*, 205 Pa. St. 439, the opinion is by Mr. Justice Mitchell, and, speaking for the Supreme Court of Pennsylvania, the learned justice, after quoting § 60*d*, says:

"A pledge or payment for a consideration given in the present, or to be given in the future, whether in money or goods or services, is not a preference. The object of prohibiting preferences is to prevent favoritism, whether for secret benefit to himself or other reason, among a debtor's creditors who ought in fairness to stand on the same footing. A transaction by which the debtor parts with something now, in return for something he acquires or is to acquire in the future, is not within the mischief the act was aimed against. Section 60 therefore expressly recognizes this class of transactions; but, as it is capable of abuse, provides for a reëxamination and re-

duction, if necessary, to a reasonable amount by the court on the petition of the trustee or a creditor."

The same statute was before the Court of Appeals for the Sixth Circuit in the case of *Bothe* v. *Pratt*, 130 Fed. Rep. 670. In that case, in speaking of the provisions of § 60*d*, Judge Severens, speaking for the court, said:

"It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought without unnecessary expenditure to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right to employ and pay for legal assistance in his affairs during that critical period, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount—in short, proposed to apply to the incipient stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors and proctors in no worse position than it did some other classes of those having business with the debtor."

And the court reached the conclusion that there having been no petition of the trustee or any creditor to inquire into the reasonableness of the compensation to be paid attorneys in contemplation of bankruptcy, his claim should be allowed, and the learned judge adds: "As the rights of the parties are governed by the specific provision of the statute relating to the subject, no question of preference by reason of the payments arises."

The bankrupt act itself leaves no doubt as to what is a preference which can be sued for in another jurisdiction, for the section (60) provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing

of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

To undertake to bring within this definition of a preference, requiring a plenary action for its recovery, the protection given a bankrupt's estate, because of a transfer of property or money to an attorney or counsellor for services to be rendered in contemplation of filing a petition in bankruptcy, is to add to the clearly defined preferences contemplated by the act, and is to include entirely different transactions, not embraced in the statutory definition of a preference as Congress has defined that term.

Section 60*d* is *sui generis*, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, reëxamine it with a view to a determination of its reasonableness.

The section makes no provision for the service of process, and in that view such reasonable notice to the parties affected should be required as is appropriate to the case, and an opportunity should be given them to be heard.

We see no reason why notice of the proceedings under § 60*d* may not be by mail or otherwise, as the court shall direct, so that an opportunity is given to appear in the court where the

estate is to be administered and contest the reasonableness of the charges in question.

Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular District Court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights.

Our attention is called to other cases in which this view has been taken of this section of the bankruptcy act. In *In re Lewin*, 103 Fed. Rep. 850, it was held that a proceeding upon the petition of a trustee under this section is one administrative in its character, and that jurisdiction was not dependent upon service of regular process as in a suit, but is expressly given by statute, and that a notice of the hearing before the referee given by mail to the attorneys in interest a reasonable time before the hearing was sufficient. In speaking of this section Judge Wheeler says:

"This is not a suit such as is mentioned in that clause of section 23, but is an administrative proceeding, of which the bankruptcy court has express jurisdiction, given by this clause 'd' of section 60, if it would not have any by the general grant of jurisdiction over bankrupts and their estates, and of their attorneys in the proceedings, as officers of the court. This specific provision seems rather to have been intended for requiring specific vigilance in this quarter, and for providing for a recovery of any excess from the attorneys, than for any special grant of jurisdiction, which, however, it plainly gives. The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in *Rosser's case*, cited. He says, at page 159, Am. Bankr. R. and page 567, 101 Fed. Rep.:

" 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice

must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.' "

Jurisdiction to reëxamine the transfer to counsel was certainly not conferred upon any state court. When the statute says that if the transfer in contemplation of filing a petition in bankruptcy shall be found to be excessive it may be reduced by "the court," is it possible that it was intended to give the state courts jurisdiction of that much of the administration of the estate, and oust the District Court of the United States, and perhaps delay the settlement of the estate until the state courts of original and appellate jurisdiction should determine the reasonableness of the counsel fee provided for in contemplation of bankruptcy? The answer to this question is obvious, and clearly against a construction which has this effect upon the system of bankruptcy to be administered in the District Courts of the United States established by the act of Congress.

It is true that the state courts under the bankruptcy act as it stood before the amendment of February, 1903, were given jurisdiction to entertain suits to recover preferences to the exclusion of the Federal courts, unless the defendant consented to be sued in the Federal court. *Bardes* v. *The Bank*, 178 U. S. 524. The District Courts had jurisdiction only over proceedings in bankruptcy, as distinct from plenary suits against third persons having possession of transferred property, to be exercised when the District Court had acquired jurisdiction of the bankrupt's property. *Bardes* v. *The Bank*, *supra*; *White* v. *Schloerb*, 178 U. S. 542; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Whitney* v. *Wenman*, 198 U. S. 539.

Section 60*d* is a part of the original Bankruptcy Act of 1898, and intended by Congress to be a part of a uniform system of bankruptcy to be consistently administered by the courts given jurisdiction. Suppose, then, instead of obtaining the order in the District Court administering the property, the trustee, because he could not get personal service upon the attorneys, had gone to any court within the limits of the State of Arkansas,

state or Federal, upon the theory of a preference, and obtained jurisdiction by valid service of process, it was in the power of the defendants to end the suit by refusing to consent to the jurisdiction of such court. If suit was begun in the state court of Arkansas that court would have answered, as did the Supreme Court of Missouri in *Swartz* v. *Frank*, 183 Missouri, 439, the bankruptcy act confers no jurisdiction upon a state court to entertain an application of the trustee, or of a creditor to reduce the provision made for counsel, that jurisdiction is given alone to the District Court of the United States administering the property. If the action had been brought in the United States court it would have made the same answer, and, in addition thereto, the jurisdiction of the Circuit or District Court of the United States could have been ousted, prior to the amendment of 1903, by the defendants withholding their consent to the jurisdiction of the Federal court. It is true that by the amendment referred to (the act of February, 1903) concurrent jurisdiction with the state courts is now given to the Federal courts, to suits for the recovery of property under § 60, subdivision *b*, and § 67, subdivision *e*. These last-named sections have reference to suits to recover preferences or fraudulent conveyances. No attempt has been made to change the exercise of jurisdiction under § 60*d*. The transfer to counsel may be wholly sustained; it is certainly valid to the extent that it is reasonable. It is neither a preference nor a fraudulent conveyance, as defined by §§ 60*b* or 67*e* of the act.

It is to be noted that in this case, as the statement of the certificate shows, the District Court rendered no judgment against the defendant for a recovery of the excess, but directed the trustee to bring an action therefor. It simply assumed and exercised the jurisdiction conferred by § 60*d* to determine the amount of the excessive transfer for a counsel fee provided in view of filing a petition in bankruptcy. It may be that this order, though binding upon the parties, cannot be made finally effectual until a judgment is rendered in a jurisdiction where it can be executed.

We reach the conclusion that no reëxamination can be had in this transaction, except in the District Court of the United States administering the estate.

If the opinions of text-writers are to be looked to—and certainly they are entitled to much respect—they have spoken with clear meaning as to the section of the Bankruptcy Act which is the subject-matter now under consideration. In Loveland on Bankruptcy (3d ed.), p. 166, that author says:

"The petition by the trustee to reëxamine a transaction between the bankrupt and his attorney under this section is administrative in character, of which the court of bankruptcy has jurisdiction, irrespective of section 23 of the act."

And in Collier on Bankruptcy, 6th ed., the rule is thus stated (p. 492):

"The practice on proceedings of this character—the attorney being usually an officer of the court—is both simple and summary. Being rarely resorted to, there are no stated rules or forms applicable. The amount paid must appear in schedule B (4) of a voluntary petition. Any notice to the attorney directed by the court is sufficient. The motion may be heard on affidavits or orally. A suit to recover will rarely be necessary; though an order to restore, if not obeyed, is perhaps not now the foundation for a proceeding in contempt."

In Brandenburg on Bankruptcy (3d ed.), § 971, it is said:

"This provision [60*d*] recognizes this fact [the right to employ counsel] and approves the payment by the bankrupt to such attorney of reasonable compensation. The reasonableness of it may be inquired of by the court upon the petition of the trustee or any creditor. This proceeding is administrative in character, in which the jurisdiction of the court is not dependent on the service of process but is expressly given by statute and a notice of hearing therein given by mail a reasonable time before the hearing is sufficient."

And in the latest work on the subject, Remington on Bankruptcy, the rule is thus stated:

"The court has jurisdiction over the attorney to require re-

payment by him. Such jurisdiction may be exercised in the bankruptcy proceedings themselves; and its exercise is not violative of the rules regarding the form for suits against adverse claimants; moreover, it is provided for by a special clause of the bankrupt act itself. Such reëxamination should be had, however, only on due notice to the attorney concerned." Sec. 2099, p. 1298.

The construction which we have given § 60*d* does not deprive parties of rights secured under the Seventh Amendment of the Constitution to trials by jury in suits at common law where the value in controversy exceeds twenty dollars. This provision of the Constitution extends to rights and remedies peculiarly legal in their nature, and such as it was proper to extend in courts of law by the appropriate modes and proceedings of such courts. *Shields* v. *Thomas*, 18 How. 253–262.

This section in effect confers a special jurisdiction in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy. When the affairs of one about to be adjudicated a bankrupt are in that situation, then the act, recognizing the right of the bankrupt to legal services to be rendered, undertakes to prevent the diminution of the estate to be administered and distributed for the benefit of creditors beyond a fair provision for counsel under such circumstances. To the extent that the provision is unreasonable the transfer is not given the effect to separate the property from the bankrupt's estate. As to this excess, the estate comes, within the meaning of the bankruptcy act, within the jurisdiction of the court, and will be ordered to be restored and administered for the benefit of creditors. The order contemplated can only be made after reasonable notice, which the facts certified in this case show was given to the petitioners.

The first and second questions should be answered in the affirmative and the third, as having application to a suit before the order is made in the bankruptcy proceeding, in the negative.

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

I am constrained to dissent in this case, and will state my reasons therefor. The facts are sufficiently given in the opinion of the court. The petitioners were lawyers, living at Hot Springs, Arkansas. They had never been within the State of Colorado, or appeared in the District Court except to file their petition for review, and the only service upon them was made in Arkansas by the delivery of a copy of the application and an order to show cause. The District Court of Colorado, the court in which the bankruptcy proceedings were had, confirming the report of the referee, adjudged that of the money paid to the petitioners employed by the bankrupt in anticipation of proceedings in bankruptcy to render services therein, the sum of $800 was a reasonable compensation for such services, and ordered that the trustee proceed to recover the excess from petitioners. Justification for this order is found in this paragraph of the bankruptcy act:

"SEC. 60*d*. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reëxamined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." 30 Stat. 544, 562.

It is said that this was an administrative and not a judicial proceeding. Three possibilities are suggested by the section. One is that the bankruptcy court, after an examination, may find that there is reason to believe that the attorneys have been paid an excessive sum, and direct the trustee to proceed by action in any court acquiring jurisdiction of the persons of the attorneys to recover what by that court shall be adjudged excessive. This would be a strictly administrative proceeding,

and if that were the conclusion of the court I should have nothing to say in the way of dissent. Another is that the bankruptcy court both adjudicates the amount of the excess—the amount which has been wrongfully paid to the attorneys, and by which, in effect, they have been preferred to the prejudice of creditors of the bankrupt, and also awards process for the collection of that excess. This is not suggested in the opinion of the court, which in effect holds the third possibility, to wit, that the bankruptcy court can adjudicate the amount of the wrongful prepayment, leaving the recovery of that amount to be accomplished by action in a court acquiring jurisdiction of the person in the ordinary way of legal proceedings. Such a construction is inconsistent with the whole history of the jurisdiction of District and Circuit Courts since the foundation of the Government, and is, indeed, against the construction placed on other provisions of the present bankruptcy law.

By Article VI of the Amendments to the Constitution criminal prosecutions are limited to "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." By this, so far as criminal cases are concerned, a state locality of jurisdiction is established beyond the power of Congress to disturb. We need not stop to inquire whether Congress can invest the District Court of a single district or State with a jurisdiction in civil cases operative through the whole length and breadth of the country, but has it done so?

The original judiciary act, passed in 1789 (1 Stat. 73, 79), provides, in respect to Circuit Courts, that "no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." See also with respect to the jurisdiction of District Courts, Rev. Stat. § 563, and with respect to that of Circuit Courts, Rev. Stat. § 629.

Construing the judiciary act of 1789, it was said in *Toland* v. *Sprague*, 12 Pet. 300, 328:

"The judiciary act has divided the United States into judicial districts. Within these districts a Circuit Court is required to be holden. The Circuit Court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court, to have run into any State of the Union. It has not done so. It has not in terms authorized any original civil process to run into any other district; with the single exception of subpœnas for witnesses, within a limited distance."

While the general conditions of jurisdiction of the Federal courts were in some respects changed by the act of August 13, 1888 (25 Stat. 433), the change does not affect the present question.

Before the District Court of Colorado could in ordinary matters acquire jurisdiction over the person of one not found within its territorial limits, there must be a voluntary appearance of the defendant. He cannot, in an ordinary litigation, be brought into that court by service of process outside the limits of the court's jurisdiction. It has been held that the Circuit Court of one State has no jurisdiction in matters such as the sale of real property beyond the limits of the State. *Boyce's Exrs.* v. *Grundy*, 9 Pet. 275; *Miss. & M. R. R. Co.* v. *Ward*, 2 Black, 485; *Northern Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233. It is true that when suit is brought to enforce any legal or equitable claim against real or personal property within the district where the suit is brought one who is not an inhabitant of nor found within the district, and does not voluntarily appear thereto, can be brought into court by personal service outside the limits of the district or by publication, as the court may direct, but any adjudication made in that suit, as regards such absent defendant without appearance, affects only his property within the district. Rev. Stat. § 738. So where suit is brought to foreclose a mortgage or trust deed on property

situate in several States the settled practice is for proceedings of foreclosure to be commenced in one court, called the court of primary jurisdiction, and then, in order to establish and maintain judicial control over the property in the other States, obtain ancillary administration in those States; although if the defendant, the owner of the property, is brought into the court of primary jurisdiction that court may act upon him and compel him to do with the property that which ought to be done. But in all these cases either the person or the property is within the territorial jurisdiction of the court.

When an individual, not an inhabitant of the State or district and not found therein, is sought to be charged, by reason only of his indebtedness to a defendant duly served, jurisdiction is not acquired by mere service of notice outside the State, for the fact of indebtedness does not bring him within the jurisdiction of the court. While for some purposes the *situs* of a debt may accompany the creditor, yet that *situs* is not sufficient to give to a court jurisdiction of a personal action against the debtor; that must be maintained in the State where the debtor is found.

Now the recovery of an amount due or of property belonging to an individual or an estate is ordinarily by a common law action. That the claimant is an estate and in the hands of a trustee or receiver does not change the nature of the proceeding. Suppose one of our large railroad properties is in the hands of receivers, can it be tolerated that the amount of the indebtedness by any individual to that estate can be determined absolutely by the court without a jury? If this be so, what becomes of the protection given by Article VII of the Amendments to the Constitution, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"? Even if an action has to be brought to obtain the process of execution in the State where the alleged debtor resides, of what significance is it if the amount which is to be recovered is already settled, not by a jury, but by a court acting independently and in a prior pro-

ceeding? If the benefit of a trial by jury can in that way be taken away it will take but little ingenuity on the part of lawmakers to provide for the total destruction of the right of trial by jury, a right which has been considered of priceless benefit in all English-speaking nations, and the protection of which is imbedded in the National as well as state constitutions.

How appropriate in this connection is the language of Mr. Justice Bradley, delivering the opinion of the court in *Boyd* v. *United States*, 116 U. S. 616, 635, where, speaking of an attack upon another constitutional provision, he says:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Again, it is said that an excessive prepayment to an attorney does not come within the technical definition of a preference, as stated in § 60:

"SEC. 60*a*. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

An attorney rendering services becomes thereby a creditor of the client, and if he is paid more for the services than they are worth he has received as creditor more than he is entitled to

and comes within the spirit, if not the letter, of § 60, which provides that "a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition . . . made a transfer of any of his property, and the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." The idea of bankruptcy is that the bankrupt is unable to pay his debts in full, and if the attorney has received payment in full he has received a greater percentage of his debt than any other creditor.

While § 60*d* is not in the bankruptcy act of 1867, obviously it was specially inserted in the present act for the purpose of making clear the liability of counsel receiving payment in advance. It is simply a declaration that an excessive prepayment to counsel employed with a view to bankruptcy proceedings is to be considered, so far as the excess is concerned, a preference and recoverable by the trustee in bankruptcy. And unless a contrary intent be clearly manifested the proceeding to recover that preference should be in the same way and by the same tribunals that have jurisdiction of any other proceeding to recover money or property given by way of preference. It would be giving an unreasonable extension to language to make it not simply a declaration of the right to recover, but also a limitation of the tribunal in which the recovery can be had or the amount due determined—a limitation not obtaining in respect to any other preference.

In *In re Waukesha Water Company*, 116 Fed. Rep. 1009, it was held by the District Court of the Eastern District of Wisconsin that "the bankrupt act of 1898 confers no power on a court of bankruptcy to summon before it by a rule to show cause third persons who are not parties to the record and who reside without the district and State, and are there served with the order, and under the general rules of law governing the Federal courts, in the absence of express authority, such service is ineffectual to confer jurisdiction *in personam*."

Again, it is suggested that § 60*d* provides for proceedings in the bankruptcy court—no vesting of jurisdiction in any other than that court—and it is said there is no provision for a plenary suit to recover the amount of the excessive prepayment and none for a jury. But by the bankrupt act of March 2, 1867, the general jurisdiction over bankruptcy proceedings was vested in the court in which they were commenced, and there was no special provision for ancillary proceedings in the courts of other districts, and yet it was decided that those ancillary proceedings might be held that seemed to be the necessary result of the general jurisdiction conferred and to be in harmony with the design and scope of the act. As said by Mr. Justice Bradley, in *Lathrop, Assignee,* v. *Drake,* 91 U. S. 516, 517, 518:

"Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. . . . Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act."

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

CITY OF ST. LOUIS *v.* UNITED RAILWAYS COMPANY.

SAME *v.* ST. LOUIS AND SUBURBAN RAILWAY COMPANY.

SAME *v.* ST. LOUIS AND MERAMEC RIVER RAILROAD COMPANY.

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

Nos. 193, 194, 195. Argued March 20, 23, 1908.—Decided May 18, 1908.

While a State, or a municipal corporation acting under the authority of the State, may deprive itself by contract of its lawful power to impose certain taxes or license fees, such deprivation only follows the use of clear and unambiguous terms; any doubt in the interpretation of the alleged contract is fatal to the exemption.

The fact that a street railway company has agreed to pay for the use of the streets of a city for a given period does not, in the absence of unequivocal terms to that effect, create an inviolable contract within the meaning and protection of the contract clause of the Federal Constitution which will prevent the exaction of a license tax within the acknowledged power of the city. *New Orleans City and Lake Railway Company* v. *New Orleans*, 143 U. S. 192.

The ordinances of the city of St. Louis, granting rights of construction and operation to street railways involved in this case, do not contain any clearly expressed obligation on the part of the city to surrender its right to impose further license or taxes upon street railway cars which is within the meaning and protection of the contract clause of the Federal Constitution.

THE facts are stated in the opinion.

Mr. William F. Woerner, with whom *Mr. Charles W. Bates* was on the brief, for appellant:

Under its charter, derived from the constitution of Missouri, art. IX, §§ 20–25, the city of St. Louis had the broad and specific power, in general, to enact ordinance 21,087 imposing a license tax on all street railway cars operated within its limits, as well as to enact the prior ordinance thereby replaced which had fixed the amount at $25.00 per car, per annum. The power

to tax as well as to license is conferred in express terms. Charter of St. Louis, art. III, § 26, cl. 5; *Springfield* v. *Smith*, 138 Missouri, 645, 654; *Kansas City* v. *Corrigan*, 18 Mo. App. 206; 27 Am. & Eng. Enc. Law (2d ed.), "Street Railways," p. 52; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365. See further on the general power of cities to impose license taxes in Missouri: *St. Louis* v. *Weitzel*, 130 Missouri, 600, 619; *Aurora* v. *McGannon*, 138 Missouri, 38, 45; *St. Louis* v. *Green*, 7 Mo. App. 468, 474, aff'd on this point in 70 Missouri, 562.

An examination of the numerous franchise or right-of-way ordinances to the predecessors of appellees, demonstrates that the conditions therein recited "in consideration" of which the grants were made, are conditions annexed under art. X of the city charter, and assumed by the street car companies in order to obtain the city's initial consent, necessary under the state constitution, and cannot be construed as an exercise of the power conferred in the city charter in art. III, § 26, cl. 5, to tax street cars, nor as an exemption from such taxes.

There can be no question as to the right or propriety of the city to impose just such terms and conditions before giving its consent as it chose to impose in the said right-of-way ordinances, to wit: payment of certain fixed stipulated sums, or percentage of gross receipts increasing as the franchise ages, paving and repair of space between the rails, rate of fare, time for completion of work, etc.; all of such provisions stand upon the same basis as to the city's power, but vary in particularity with each respective ordinance.

Whilst it is true in one sense that all Missouri corporations, including street railways, derive their franchises or right to exist originally from the State, acting through the General Assembly under general law, yet the rights-of-way conferred by the city upon street railroads are in effect equivalent to franchises, because unlike other corporations, under the Constitution, no street railroad can be granted the right "to construct and operate a street railroad within any city, town, village, or on any public highway without first acquiring the

consent of the local authorities, nor can the franchise so granted be transferred without similar assent." Constitution of Missouri of 1875, art. XII, § 20. See also as to such power being equivalent to a franchise: *Blair* v. *Chicago*, 201 U. S. 400, *loc. cit.* 457–460; *State ex rel. Cream City Ry.* v. *Hilbert*, 72 Wisconsin, 184, *loc. cit.* 190.

And the charter of St. Louis also expressly provides that in granting the right-of-way or franchise to a street railway, the city "as a consideration therefor, may impose a per capita tax on passengers transported or an annual tax on gross receipts." Charter, art. X, § 1.

In construing the ordinance of a city conferring upon a street railway company the authority to construct and operate a street railway, the right of the city to exact license taxes will not be denied unless such right has been expressly surrendered in the ordinance. Such grants are construed strictly against the corporation companies, and liberally in favor of the public; silence is negation, and doubt is fatal to the claim. There is no such surrender by a grant to operate, construct and maintain a street railway, though given upon compliance with certain conditions and payments. And when the contract ordinance between the city and the company does not in terms dispense with the payment of a license tax, the rights of a company are not impaired by a subsequent ordinance requiring such payment. *Springfield* v. *Smith*, 138 Missouri, 645, 655; *Wyandotte* v. *Corrigan*, 35 Kansas, 21; *New Orleans City Ry.* v. *New Orleans*, 143 U. S. 192; *Railway Co.* v. *Philadelphia*, 101 U. S. 528; *Met. Street Ry. Co.* v. *New York*, 199 U. S. 1, 37; *Savannah Ry.* v. *Savannah*, 198 U. S. 392, 398; *Blair* v. *Chicago*, 201 U. S. 400, 471; *State ex rel. Cream City Ry.* v. *Hilbert*, 72 Wisconsin, 184, 194; *Newport &c. Ry.* v. *Newport*, 100 Virginia, 157; *New Orleans* v. *Orleans Ry. Co.*, 42 La. Ann. 4; *New Orleans* v. *New Orleans Ry. Co.*, 40 La. Ann. 587; *San Jose* v. *S. J. Railway*, 53 California, 475, 481; *State* v. *Herod*, 29 Iowa, 123; *Rochester Ry.* v. *Rochester*, 205 U. S. 236, 248; *Cleveland Electric Ry.* v. *Cleveland*, 204 U. S. 116, 130.

Mr. Henry S. Priest, for appellees:

The city of St. Louis had the power to grant the right to construct railways in the streets of the city; and the right to operate cars thereon for a definite period and a specific sum, payable as might be agreed. It might do both in a single ordinance, and such an ordinance when accepted by the grantee would become a binding and unalterable contract. This we claim it did by the several ordinances pleaded and put in evidence. *Detroit* v. *Railway Co.*, 184 U. S. 368; *Stearns* v. *Minnesota*, 179 U. S. 223; Art. III, § 26, subd. 5, 11, City Charter; Art. IV, City Charter.

The charter reservation of the right to alter, amend or repeal is not properly under discussion, because the ordinance which impairs the right does not pretend to be an amendment, alteration or repeal of the special ordinances granting the several rights to the different companies; and if it did, the right does not exist in such cases. Cases *supra* and Art. III, § 28, City Charter; *Ruschenberg* v. *Railway Co.*, 161 Missouri, 70.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were submitted together and involve the effect of certain ordinances of the city of St. Louis, which are alleged to be binding contracts protected by the Federal Constitution.

A bill was filed in the Circuit Court of the United States for the Eastern District of Missouri by the United Railways Company of St. Louis and the St. Louis Transit Company, the former being the lessor and the latter the lessee of a large system of street railways in the city of St. Louis. The bill seeks to enjoin the enforcement of a certain ordinance, No. 21,087, in the city of St. Louis, passed March 25, 1903, alleging violation of the contract clause of the Constitution and of rights secured by the Fourteenth Amendment. The case was tried upon the bill, answer, replication and an agreed statement of facts.

The complainants are the owners of certain rights granted by ordinances to a number of street railway companies in the city of St. Louis, the assignors of the complainants. These ordinances are set out in the record and are quite numerous. Some of them cover quite extended terms, running as long as forty and fifty years. They purport on their face to grant to the railway companies named in the ordinances, their licensees, successors and assigns, rights in certain streets "to operate, maintain and construct,"—"to lay down, construct, operate and maintain,"—"to reconstruct its tracks and maintain and operate its railway thereon." The grants in these ordinances are in consideration of certain undertakings and obligations stated therein on behalf of the railway companies, which are thus epitomized in the opinion of the learned judge in the case in the Circuit Court: (1) To commence and complete the work of laying down the tracks and installing the road within certain specified periods. (2) To grade the streets from curb to curb. (3) To construct and keep in repair that portion of the street lying between the tracks and twelve inches outside thereof. (4) To cause cars to be run day and night at certain intervals named in the ordinances. (5) To pay certain stipulated sums of money, or certain percentages of the gross earnings of the several companies, to the city each year during the continuance of the privileges specified in the contract.

At the time these ordinances were passed there was in force in the State of Missouri a certain provision of the state constitution, namely:

"No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchise so granted shall not be transferred without similar assent first obtained."

The city charter of St. Louis contains, among others, the following provisions:

"ARTICLE X.

"SEC. 1. Authority of municipal assembly in reference to street railroads--May sell franchises or impose a *per capita* tax or a tax on gross receipts.—The municipal assembly shall have power by ordinance to determine all questions arising with reference to street railroads, in the corporate limits of the city, whether such questions may involve the constructions of such street railroads, granting the right of way, or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder, or, as a consideration therefor, to impose a *per capita* tax on the passengers transported, or an annual tax on the gross receipts of such railroad, or on each car, and no street railroad shall hereafter be incorporated or built in the city of St. Louis except according to the above and other conditions of this charter, and in such manner and to such extent as may be provided by ordinance."

There was also in force in the city charter of St. Louis, article III, § 26, subdivision 11, which empowers the city, through its mayor and municipal assembly:

"Eleventh.—To protect rights of city in corporations—Grant, regulate and repeal railway franchises—Free passes on street railways prohibited.—To take all needful steps in and out of the State, to protect the rights of the city in any corporation in which the city may have acquired an interest; to have sole power and authority to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter or repeal any such grant, in whole or in part, and to regulate and control the same as to their fares, hours and frequency of trips, and the repair of their tracks, and the kind of their rails and vehicles; but every right so granted shall cease, unless the work of construction shall be begun within one year from the granting of the right and be continued to completion with all reasonable practical speed, and it shall be the cause of forfeiture of the rights and privileges derived from the city of any railroad company operating

its road only within this city, which shall allow any person to ride or travel on its road gratuitously or for less than usual price of fare, unless such person be an officer or employee of such company."

The fifth subdivision of § 26 of article III, clause 5, confers upon the mayor and assembly the power to license, tax and regulate certain occupations and kinds of business, vehicles, conveyances, etc., among others, street railway cars. As appears from the agreed statement of facts, at the time the ordinances granting rights to the street railways were passed there were sections of the municipal code of St. Louis (2134 *et seq.*) in force, requiring the street railway companies to pay to the city collector an annual license fee of $25 for each and every car used by them, in transporting passengers for hire in the city. These sections were passed under the power conferred to license, tax and regulate occupations, vehicles and street railway cars.

The ordinance which is the subject-matter of this controversy is No. 21,087, purporting to impose a tax equal to one mill for each pay passenger on each car, and purporting to be an amendment of the sections of the municipal code fixing the license tax at $25 per car. It is stipulated in the agreed statement of facts that all the railway companies named in the complaint, including the United Railways Company and the St. Louis Transit Company, paid the annual license of $25 per car until the going into effect of ordinance 21,087.

This case was decided by the learned judge of the Circuit Court upon the theory that the power of the city to give its consent to the use of the streets for the purpose of constructing and operating railroads, and the power to license street railway cars, were both exercised in the special ordinances in question, and that in fixing the compensation to be paid by the railway companies an irrevocable contract was made which prevented the city, during the terms of the ordinances, from imposing any license fee or tax for the operation of the cars; for, says the learned judge:

"There is neither statutory command nor any perceptible reason why both these powers should not be exercised in one and the same ordinance, and such, in my opinion, is the obvious purpose of the original ordinances granted to complainants' assignors.

"The right 'to construct and operate' is conferred in terms admitting of no doubt. The license, which is essentially an occupation tax, is, in my opinion, also fixed in each of the ordinances. The several original ordinances or contracts clearly mean that the city exacted, among other things, certain quarterly or yearly payments of money to be made to it by the railroad companies as a consideration for the grant by it of the right to occupy and use its streets for the purpose of laying down, maintaining and operating railroad tracks thereon. The law nowhere commands that the license fee, as authorized by the fifth subdivision in question, shall be for annual or other terminal occupation. And I perceive no reason why the city may not at the outset fix such a license for the full term of its grant. This is what I think it did in and by the terms and stipulations of the several ordinances in question."

The theory, then, upon which the bill was framed and this case decided was that the city, having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance of March 5, 1903, amending the municipal code in the manner already referred to. These sections of the municipal code requiring the payment of the license fee impose a tax, as the main purpose of their enactment is the raising of revenue. *City of St. Louis* v. *Spiegel*, 75 Missouri, 145, 146.

The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a State or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or

license fees, at the same time the principle has been established that such deprivation can only follow when the State or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption. The section of the Missouri constitution and the laws, to which we have referred, clearly show that while the franchise of the corporation essential to its existence is derived from the State, the city retains the control of its streets, and the use of them must be acquired from the municipal authorities upon terms and conditions which they shall fix. *Blair* v. *Chicago*, 201 U. S. 400.

An examination of the cases in this court shows that it is not sufficient that a street railway company has agreed to pay for the privilege of using the streets for a given term, either in a lump sum, or by payments in installments, or percentages of the receipts, to thereby conclude the municipality from exercising a statutory authority to impose license fees or taxes. This right still exists unless there is a distinct agreement, clearly expressed, that the sums to be paid are in lieu of all such exactions.

A leading case is *New Orleans City & Lake Railroad Co.* v. *New Orleans*, 143 U. S. 192. In that case the city of New Orleans, on October 2, 1879, sold to the New Orleans City Railroad Company, assignor of the plaintiff in error, for the price of $630,000, the right of way and franchises for running certain lines of railroad for carrying passengers within the city, for the term of twenty-five years, and the company agreed to construct its railroad, to keep the streets in repair, to comply with the regulations as to the style and running of cars, rates of fare and motive power, and to annually pay into the city treasury, upon the assessed value of the road and fixtures, the annual tax levied upon the real estate, the value of the road and fixtures to be assessed by the usual mode of assessment; and the city bound itself not to grant, during the period for which the franchises were sold, a right of way to any other

railroad company upon the streets where their right of way was sold, unless by mutual agreement between the city and the purchaser or purchasers of the franchises.

Afterwards, in the year 1887, under authority of a legislative act, the city imposed a license tax upon the business of carrying on, operating and running a horse or steam road for the transportation of passengers within the limits of the city, payable annually, and based on the annual gross receipts; when the same exceeded $500,000, the amount to be $2,500. The railroad company admitted its receipts exceeded that sum, and claimed the protection of the Constitution of the United States for its franchise contract extending to January 1, 1906, as above set forth.

This would seem to be as strong a case for the exemption from the license tax as could be made, short of a specific agreement binding the city not to exercise its power in that direction.

This court affirmed the judgment of the Supreme Court of Louisiana denying the contention of the railroad company (40 La. Ann. 587), and Mr. Justice Gray, speaking for the court, said (143 U. S. 195):

"Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665, 668, and cases cited. Assuming, without deciding, that the city of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the State, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property.

"In *Gordon* v. *Appeal Tax Court*, 3 How. 133, upon which the plaintiff in error much relied, the only point decided was that an act of the legislature, continuing the charter of a bank, upon condition that the corporation should pay certain sums

annually for public purposes, and declaring that, upon its acceptance and complying with the provisions of the act, the faith of the State was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error has been often explained or disapproved. *State Bank* v. *Knoop*, 16 How. 369, 386, 401, 402; *People* v. *Commissioners*, 4 Wall. 244, 259; *Jefferson Bank* v. *Skelly*, 1 Black, 436–446; *Farrington* v. *Tennessee*, 95 U. S. 679, 690, 694; *Stone* v. *Farmers' Loan & Trust Company*, 116 U. S. 307, 328.

"The case at bar cannot be distinguished from that of *Memphis Gaslight Co.* v. *Shelby County*, in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gasworks and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: 'The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the State to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the State that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the States. That is left to the state constitution and state laws.' 109 U. S. 398, 400."

This case was but an affirmation of the doctrine announced in *Railroad Company* v. *Philadelphia*, 101 U. S. 528; *Delaware Road Tax Case*, 18 Wall. 206. The New Orleans case was quoted with approval, and the former cases in this court reviewed in the recent case of *Metropolitan Street Railway Company* v. *New*

York Tax Commissioners, 199 U. S. 1. In that case the decision of the New York Circuit Court of Appeals was affirmed, sustaining the right of the State of New York to tax franchises of street railway companies, notwithstanding the railway companies had already paid for the right to construct, maintain and operate and use street railroads in consideration of payment into the treasury of the city of New York of a percentage of their gross receipts. In that case Mr. Justice Brewer, who spoke for the court, said (pp. 37, 38):

"Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically in respect to the construction, operation and maintenance of a street railroad. These were all that in terms was granted. As consideration for this grant the grantees were to pay something, and such payment is nowhere said to be in lieu of or as an equivalent or substitute for taxes. All that can be extracted from the language used was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation."

Many state authorities have reached the same conclusion. We will refer to some of them. *Springfield* v. *Smith*, 138 Missouri, 645; *Wyandotte* v. *Corrigan*, 35 Kansas, 21; *State ex rel. Cream City Ry.* v. *Hilbert*, 72 Wisconsin, 184; *Newport &c. Ry.* v. *Newport*, 100 Virginia, 157; *New Orleans* v. *Orleans Ry. Co.*, 42 La. Ann. 4; *New Orleans* v. *New Orleans Ry. Co.*, 40 La. Ann. 587; *San Jose* v. *S. J. Railway*, 53 California, 475, 481; *State* v. *Herod*, 29 Iowa, 123.

Applying these principles to the ordinances in question, we do not find in them any express relinquishment of the power to levy the license tax which is the subject-matter of this controversy. In some of them is found the language that "such payments are to be in addition to all taxes, as now or after-

wards shall be prescribed by law." In one ordinance concerning consolidation of roads it is agreed, as to certain payments from gross receipts, that such "payments shall be in addition to all other taxes or license fees now or hereafter prescribed by law." In one of them is found the following language:

"Said Lindell Railway Company shall in lieu of all payments, now required of it under any and all previous ordinances, and such as are now, or may hereafter by ordinance passed be required of any railroad company whose tracks it is hereby authorized to acquire, etc., on the first day of (various months) pay to the city of St. Louis, etc. (various sums), which several sums said Lindell Railway Company, its successors and assigns, in consideration of the rights and privileges granted by this ordinance, hereby agrees to pay to the city of St. Louis, at the times, . . ." etc.

The stipulation as to the payments to be in lieu of all other payments under previous ordinances and such as are now or may by ordinance be hereafter passed, etc., in this ordinance may well be referred to the special ordinances passed under the right to grant the use of the streets "in consideration of the rights and privileges" therein granted, and are not designed to repeal *pro tanto* the section of the municipal code then in effect imposing a license fee on railway cars operated in the city.

No ordinance contains any express relinquishment of the right to exact a license fee or tax. It is true that the city in granting the right to use the streets by special ordinance and in exercising by general ordinance the right conferred in the charter to impose a license tax upon cars is dealing with rights and privileges somewhat similar, but, nevertheless, essentially separate and distinct. In the special ordinances the city is making an arrangement with the railway company to confer the right to use the streets in consideration of certain things the company is to do by way of operation and otherwise, including, it may be, payment of fixed sums or a proportion of receipts in consideration of the rights and privileges conferred.

The city does this by virtue of its power to grant rights and privileges and control their exercise in the streets of the city, power expressly conferred in the charter of the city.

In the fixing of a license tax upon all companies alike for the privilege of using cars in the city, it is exerting other charter powers. It makes provision uniformly applicable to all persons or companies using street cars. It is a revenue measure equally applicable to all coming within its terms. We do not perceive that the exercise of the power to grant privileges in the streets in making terms with companies seeking such rights, in the absence of plain and unequivocal terms to that effect, excludes the city's right to impose the license tax under the power conferred for that purpose.

How, then, stands the case? Is it true that because the city has required and the company has agreed to pay certain sums fixed in amount, or based on the receipts, for the use of the streets, that it has thereby deprived itself of the power to exercise the authority existing at the time the ordinances were passed to license street railway cars, and in the exercise of that power to charge a license fee or tax? At the time when the several special ordinances were passed the city of St. Louis had the right under its charter to grant the use of the streets for the use of the company, upon the terms which are named in such ordinances. It also had authority under another provision of its charter to require a license fee on certain vehicles, including street railway cars. There was in force a section of the municipal code assessing this license charge at $25.00 per annum for each car. (This is the code which has been amended by No. 21,087, in controversy.) It is stipulated that until the passage of the last-named ordinance the railway companies paid the license fees without objection. It is said in the opinion of the learned judge below that the tax, equal to one mill for each paid passenger, amounts to a tax of two per cent on the gross receipts, and is, therefore, an increase on what the company had theretofore agreed to pay. But the tax is not levied on the gross receipts as such, and any license tax, in

whatever sum imposed, would take something from the gross receipts of the company.

It seems to us that this case is virtually decided by the rule laid down in *Railway Company* v. *New Orleans*, 143 U. S. 192, *supra*, which holds that because a street railway company has agreed to pay for the use of the streets of the city for a given period, it does not thereby create an inviolable contract which will prevent the exaction of a license tax under an acknowledged power of the city, unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation.

We are of the opinion that an application of settled principles, derived from the decisions of this court, shows that these ordinances do not contain any clearly expressed obligation on the part of the city surrendering its right to impose further license fees or taxes upon street railway cars, and we are of the opinion that the learned Circuit Court erred in reaching the contrary conclusion and in granting a decree perpetually enjoining the enforcement of the ordinance in controversy.

We have discussed this case on the record and briefs filed in No. 193. It was said by the learned counsel in the argument at bar that cases Nos. 194, 195 involved identical questions. For the reasons stated the decrees in the three cases are reversed.

Reversed.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY *v.* TAYLOR, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 201. Argued April 14, 1908.—Decided May 18, 1908.

Each State may, subject to restrictions of the Federal Constitution, determine the limit of the jurisdiction of its courts, and the decision of the highest court sustaining jurisdiction although the cause of action arose outside the border of the State is final and does not present a Federal question.

The provision in § 5 of the Safety Appliance Act of March 2, 1893, 27 Stat. 531, referring it to the American Railway Association and the Interstate Commerce Commission to designate and promulgate the standard height and maximum variation of draw bars for freight cars is not unconstitutional as a delegation of legislative power. *Buttfield* v. *Stranahan*, 192 U. S. 470.

Under the Safety Appliance Act of 1893, 27 Stat. 531, the center of the draw bars of freight cars used on standard guages shall be, when the cars are empty, thirty-four and a half inches above the rails, and the statute permits when a car is loaded or partly loaded a maximum variation in the height downwards of three inches. The statute does not require that the variation shall be proportioned to the load or that a fully loaded car shall exhaust the entire variation.

An instruction that under the statute the draw bars of fully loaded freight cars must be of a uniform height of thirty-one and a half inches and that a variation between two loaded cars constitutes negligence under the statute is prejudicial error.

Although the constitutional grant of power to this court to review judgments of the state courts may be wider than the statutory grant in § 709, Rev. Stat., the jurisdiction of the court extends only to the cases enumerated in that section.

The denial by the state court to give to a Federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the United States and presents a Federal question reviewable by this court under § 709, Rev. Stat.

It is only by reviewing in this court the construction given by the state courts to Federal statutes that a uniform construction of such statutes throughout all the States can be secured.

The Safety Appliance Act of March 2, 1893, 27 Stat. 531, supplants the common-law rule of reasonable care on the part of the employer as to providing the appliances defined and specified therein, and imposes upon

interstate carriers an absolute duty; and the common-law rule of reasonable care is not a defense where in point of fact the cars used were not equipped with appliances complying with the standards established by the act.

The courts have no responsibility for the justice or wisdom of legislation. They must enforce the statute, unless clearly unconstitutional, as it is written, and when Congress has prescribed by statute a duty upon a carrier the courts cannot avoid a true construction thereof simply because such construction is a harsh one.

THE facts are stated in the opinion.

Mr. Rush Taggart, with whom *Mr. John F. Dillon* was on the brief, for plaintiff in error:

A Federal question was presented when plaintiff in error moved at the close of all the testimony in the case for a verdict in its favor on the ground that Congress had not passed a valid law requiring railroads engaged in interstate commerce to equip their cars with couplers of uniform and standard height.

Congress alone has the power to provide for uniform and standard height of draw bars; this power is exclusively in the Congress, and cannot be delegated to any other association, commission or agency. When it came to making provision for uniform and standard height of draw bars it was the duty of Congress to ascertain from any source it desired to use—the American Railway Association—the Interstate Commerce Commission—the Master Car Builders' Association—or any number of those railway managers who may be found in any State of the Union—what that uniform and standard height should be, and then provide by specific enactment for its establishment, just as it did with regard to automatic couplers, air brakes, train brake system and grab-irons. Having failed to do this, this provision has fallen entirely outside the congressional enactment, and is no more enforcible in the courts than if the subject had never engaged the attention of the Congress at all. See Cooley on Const. Lim. (5th ed.), 139; 1 Dillon on Mun. Cor. (4th ed.), § 44; *Barto* v. *Himrod*, 8 N. Y. 483

The first instruction given by the trial court and finally approved by the Supreme Court of Arkansas presents a very erroneous interpretation of what is meant by uniform and standard height of draw bars.

It appears that all railroad men clearly understand what was meant by uniform and standard height and what it referred to and what provisions had been made to maintain it, and yet with all of this testimony in this record, the trial court and the Supreme Court of Arkansas interpreted the act entirely and radically different from the interpretations placed upon it by the American Railway Association and the Interstate Commerce Commission and by all the railway employés who testified in this case. This erroneous interpretation of the act was prejudicial to the plaintiff in error.

The court should have given the instruction contained in defendant's request No. 23, because a reasonable construction of the Safety Appliance Act is that if the railroad company equipped all its cars with uniform and standard height draw bars when such cars were first built and turned out of the shops, then that thereafter the defendant is only bound to use ordinary care to maintain such draw bars at the uniform and standard height mentioned in the testimony.

Mr. Sam R. Chew, for defendant in error, submitted:

There is no Federal question presented by this record and this court has, therefore, no power to review the judgment of the state court herein. *Snell* v. *City of Chicago et al.*, 152 U. S. 193, 195; *Miller* v. *Swann*, 150 U. S. 132; *Eustis* v. *Bowles*, 150 U. S. 361; *Scudder* v. *New York*, 175 U. S. 32; *Columbia Water Power Co.* v. *Columbia Electric Street Car Co.*, 172 U. S. 475; *Cook County* v. *Calumet Co.*, 138 U. S. 635; *Cameron* v. *United States*, 146 U. S. 533; *Kennard* v. *Nebraska*, 186 U. S. 304; *Florida Central* v. *Bell*, 176 U. S. 321; *Blackburn* v. *Portland Mining Co.*, 175 U. S. 571; *Baker* v. *Baldwin*, 187 U. S. 61; *Walsh* v. *Columbus R. Co.*, 176 U. S. 469; *Baltimore R. Co.* v. *Hopkins*, 130 U. S. 210.

There is no unlawful or unconstitutional delegation of power in the portion of the Safety Appliance Act involved in this case. Similar statutes have been frequently held valid. *McWhorter* v. *Pensacola Ry.*, 192 U. S. 470; *State* v. *C., M. & St. P. Ry.*, 38 Minnesota, 281; *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *Wymand* v. *Southed*, 10 Wheat. 15; *Tilley* v. *Savannah Ry.*, 5 Fed. Rep. 641; *McCullough* v. *Maryland*, 4 Wheat. 316; *Boyd* v. *Bryant*, 35 Arkansas, 69; *Dent* v. *United States*, 76 Pac. Rep. 455; *Field* v. *Clark*, 143 U. S. 649.

Under the Safety Appliance Act it is immaterial whether the defendant had notice of the defect or had used ordinary care to prevent this and similar defects from arising. The railroad is liable under the act, unconditionally, for any violation of its provisions. *Carson* v. *Southern Railway*, 194 U. S. 136; *United States* v. *Atlantic Coast Line Railway Co.*, 153 Fed. Rep. 918; *United States* v. *Southern Ry.*, 135 Fed. Rep. 122; *United States* v. *Great Northern Ry. Co.*, 150 Fed. Rep. 229.

Mr. Justice Moody delivered the opinion of the court.

The defendant in error, as administratrix of George W. Taylor, brought, in the Circuit Court of the State of Arkansas, this action at law against the plaintiff in error, a corporation owning and operating a railroad. Damages were sought, for the benefit of Taylor's widow and next of kin, on account of his injury and death in the course of his employment as brakeman in the service of the railroad. It was alleged in the complaint that Taylor, while attempting, in the discharge of his duty, to couple two cars was caught between them and killed. The right to recover for the death was based solely on the failure of the defendant to equip the two cars which were to be coupled with such draw bars as were required by the act of Congress known as the Safety Appliance Law. Act of March 2, 1893, c. 196, 27 Stat. 531. The defendant's answer denied that the cars were improperly equipped with draw bars, and alleged that Taylor's death was the result of his own negligence. At a trial before a jury upon the issues made by the

pleadings there was a verdict for the plaintiff, which was affirmed in a majority opinion by the Supreme Court of the State. The judgment of that court is brought here for re-examination by writ of error. The writ sets forth many assignments of error, but of them four only were relied upon in argument here, and they alone need be stated and considered. It is not, and cannot be, disputed that the questions raised by the errors assigned were seasonably and properly made in the court below, so as to give this court jurisdiction to consider them; so no time need be spent on that. But the defendant in error insists that the questions themselves, though properly here in form, are not Federal questions; that is to say, not questions which we by law are authorized to consider on a writ of error to a state court. For that reason it is contended that the writ should be dismissed. That contention we will consider with each question as it is discussed.

The accident by which the plaintiff's intestate lost his life occurred in the Indian Territory, where, contrary to the doctrine of the common law, a right of action for death exists. The cause of action arose under the laws of the Territory, and was enforced in the courts of Arkansas. The plaintiff in error contends that of such a cause, triable as it was in the courts of the Territory created by Congress, the courts of Arkansas have no jurisdiction. This contention does not present a Federal question. Each State may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142. We have, therefore, no authority to review the decision of the state court, so far as it holds that there was jurisdiction to hear and determine this case. On that question the decision of that court is final.

The next question presented requires an examination of the

act of Congress, upon which the plaintiff below rested her right to recover. Section 5 of the Safety Appliance Law is as follows, 27 Stat. 531:

"Within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

The action taken in compliance with this law by the American Railway Association, which was duly certified to and promulgated by the Interstate Commerce Commission, was contained in the following resolution, June 6, 1893—Int. Com. Comm. Rep. for 1893, pp. 74, 263:

"Resolved, that the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for standard gauge railroads in the United States, shall be thirty-four and one-half inches, and the maximum variation from such standard heights to be allowed between the draw bars of empty and loaded cars shall be three inches.

"Resolved, that the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for the narrow gauge railroads in the United States, shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars shall be three inches."

It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with draw bars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in *Buttfield* v. *Stranahan*, 192 U. S. 470, a case which in principle is completely in point. And see *Union Bridge Co.* v. *United States*, 204 U. S. 364, where the cases were reviewed.

Before proceeding with the consideration of the third assignment of error, which arises out of the charge, it will be necessary to set forth the course of the trial and the state of the evidence when the cause came to be submitted to the jury. This is done, not for the purpose of retrying questions of fact, which we may not do, but first to see whether the question raised was of a Federal nature, and second, to see whether error was committed in the decision of it. Taylor was a brakeman on a freight train, which had stopped at a station for the purpose of leaving there two cars which were in the middle of the train. When this was done the train was left in two parts, the engine and several cars attached making one section and the caboose with several cars attached making the other. The caboose and its cars remained stationary, and the cars attached to the engine were "kicked" back to make the coupling. One of the cars to be coupled had an automatic coupler and the other an old-fashioned link and pin coupler. That

part of the law which requires automatic couplers on all cars was not then in force. In attempting to make the coupling Taylor went between the cars and was killed. The cars were "kicked" with such force that the impact considerably injured those immediately in contact and derailed one of them. One of the cars to be coupled (that with the automatic coupler) was fully and the other lightly loaded. The testimony on both sides tended to show that there was some difference in the height of the draw bars of these two cars, as they rested on the tracks in their loaded condition, but there was no testimony as to the height of the draw bars if the cars were unloaded, except that, as originally made some years before, they were both of standard height. But as to the extent of the difference in the height of the draw bars, as the cars were being used at the time of the accident, there was a conflict in the testimony. One witness called by the plaintiff testified that the automatic coupler appeared to be about four inches lower than the link and pin coupler. Although another, called also by the plaintiff, testified that the automatic coupler was one to three inches higher than the other. That the automatic coupler was the lower is shown by the marks left upon it by the contact, which indicated that it had been overriden by the link and pin coupler, and was testified to by a witness who made up the train at its starting point. Two witnesses called by the defendant testified to actual measurements made soon after the accident, which showed that the center of the draw bar of the automatic coupler was thirty-two and one-half inches from the top of the rail, and that of the link and pin coupler thirty-three and one-half inches from the top of the rail. The evidence therefore, in its aspect most favorable to the plaintiff, tended to show that the fully loaded car was equipped with an automatic coupler, which at the time was four inches lower than the link and pin coupler of the lightly loaded car. On the other hand, the evidence in its aspect most favorable to the defendant tended to show that the automatic draw bar of the loaded car was exactly one inch lower than the link and

pin draw bar. It was the duty of the jury to pass upon this conflicting evidence, and it was the duty of the presiding judge to instruct the jury clearly as to the duty imposed upon the defendant by the act of Congress. Before passing to the consideration of the charge to the jury we will for ourselves determine the meaning of that act. We think that it requires that the center of the draw bars of freight cars used on standard gauge railroads shall be, when the cars are empty, thirty-four and one-half inches above the level of the tops of the rails; that it permits, when a car is partly or fully loaded, a variation in the height downward, in no case to exceed three inches; that it does not require that the variation shall be in proportion to the load, nor that a fully loaded car shall exhaust the full three inches of the maximum permissible variation and bring its draw bars down to the height of thirty-one and one-half inches above the rails. If a car, when unloaded, has its draw bars thirty-four and one-half inches above the rails, and, in any stage of loading, does not lower its draw bars more than three inches, it complies with the requirements of the law. If, when unloaded, its draw bars are of greater or less height than the standard prescribed by the law, or if, when wholly or partially loaded, its draw bars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law. On this aspect of the case the presiding judge gave certain instructions and refused certain instructions, both under the exception of the defendant. The jury were instructed, the italics being ours:

"I. The act of Congress fixes the standard height of loaded cars engaged in interstate commerce on standard gauge railroads at thirty-one and one-half inches, and unloaded cars at thirty-four and one-half inches measured perpendicularly from the level of the face of the rails to the centers of the draw bars, and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law required

that the two cars between which Taylor lost his life should be when unloaded of the equal and uniform height from the level of the face of the rails to the center of the draw bars of thirty-four and one-half inches, *and when loaded to the full capacity should be of the uniform height of thirty-one and one-half inches. Now, if the plaintiff by a preponderance of the evidence shows a violation of this duty on part of defendant, then this is negligence,* and if the proof by a preponderance also shows that this caused or contributed to the death of Taylor, then you should find for the plaintiff, unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety, and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant.

"II. *If there was the difference between the height of the center of the draw bars in the two cars in question, as indicated in the first instruction,* then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for. On that point if such difference existed, and but for its existence the injury and death of Taylor would not have happened, then such difference is said in law to be an efficient proximate cause of Taylor's injury and death, although it may be true that other causes may have coöperated with this one in producing the injury and death of Taylor, and but for these other coöperating causes the injury and death of Taylor would not have ensued. But if such difference in height of the center of the draw bars as aforesaid actually existed, yet if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the center of the draw bars, then such difference in the height of the center of the draw bars is not in law an efficient proximate cause of the injury and death of Taylor."

The clear intendment of these instructions was that the law required that the draw bars of a fully loaded car should be of the height of thirty-one and one-half inches, and that if either of the cars varied from this requirement the defendant had

failed in the performance of its duty. We find nothing in the remainder of the charge which qualifies this instruction, and we think it was erroneous. We should be reluctant to insist upon mere academic accuracy of instructions to a jury. But how vitally this error affected the defendant is demonstrated by the fact that its own evidence showed that the draw bar of the fully loaded car was thirty-two and one-half inches in height. Under these instructions the plaintiff was permitted to recover on proof of this fact alone. From such proof a verdict for the plaintiff would logically follow. The error of the charge was emphasized by the refusal to instruct the jury, as requested by the defendant, "that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the center of the draw bars of such cars, without regard to the amount of weight in the partially loaded car." This request, taken in connection with the instruction that the draw bars of unloaded cars should be of the height prescribed by the act, expressed the true rule, and should have been given. On the other hand, a request for instructions, which was as follows, "The court charges you that the act of Congress allows a variation in height of three inches between the centers of the draw bars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the draw bar shank or draft line," contained an erroneous expression of the law, and was correctly refused. It is based upon the theory that the height of the draw bars of unloaded cars may vary three inches, while the act, as we have said, requires that the height of the draw bars of unloaded cars shall be uniform.

But we have not the power to correct mere errors in the trials in state courts, although affirmed by the highest state courts. This court is not a general court of appeals, with the general right to review the decisions of state courts. We may only inquire whether there has been error committed in the

decision of those Federal questions which are set forth in § 709 of the Revised Statutes, and it is strenuously urged that the error in this part of the case was not in the decision of any such Federal question. That position we proceed to examine.

The judicial power of the United States extends "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." Article III, § 2, Constitution. The case at bar, where the right of action was based solely upon an act of Congress, assuredly was a case "arising under . . . the laws of the United States." It was settled, once for all time, in *Cohens* v. *Virginia*, 6 Wheat. 264, that the appellate jurisdiction, authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of state courts so far as they pass upon a law of the United States. It was said in that case (p. 416): "They [the words of the Constitution] give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided;" and it was further said (p. 379): "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." But the appellate jurisdiction of this court must be exercised "with such exceptions and under such regulations as the Congress shall make." Article III, § 4, Constitution. Congress has regulated and limited the appellate jurisdiction of this court over the state courts by § 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock* v. *Memphis*, 20 Wall. 590, 620. The words of that section material here are those authorizing this court to reëxamine the judgments of the state courts "where any title, right, privi-

lege, or immunity is claimed under . . . any statute of . . . the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such . . . statute." There can be no doubt that the claim made here was specifically set up, claimed, and denied in the state courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick* v. *Market Bank*, 165 U. S. 538; *California Bank* v. *Kennedy*, 167 U. S. 362; *San José Land and Water Co.* v. *San José Ranch Co.*, 189 U. S. 177; *Nutt* v. *Knut*, 200 U. S. 12; *Rector* v. *City Deposit Bank*, 200 U. S. 405; *Illinois Central Railroad* v. *McKendree*, 203 U. S. 514; *Eau Claire National Bank* v. *Jackman*, 204 U. S. 522; *Hammond* v. *Whittredge*, 204 U. S. 538. The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.

It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a cor-

rect construction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here.

The plaintiff in error raises another question, which, for the reasons already given, we think is of a Federal nature. The evidence showed that draw bars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered draw bar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with draw bars of a standard height, and furnished shims to competent inspectors and trainmen and used reasonable care to keep the draw bars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the draw bar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry.* v. *Delk*, 158 Fed. Rep. 931), we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no

cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employé and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hard-

ship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case. But for the reasons before given the judgment must be

Reversed.

MR. JUSTICE BREWER concurs in the judgment.

MUNICIPALITY OF PONCE *v.* ROMAN CATHOLIC APOSTOLIC CHURCH IN PORTO RICO.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 143. Argued March 3, 1908.—Decided June 1, 1908.

Under the organic act of Porto Rico, March 2, 1901, 31 Stat. 77, the legislative assembly has express authority to legislate regarding the jurisdiction and procedure of its courts, and it has been usual for Congress to give such power to the legislatures of the Territories.

Such legislation was not contrary to the Constitution and was in conformity with the power conferred by Congress upon the legislative assembly to regulate the jurisdiction of the courts.

Since April 11, 1899, Porto Rico has been *de facto* and *de jure* American territory, and its history and its legal and political institutions up to the time of its annexation will be recognized by this court.

As to our insular possessions the Spanish law is no longer foreign law, and the courts will take judicial notice thereof so far as it affects those possessions.

The act of legislative assembly of Porto Rico of March 10, 1904, conferring jurisdiction on the Supreme Court of Porto Rico for the trial and adjudication of property claimed by the Roman Catholic Church was within its legislative power.

The general prohibition in the act of July 30, 1886, 24 Stat. 170, against territorial legislatures passing special laws does not apply where specific permission is granted by the organic act of a particular Territory.

Because it gives a certain corporation a right to maintain an action, a law cannot be regarded as a special law granting an exclusive privilege where it confers equal rights upon the people and the municipalities affected by the right and interested in matters affected.

A dedication to a public or charitable use may exist, even where there is no specific corporate entity to take as grantee. *Werlein* v. *New Orleans*, 177 U. S. 390.

The Roman Catholic Church has been recognized as possessing legal personality by the treaty of Paris with Spain of 1898 and its property rights solemnly safeguarded. In so doing the treaty followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession. The juristic personality of the Roman Catholic Church and its ownership of property was formally recognized by the concordats between Spain and the papacy and by the Spanish laws from the beginning of settlements in the Indies. Such recognition has also been accorded the church by all systems of European law from the fourth century of the Christian era.

The fact that a municipality in Porto Rico furnished some of the funds for building or repairing the churches cannot affect the title of the Roman Catholic Church, to whom such funds were thus irrevocably donated and by whom these temples were erected and dedicated to religious uses.

THIS suit was commenced by the Roman Catholic Church in Porto Rico through the Bishop of that diocese against the municipality of Ponce. The complaint fully set forth the facts by reason of which relief was demanded. A demurrer was interposed, which was overruled, and leave to answer granted, which defendant having failed to do, judgment was entered by default.

It appeared that the Roman Catholic Church had been for many years in the lawful and peaceful possession of two churches, or temples, one in Ponce and one in Playa, the port of Ponce, dedicated, consecrated to and always used by the Catholic Church for its worship.

The petition alleged, among other things, that "these temples or churches were built with the funds of the municipality within which they are situated, and since then they have been maintained by donations and alms from the parishioners; and with respect to them their possession by the Catholic Church runs for many years, counting from the time when the build-

ing of the same was completed. And none of the buildings of those temples, since they were built, have been used for any other purpose than Catholic worship."

In 1827, by reason of steps taken by the royal alcalde of Ponce and by the then governor of the island, Don Simon de la Torre, a board or commission having jurisdiction over the repairing and conservation of churches advised the governor that it was "in keeping with the decorum of a rich and Christian city like Ponce to have a temple which would show that such conditions existed covered with an arched roof, and not a roof of thatch," etc.

The petition describes with considerable minuteness of detail the various steps taken to rebuild or repair this church at Ponce. The last estimate for repairs was made in 1872.

It is evident from the record that the sums expended came from several distinct sources—

(1) Funds voluntarily contributed by the parishioners; (2) the funds of the "House of the King;" (3) an assessment made in 1835–36; (4) moneys advanced by the municipality.

As to the church at Playa, it was erected in part, at least, with funds donated by the parishioners and apparently on private land.

Whether the funds subsequently used for repairs of either or both of the temples were in part derived directly from the municipality or merely taken by way of loan, was a matter between the central government and the municipality, which could not affect the title of the church under the then existing relations between church and State.

The complaint then alleged:

"13. The city council of the city of Ponce has included in the inventory of its property the parochial church, described in the first allegation of the complaint, on the ground that from time immemorial the said church has been included in that inventory. We do not know the exact date on which that inventory may have been made, but according to the information we have it only runs back a few years from this date.

"14. After the change of sovereignty the city council of Ponce attempted to record in the registry of property the possession of the said church, and the lot upon which the same is situated, but in view of the fact that this was contrary to the provisions of paragraph 2 of article 25 of the regulations for the application of the mortgage law, which excludes the inscription of public temples used for Catholic worship, the registrar of property of the district of Ponce refused to make the inscription, unless a decision be obtained from the secretary of justice to authorize the same, notwithstanding the prohibitive provisions of the regulations. The secretary of justice rendered the decision applied for, repealing, without being a legislative authority, the said article 25 of the regulations in its second paragraph."

The Supreme Court of Porto Rico rendered the following judgment at San Juan, Porto Rico, May 21, 1906:

"This cause having heretofore been regularly called for decision upon the demurrer filed by the defendant to the plaintiff's complaint, and the same having been duly considered and overruled, and leave granted the defendant to file an answer within the time prescribed by law, and the said defendant having failed to file such answer, and judgment by default having been duly rendered therein, all of which proceedings appear in the record of this court, it is accordingly now hereby ordered, adjudged and decreed that the plaintiff have judgment against the defendant as prayed for in the complaint, and that all adverse claims whatsoever of the defendant and of all persons claiming or to claim the property herein described, or any part thereof, under said defendant, are hereby ordered, adjudged and decreed to be invalid and groundless, null and void; and that the plaintiff be and hereby is declared, adjudged and decreed to be the sole, true and lawful owner of the houses and lands hereinafter described, as set forth in the complaint, and every part and parcel thereof, and that the title of the plaintiff thereto is adjudged and decreed to be quieted against any and all claims and demands

of the defendant; and the said defendant is hereby perpetually enjoined and estopped from setting up any claim or title whatever thereto, or to any part thereof.

"Said premises are bounded and described as follows:

" 'The first is a building constructed of brick and masonry, situated in the city of Ponce, on an area of sixty-five meters and eight centimeters wide, including the walk, the building measuring forty-eight meters long by twenty-four meters and sixty-seven centimeters wide; bounded on the north by the Plaza Principal; on the south by the Plaza de las Delicias; on the east by the fire department, which is situated on the same lot or yard as the church; on the west by the said Plaza Principal.

" 'The second is another building situated in the center of the Plaza de la Playa de Ponce; the superficial area whereof measures forty-two meters and twenty centimeters long, by nineteen meters and forty centimeters wide; including the walk, the building measuring eighteen meters and thirty centimeters long by sixteen meters and twenty centimeters wide. It is bounded on all four sides by the Plaza de la Playa.'

"The inscription of possession heretofore made in the registry of property at Ponce, concerning the above said properties, in favor of the defendant, the municipality of Ponce, is hereby cancelled and declared to be utterly null and void, and the proper endorsement must be made upon the said registry indicating the same.

"It is hereby further ordered, adjudged and decreed that the plaintiff do have and recover all costs of this suit, which are hereby taxed at $—— dollars, and that the defendant be ordered to pay the same within thirty days from this date.

"Thus we pronounce, command and sign."

The case was then appealed to this court, and the following errors assigned:

"First. That the Supreme Court of Porto Rico was without jurisdiction of the subject-matter in controversy.

"Second. That said court was without jurisdiction of the parties.

"Third. That the said court erred in overruling the general demurrer and the eleven special grounds of demurrer interposed by the defendant to the complaint filed in said cause.

"Fourth. That the said court erred in rendering judgment against defendant in said cause, upon the pleadings in said cause, and that the judgment is contrary to the law and the facts as stated in the pleadings in said cause.

"Fifth. That the court erred in entering judgment without taking evidence and proofs or setting the cause upon the docket for hearing.

"Sixth. That the said court erred in rendering judgment in favor of the plaintiff and against the defendant in said cause."

Mr. Frederick L. Cornwell, for appellant, submitted:

The act of the legislative assembly of Porto Rico, approved March 10, 1904, conferring original jurisdiction on the Supreme Court of Porto Rico is absolutely void, as being contrary to the Fourteenth Amendment to the Constitution of the United States. *Davidson* v. *New Orleans*, 96 U. S. 101; *Weimar* v. *Bunbury*, 30 Michigan, 214; *Robertson* v. *Baldwin*, 165 U. S. 281; *Wally's Heirs* v. *Kennedy*, 2 Yerg. (Tenn.) 554; *Guy et al.* v. *Hermance et al.*, 5 California, 73.

The act is void for the further reason that the legislative assembly had no power to enact a private or special law, such being contrary to the organic act establishing civil government in Porto Rico and contrary to the acts of Congress applicable to all Territories. 31 Stat. at Large, 77 (§ 14); 24 Stat. at Large, p. 170; *Martin* v. *Territory*, 8 Oklahoma, 41; *S. C.*, 48 Pac. Rep. 106.

The legislative assembly exceeded its power and authority when it attempted to alter, change, amend or augment the jurisdiction of the Supreme Court of Porto Rico, and the Supreme Court of Porto Rico was absolutely without the power

and authority to hear and adjudicate this case as a *nisi prius* or trial court, and all the proceedings had by the Supreme Court in this case are absolutely null and void. 31 Stat. at Large, 77; *Perris* v. *Higley et al.*, 20 Wall. 375; *Territory* v. *Ortiz*, 1 N. M. 5; Cooley on Constitutional Limitations (3d ed.), p. 392.

The Supreme Court of Porto Rico was without jurisdiction of the parties, because the Roman Catholic Church in Porto Rico is neither a natural person nor a corporation, or if a corporation then it has not complied with the laws so as to enable it to sue and be sued in the courts of Porto Rico. The laws of Porto Rico having specifically stated the terms under which a foreign corporation may do business in Porto Rico, it was necessary that the church should show that it had complied with all these conditions before it could be entitled to sue.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury*, with whom *Mr. Paul Fuller* was on the brief, for appellee:

The law under which this suit was brought by the church is a valid enactment of the legislative assembly of Porto Rico, wholly within the scope of its powers under the organic act. *Kent* v. *Porto Rico*, 207 U. S. 113, 117. The act does not come within the prohibitions, in the general laws of Congress relating to the Territories, as to local and special laws, etc. *American Ins. Co.* v. *Canter*, 1 Pet. 511; *Hornbuckle* v. *Toombs*, 18 Wall. 648. But whether so or not, the act under consideration is not objectionable as a special law. *Vanzant* v. *Waddell*, 2 Yerg. 260; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 105; *People ex rel. Kenny* v. *Folks*, 89 App. Div. (N. Y.) 179; *United States* v. *Union Pac. Co.*, 98 U. S. 569. See also *Bank of Columbia* v. *Okely*, 4 Wheat. 255; *Bank of Newbern* v. *Taylor*, 6 N. C. 266.

The Roman Catholic Church in Porto Rico is a juristic personality and a legal entity under the laws of Porto Rico, as it had always been under the Spanish laws in force in the island at the time of the ratification of the Treaty of Paris.

The Roman Catholic Church has been recognized as possessing a legal personality and a capacity to take and acquire property since the time of the Emperor Constantine. The American law has been no less liberal in recognizing the corporate entity of churches than has the European and English law. *Werlein* v. *New Orleans*, 177 U. S. 390, 401. The Holy See still occupies a recognized position in international law of which the courts must take judicial notice. 1 Moore's Digest of Int. Law, pp. 130, 131.

Upon the facts stated in the petition the church has a good title to the property in question.

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

This suit was brought under an act of the legislative assembly of Porto Rico, entitled "An act to confer original jurisdiction on the Supreme Court of Porto Rico for the trial and adjudication of certain property claimed by the Roman Catholic Church in Porto Rico," approved March 10, 1904, as follows:

"*Be it enacted by the Legislative Assembly of Porto Rico:*

"SEC 1. Original jurisdiction is hereby conferred on the Supreme Court of Porto Rico for the trial and adjudication of all questions now existing or which may arise, between the Roman Catholic Church in Porto Rico and the people of Porto Rico, affecting property rights, whether real or personal or mixed, claimed by either party.

"SEC. 2. The Attorney General of Porto Rico shall be authorized to accept service for the people of Porto Rico of any citation, summons or other process issued by said court in said proceedings.

"SEC. 3. The Supreme Court, for the purpose of such trial and adjudication, shall have the right to issue process for witnesses and to receive and hear testimony, and the procedure in said court shall be the same, as near as may be, as that prescribed for the District Courts of Porto Rico in civil cases, and

the Supreme Court shall have full power to enter any and all orders and decrees that may be necessary to a final and full adjudication of all the claims of either party to the proceedings, and may issue all writs or process necessary to enforce the jurisdiction hereby conferred upon said court: *Provided*, that the Attorney General of Porto Rico shall at once prepare for such hearing and trial, and if the said Roman Catholic Church does not commence proceedings under this act within three months after its passage and approval, then, in that event, it shall be the duty of the Attorney General to commence said proceedings in behalf of the insular government.

"SEC. 4. After the issues have been fully submitted to said court upon the law and the facts, and after hearing the arguments of the respective parties, or their counsel, the court shall enter a final judgment and decree, fully determining the rights of either or both of the parties, and vesting the title to the subject-matter of the controversy, or any part thereof, in such party or parties, as the court may deem entitled thereto. The said court may issue any and all writs that may be necessary to place the parties in quiet possession of the property so adjudicated to them, or either of them. But nothing in this act shall be construed to limit the right of appeal, either of the people of Porto Rico or of the Roman Catholic Church, but either party may appeal from the final judgment or decree of said court to the Supreme Court of the United States, in the manner provided by law for appeals to that court generally.

"SEC. 5. Original jurisdiction is hereby also conferred on the Supreme Court of Porto Rico for the trial and adjudication of all questions now existing, or which may arise, between the Roman Catholic Church in Porto Rico and any municipality of Porto Rico, affecting property rights, whether real or personal or mixed, claimed by either party.

"SEC. 6. The mayor of any municipality within Porto Rico, wherein may be situated any property over which such questions exist, shall be authorized to accept service for the munic-

ipality of any citation, summons or other process issued by said court in said proceedings.

"SEC. 7. For the purpose of such trial and adjudication and appeal, all the provisions of sections 3 and 4 of this act shall be deemed applicable.

"SEC. 8. This act shall take effect from and after its passage."

The power to confer this jurisdiction was derived from the act of Congress creating an organized government for Porto Rico, approved March 2, 1901, usually called the Foraker Act, c. 191, 31 U. S. Stat. 77.

Section 8 of this act provides:

"That the laws and ordinances of Porto Rico now in force shall 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."

It is further provided (§ 15):

"That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may from time to time see fit."

The paragraph relating to the judiciary is as follows (§ 33):

"That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of General Orders, numbered 118, as promulgated by Brigadier General Davis, United States Volunteers, August 16, 1899, and including also the police courts established by General Orders, numbered 195, promulgated November 29, 1899, by Brigadier General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all of

which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said General Orders, numbered 118 and 195, until otherwise provided by law: *Provided, however,* that the Chief Justice and Associate Justices of the Supreme Court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the District Court shall be appointed by the Governor, by and with the advice and consent of the Executive Council, and all other officials and attachés of all the other courts shall be chosen as may be directed by the legislative assembly, which shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attachés for each, their jurisdiction, their procedure, and all other matters affecting them."

Clearly under these sections of the organic act the legislative assembly had express authority to legislate regarding the jurisdiction and procedure of its courts. While the jurisdiction of the other courts might be changed, the proper interpretation of the statute prevents the legislative assembly from passing an act in any wise affecting the jurisdiction of the Supreme Court or the District Courts.

In *Kent* v. *Porto Rico,* 207 U. S. 113, 115, it was contended that an act of the local legislature, creating additional judicial districts and changing those fixed by the military orders and local law, referred to in the organic act, and also reducing the number of judges in the District Court from three to one, "was void, because in conflict with the provision of the thirty-third section of the act of Congress," the same one here relied upon by the appellant as making the jurisdiction of the courts unchangeable save by Congress.

But to that contention this court replied:

"The argument is that this local law, in so far as it changed

the District Courts, and especially in so far as it provided for one instead of three judges to preside over each court, was void, because in conflict with the provision of the thirty-third section of the act of Congress. The contention amounts to this, that there were no District Courts in Porto Rico from the time of the going into effect of the Porto Rican act in 1904 up to the present time. Whilst the proposition presents a formal Federal question, we think it is clear that it is so frivolous as to bring it within the rule announced in *American Railroad Co.* v. *Castro, supra.* We say this, because we think that no other conclusion is reasonably possible from a consideration of the whole of section 33 of the act of Congress and the context of that act, particularly section 15 thereof, both of which are reproduced in the margin.[1]

"We do not deem it necessary to analyze the text of the act of Congress to point out the inevitable result just stated, since the obvious meaning of the act is established by a decision heretofore rendered. *Dones* v. *Urrutia,* 202 U. S. 614. . . . On appeal to this court the questions raised were fully argued in printed briefs, but were deemed to be of such a frivolous character as not to require an opinion, and were hence disposed of *per curiam,* referring to the provisions of the statute and pertinent authorities."

It is true that the act of Congress of July 30, 1886, c. 818, 24 Stat. 170, enacts "that the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases," and among the prohibitions are those against "regulating the practice in courts of justice," and granting "to any corporation, association, or individual any special or exclusive privilege, immunity or franchise." But such general prohibitions have no application where specific permission to the contrary is granted by the organic act applying to the particular Territories.

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[1] See note at foot of p. 116, 207 U. S.

This act is not a special law regulating the practice in courts of justice nor one granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise. It confers the same right upon the people of Porto Rico and upon the municipalities as upon the church.

In the organic acts for the Territories (59th Congress, Senate Doc. 148) it appears that it has been usual for Congress to give the local legislatures the power to regulate the jurisdiction and procedure of their courts.

In *Hornbuckle* v. *Toombs*, 18 Wall. 648, after reviewing the question, the court, speaking through Mr. Justice Bradley, said (p. 655):

"Whenever Congress has proceeded to organize a government for any of the Territories it has merely instituted a general system of courts therefor, and has committed to the Territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. . . . The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature; and the jurisdiction of the Territorial courts is collectively coëxtensive with and correspondent to that of the State courts.

* * * * * * * *

"From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is that the practice, pleadings and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the Territorial assemblies, and to the regulations which might be adopted by the courts themselves."

The Porto Rican act under consideration merely repeats the action of Congress in the past in organizing other Territories. The appellant contends "that the Roman Catholic Church of Porto Rico has not the legal capacity to sue, for the

reason that it is not a judicial person, nor a legal entity, and is without legal incorporation. . . . If it is a corporation or association, we submit to the court that it is necessary for the Roman Catholic Church to specifically allege its incorporation, where incorporated, and by virtue of what authority or law it was incorporated, and if a foreign corporation show that it has filed its articles of incorporation or association in the proper office of the government, in accordance with the laws of Porto Rico."

Since April 11, 1899, Porto Rico has been *de facto* and *de jure* American territory. The history of Porto Rico and its legal and political institutions up to the time of its annexation to the United States are matters which must be recognized by this court as the ancient laws and institutions of many of our States when matters come before it from their several jurisdictions.

The court will take judicial notice of the Spanish law as far as it affects our insular possessions. It is *pro tanto* no longer foreign law.

The Civil Code in force in Cuba, Porto Rico and the Philippines at the time of the Treaty of Paris contains these provisions (Art. 35):

"Art. 35. The following are judicial persons: The corporations, associations and institutions of public interest recognized by law. Their personality begins from the very instant in which, in accordance with law, they are validly established."

"Art. 38. Judicial persons may acquire and possess property of all kinds as well as contract obligations and institute civil or criminal actions in accordance with the laws and rules of their establishment.

"The church shall be governed in this particular by what has been agreed upon by both powers and educational and charitable institutions by the provisions of special laws."

The phrase "agreed upon by both powers" refers to the "concordats" or treaties between the Holy See and the Spanish crown, which recognize the right of the church to possess and acquire property.

The law thus recognized at the time of the cession the juristic personality and legal status of the church.

In *Ortega* v. *Lara*, 202 U. S. 339, 342, this court said:

"By the general rule of public law, recognized by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States, so far as applicable, would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.

"Nevertheless, and apparently largely out of abundant caution, the eighth section of the act of April 12, 1900, provided: 'That the laws and ordinances of Porto Rico, now in force, shall 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, . . .'"

Article 8 of the Treaty of Paris is to this effect:

"And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belongs to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories, renounced or ceded, or of private individuals of whatever nationality such individuals may be."

This clause is manifestly intended to guard the property of the church against interference with, or spoliation by, the new master, either directly or through his local governmental agents. There can be no question that the ecclesiastical body referred to, so far as Porto Rico was concerned, could only be the Roman Catholic Church in that island, for no other ecclesiastical body there existed.

The mortgage law, in force in Porto Rico both before the cession and at present, provided for the registration generally of "Title deeds of real property or property rights owned or administered by the State or by civil or ecclesiastical corporations, subject to the provisions of law or regulations." (Art. 2, paragraph 6.)

But this was qualified by the general regulations for the execution of the mortgage law (see translation of general regulations for the execution of the mortgage law for Cuba, Porto Rico and the Philippines, War Department, 1899), which provided:

"Art. 25. Exceptions to the record required by article two of the law are—

"First. Property which belongs exclusively to the eminent domain of the State, and which is for the use of all, such as the shores of the sea, islands, etc., etc., walls of cities and parts, ports and roadsteads, and any other analogous property during the time they are in common and general use;

"Second. Public temples, dedicated to the Catholic faith."

Of course, the temples in question were not subject to the registration law, and were recognized as a peculiar class of property, wholly different from that belonging to private individuals.

Counsel for appellee well argues that the Roman Catholic Church has been recognized as possessing a legal personality and the capacity to take and acquire property since the time of the Emperor Constantine. And he quotes from the Code of Justinian the law of Constantine of 321 to that effect.

The strictest prohibition against alienating the property of

the church exists in that code, and it provides that the alienation of church property shall not take place, even with the assent of all the representatives of the church, since these rights "belong to the church," and the church is the mother of religion; and as faith is perpetual, its patrimony must be preserved in its entirety perpetually.

In his History of Latin Christianity (vol. 1, p. 507), Dean Milman says:

"The Christian Churches succeeded to that sanctity which the ancient law had attributed to the temples; as soon as they were consecrated they became public property, and could not be alienated to any other use. The ground itself was hallowed, and remained so even after the temple had been destroyed. This was an axiom of the heathen Papinian. Gifts to temples were alike inalienable, nor could they be pledged; the exception in the Justinian code betrays at once the decline of the Roman power, and the silent progress of Christian humanity. They could be sold or pledged for the redemption of captives, a purpose which the old Roman law would have disdained to contemplate."

And Milman also points out that in the barbarian codes most sweeping provisions are found, recognizing the right of the church to acquire property and its inalienability when acquired. Church property everywhere remained untouched by the rude hands of invading barbarians. Trespass upon or interference with such property was severely punished, and gradually it became exempted from taxation.

The historic continuity of the juristic conception, exemplified by the civil law, is maintained by the Partidas, the fundamental code of ancient Spanish law, whose provisions show that whoever built a church was required to provide it with an adequate perpetual endowment as well as a site, and refute any idea of a retention of ownership by the donor of the land or the contributors to the building.

In Law I, Title XI, part I, it is stated:

" . . . And in addition, the churches have other privi-

leges; that as to the estates which have been given or sold or left to them lawfully by will, even if they have not received possession of them, they get the title and right which has been given or sold or left to them, so that they can demand them for their own against whomsoever may hold them."

In Law I, Title XIV, part I, we find a general prohibition against the alienation of church property, certain exceptions being enumerated.

While Law II provides that when alienation is permitted it shall be made only by the prelates, with the authorization of their chapters; that lands shall be sold only in default of sufficient personalty to meet the requirements of the case, and that lands given by the Emperor or the King shall never be alienated.

Then Law VI, Title XXIX, part III, the law governing prescription, provided that "a consecrated, or holy, or religious thing cannot be acquired by lapse of time."

Again, Law XXVI, Title XXIX, part III, provided that lands belonging to the church (but apparently not actually consecrated) cannot be acquired by prescription in less than forty years; that destructible personal effects can be acquired by prescription in three years; and then: "But the others which belong to the Church of Rome exclusively cannot be acquired by any one in less than one hundred years."

This was in substance the law of Spain and the rest of Europe throughout the middle ages, certain modifications being made in the way of prohibitions limiting the right to give to the church, which in no way affected the juristic personality of the church or its general right to hold and acquire property in its corporate capacity.

As to England, the concept of the church as a corporation was worked out by the English canonists and fully recognized by the ordinary law courts before the end of the fourteenth century, and Pollock and Maitland show that the English ecclesiastical law was practically similar to that of continental Europe in its recognition of the property rights of the church.

In this country it was held in *Terrett* v. *Taylor* (1815), 9 Cranch, 43, that the legislature of Virginia could not authorize any persons to take land formerly granted to the Church of England. Mr. Justice Story, speaking for the court, says (p. 49):

"Be, however, the general authority of the legislature as to the subject of religion, as it may, it will require other arguments to establish the position that, at the Revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the State. Had the property thus acquired been originally granted by the State or the King, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it; nor of the Parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted. . . . Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the State by the Revolution any more than the property of any other corporation created by the royal bounty or established by the legislature."

This court further held that it made no difference whether the church was a voluntary society or clothed with corporate powers, and the local authorities were restrained from interfering with the church property or claiming title thereto.

It is the settled law of this court that a dedication to a public or charitable use may exist, even where there is no specific corporate entity to take as grantee. *Werlein* v. *New Orleans*, 177 U. S. 390, 401, and see *Beatty* v. *Kurtz*, 2 Pet. 566.

The Spanish law as to the juristic capacity of the church at the time of the cession merely followed the principles of the Roman law, which have had such universal acceptance, both

in the law of continental Europe and in the common law of England.

Roman Catholicism has been the official religion of Spain since the time of the Visigoths. As far as the church in Spanish-America was concerned, the King of Spain was supreme patron. See Alcubilla, vol. 8, p. 662.

The laws enacted in Spain for the government of the Indies, and promulgated at different periods, were compiled by order of Philip IV in 1661, in the " Recopilacion " of the Laws of the Indies, of which a subsequent edition was published. This is the only authentic collection of the ordinances and decrees governing Spanish-America prior to the year 1860. Alcubilla, vol. 9, p. 936.

Under the bulls of Julius II and Alexander XI there were conceded to the Spanish crown all the tithes of the Indies, under the condition of endowing the church and providing the priests with proper support. The church in Spanish-America, through this royal patronage, came into possession of considerable properties. The right of the church to own, maintain and hold such properties was unquestioned, and the church continued in undisputed possession thereof.

In the year 1820 the Spanish revolutionary government passed certain confiscatory laws as to monasteries and other ecclesiastical foundations, but even these revolutionary enactments left the actual temples undisturbed.

There was further legislation to the same effect in 1835, and again in 1837, but this legislation does not appear to have ever been extended to the colonies, although it was wrongfully but effectually applied there by the seizure of church properties, afterwards agreed to be restored by the concordats of 1851 and 1859. After more than twenty-five years of intermittent conflict between church and state, the Spanish government and the papacy concluded the concordat of March 16, 1851, which had in Spain the force of law, and which was promulgated in the insular possessions. Alcubilla, vol. 3, p. 94, Diccionario de La Administracion Española.

By the first article of this concordat it is provided:

" That the Catholic apostolic religion, to the exclusion of any other religion whatever, shall continue to be the sole religion of the Spanish nation, and will always be preserved in the domains of His Catholic Majesty, with all the rights and privileges, which it ought to enjoy, according to the law of God and the provisions of its sacred canons."

Article 11 of the Spanish constitution of 1876 is to the same effect. Alcubilla, vol. 3, p. 357.

There are numerous provisions in the concordat fixing the amounts to be paid by the State for the support of the church and for the settlement of other causes of difficulty between the crown and the Roman See, and art. 41 specifically recognizes the church's " right of property in everything it now possesses or may hereafter acquire." Alcubilla, vol. 3, p. 109.

In 1859, as a further guaranty of the property rights of the church, an additional concordat was made between the Spanish crown and the Roman See. The first article of this, reciting the unfortunate events by reason of which ecclesiastical properties have been wrongfully taken, obligates the Spanish crown not to sell or alienate any of these properties without the permission of the Holy See.

The third article reads as follows:

" Art. 3. Especially the government of His Majesty again formally recognizes the full and free right of the church to acquire, retain and enjoy in full property right and without limitation or reserve all kinds of property and values, renouncing in consequence by this treaty any disposition contrary hereto and particularly those which may be contained in the law of May 1st, 1855. The properties which in virtue of this right the church may acquire and possess in future are not to be considered as part of the donation which is assigned to it by the concordat."

The difficulties between church and state incident to the revolutionary movement were thus adjusted, but in 1868, during the regime of the provisional government, there were

certain decrees closing all conventual establishments, etc., but the relations between the church and the government were finally restored by King Alfonso XII, who, in January, 1875, issued a decree, returning to the church all the property belonging to the clergy which was still in the hands of the government.

None of these revolutionary decrees disturbed actual church edifices, but were directed almost wholly against conventual properties, belonging to the various congregations or monastic orders. The attacks were directed against the property of the regular clergy and not that of the seculars.

Under the civil law of Spain, the collection of tithes and first fruits of land and stock was obligatory. First, they were collected by the church, but later collected by the government and turned over to the church. The levy of such tithes finally disappeared under the concordat, because the government paid all expenses of worship.

In Report No. 2977, Senate Doc. 57th Congress, 2d Session, the subject was discussed, and, in accordance with the terms of the concordat, down to the occupation of Porto Rico by the American troops in August, 1898, amounts were regularly appropriated by the Spanish Government for the expenses of worship in Spain, Cuba, Porto Rico and the Philippines.

At the date of the American military occupation neither the State nor the municipalities, directly or indirectly, disputed or questioned the legitimate ownership and possession by the church of the property occupied by her, including temples, parochial houses, seminaries and ecclesiastical buildings of every description. It is only since the occupation that some of the ayuntamientos have evinced a desire to deprive the church of her temples, under the pretext that they were built with municipal funds.

At the time of the American occupation the Catholic Church was the only church in the island. In 1900, Governor Allen, in the first annual report, said, p. 54:

"Out of the 953,243 inhabitants of Porto Rico, there are nearly 950,000 Catholics, and there is a Catholic church in

every town and village and in the larger towns and cities several; in the city of San Juan there are eight, including the cathedral. Nearly all these are well-built structures, occupying central locations, and are ornaments to the towns where situated. There are many parochial schools and other church institutions, belonging to the Catholics. . . . None of the public money is now used in the salaries of clergymen or otherwise in the support of religion. All such expenses are defrayed, as in the United States, by voluntary contribution of the congregation and friends on the continent. The controversies formerly existing between the municipal and the church authorities concerning the ownership of church property have not yet been settled."

This was the status at the moment of the annexation, and by reason of the treaty, as well as under the rules of international law prevailing among civilized nations, this property is inviolable.

The corporate existence of the Roman Catholic Church, as well as the position occupied by the papacy, has always been recognized by the Government of the United States.

At one time the United States maintained diplomatic relations with the Papal States, which continued up to the time of the loss of the temporal power of the papacy. Moore's Digest of Int. Law, vol. 1, pp. 130, 131.

The Holy See still occupies a recognized position in international law, of which the courts must take judicial notice.

"The Pope, though deprived of the territorial dominion which he formerly enjoyed, holds, as sovereign pontiff and head of the Roman Catholic Church, an exceptional position. Though, in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his apostolic nuncios, are specially privileged. Nevertheless he does not make war, and the conventions which he concludes with states are not called treaties, but concordats. His relations with the Kingdom of Italy are governed, unilaterally, by

the Italian law of May 13, 1871, called 'the law of guarantees,' against which Pius IX and Leo XIII have not ceased to protest." 1 Moore's Dig. 39.

After the cession of Louisiana by France to the United States certain questions came up as to the title to lands granted by the King of Spain to the Roman Catholic Church. The opinion of Attorney General Wirt, having been asked thereon, he wrote as follows, 1 Op. Atty. Gen. 563.

"There can be no doubt of the power of the King of Spain to grant lands in Florida while the province was his, nor of the capacity of the Roman Catholic Church to take by grant. Our treaty with Spain recognizes and ratifies all such grants made prior to a certain day."

The proposition, therefore, that the church had no corporate or jural personality seems to be completely answered by an examination of the law and history of the Roman Empire, of Spain and of Porto Rico down to the time of the cession, and by the recognition accorded to it as an ecclesiastical body by the Treaty of Paris and by the law of nations.

Appellant claims that there were some laws of Porto Rico which should have been complied with before the Roman Catholic Church could have any corporate existence or right to sue. It may be assumed that he refers to the various laws of Porto Rico relating to the formation and regulation of business corporations. But it is plain that none of these laws have any application to the church and never were so intended.

If the people of Porto Rico had passed some law, by which the manner of holding properties by ecclesiastical bodies through trustees or otherwise, or the method in which such body should be represented before the courts were prescribed, a different question would arise. But there was no such law, and by the Spanish law, from the earliest moment of the settlement of the island to the present time, the corporate existence of the Catholic Church has been recognized. As counsel for the appellee says: "At the very least, and even assuming that for centuries the church had not been recognized as a body of equal

importance with the State in Porto Rico, but that it was a merely *de facto* organization or association holding property it would nevertheless have sufficient standing to maintain this suit."

There is no pretense in the corporation law of regulating the manner in which the Roman Catholic Church or any other religious corporation or body shall hold its property. No question of conformity to any law of "Sociétés Cultuelles" or of "Associations" or religious societies can here arise, since there are no statutes relating to any such genus of legal or artificial persons.

The general law as to corporations is found in Titles I and II of the Civil Code now in force. We give in the margin sections 27–30 and part of section 65.[1]

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[1] SEC. 27. The following are artificial persons:

(1) Corporations, associations and institutions of public interest, having artificial personality recognized by law.

The personality of such bodies shall commence from the moment of their establishment in accordance with law.

(2) Private associations, whether civil, commercial or industrial, to which the law grants legal personality.

SEC. 29. The civil status of corporations shall be governed by the laws which create or recognize them; that of associations by their by-laws; and that of institutions by the rules of their establishment duly approved by administrative action when such requisite be necessary.

SEC. 30. Artificial persons may acquire and possess property of all kinds and also contract obligations and institute civil and criminal actions in accordance with the laws and regulation of their establishment.

SEC. 65. All corporations or joint stock companies, organized under the laws of any State, or of the United States, or of any foreign government, shall, before doing business within this island, file in the office of the secretary a duly authenticated copy of their charters or articles of incorporation, and also a statement verified by the oath of the president and secretary of said corporation, and attested by the majority of its board of directors, showing—

(1) The name of such corporation and the location of its principal office or place of business, without this island; and if it is to have any place of business or principal office within this island, the location thereof.

(2) The amount of its capital stock.

(3) The amount of its capital stock actually paid in, in money.

(4) The amount of its capital stock paid in, in any other way, and in what, etc.

Domestic corporation law is equally inapplicable. Its terms are found in the Civil Code, Title II, chap. I, and have reference solely to business or commercial corporations. No religious, eleemosynary or charitable corporation can fall within its purview. Stock, stockholders, capital, surplus, officers, directors, the doing of business are the basic elements of this statute.

The properties of the church in Cuba and the Philippines at the time of the ratification of the treaty were far more considerable than those in Porto Rico. And the controversies or questions arising as to those properties have been quite generally adjusted in both Cuba and the Philippines partly with and partly without recourse to the courts. In Cuba a commission was appointed to consider the whole question and its report contains much interesting and pertinent information. It begins with the fundamental proposition that: "The church, as a juridical person, has held and holds the right to acquire, possess, or transfer all kinds of properties. The church has never been denied this right in Spain; rather, on the contrary, in all the provisions covering these matters this right has been recognized in the church," Sen. Rep. 2977, 57th Cong., 2d Sess., p. 12.

On this admitted basis was concluded a satisfactory adjustment of the difficult problem incident to the transfer of sovereignty from a regime of union of church and state to the American system of complete separation.

Even greater difficulties were settled in the Philippines, and the American Government never suggested that the church was without juristic capacity to possess or protect property rights. The suggestion that it did not possess a license from the local authorities "to do business" was never put forward.

Whether these ecclesiastical properties originally came from the State or any subdivision thereof, they were donated to, at once became and have ever since remained the property and in the peaceful possession of the Roman Catholic Church.

In the Philippines, the Supreme Court of the islands has recently treated these questions in an interesting and satisfactory opinion. *Barlin* v. *Ramirez*, 7 Philippines, 41. The sug-

gestion, made there as here, that the church was not a legal person entitled to maintain its property rights in the courts, the Supreme Court answered by saying that it did not require serious consideration when " made with reference to an institution which antedates by almost a thousand years any other personality in Europe."

It is urged that the complaint does not state facts sufficient to constitute any cause of action, and that it admits that the property in question was constructed out of funds of the municipality of Ponce, Porto Rico. This contention has been sufficiently answered. Counsel for appellee rightly says that—

" Whether the property originally came from the crown or the local government is immaterial, since it had been for centuries recognized as the property of the church. Because the Spanish crown or one of its municipal agencies chose to donate churches some years or centuries ago, it scarcely follows that it can now be claimed that the gift is revocable, and that the municipality may now expropriate the church and convert the property to any purpose it may desire."

In his statement to His Holiness, the Pope, when on special mission, Mr. Taft, the then Governor General of the Philippines, said, in referring to those islands:

" The transfer of sovereignty and all governmental property rights and interests from the crown of Spain to the United States in the Philippine Islands contained in the Treaty of Paris was a transfer from a government between which and the Church of Rome there had been in those islands the closest association in property, religion, and politics, to a government which by the law of its being is absolutely prevented from having such associations with any church. To make the transfer effectual, and, at the same time just, it is obvious that the proper line of division must be drawn between what were really civil property interests of the crown of Spain and what were religious trusts of the Catholic Church, and that all union of civil and clerical agencies for performance of political functions must end." Report of the Secretary of War, 1902, p. 237.

In *Mormon Church* v. *United States*, 136 U. S. 1, 53, Mr. Justice Bradley said:

"By the Spanish law, whatever was given to the service of God, became incapable of private ownership, being held by the clergy as guardians or trustees; . . . when property was given for a particular object, as a church, a hospital, a convent or a community, etc., and the object failed, the property did not revert to the donor, or his heirs, but devolved to the crown, the church or other commune or community," etc.

All the public funds employed in church buildings and other property were appropriated for that purpose without any reservation or restriction whatever, being approved according to law by the representatives of the nation in the Cortes, or by those of the towns in the common councils. Therefore the application of funds thus appropriated and voted by the legitimate mandataries of the nation or of the municipalities constituted, from the standpoint of law and justice, a perfect, irrevocable gift.

Certain objections in the nature of matters of procedure made by appellant we do not think we need consider. They may be classified as follows:

(1) Misjoinder of causes of action; (2) Insufficiency and irregularity of form; (3) Bar of statute of limitations; and (4) Lack of authority to bring suit in name of the church.

We do not regard either of these as possessing sufficient merit to require discussion.

We accept the conclusions of appellee's counsel as thus summarized:

"First. The legislative assembly of Porto Rico had the power to confer jurisdiction on the Supreme Court of the island of this special class of controversies. Such legislation was not contrary to the constitution and was in conformity with the power conferred by Congress upon the legislative assembly to regulate the jurisdiction of the courts.

"Second. The Roman Catholic Church has been recognized as possessing legal personality by the treaty of Paris and its

property rights solemnly safeguarded. In so doing the treaty has merely followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession. This juristic personality and the church's ownership of property had been recognized in the most formal way by the concordats between Spain and the papacy and by the Spanish laws from the beginning of settlements in the Indies. Such recognition has also been accorded the church by all systems of European law from the fourth century of the Christian era.

"Third. The fact that the municipality may have furnished some of the funds for building or repairing the churches cannot affect the title of the Roman Catholic Church, to whom such funds were thus irrevocably donated and by whom these temples were erected and dedicated to religious uses."

Decree affirmed.

DELMAR JOCKEY CLUB *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 219. Argued April 29, 30, 1908.—Decided June 1, 1908.

Even if the state court erred in a proceeding over which it has exclusive jurisdiction such error would not afford a basis for reviewing its judgment in this court.

The mere assertion by plaintiff in error that the judgment of the state court deprived him of his property by unequal enforcement of the law in violation of Federal immunities specially set up does not create a Federal question where there is no ground for such a contention, and the state court followed its conception of the rules of pleading as expounded in its previous decisions.

Where the asserted Federal questions are so plainly devoid of merit as not to constitute a basis for the writ of error the writ will be dismissed.

Whether a Missouri corporation has forfeited its charter by nonuser and misuser under the law of the State does not involve a Federal question, and a proceeding regularly brought by the Attorney General in the

nature of *quo warranto* constitutes due process of law. *New Orleans Waterworks* v. *Louisiana*, 185 U. S. 336.

Writ of error to review, 200 Missouri, 34, dismissed.

THE plaintiff in error was organized as a corporation under the laws of the State of Missouri on January 18, 1901, for the following purposes stated in its articles of association:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track public exhibitions of agricultural products and stock and of speed or races between horses, for premiums, purses or other awards, made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and track; to engage in poolselling, bookmaking and registering bets on exhibition of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, cafes, and other stands for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

In 1905 the attorney general of Missouri, *ex officio*, filed in the Supreme Court of the State of Missouri an information, in the nature of *quo warranto*, seeking to annul the charter of the company and forfeit all of its franchises and property, for the following alleged acts of abuse and nonuse of its corporate powers and franchises: First, engaging in bookmaking, poolselling and the registration of bets upon horse races from the date of its incorporation up to June 16, 1905; second, during the same period selling pools and accepting and registering

bets from minors upon the result of horse races run on the track of the corporation; third, engaging in bookmaking, pool-selling and the registration of bets upon horse races after June 16, 1905, in violation of an act of the legislature of Missouri approved March 21, 1905; and fourth, failure to give any exhibition of agricultural products or to give any exhibition of speed in races between horses for the purpose of improving the stock of trotting and pacing horses, or to establish or maintain any fair grounds in the city or county of St. Louis, or any other place.

The corporation demurred to the information upon nine grounds. In the first it was recited that as the information did not charge that the defendant was not licensed to engage in the business of bookmaking, etc., alleged to have been carried on prior to June 16, 1905, no violation of law was stated. The remaining grounds set forth reasons why it was asserted that the information in the second and third grounds, heretofore stated, did not charge violations of law or state facts upon which a judgment of ouster for such alleged acts could lawfully be based. After hearing argument the Supreme Court of Missouri sustained the first ground of demurrer and overruled all the others, and granted defendant fifteen days in which to answer the remaining allegations contained in the information, viz., the second, third and fourth grounds of alleged misuse and nonuse of the corporate franchises heretofore referred to. 200 Missouri, 34. Subsequently an answer was filed, of which (omitting title) a copy is in the margin.[1]

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[1] Respondent, Delmar Jockey Club, comes by its attorneys and for its answer to the information of the Attorney General herein, admits that it is a corporation duly organized and incorporated under the laws of the State of Missouri, and denies each and every other allegation in said information alleged or contained.

Wherefore, respondent prays that it be hence discharged with its costs.

II. For its further answer to that portion of the information of the Attorney General herein, wherein it is alleged that respondent has failed to exercise certain franchises claimed to be possessed by it, this respondent states that it has fully carried out and exercised all those provisions in its

Thereupon a motion for a final judgment of ouster, etc., on the pleadings was filed, for the following reasons:

"First. That said return and answer fails to state facts showing any sufficient cause or excuse for, or any legal defense to, the nonuser of respondent's franchises authorizing it to give exhibitions of agricultural products and exhibition of contests of speed or races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the city and county of St. Louis, as set forth and charged in the information herein.

"Second. It appears from the facts stated in said return and answer, and the second count thereof, that respondent is guilty of the acts of misuser and abuser of its franchises charged in the information herein filed, in this, to wit, that respondent engaged in the business of bookmaking and poolselling, registration of bets, and the acceptance of bets in violation of the laws of this State:

"Wherefore, informant prays that final judgment of ouster be rendered against the respondent as prayed for in the information in the case."

A motion to strike from the files having been overruled, the motion was heard and granted, and judgment of ouster was entered, a fine of five thousand dollars was imposed upon the corporation because of nonuse, misuse, and violation of its franchises, and provision was made for the winding up of the affairs of the corporation. A motion for a rehearing was

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charter authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed and races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and has provided suitable fair grounds for the same, in this that between the eighteenth day of January, 1901, and the sixteenth day of June, 1905, in pursuance of the provisions and requirements of §§ 7419 to 7424, inclusive, Revised Statutes of Missouri, 1899, respondent duly paid large sums of money into the treasury of the State of Missouri, which were placed by the treasurer of the State of Missouri to the credit of the State fair fund, the same being a fund created by § 7424, Revised Statutes of Missouri, 1899,

made, in which the protection of various clauses of the Constitution of the United States was invoked, the following only being material to the controversy arising on this record:

"Third. Respondent is charged with nonuse of its corporate franchise as to the right to hold fairs. The general denial of respondent applies to this charge, and there has been no trial as to that fact. Yet the judgment adjudges the respondent guilty without a hearing, thereby also violating the Fourteenth Amendment to the Constitution of the United States.

"But without this, the plea of estoppel interposed by the respondent to the charge of nonuse does not deprive respondent of the benefit of its general denial of that charge. Even at common law, and certainly since the statute of Anne, a plea of estoppel may be united with a general denial in a *quo warranto* proceeding.

"Fifth. The judgment of ouster ought not to be entered in this case in the present state of the pleadings, for the reason that even though the power conferred by the charter of the respondent to engage in bookmaking and poolselling be regarded as taken away by the repeal of the breeder's law, and even though respondent has lost its charter privileges to con-

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for the development and advancement of the industrial interests of this State under the direction of the state board of agriculture, and that all of said money so paid into said fund was received, used and appropriated by the State of Missouri for the purpose of holding and giving annual exhibitions of agricultural products and stock of every kind and description at the city of Sedalia, State of Missouri, and that the said sums of money paid by respondent into the treasury of the State of Missouri under the terms of §§ 7419 to 7424, inclusive, were used and appropriated by the said State of Missouri and its said state board of agriculture solely for the maintenance and support of said Missouri State fair held annually at Sedalia, Missouri, and for the further purpose of providing, constructing, improving and equipping all grounds, stands and buildings necessary for the holding and giving of said fair.

Respondent further states that by exacting and receiving the said sums of money for the above-mentioned purposes the said State of Missouri intended to and did accept the same as full and complete performance and use by respondent of its franchise to give exhibitions of agricultural products

duct fairs by failure to exercise those privileges, nevertheless respondent has other privileges conferred by its charter which are not contrary to any law of this State or to the policy of the State, and which have not been lost by nonuser, among which privileges is the right to conduct horse races for prizes or purses or at pleasure, and which the judgment of this court deprives respondent of without respondent having in any manner lost the right so to do, and in this respect also the judgment deprives the respondent of its property without due process of law, contrary to the guarantees of the Fourteenth Amendment to the Constitution of the United States, which respondent here invokes."

The motion for a rehearing was granted, and upon a reconsideration of the cause the motion for judgment on the pleadings was again sustained upon the ground of nonuser of the corporation franchises, and judgment was entered ousting the corporation of all of its franchises and charter rights, and adjudging that the same be forfeited to the State and the corporation dissolved. 200 Missouri, 34. A motion for a rehearing having been filed and overruled, the cause was brought here by writ of error.

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and stock, and the said State of Missouri thereby intended to and did waive any other or further exercise of such franchise on the part of respondent.

Further answering the allegations of non-user from June 16, 1905, to the date of the filing of this information, to wit, July 28, 1905, respondent states that the franchise of giving exhibitions of agricultural products and stock is not one which can be exercised continuously and at all times from the beginning to the end of the year, but is one, owing to its peculiar character, which can only be exercised during the harvest season of each year. For these reasons respondent was not required to exercise such franchise between the above specified dates, but respondent further avers that it has in good faith endeavored at all times to exercise the franchises granted to it by its articles of incorporation in the manner and for the purposes intended by such grants, and that such is its purpose in the future, and respondent intends in every way to comply with and perform according to law all the obligations which it assumed upon the grant of the aforesaid franchises to it by the State of Missouri, and respondent again specifically denies each and every charge, allegation or assertion of a contrary purpose on its part, contained in the information filed herein.

Wherefore, respondent prays that it be hence discharged with its costs.

Mr. Thomas Bond, with whom *Mr. Henry W. Bond* was on the brief, for plaintiff in error:

Where a Federal question appears in the record and was decided, or where a decision of such a question was necessarily involved in the case, it is not necessary that the particular section of the Federal Constitution violated be specifically pointed out in the state court, in order to confer jurisdiction upon this court. *Murray* v. *Charleston*, 96 U. S. 432; *Columbia Water & Power Co.* v. *Columbia Electric Co.*, 172 U. S. 475, 488; *Bridge Proprietors* v. *Hoboken L. & I. Co.*, 1 Wall. 116; *Furman* v. *Nichol*, 8 Wall. 44; *Spencer* v. *Merchant*, 125 U. S. 345; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 657.

Where jurisdiction is predicated upon the third class of controversies mentioned in § 709, Rev. Stat., it is not necessary that the Federal right, title, privilege or immunity claimed to be denied by the state court be raised in the state court by pointing out the particular section of the Constitution claimed to be violated, or that it be set up by any particular form of words, but the requirement of the statute is complied with if the record shows that the attention of the state court was called to the right, title, privilege or immunity claimed. *Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 68; *Dewey* v. *Des Moines*, 173 U. S. 193, 199; *San Jose Land & Water Co.* v. *Ranch Co.*, 189 U. S. 175; 180; *Williams* v. *Bruffy*, 96 U. S. 176; *Harris* v. *Dennie*, 3 Pet. 292; *Eureka Canal Co.* v. *Yuba Co.*, 116 U. S. 410.

The Federal rights, titles, privileges and immunities claimed by plaintiff in error herein and denied by the judgment of the Supreme Court of Missouri ousting it of all of its franchises for alleged nonuse, were specially and specifically set up, claimed, and called to the attention of the state court on the motion for rehearing, and it was on the points raised on such motion that this cause was last submitted and was finally considered and decided by the court.

Federal questions raised in a motion for rehearing are not raised too late if the state court sustains said motion, or con-

siders the Federal questions therein presented. *Mallett* v. *North Carolina*, 181 U. S. 589, 592; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308.

The constitutional rights, privileges and immunities set up by plaintiff in error in its motion for a rehearing filed after the entry of the first judgment of ouster were necessarily denied by the Supreme Court of Missouri in its final judgment ousting plaintiff in error of its corporate existence because of an alleged nonuser of certain of its corporate franchises. *Detroit &c. Ry. Co.* v. *Osborn*, 189 U. S. 383; *Kaukauna W. P. Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S. 254.

Mr. John Kennish, with whom *Mr. Herbert S. Hadley*, Attorney General of the State of Missouri, was on the brief, for defendant in error:

Questions relating to matters of pleading and practice under the laws of the State involve no Federal question. Taylor on Juris. & Proc. of the U. S. Supreme Court, p. 393; *Vista County* v. *Iowa Falls & S. C. R. Co.*, 112 U. S. 177; *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 394; *Nat. F'dry Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216.

The Supreme Court cannot review the decision of the state court resting upon the defense of estoppel. Taylor, *supra*, 404; *Michigan* v. *Flint & Pere Marquette R. R. Co.*, 152 U. S. 363; *Sherman* v. *Grinell*, 144 U. S. 198; *Israel* v. *Arthur*, 152 U. S. 355; *Weyerhaueser* v. *Minn.*, 176 U. S. 550.

In the first motion for a rehearing but two of the grounds thereof sought to raise a Federal question as to the charge of nonuser of franchises. In the first ground it was claimed that the judgment of the court was cruel and unusual punishment and violative of the Eighth Amendment to the Constitution of the United States; and in the third ground of said motion it was claimed that the judgment adjudges the respondent guilty without a hearing, thereby also violating the Fourteenth Amendment.

The first ten Amendments to the Federal Constitution con-

tained no restrictions of the powers of the State, but were intended to operate solely on the Federal Government. *Brown* v. *New Jersey*, 175 U. S. 172; *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410; *Twitchell* v. *Commonwealth*, 7 Wall, 321; *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Spies* v. *Illinois*, 123 U. S. 131; *Davis* v. *Texas*, 139 U. S. 651.

Parties having been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law. Taylor, *supra*, 412; *Central Land Co.* v. *Laidley*, 150 U. S. 112; *Walker* v. *Sauvinet*, 92 U. S. 90; *Head* v. *Amoskeag Co.*, 113 U. S. 9; *Morley* v. *Lake Shore R. R.*, 146 U. S. 162; *Bergman* v. *Becker*, 157 U. S. 655.

When a constitutional right is asserted in a state court without stating whether such right is claimed under the state or Federal Constitution, and which could have been claimed under either, the presumption is that the right was asserted under the state constitution. *Porter* v. *Foeley*, 24 How. 420; *Jacobi* v. *Alabama*, 187 U. S. 133; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131; *Kansas Association* v. *Kansas*, 120 U. S. 103; *Kipley* v. *Illinois*, 170 U. S. 182; *New York Central R. R. Co.* v. *New York*, 186 U. S. 269.

A Federal question is raised too late when suggested for the first time in the petition for rehearing after judgment in the highest court of the State where such petition is denied without opinion. Taylor, *supra*, 448; *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U. S. 273; *Turner* v. *Richardson*, 180 U. S. 87; *Scudder* v. *Coler*, 175 U. S. 33.

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

Soon after the filing of the record in this court the Attorney General of Missouri submitted a motion to dismiss the writ of error or to affirm, and the determination of the motion was postponed until the hearing on the merits. The cause having been

argued, the motion to dismiss or affirm must now be disposed of.

We are of opinion that the record does not present any Federal question and that the motion to dismiss must be granted.

The Supreme Court of Missouri, in the opinion delivered by it on the rehearing, considered three propositions: First, the effect of the general denial contained in the first paragraph and the plea embodied in the second numbered paragraph of the answer; second, upon what grounds a forfeiture of a corporate franchise might be declared; and, third, whether or not, in addition to ousting the corporation from its franchises, the court could and should "appropriate a part of its substance to the use and benefit of the State." These propositions were determined after an elaborate consideration of the subject and a review of many authorities. It was decided that the plea following the general denial in the answer amounted to a plea of confession and avoidance; that in consequence the general denial first pleaded raised no issue, and hence "the motion for judgment upon the ground of nonuser should be sustained." It was next determined, after declaring that it was the duty of the court to act with great caution in decreeing a forfeiture, that forfeiture of the corporate franchises might be declared "where there is either willful misuse or willful nonuse of the franchise and franchises, which are of the essence of the contract with the State, and those in which the State or public is most interested, then a forfeiture of the whole charter should be and will be declared. When a corporation receives from the State a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others, and that it will not misuse those granted. A failure in any substantial particular entitled the State to come in and claim her own, the rights theretofore granted, and this through a judgment of forfeiture in a proceeding like the one at bar." On this branch of the case the court concluded as follows:

"The right to construct and maintain suitable fair grounds in the city and county of St. Louis, and to give exhibitions of agricultural products thereat, is one of the essence of this contract between the State and the respondent. It was and is the franchises in the exercise of which the State and general public have the most interest and concern. A failure to exercise this franchise was a failure to perform the very thing which was of the essence of the contract. That this failure was willful is shown by the length of time of the admitted nonuser as well as by other things made apparent by the pleadings. So far as the State and general public are concerned this right or franchise, so long neglected, was leading and uppermost in interest. No legal excuse is offered for respondent's failure. It would appear, at least by inferences deducible from the pleadings, that respondent was alert in promoting that incidental feature of its charter, gambling upon horse races, and furnishing its gamblers with refreshments, both liquid and solid, but extremely indifferent as to doing the things, moral in character, which it had, by receiving its charter, tacitly agreed to do, and the only things in which the State and the public had any special interest.

"Such a flagrant and willful nonuser of franchises, which are of the very essence of the grant, demand, in our judgment, the forfeiture of all the rights and franchises granted, and we therefore hold that there shall be a judgment decreeing a forfeiture of all the rights and franchises granted to respondent by its charter and a dissolution of said corporation."

As to the third proposition, the court was of opinion that no further fine or punishment than that of ouster should be inflicted.

In substance the contention of plaintiff in error is that the plea, contained in the second paragraph of the answer, merely presented a question of estoppel, which did not waive the prior general denial, and that the judgment of the Supreme Court of Missouri destroyed, "without a trial or a hearing and by an unequal and unjust enforcement of the law, vested property

rights both of plaintiff in error and its stockholders, in the face of Federal immunities, which the record shows to have been specially set up and claimed." In effect this is but asserting that the judgment of the Supreme Court of Missouri was so plainly arbitrary and contrary to law as to be an act of mere spoliation. But we fail to perceive the slightest semblance of ground for such a contention. In determining the scope and effect of the allegations of the answer and in reaching the conclusion that the charges of nonuser contained in the information stood as confessed under the pleadings, the Supreme Court of Missouri followed its conception of the rules of pleading, as expounded in many of the previous decisions of that court, and the question of the extent of the power to take from the corporation its charter grant of franchises was determined as a question of general law. The determination of those matters did not involve a Federal question. *San Francisco* v. *Itsell*, 133 U. S. 65. Manifestly, the proceeding constituted due process. *Caldwell* v. *Texas*, 137 U. S. 692; *New Orleans Waterworks* v. *Louisiana* (where the subject of the power of a State to forfeit corporate franchises is considered), 185 U. S. 336, 344. And if the fact was, which we do not intimate is the case, that the court below erred in the conclusions reached by it in respect to the propositions which it determined, the error would not afford a basis for reviewing its judgments in this court. *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112, and cases cited; *Ballard* v. *Hunter*, 204 U. S. 241, 259; *Patterson* v. *Colorado*, 205 U. S. 460.

The asserted Federal questions were so plainly devoid of merit as not to constitute a basis for the writ of error (*Wilson* v. *North Carolina*, 169 U. S. 586, 595), and the writ of error is, therefore,

Dismissed.

KANSAS CITY NORTHWESTERN RAILROAD COMPANY *v.* ZIMMERMAN.

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

No. 231. Submitted April 28, 1908.—Decided June 1, 1908.

Where the ground on which the jurisdiction of the Circuit Court was denied did not go to its jurisdiction as a Federal court as such, but its jurisdiction was denied on the ground that the state court where the proceedings started had no jurisdiction, a direct appeal on the jurisdictional question will not lie to this court under § 5 of the Judiciary Act of 1891.

It is not open to a defendant who has secured a removal and successfully resisted a motion to remand to raise the question that the removal was improper on a certificate of jurisdiction to this court under § 5 of the Judiciary Act of 1891.

Appeal from 144 Fed. Rep. 522, dismissed.

THE facts are stated in the opinion.

Mr. Balie Peyton Waggener for appellant.

Mr. John H. Atwood and *Mr. W. W. Hooper* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to enjoin the appellant, hereafter called the defendant, from operating its railroad over certain land in Leavenworth, formerly belonging to the plaintiff's intestate, until a judgment against the defendant's predecessor in title for the damages caused by the appropriation of the land should be paid. It appears from the bill, among other things, that the defendant's predecessor appropriated the land without regular proceedings, and in 1889 the plaintiff's intestate began an action on which he recovered a judgment on May 15, 1897;

that the defendant's predecessor had mortgaged its road in 1888; that on March, 1890, a suit to foreclose the mortgage was begun, and in 1893 there was a decree of foreclosure; and that this decree was followed (in 1894) by a sale to the defendant. It is alleged that the defendant became the successor in interest to all the rights "and as part of the consideration assumed and was subject to all the liabilities" of its predecessor, "under and by virtue of said decree and purchase"; and again, "that under and by virtue of said decree and the ordinances of said city, said defendant assumed and agreed to pay off any and all obligations" of the earlier road.

The present suit was begun in a state court in May, 1899. In June the defendant removed it to the Circuit Court of the United States, on the ground that the determination of the cause involved the construction of the foreclosure decree and of the Constitution and of the laws of the United States. The bill was reformed, and the defendant demurred to the merits, and also on the ground that the state court had no jurisdiction, and that therefore the United States court had none. The demurrer was sustained by the Circuit Court on the ground of want of jurisdiction in the state court, but on appeal by the plaintiff the decree was reversed by the Circuit Court of Appeals and a decision rendered for the plaintiff on the merits. 144 Fed. Rep. 622. Thereupon on November 27, 1906, a decree was entered for the plaintiff. On January 17, 1907, an appeal to this court was taken by the defendant and allowed, and on October 23 of the same year a certificate was made that the question involving the jurisdiction of the Circuit Court was in issue and decided against the defendant, and thus the case now stands.

We do not deem it necessary to discuss all the difficulties that the appellant would have to overcome in order to maintain its case. It seems from the opinion of the Circuit Court of Appeals not to have insisted on the objection to the jurisdiction there, but to have taken its chances on the merits, 144 Fed. Rep. 624, as also by its demurrer it relied mainly on the want of equity

in the bill. See *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127. It comes here on the purely technical proposition that, although the plaintiff is in the right court, and although the case has been heard on the merits at the defendant's invitation, the plaintiff must begin over again because he did not come into court by the right way.

If the defendant had confined its defense to a denial of jurisdiction, there would be force in the consideration that the plaintiff, not it, took the case to the Circuit Court of Appeals. But in the circumstances of this case the defendant seems to us to stand no better than it would if it had taken the appeal to the Circuit Court of Appeals. *Carter* v. *Roberts*, 177 U. S. 496, 500. *Robinson* v. *Caldwell*, 165 U. S. 359. It is suggested that the Circuit Court of Appeals had no jurisdiction, citing *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277. But although the defendant in its petition for removal set up that the construction of the Constitution of the United States was involved, such was not the fact, and the language of the case cited does not apply.

It is enough, however, that the ground on which the jurisdiction of the Circuit Court was denied did not go to its jurisdiction as a Federal court. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225. The certificate does not purport to enlarge the record, but simply to state what was in issue. The record shows that the jurisdiction of the Circuit Court was denied on the single ground that the state court where the proceedings started had none. Whether that contention was correct or not under *Wabash Railroad Co.* v. *Adelbert College*, 208 U. S. 38, it had nothing to do with the jurisdiction of the Federal court as such, or indeed, at all, except for the reason that the power of a secondary tribunal can go no higher than its source. We may add that the jurisdiction of the Circuit Court, if it existed, was ancillary to its possession of the *res*, if it had it, that the principles to be applied are of general application, 208 U. S. 54, and again these do not concern the jurisdiction of the Federal court as such.

The defendant now, after having secured a removal and after having successfully resisted a motion to remand, attempts to deny the jurisdiction of the Circuit Court on the ground that the removal was improper. It is enough to say that that question is not open under the certificate.

Appeal dismissed.

BOBBS-MERRILL COMPANY, *v.* STRAUS *et al.*, DOING BUSINESS AS R. H. MACY & COMPANY.

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

No. 176. Argued March 12, 13, 1908.—Decided June 1, 1908.

There are differences between the patent, and the copyright, statutes in the extent of the protection granted by them, and the rights of a patentee are not necessarily to be applied by analogy to those claiming under copyright.

At common law an author had a property in his manuscript and might have redress against any one undertaking to publish it without his authority.

Copyright property under the Federal law is wholly statutory and depends upon the rights created under acts of Congress passed in pursuance of authority conferred by § 8 of Art. I of the Federal Constitution.

The copyright statutes are to be reasonably construed. They will not by judicial construction either be unduly extended to include privileges not intended to be conferred, nor so narrowed as to exclude those benefits that Congress did intend to confer.

The sole right to vend granted by § 4952, Rev. Stat., does not secure to the owner of the copyright the right to qualify future sales by his vendee or to limit or restrict such future sales at a specified price, and a notice in the book that a sale at a different price will be treated as an infringement is ineffectual as against one not bound by contract or license agreement.

147 Fed. Rep. 15, affirmed.

THE facts are stated in the opinion.

Mr. W. H. H. Miller, with whom *Mr. C. C. Shirley* and *Mr. Samuel D. Miller* were on the brief, for appellant:

The matter here involved is of statutory copyright alone; no question of common-law rights or property of either the

author or publisher is presented. Appellant claims the right to control the price under the provision of the statute which gives the owner of a copyright the "sole" right of "vending," in strict analogy to the right of the owner of a patent to control the price of the patented article under the statutory use of the same word.

The analogy is complete between the case at bar and those numerous patent cases wherein the courts have upheld the right of patentees to impose restrictions upon the sale of the patented article or its products and to exercise a certain control over the thing sold after the completion of the sale. *Edison Phonograph Co.* v. *Kaufmann et al.*, 105 Fed. Rep. 960; *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863; *National Phonograph Co.* v. *Schlegel et al.*, 128 Fed. Rep. 733; *Heaton-Peninsular-Button-Fastener Co.* v. *Eureka &c. Co.*, 77 Fed. Rep. 288; *Cortelyou* v. *Lowe*, 111 Fed. Rep. 1005; *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 424. Numerous other cases might be cited. See also *Dickerson* v. *Tinling*, 84 Fed. Rep. 192; *Dickerson* v. *Matheson*, 57 Fed. Rep. 524.

The power of the owner of the patent to limit price has been expressly decided by this court. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *National Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *Edison Phonograph Co.* v. *Pike* 116 Fed. Rep. 863. See also: *Cortelyou et al.* v. *Johnson & Co.*, 138 Fed. Rep. 110; *A. B. Dick Co.* v. *Roper*, 126 Fed. Rep. 966; *Brodrick Copygraph Co.* v. *Roper*, 124 Fed. Rep. 1019; *Cotton Tie Co.* v. *Simmons*, 106 U. S. 89; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425.

Mr. John G. Carlisle and *Mr. Edmond E. Wise* for appellees:

The right, claimed by appellants, to control the retail price of books which have passed out of their possession, is not granted by the provisions of the statute which gives the owner of a copyright the sole right of vending. *Publishing Co.* v. *Smythe*, 27 Fed. Rep. 914; *Harrison* v. *Maynard-Merrill Co.*, 61 Fed. Rep. 689; *Clemens* v. *Estes*, 22 Fed. Rep. 899; *Publish-*

ing Co. v. *Smith*, 27 Fed. Rep. 914; *Werckmeister* v. *American Lithographic Co.*, 134 Fed. Rep. 321; *Doan* v. *American Book Co.*, 105 Fed. Rep. 772; *Kipling* v. *G. P. Putnam's Sons*, 120 Fed. Rep. 631; *Bobbs-Merrill Co.* v. *Snellenburg*, 131 Fed. Rep. 530.

Owing to the difference both in the theory and the letter of the patent and copyright statutes, the patent cases relied upon by complainant are inapplicable to the question of copyright here presented.

MR. JUSTICE DAY delivered the opinion of the court.

The complainant in the Circuit Court, appellant here, the Bobbs-Merrill Company, brought suit against the respondents, appellees here, Isidor Straus and Nathan Straus, partners trading as R. H. Macy & Company, in the Circuit Court of the United States for the Southern District of New York, to restrain the sale of a copyrighted novel, entitled "The Castaway," at retail at less than one dollar for each copy. The Circuit Court dismissed the bill on final hearing. 139 Fed. Rep. 155. The decree of the Circuit Court was affirmed on appeal by the Circuit Court of Appeals. 147 Fed. Rep. 15.

The appellant is the owner of the copyright upon "The Castaway," obtained on the eighteenth day of May, 1904, in conformity to the copyright statutes of the United States. Printed immediately below the copyright notice on the page in the book following the title page is inserted the following notice:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

"THE BOBBS-MERRILL COMPANY."

Macy & Company, before the commencement of the action, purchased copies of the book for the purpose of selling the same at retail. Ninety per cent of such copies were purchased by them at wholesale at a price below the retail price by about

forty per cent, and ten per cent of the books purchased by them were purchased at retail, and the full price paid therefor.

It is stipulated in the record:

Defendants, at the time of their purchase of copies of the book, knew that it was a copyrighted book and were familiar with the terms of the notice printed in each copy thereof, as above set forth, and knew that this notice was printed in every copy of the book purchased by them.

The wholesale dealers, from whom defendants purchased copies of the book, obtained the same either directly from the complainant or from other wholesale dealers at a discount from the net retail price, and at the time of their purchase knew that the book was a copyrighted book and were familiar with the terms of the notice printed in each copy thereof, as described above, and such knowledge was in all wholesale dealers through whom the books passed from the complainants to defendants. But the wholesale dealers were under no agreement or obligation to enforce the observance of the terms of the notice by retail dealers or to restrict their sales to retail dealers who would agree to observe the terms stated in the notice.

The defendants have sold copies of the book at retail at the uniform price of eighty-nine cents a copy, and are still selling, exposing for sale and offering copies of the book at retail at the price of eighty-nine cents per copy, without the consent of the complainant.

Much of the argument on behalf of the appellant is based upon the alleged analogy between the statutes of the United States securing patent rights to inventors and the copyright acts securing rights and privileges to authors and others. And this analogy, it is contended, is so complete that decisions under the patent statutes in respect to the rights claimed in this suit under the copyright act are necessarily controlling.

In the main brief submitted by the learned counsel for the appellant it is said:

"All of the argument has been upon the assumption that

the very numerous decisions of the Circuit Courts and Circuit Courts of Appeals, such as the *Heaton-Peninsular case* [*Button-Fastener case*], 77 Fed. Rep. 288, the *Victor Talking Machine case*, 123 Fed. Rep. 424, and others along the same line, as well as the *Cotton Tie case* in this court, upholding this restriction, with reference to sales of patented articles, express the law; and we have been especially confident that such must be the case, for the reason that this court, in *Bement* v. *National Harrow Company*, 186 U. S. page 70, has given its sanction to the broad doctrines laid down in the *Heaton-Peninsular case*, 77 Fed. Rep. 288."

The present case involves rights under the copyright act. The facts disclose a sale of a book at wholesale by the owners of the copyright, at a satisfactory price, and this without agreement between the parties to such sale obligating the purchaser to control future sales, and where the alleged right springs from the protection of the copyright law alone. It is contended that this power to control further sales is given by statute to the owner of such a copyright in conferring the sole right to "vend" a copyrighted book.

A case such as the present one, concerning inventions protected by letters patent of the United States, has not been decided in this court, so far as we are able to discover. In the so-called *Cotton Tie case* (*Cotton Tie Co.* v. *Simmons*, 106 U. S. 89), the complainant company owned patents for improvements in metallic cotton-bale ties, and these cotton-bale ties were manufactured by the patentee, and stamped in the buckles were the words: "Licensed to use once only." After the bands had been severed at the cotton mill the respondent bought them and the buckles as scrap iron, rolled and straightened the pieces of the bands, and rivetted their ends together. He then cut them into proper lengths and sold them, with the buckles, to be used as ties.

The report of this case in the Circuit Court for the District of Rhode Island is found in 3 Banning & Arden, 320; *S. C.*, 1 Fed. Cases, No. 293, p. 623. The report shows that Judge

Shepley dismissed the bill on the ground that the attempted restriction to a single use by the words stamped on the buckle was not one which the patentee was entitled to impose, as the sale of the patented article, as an ordinary article of commerce, had taken it outside of the limits of the patent monopoly, and that the purchaser took unrestricted title to the buckle, without any reservation in the vendor. This court reversed that decision, holding that the reconstructed ties were not a repair of the old article, but a recreation of the subject of the patent, and, therefore, an infringement. Mr. Justice Blatchford, in delivering the opinion of the court, said:

"Whatever right the defendants could acquire to the use of the old buckle, they acquired no right to combine it with a substantially new band, to make a cotton-bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or the tie, in any proper sense. The band was voluntarily severed by the consumer at the cotton mill, because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capacity for use as a tie was voluntarily destroyed. As it left the bale it could not be used again as a tie. As a tie the defendants reconstructed it, although they used the old buckle without repairing that."

That the case was not decided as one of restricted license, because of the words stamped on the buckle, is shown by the language of Mr. Justice Blatchford in concluding his opinion:

"We do not decide that they are liable as infringers of either of the three patents, merely because they have sold the buckle considered apart from the band or from the entire structure as a tie."

We cannot agree that any different view of the *Cotton Tie case* was indicated in the comments of the learned justice, speaking for this court, in *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 433. What was there said in con-

nection with the quotation from the opinion of Mr. Justice Blatchford in the *Cotton Tie case* enforces the view that the case was one of infringement, because of the reconstruction of the patented device.

In *Bement* v. *National Harrow Co.*, 186 U. S. 70, the suit was between the owners of the letters patent as licensor and licensees, seeking to enforce a contract as to the price and terms on which the patented article might be dealt with by the licensee. The case did not involve facts such as in the case now before us, and concerned a contract of license sued upon in the state court, and, of course, does not dispose of the questions to be decided in this case.

The question was supposed to be involved in the recent case of *Cortelyou* v. *Johnson*, 207 U. S. 196, where a patented machine, known as the Neostyle, was sold with a license, printed on the baseboard of the machine, limiting the use thereof to certain paper, ink and other supplies, made by the Neostyle company. While the question as to the validity of such license restriction was fully and ably argued by counsel, the case went off upon the finding that notice of the license restriction was not brought home to the defendant company.

If we were to follow the course taken in the argument, and discuss the rights of a patentee, under letters patent, and then, by analogy, apply the conclusions to copyrights, we might greatly embarrass the consideration of a case under letters patent, when one of that character shall be presented to this court.

We may say in passing, disclaiming any intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted by them. This was recognized by Judge Lurton, who wrote a leading case on the subject in the Federal courts (*The Button Fastener Case*, 77 Fed. Rep. 288), for he said in the subsequent case of *Park & Sons* v. *Hartman*, 153 Fed. Rep. 24:

"There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other."

We therefore approach the consideration of this question as a new one in this court, and one that involves the extent of the protection which is given by the copyright statutes of the United States to the owner of a copyright under the facts disclosed in this record. Recent cases in this court have affirmed the proposition that copyright property under the Federal law is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under Article I, § 8, of the Federal Constitution: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1; following the previous cases of *Wheaton* v. *Peters*, 8 Pet. 590; *Bank* v. *Manchester*, 128 U. S. 244–253; *Thompson* v. *Hubbard*, 131 U. S. 123–151.

The learned counsel for the appellant in this case in the argument at bar disclaims relief because of any contract, and relies solely upon the copyright statutes, and rights therein conferred. The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.

At common law an author had a property in his manuscript and might have redress against any one who undertook to realize a profit from its publication without authority of the author. *Wheaton* v. *Peters*, 8 Pet. 591, 659.

In Drone on Copyright that author says, page 100:

"As the law is now expounded, there are important differ-

ences between the statutory and the common-law right. The former exists only in works which have been published within the meaning of the statute, and the latter only in works which have not been so published. In the former case ownership is limited to a term of years; in the latter it is perpetual. The rights do not coëxist in the same composition; when the statutory right begins the common-law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common-law rights are lost, and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured."

While the nature of the property and the protection intended to be given the inventor or author as the reward of genius or intellect in the production of his book or work of art is to be considered in construing the act of Congress, it is evident that to secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes. Speaking for this court in *Stephens* v. *Cady*, 14 How. 528, 530, Mr. Justice Curtis said:

"The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Miller* v. *Taylor*, 4 Burr, 2396, 'a property in notion, and has no corporeal, tangible substance.' "

This fact is emphasized when we note the title to the act of Congress, passed at its first session—"An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." 1 Stat. at Large, by Peters, chap. 15, p. 124.

In order to secure this right it was provided in that statute, as it has been in subsequent ones, that the authors of books, their executors, administrators, or assigns, shall have the "sole right and liberty of printing, reprinting, publishing, and vending" such book for a term of years, upon complying with the

statutory conditions set forth in the act as essential to the acquiring of a valid copyright. Each and all of these statutory rights should be given such protection as the act of Congress requires, in order to secure the rights conferred upon authors and others entitled to the benefit of the act. Let us see more specifically what are the statutory rights, in this behalf, secured to one who has complied with the provisions of the law and become the owner of a copyright. They may be found in §§ 4952, 4965 and 4970 of the Revised Statutes of the United States, and are as follows:

"SEC. 4952. Any citizen of the United States or resident therein, who shall be the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same." U. S. Comp. St. 1901, p. 3406.

"SEC. 4965. If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of fine arts, as provided by this chapter, shall within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further for-

feit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale, one-half thereof to the proprietor and the other half to the use of the United States." U. S. Comp. St. 1901, p. 3414.

Section 4970 is as follows:

"The Circuit Courts, and District Courts having the jurisdiction of Circuit Courts, shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable." U. S. Comp. St. 1901, p. 3416.

Section 4965 undertakes to work a forfeiture of copyrighted articles, and confers a right of action for a penalty. Relief is given in a single suit, one-half of the money recovered going to the United States. *Werckmeister* v. *American Tobacco Company*, 207 U. S. 375.

As this is a suit in equity for relief under § 4970 of the U. S. Revised Statutes, giving to the Circuit and District Courts of the United States the right to grant relief by injunctions to prevent the violations of rights secured by the copyright statutes, we are not concerned with rights and remedies under § 4965.

It is the contention of the appellant that the Circuit Court erred in failing to give effect to the provision of § 4952, protecting the owners of the copyright in the sole right of vending the copyrighted book or other article, and the argument is that the statute vested the whole field of the right of exclusive sale in the copyright owner; that he can part with it to another to the extent that he sees fit, and may withhold to himself, by proper reservations, so much of the right as he pleases.

What does the statute mean in granting "the sole right of vending the same"? Was it intended to create a right which would permit the holder of the copyright to fasten, by notice

in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.

In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy.

The precise question, therefore, in this case is, does the sole right to vend (named in § 4952) secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.

In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose

to secure the right of multiplying copies of the work, a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.

This conclusion renders it unnecessary to discuss other questions noticed in the opinion in the Circuit Court of Appeals, or to examine into the validity of the publisher's agreements, alleged to be in violation of the acts to restrain combinations creating a monopoly or directly tending to the restraint of trade.

The decree of the Circuit Court of Appeals is

Affirmed.

SCRIBNER *v.* STRAUS *et al.*, TRADING AS R. H. MACY & COMPANY.

CHARLES SCRIBNER'S SONS, INCORPORATED, APPELLANT, *v.* SAME.

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

Nos. 204, 205. Argued April 16, 1908.—Decided June 1, 1908.

Bobbs-Merrill Co. v. *Straus*, *ante*, p. 339, followed as to construction of § 4952, Rev. Stat., and the extent of the exclusive right to vend thereby granted to the owner of a statutory copyright.

Where the jurisdiction of the Circuit Court is invoked for the protection of rights under the copyright statute that court cannot consider questions of contract right not dependent on the statute where diverse citizenship does not exist, or if it does exist, where the statutory amount is not involved.

Both the courts below having found that there was no satisfactory proof to support complainants' claim against defendants for contributory infringement by inducing others to violate contracts of conditional sale this court applies the usual rule and will not disturb such findings.

147 Fed. Rep. 28, affirmed.

THE facts are stated in the opinion.

Mr. Stephen H. Olin, for appellants, submitted.

Mr. John G. Carlisle, with whom *Mr. Edmond E. Wise* was on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

These actions were submitted at the same time and admittedly involve the same questions of law. The suits were brought, the one by a partnership, as Charles Scribner's Sons,

and the other by a corporation, Charles Scribner's Sons, incorporated, against R. H. Macy & Company, to restrain the selling at retail of the complainant's books, copyrighted under the laws of the United States, at prices less than those fixed by complainants, and from buying such copyrighted books except under the rules and regulations of the American Publishers' Association. The learned counsel for the appellants in this case, by consent, filed a brief in the case of *Bobbs-Merrill Company* v. *Isidor Straus and Nathan Straus, Partners as R. H. Macy & Co., No.* 176, just decided, *ante*, p. 339. So far as the same questions are involved the decision in No. 176 is pertinent to this case, and these cases are controlled by the rulings made in that case.

The defendants carried on a department store. Among other things they sold books at retail, some copyrighted and some not. In the year 1901 the American Publishers' Association was formed among certain publishers of copyrighted books, and in their agreement is found the following:

"III. That the members of the association agree that such net copyrighted books, and all others of their books, shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided."

Scribner's Sons' catalogue, invoices and bill of goods contained the following notice:

"Copyrighted net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association."

In the case of a new publisher, notice was given by correspondence and by sending a blank, as follows:

"American Publishers' Association.

—— —, 190—.

"In consideration of discount allowed on books bought from —— —— we hereby agree that for one year from date of publication we will not sell net books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1, 1902, at a greater discount than twenty-eight per cent at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers' Association to any dealer known to us to cut prices of net books or of new fiction, except as above provided."

The new publisher was required to execute this pledge before deliveries were made, although if dealers refused to sign the trade was still allowed to sell to them and would sell to them. If a new member made application for books, such application was referred to the association, and the agreement executed before deliveries were made.

Macy & Company refused to enter the association or to be bound by its rules. They sold books at less than the prices fixed by the association, and bought books from other dealers, including publications of complainants, and sold them at less prices than those fixed by the association. And they purchased from dealers who knew that Macy & Company intended to sell at such prices.

Upon the theory that Macy & Company had notice of these agreements, it was sought to hold them as copyright infringers. Both the Circuit Court (139 Fed. Rep. 193) and the Court of Appeals (147 Fed. Rep. 28) held that there was nothing in any of the notices of a claim of right or reservation under the copyright law, and held that the question was one of the right of the complainants to relief in a court of equity by virtue of their rights, independent of statutory copyright, in view of the alleged conditional sale embodied in the notice as to the copyrighted book. The Circuit Court of Appeals held, rightfully as we think, that this question was not open in the case,

as in the first case there was no diversity of citizenship, nor in either case a claim of damages in the sum of $2,000, requisite to confer jurisdiction of questions of rights independent of the copyright statutes.

Upon the allegations of the bill as to alleged contributory infringement of the copyright, that the defendant had induced and persuaded sundry jobbers and dealers who had obtained copyrighted books from the complainants to deliver the same to the defendant for sale at retail at less than the prices fixed by the complainants, and in violation of the agreement upon which the books were obtained, both the Circuit Court and the Circuit Court of Appeals held that there was no satisfactory proof that the defendant did thus induce any person to break his agreement with the complainants. It is contended in the brief of the complainants that these findings are opposed to the weight of the testimony, and particularly violate the admissions of the answer, but we think, taking the answer altogether, it did deny the allegations of the complaint as to the conduct of the defendant in inducing dealers to violate their agreements.

Upon the question of fact involved in this branch of the case both courts below found against the contention of the complainants in this respect, and, applying the usual rule in such cases, we find no occasion to disturb such findings.

The decrees of the Circuit Court of Appeals in both cases are

Affirmed.

GLOBE NEWSPAPER COMPANY *v.* WALKER.

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

No. 210. Argued April 23, 1908.—Decided June 1, 1908.

The right of an author in the United States to multiply copies of his works after publication is the creation of a new right by Federal statute under constitutional authority and not a continuation of a common-law right. *Wheaton* v. *Peters*, 8 Pet. 590.

While a general liability or right created by statute without a remedy may be enforced by an appropriate common-law action, when a special remedy is coupled therewith that remedy is exclusive. *Pollard* v. *Bailey*, 20 Wall. 520.

Although remedies given by a statute to protect property in copyright may be inadequate for the purpose intended, the courts cannot enlarge the remedy. Congress alone has power so to do by amending the statute.

Congress having by §§ 4965–4970, Rev. Stat., provided a remedy for those whose copyrights in maps are infringed, a civil action at common law for money damages cannot be maintained against the infringers.

140 Fed. Rep. 305, reversed.

THE facts are stated in the opinion.

Mr. William Quinby for plaintiff in error:

The common-law rights of authors run only to publication; thereafter their sole protection is under the copyright statute. A copyright cannot be maintained as a right existing at common law, but depends wholly upon the copyright statutes. All common-law rights of authors are superseded by the copyright statute after copyright. *Banks* v. *Manchester*, 23 Fed. Rep. 143; *S. C.*, 128 U. S. 244, 252; *Wheaton* v. *Peters*, 8 Peters, 591, 662, 663; aff'd and followed in *Holmes* v. *Hurst*, 174 U. S. 82, 85; *Werckmeister* v. *American Lithographic Co.*, 134 Fed. Rep. 321; *Palmer* v. *DeWitt*, 47 N. Y. 532, 536; *Jewellers Mercantile Agency* v. *Jewellers Weekly Publishing Co.*, 155 N. Y. 241.

The copyright act provides no remedy by a civil action

either at law or in equity for damages on behalf of the owner of a copyright of a map. Section 4965, Rev. Stat., Forfeiture; *Thornton* v. *Schreiber*, 124 U. S. 612, 614; MacGillivray, Copyrights, 290; *Chapman* v. *Ferry*, 12 Fed. Rep. 693; *Sarony* v. *Ehrich*, 28 Fed. Rep. 79.

The sole and only remedy provided by § 4965 for the infringement of a copyrighted "map" is the forfeiture to the owner of the copyright of infringing copies and one dollar for each copy found, etc. Section 4970 gives to the owner of a copyrighted map in common with owners of other classes of copyrighted property a remedy by injunction.

The owner of a cut or a map cannot avail himself of the remedies, damages and forfeitures for copies sold or offered for sale, provided for a book or a painting. *Bennett* v. *Boston Traveler*, 101 Fed. Rep. 445; maps may be copyrighted as an atlas or book. *Black* v. *Allen*, 42 Fed. Rep. 618, 625 (1890), Shipman, J.

A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action, but where the provision for the liability is coupled with the provision for a special remedy, that remedy, and that alone, must be employed. *Pollard* v. *Bailey*, 20 Wall. 520; *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29; *Barnet* v. *National Bank*, 98 U. S. 555; *Arnson* v. *Murphy*, 109 U. S. 238; *Fourth National Bank of New York* v. *Francklyn*, 120 U. S. 747.

The rule applied by the Circuit Court of Appeals in the case at bar is in direct conflict with previous cases. See *Sarony* v. *Ehrich*, 28 Fed. Rep. 79, 80; *Bennett* v. *Boston Traveler Co.*, 101 Fed. Rep. 445.

The right of the defendant in error being a statutory right, the rule as stated in *Pollard* v. *Bailey*, 20 Wall. 520, 526, 527; *Barnet* v. *National Bank*, 98 U. S. 555; *Arnson* v. *Murphy*, 109 U. S. 238, controls and said rule is in no way modified by the decision in *Dennick* v. *Railroad Co.*, 103 U. S. 11, 17, relied on by the United States Circuit Court of Appeals for the First Circuit.

Mr. H. L. Boutwell, with whom *Mr. A. W. Levensaler* was on the brief, for defendants in error:

Original and exclusive jurisdiction in copyright and patent cases is vested in the Circuit Courts of the United States. Rev. Stat. § 629, par. 9; Rev. Stat. § 711, par. 5; see also *Walker* v. *Globe Newspaper Co.*, 140 Fed. Rep. 305, 315; Drone on Copyright, p. 546; *Harrington* v. *Atlantic & Pacific Telegraph Co.*, 143 Fed. Rep. 329; *Falk* v. *Curtis Pub. Co.*, 100 Fed. Rep. 77, 79; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 291; *Littlefield* v. *Perry*, 21 Wall. 205.

Where a right, previously existing by the common law, is secured by a statute which provides no remedy for its protection, the common-law remedies are available, and where the statute prescribes penalties and forfeitures, but does not provide a remedy for damages, the common-law action for damages will lie. This rule has been applied in the interpretation of copyright statutes. Drone on Copyright, 473, 493; Sutherland on Stat. Const. 509; 7 Am. & Eng. Ency. of Law (2 ed.), 592-593; Curtis on Copyright, 313; Copinger, Law of Copyright, 247-252; Slater on Copyright, 168, 169. See also *Beckford* v. *Hood*, 7 T. R. 620; *Thompson* v. *Symonds*, 5 T. R. 41; *Cadell* v. *Robertson*, Paton's Appeal Cases, vol. 5, p. 493; *Roworth* v. *Wilkes*, 1 Camp. 94.

The plaintiff in error published a copy of the map of the defendants in error in a single issue of its paper. Immediately upon publication substantially the whole issue was distributed. When the infringement was brought to the attention of the defendants in error no substantial number of copies could be found in the possession of the plaintiff in error. Equity furnished no relief, for the purpose of the plaintiff in error had been accomplished. If this action cannot be maintained, then a copyright of a map affords the map-makers of this country no protection as against the publishers of newspapers. Are the defendants in error without a remedy?

That the law confers no right without a remedy to secure it is a maxim of the law. *Beckford* v. *Hood, supra;* 11 Ency. of

Law, 179; 1 Pom. Eq. Jur. (2d ed.), § 423; *Miller* v. *Jefferson College*, 5 Smed. & M. (Miss.) 661; *Stanley* v. *Earl*, 5 Litt. (Ky.) 282; *Robinson* v. *Steamboat Red Jacket*, 1 Michigan, 175.

The decision of the Circuit Court of Appeals for the First Circuit (140 Fed. Rep. 305) controls the question raised by the assignment of error.

The Circuit Courts of Appeals have no jurisdiction over appeals and writs of error where the only assignments of error are jurisdictional questions. *The Annie Faxon*, 87 Fed. Rep. 961; *Davis & R. Mfg. Co.* v. *Barber*, 60 Fed. Rep. 465.

Where, however, the assignments include other errors, the Circuit Courts of Appeals can determine the whole case, including the question of jurisdiction. *The Alliance*, 70 Fed. Rep. 273; *United States* v. *Sutton*, 47 Fed. Rep. 129; *Cabot* v. *McMaster*, 65 Fed. Rep. 533; and it may certify the jurisdictional question to this court. *Rust* v. *United Water Works Co.*, 70 Fed. Rep. 129; *American S. R. Co.* v. *Johnston*, 60 Fed. Rep. 503; *United States* v. *Jahn*, 155 U. S. 109.

Circuit Courts of Appeals have jurisdiction over questions touching the jurisdiction of the Circuit Courts, unless the issue has been made in the court below and certified to the Supreme Court. *Cabot* v. *McMaster*, 65 Fed. Rep. 533, 534; limited in *King* v. *McLean*, 64 Fed. Rep. 325, 327.

The provisions of the statute permit in the alternative, two methods of procedure to bring before this court the question of jurisdiction, namely:

To have the question certified directly from the Circuit Court; or to carry the whole case to the Circuit Court of Appeals and the question of jurisdiction then certified by that court to the Supreme Court.

When the unsuccessful party wishes to have the judgment or decree reviewed upon jurisdictional grounds and other grounds as well he cannot appeal to both this court and the Circuit Court of Appeals. *United States* v. *Jahn*, *supra*; *Columbus Const. Co.* v. *Crane*, 174 U. S. 600. See also *McLish* v. *Roff*, 141 U. S. 661, 667.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon writ of error to the Circuit Court of the United States for the District of Massachusetts, upon a question of its jurisdiction to entertain a suit to recover damages for an alleged infringement of the copyright of a map.

The Revised Statutes of the United States, § 711, par. 5, give jurisdiction to the courts of the United States in cases arising under the patent right or copyright laws of the United States, exclusive of the courts of the several States. The case is one, therefore, which involves the jurisdiction of a Federal court as such.

The defendants in error, plaintiffs below, partners under the style of George H. Walker & Company, are the owners of a certain copyrighted map, known as the "map of the electric railways of the State of Massachusetts accompanying the report of the railroad commissioners." They allege that they had complied with all of the requirements of the copyright statutes of the United States, and that the defendant, Globe Newspaper Company, well knowing the premises, without the plaintiff's consent, printed and sold a large number of the copies of the copyrighted map. And the plaintiffs sought to recover damages in an action at law thus begun for the alleged infringement of the copyright.

The newspaper company demurred upon several grounds, among others:

"1. That the statutes relating to copyrights provide no remedy by a civil action on behalf of the owner of the copyright of a map.

"2. That the declaration confuses two separate and distinct causes of action, neither of which is authorized by the statutes relating to the copyright of maps.

"3. That the declaration contains no allegation that any copy or copies of the alleged infringing map complained of was or were found in the possession of the defendant.

"4. That the declaration contains no allegation that the

alleged infringing map complained of, or any copy thereof, was published with the knowledge or consent of the defendant, or any of its officers, or with any intent to evade the statutes for the protection of the copyright for a map."

Upon hearing the demurrer the Circuit Court at its February term, 1904, sustained the same, on the ground that the copyright law gave no such action, and judgment was entered for the newspaper company. 130 Fed. Rep. 594. Walker & Company took the case to the Court of Appeals, where the judgment of the Circuit Court was reversed. 140 Fed. Rep. 305. That court, holding that the declaration contained a good cause of action for money damages against the newspaper company, the cause was remanded and a new trial had in the Circuit Court, which resulted in a verdict and judgment in the sum of $250 in favor of the Walker Company against the Globe Newspaper Company. At the trial the newspaper company moved that the action be dismissed and a verdict be directed for it, on the ground that the court had no jurisdiction of the action. At the close of the plaintiff's evidence in chief the motion was renewed; the court overruled the motion and the defendant excepted. A like motion and order was made at the close of all the evidence. The court made a certificate that the denial of the motions aforesaid was based in each case solely upon the ground that the cause set forth in the declaration was one, in the opinion of the court, which arose under the copyright laws of the United States, whereof the Circuit Court of the United States had jurisdiction, and, in any event, its action was controlled by the opinion of the Circuit Court of Appeals in 140 Fed. Rep. 305. Thereupon the case came here upon the question of jurisdiction.

A preliminary objection is made that this court cannot entertain jurisdiction of this writ of error, because the case is not one which may properly come here under § 5 of the Court of Appeals Act of 1891, and it is contended that, as the case went to the Circuit Court of Appeals and that court determined it, if the present plaintiff in error wished to save the question of

jurisdiction it should have been duly certified to this court from the Court of Appeals. But we are of the opinion that this objection is untenable. The case was taken to the Circuit Court of Appeals by Walker & Company. The judgment of the Circuit Court was in favor of the newspaper company. It had no occasion to take the case to the Court of Appeals. When the Court of Appeals reversed the decision of the Circuit Court and remanded the case for trial, because of its holding that the declaration contained a cause of action in favor of Walker & Company, the Circuit Court was bound by, and of course followed, the decision of the Circuit Court of Appeals.

The newspaper company, in various forms, objected to the jurisdiction of the court as a court of the United States, because there was no such action under the copyright law as was asserted in the declaration filed against it. Its objection to the jurisdiction was overruled. It saved the question in various ways and brought it here upon an adequate certificate, raising solely the question of jurisdiction. We think we have jurisdiction of the case.

Certain propositions arising under the copyright laws are settled by the decisions of this court beyond the necessity of further discussion. In this country the right of an author to multiply copies of books, maps, etc., after publication, is the creation of the Federal statutes. These statutes did not provide for the continuation of the common-law right, but, under constitutional authority, created a new right. This was directly held in the case in this court of *Wheaton et al.* v. *Peters et al.*, 8 Pet. 590. That case has frequently been followed since, and is directly approved of in subsequent cases in this court. *Bobbs-Merrill Co.* v. *Straus*, just decided, *ante*, page 339, and the previous cases from this court therein cited.

The question in this case, therefore, is, whether in the absence of a statute to that effect, there is a common-law right of action because of the right of property created by the statute to recover money damages against infringers of a copyright. That there is no express statutory provision giving such right

of action is conceded. The Circuit Court (130 Fed. Rep. 594) was of the opinion that the question was determined adversely to plaintiffs below by the well-known case of *Wheaton* v. *Peters*, 8 Pet. *supra*. In that case the court held that there could be no relief at common law in an action brought for the infringement of the copyright of Wheaton's reports, because of the publication, since the passage of the copyright act, of condensed reports of cases decided in the Supreme Court of the United States. It was held that there was no common law of the United States, and that for common-law rights this court looked to the State in which the controversy originated, and the court held that there was no common-law right in Pennsylvania to a perpetual copyright. And, further, held that Congress, by the copyright act of 1790, instead of sanctioning an existing right, created a new one, and said (p. 662) that "If the right of the complainant can be sustained, it must be sustained under the acts of Congress." The judgment of the court below was reversed, and the cause remanded to the Circuit Court with directions to direct an issue of fact to be examined and tried by a jury as to whether Wheaton, the author, or other person as proprietor, had complied with the requirements of the copyright act of the United States of May 31, 1790.

While we agree that the case did not necessarily decide the point made in the present case, yet the reasoning and the decree of the court decidedly favor the conclusion that Congress not only created a new right in the copyright statute, but that the remedies therein given are the only ones open to those seeking the benefit of the statutory right thereby created.

The Circuit Court of Appeals, conceding the effect of the decision in *Wheaton* v. *Peters*, *supra*, as to the origin of property in copyright, says:

"The property right being established, the common-law remedies attach, whether the right arises out of the common law or under a statute, unless there is something in the statute to the contrary."

And in support of this doctrine reliance is had on *Beckford* v.

Hood, 7 T. R. 620. That was an action on the case to recover damages for the publication of the plaintiff's book, "Thoughts upon Hunting." Neither the original nor any subsequent editions were entered in Stationers' Hall, as required by the statute. The defendant published the same work under title "Thoughts upon Hare and Fox Hunting," with plaintiff's name upon the title page.

Lord Kenyon, C. J., in the opinion delivered by him, held that the statute, 8 Anne, chap. 9, vested in authors for the periods named in the act the sole right and liberty of printing, etc., and the statute, having vested the right in the author, the common law gave the remedy by action on the case. "Of this," says Lord Kenyon, p. 627, "there could have been no doubt made if the statute had stopped there. But it has been argued that as the statute in the same clause that creates the right has prescribed a particular remedy, that and no other can be resorted to. And if such appeared to have been the intention of the legislature, I should have subscribed to it, however inadequate it might be thought;" and, concluding his opinion, says:

"On the fair construction of this act, therefore, I think it vests the right of property in authors of literary works for the times therein limited, and that consequently the common-law remedy attaches if no other be specifically given by the act, and I cannot consider the action given to a common informer for the penalties which might be preoccupied by another as a remedy to the party grieved within the meaning of the act."

The gist of this decision is that the statute gave the right of exclusive publication of copies, and gave the proprietor of the copyright no remedy; hence the common law supplied one.

As we shall have occasion to see, the American copyright act does give special remedies to the owner of a copyright of maps. Inadequate it may be to fully protect the property in the copyright, yet such as Congress has seen fit to give, and which it, not the courts, have power to enlarge by amendment of the statutes.

And we think an inspection of the copyright statute indicates that the purpose of Congress was not only to create the rights granted in the statute, but also to create the specific remedies by which alone such rights may be enforced. The general rule applicable in such cases was stated in *Pollard* v. *Bailey*, 20 Wall. 520:

"A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action, but where the provision for the liability is coupled with the provision for a special remedy that remedy, and that alone, must be employed."

Pollard v. *Bailey* has been many times cited with approval and followed in this court. In *Middleton Nat'l Bank* v. *Toledo, Ann Arbor & Northern Michigan R. R.*, 197 U. S. 394, the principle was applied in an action brought outside the State of Ohio to recover the stockholders' liability given by the statutes of that State, and it was held that the action could not be maintained; that the statutory method providing for the enforcement of the right in the courts of the State must be followed. Mr. Justice Peckham, speaking for the court, said:

"The statute, under such circumstances, may be said to so far provide for the liability and to create the remedy as to make it necessary to follow its provisions and to conform to the procedure provided for therein. See *Pollard* v. *Bailey*, 20 Wall. 520, 526; *Fourth Nat'l Bank* v. *Francklyn*, 120 U. S. 747, 756; *Evans* v. *Nellis*, 187 U. S. 271."

Looking to the copyright statutes, we find a comprehensive system of rights and remedies provided. Section 4952 provides that the author, inventor, designer or proprietor of any book, map, etc., upon complying with the provisions of this section, "shall have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same." This is the section creating the right.

Section 4963 provides for a penalty of $100 for falsely inserting or impressing a copyright notice where no copyright has been obtained. The penalty in this section is recoverable, one-

half for the person suing for the same, and one-half to the use of the United States; and the Circuit Courts of the United States sitting in equity are authorized to enjoin the issuing, publishing or selling of articles marked or imported in violation of the copyright laws of the United States.

By § 4964 it is provided, as to books, that those who print, publish, dramatize, translate or import the same, without the consent of the proprietor of the copyright, signed in the presence of two witnesses, or who knowing the same to be so printed, published, dramatized and translated or imported, shall sell, or expose to sale any copies of such article, shall forfeit every copy thereof to the proprietor of the copyright, and shall also forfeit and pay such damages as may be recovered in a civil action by the proprietor of the copyright in any court of competent jurisdiction. Here is a specific remedy given to recover damages for books wrongfully printed or published, etc., in violation of the act. While Congress conferred this action to protect copyrighted books, for some reason it does not include the holders of copyrighted maps within its provisions.

Section 4965 relates to the owners of copyrights on maps, charts, etc., and provides for the forfeiture of plates and copies, and for the recovery of money penalties in certain cases, one-half of the penalty to go to the proprietor of the copyright, the other half to the use of the United States.

Section 4966 gives remedies for damages against those wrongfully performing or representing a dramatic or musical composition, in public, such damages to be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance, as to the court may seem just, and such offending persons are declared guilty of a misdemeanor, and, upon conviction, liable to imprisonment not exceeding one year; or an injunction may be granted upon hearing, after notice to the defendant, by any Circuit Court of the United States.

Section 4967 gives an action for damages for printing or publishing any manuscript without the consent of the author or proprietor.

Section 4970 provides for injunctions in copyright cases in the Circuit and District Courts of the United States, by bill in equity, to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable.

We think these statutes, taken together, indicate the purpose of Congress to provide a system of remedies to enforce the rights which have been granted to those who shall avail themselves of the statutes of the United States, and, in accordance therewith, become the owners of the exclusive right for a limited term to publish and multiply the copyrighted work.

To the owner of a copyright on a map is given, under § 4965, forfeiture of plates and sheets, and one-half the penalty of $1 for every sheet found in the defendant's possession; under § 4970, the right to proceed by injunction. It thus appears that Congress has prescribed the remedies it intends to give, this being true, "however inadequate," as Lord Kenyon said in *Beckford* v. *Hood, supra,* "no others can be resorted to."

We, therefore, think the Circuit Court erred in holding that it had jurisdiction of this action by virtue of the laws of the United States.

The judgment of the Circuit Court is reversed and the cause remanded to that court, with directions to dismiss the action for want of jurisdiction.

Reversed.

WESTERN LOAN AND SAVINGS COMPANY *v.* BUTTE AND BOSTON CONSOLIDATED MINING COMPANY.

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

No. 351. Submitted April 20, 1908.—Decided June 1, 1908.

Where diversity of citizenship exists so that the suit is cognizable in some Circuit Court the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits. *In re Moore*, 209 U. S. 490, overruling anything to the contrary in *Ex parte Wisner*, 203 U. S. 449.

In a State where objection that the court has not jurisdiction of the person must—as in Montana under code § 1820—be taken by special appearance and motion aimed at the jurisdiction, the interposition by defendant of a demurrer going to the merits as well as to the jurisdiction amounts to a waiver of the objection that the particular Circuit Court in which he is sued is without jurisdiction.

While, under § 914, Rev. Stat., practice in civil causes other than those in equity or admiralty in United States courts must conform to the state practice, where the jurisdiction of the Federal courts is involved this court alone is the ultimate arbiter of questions arising in regard thereto.

THE facts are stated in the opinion.

Mr. John A. Shelton for plaintiff in error.

Mr. C. F. Kelley, Mr. John F. Forbis and *Mr. L. O. Evans* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error brought this action at law against the defendant in error in the Circuit Court for the District of Montana. Jurisdiction was based solely on the diversity of citizenship of the parties. The plaintiff was a citizen of Utah and the defendant a citizen of New York. The judge of the Circuit Court dismissed the action for want of jurisdiction, and whether

that decision was correct is the single question brought directly here by writ of error. The Circuit Court for the District of Montana was without jurisdiction of the action, because neither of the parties to it was a resident of that district, and the statute (25 Stat. 433) requires that where the jurisdiction is founded on the fact that the parties are citizens of different States, suit shall be brought only in the district where one of them resides. But we have recently held that where diversity of citizenship exists, as it does here, so that the suit is cognizable in some Circuit Court, the objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits. *In re Moore*, 209 U. S. 490. Anything to the contrary said in *Ex parte Wisner*, 203 U. S. 449, was overruled. The question here, therefore, is narrowed to the inquiry, whether the defendant waived the objection to the jurisdiction.

While the conformity act, Rev. Stat. § 914, provides that the practice, pleadings, forms and modes of proceeding in civil causes, other than those in equity and admiralty, in the Circuit and District Courts of the United States, shall conform, as near as may be, to the practice, pleadings and forms, and modes of proceedings existing at the time in like causes in courts of record of the State wherein such United States courts are held, nevertheless, in cases like the one under consideration, involving the jurisdiction of the Federal courts, the ultimate determination of such question is for this court alone. This doctrine finds illustration in the case of *Mexican Central Railway Co.* v. *Pinkney*, 149 U. S. 194, in which the subject is discussed by Mr. Justice Jackson, delivering the opinion of the court. In that case it was held that the Texas statute, which had been upheld by the courts of the State, giving to a special appearance, made solely to challenge the court's jurisdiction, the effect of a general appearance, was not binding upon the Federal courts sitting in the State, notwithstanding the provisions of § 914 of the Revised Statutes of the United States.

In the case at bar, defendant filed its demurrer to the com-

plaint alleging: 1st, that the court has no jurisdiction of the subject of the action; 2d, that the court has no jurisdiction of the person of the defendant; 3d, that said complaint does not state facts sufficient to constitute a cause of action against this defendant; 4th, that the complaint is uncertain; 5th, that the complaint is unintelligible.

The learned judge on the seventh of November, 1903, overruled the demurrer as to the first, second and third grounds of the complaint, but sustained it upon the fourth and fifth grounds, in that the complaint was uncertain and unintelligible. Thereupon the plaintiff filed an amended complaint; the defendant repeated the same grounds of demurrer, and the same was submitted to the court on the first and second grounds, those covering jurisdiction over the subject-matter of the action and jurisdiction over the person of the defendant, respectively, and on the twenty-sixth of October, 1906, Judge Hunt, holding the Circuit Court for the District of Montana, in a well considered opinion held that inasmuch as the demurrer was interposed upon jurisdictional and other grounds, and was not confined to jurisdiction over the person alone, but reached the merits of the action, the case being one within the general jurisdiction of the court, although instituted in the wrong district, the defendant had waived its personal privilege not to be sued in the Montana district and had submitted to the jurisdiction. In support of his view Judge Hunt cited *Interior Construction & Improvement Company* v. *Gibney*, 160 U. S. 217; *In re Keasbey & Mattison Company*, 160 U. S. 221; *Ex parte Schollenberger*, 96 U. S. 369; *Central Trust Company* v. *McGeorge*, 151 U. S. 129; *St. Louis &c. R. R. Co.* v. *McBride*, 141 U. S. 127; *Lowry* v. *Tile*, 98 Fed. Rep. 817; *Texas & Pacific Railway* v. *Saunders*, 151 U. S. 105. Thereafter, before any further steps were taken in the case, the learned judge changed his ruling on the question of jurisdiction, and filed the following brief memorandum opinion:

"As neither party to this action was, at the time of the institution thereof, a citizen or resident of the State of Montana,

upon the authority of *Ex parte Abram C. Wisner,* decided by the Supreme Court December 10, 1906, and followed by the Court of Appeals of this circuit in *Yellow Aster Mining Company and Southern Pacific Company* v. *R. M. Burch,* decided February 11, 1907, I must reverse the ruling heretofore made by me upon the demurrer, and dismiss the case for lack of jurisdiction.

"So ordered."

Let us see, then, whether the defendant had submitted to the jurisdiction of the Circuit Court. It had appeared and filed its demurrer to the original complaint, invoking the judgment of the court, as hereinbefore stated, and the court had ruled against it on the question of jurisdiction, and upon the merits of the cause of action, only sustaining the demurrer as to the form of the allegations in the complaint. It invoked and obtained a ruling on the merits so far as the legal sufficiency of the cause of action is concerned. Then the amended complaint was filed. The court sustained its jurisdiction upon hearing the demurrer, which ruling is subsequently changed on the authority of *Ex parte Wisner,* which is now overruled in *In re Moore,* in so far as it was said in the *Wisner case* that a waiver could not give jurisdiction over a person sued in the wrong district, where diversity of citizenship existed.

So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code States under sections similar to § 1820 of the Montana code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States Circuit Court, as is shown by the case of *Shaw* v. *Quincy Mining Co.,* 145 U. S. 444, a suit in a district in the State of New York. In that case the parties were a citizen of Massachusetts and a corporation of Michigan, being citizens of States other than

New York. A motion was made entering a special appearance for the purpose of setting aside the service. This manner of raising the question, it was held, did not amount to a waiver of the objection to jurisdiction. The same course was pursued with the approval of this court in *In re Keasbey & Mattison Co., Petitioners,* 160 U. S. 221.

In *St. Louis & San Francisco R. R. Co.* v. *McBride,* 141 U. S. 127, the case, like the present one, arose in a code State. Suit was brought in the Circuit Court of the United States for the Western District of Arkansas. The Arkansas code in respect to grounds of demurrer is identical with the Montana code. Kirby's Digest of the Statutes of Arkansas, 1904, p. 1285. Following the Arkansas code, as the defendant in this case follows the Montana code, the defendant filed a demurrer in language identical upon these points with the demurrer in this case. The demurrer reads: "1st. Because the court has no jurisdiction of the person of the defendant. 2d. Because the court has no jurisdiction of the subject-matter of the action. 3d. Because the complaint does not state facts sufficient to constitute a cause of action."

Of the effect of this demurrer Mr. Justice Brewer, delivering the opinion of the court, said:

"Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

This case presents the same question. We are of opinion that the defendant had waived objection to jurisdiction over its person, and by filing the demurrer on the grounds stated submitted to the jurisdiction of the Circuit Court.

Judgment reversed.

LONDONER v. CITY AND COUNTY OF DENVER.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 157. Argued March 6, 9, 1908.—Decided June 1, 1908.

The legislature of a State may authorize municipal improvements without any petition of landowners to be assessed therefor, and proceedings of a municipality in accordance with charter provisions and without hearings authorizing an improvement do not deny due process of law to landowners who are afforded a hearing upon the assessment itself.

The decision of a state court that a city council properly determined that the board of public works had acted within its jurisdiction under the city charter does not involve a Federal question reviewable by this court.

Where the state court has construed a state statute so as to bring it into harmony with the Federal and state constitutions, nothing in the Fourteenth Amendment gives this court power to review the decision on the ground that the state court exercised legislative power in construing the statute in that manner and thereby violated that Amendment.

There are few constitutional restrictions on the power of the States to assess, apportion and collect taxes, and in the enforcement of such restrictions this court has regard to substance and not form, but where the legislature commits the determination of the tax to a subordinate body, due process of law requires that the taxpayer be afforded a hearing of which he must have notice, and this requirement is not satisfied by the mere right to file objections; and where, as in Colorado, the taxpayer has no right to object to an assessment in court, due process of law as guaranteed by the Fourteenth Amendment requires that he have the opportunity to support his objections by argument and proof at some time and place.

The denial of due process of law by municipal authorities while acting as a board of equalization amounts to a denial by the State.

33 Colorado, 104, reversed.

THE facts are stated in the opinion.

Mr. Joshua Freeman Grozier for plaintiffs in error.

Mr. F. W. Sanborn and *Mr. Halsted L. Ritter*, with whom *Mr. Henry A. Lindsley* was on the brief, for defendants in error.

MR. JUSTICE MOODY delivered the opinion of the court.

The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted. The relief sought was granted by the trial court, but its action was reversed by the Supreme Court of the State, which ordered judgment for the defendants. 33 Colorado, 104. The case is here on writ of error. The Supreme Court held that the tax was assessed in conformity with the constitution and laws of the State, and its decision on that question is conclusive.

The assignments of error relied upon are as follows:

"First. The Supreme Court of Colorado erred in holding and deciding that the portion of proviso 'eighth' of section 3 of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, signed and approved by the Governor of Colorado, April 3, 1893' (commonly called the Denver City Charter of 1893), which provided, 'And the finding of the city council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal,' as construed by the Supreme Court of Colorado, was valid and conclusive as against these appellees. The validity of so much of said section as is above quoted was drawn in question and denied by appellees in said cause, on the ground of its being repugnant to the due process of law clause of the Fourteenth Amendment of the Constitution of the United States and in contravention thereof.

"Second. The Supreme Court of Colorado further erred in assuming that said city council ever made a finding by ordinance in accordance with said proviso 'eighth.'

* * * * * * * *

"Fifth. The Supreme Court of Colorado more particularly erred in holding and deciding that the city authorities, in fol-

lowing the procedure in this Eighth Avenue Paving District, No. 1, of the city of Denver, Colorado, in the manner in which the record, evidence and decree of the trial court affirmatively shows that they did, constituted due process of law as to these several appellees (now plaintiffs in error) as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

"Ninth. The Supreme Court of Colorado erred in upholding sections 29, 30, and 31, and each thereof of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, signed and approved by the Governor of Colorado April 3rd, 1893' (commonly called the Denver City Charter of 1893), and not holding it special legislation and a denial of the equal protection of the laws and taking of liberty and property of these several plaintiffs in error without due process of law, in violation of both the state and Federal Constitution and the Fourteenth Amendment thereof.

"Tenth. The Supreme Court of Colorado erred in upholding each of the several assessments against the corner lots, and particularly those lots belonging to said Wolfe Londoner and Dennis Sheedy, because each thereof was assessed for the paving and other improvements in this district alone for more than the several lots so assessed were ever actually worth and far in excess of any special benefits received from the alleged improvements."

These assignments will be passed upon in the order in which they seem to arise in the consideration of the whole case.

The tax complained of was assessed under the provisions of the charter of the city of Denver, which confers upon the city the power to make local improvements and to assess the cost upon property specially benefited. It does not seem necessary to set forth fully the elaborate provisions of the charter regulating the exercise of this power, except where they call for special examination. The board of public works, upon the petition of a majority of the owners of the frontage to be assessed, may order the paving of a street. The board must, however, first adopt specifications, mark out a district of assess-

ment, cause a map to be made and an estimate of the cost, with the approximate amount to be assessed upon each lot of land. Before action notice by publication and an opportunity to be heard to any person interested must be given by the board.

The board may then order the improvement, but must recommend to the city council a form of ordinance authorizing it, and establishing an assessment district, which is not amendable by the council. The council may then, in its discretion, pass or refuse to pass the ordinance. If the ordinance is passed, the contract for the work is made by the mayor. The charter provides that "the finding of the city council, by ordinance, that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid shall be conclusive in every court or other tribunal." The charter then provides for the assessment of the cost in the following sections:

"SEC. 29. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof, affording complete drainage for any part or parts of the district and acceptance thereof by the board of public works, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board of public works shall prepare a statement therein showing the whole cost of the improvement, or such parts thereof, including six per cent additional for costs of collection and other incidentals, and interest to the next succeeding date upon which general taxes, or the first installment thereof, are by the laws of this State made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as hereinabove provided; and shall cause the same to be certified by the president and filed in the office of the city clerk.

"SEC. 30. The city clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published

in the city of Denver, notify the owners of the real estate to be assessed that said improvements have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing, by the owners, to the city council and filed with the city clerk within thirty days from the first publication of such notice, will be heard and determined by the city council before the passage of any ordinance assessing the cost of said improvements.

"SEC. 31. After the period specified in said notice the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of the apportionments made by said board; the board may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the city council of their final decision; and the city council shall thereupon by ordinance assess the cost of said improvements against all the real estate in said district respectively in the proportions above mentioned."

It appears from the charter that, in the execution of the power to make local improvements and assess the cost upon the property specially benefited, the main steps to be taken by the city authorities are plainly marked and separated: 1. The board of public works must transmit to the city council a resolution ordering the work to be done and the form of an ordinance authorizing it and creating an assessment district. This it can do only upon certain conditions, one of which is that there shall first be filed a petition asking the improvement, signed by the owners of the majority of the frontage to be assessed. 2. The passage of that ordinance by the city council, which is given authority to determine conclusively whether the action of the board was duly taken. 3. The assessment of the cost upon the landowners after due notice and opportunity for hearing.

In the case before us the board took the first step by transmitting to the council the resolution to do the work and the form of an ordinance authorizing it. It is contended, however, that there was wanting an essential condition of the jurisdiction of the board, namely, such a petition from the owners as the law requires. The trial court found this contention to be true. But, as has been seen, the charter gave the city council the authority to determine conclusively that the improvements were duly ordered by the board after due notice and a proper petition. In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. That ordinance, after reciting a compliance by the board with the charter in other respects, and that "certain petitions for said improvements were first presented to the said board, subscribed by the owners of a majority of the frontage to be assessed for said improvements as by the city charter required," enacted "That upon consideration of the premises the city council doth find that in their action and proceedings in relation to said Eighth Avenue Paving District Number One the said board of public works has fully complied with the requirements of the city charter relating thereto." The state Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the State. The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voigt* v. *Detroit,* 184 U. S. 115; *Goodrich* v. *Detroit,* 184 U. S. 432. The

legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action it could, so far as the Federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed. This disposes of the first assignment of error, which is overruled. The second assignment is that the court erred in deciding that the city council had determined that the board of public works had complied with the conditions of its jurisdiction to order the work done. It is enough to say that this is not a Federal question.

We see nothing in the sixth assignment of error. It is apparently based upon the proposition that, in construing a law of the State in a manner which the plaintiffs in error think was clearly erroneous, the Supreme Court of the State exercised legislative power, and thereby violated the Fourteenth Amendment. We are puzzled to find any other answer to this proposition than to say that it is founded upon a misconception of the opinion of the court and of the effect of the Fourteenth Amendment. The complaint in this assignment is not that the court gave a construction to the law which brought it into conflict with the Federal Constitution, but that, in construing the law so as to bring it into harmony with the Federal and state constitutions, the court so far neglected its obvious meaning as to make the judgment an exercise of legislative power. We know of nothing in the Fourteenth Amendment which gives us authority to consider a question of this kind. We think it fitting, however, to say that we see nothing extraordinary in the method of interpretation followed by the court, or in its results. Whether we should or not have arrived at the same conclusions is not of consequence.

The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme

Court gave to the charter. This may be found in the judgment under review and two cases decided with it. *Denver* v. *Kennedy*, 33 Colorado, 80; *Denver* v. *Dumars*, 33 Colorado, 94. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by § 31, is one where the board of equalization "shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant," 33 Colorado, 97; and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself therefore is clear of all constitutional faults. It remains to see how it was administered in the case at bar.

The fifth assignment, though general, vague and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding. The record discloses what was actually done, and there seems to be no dispute about it. After the improvement was completed the board of public works, in compliance with § 29 of the charter, certified to the city clerk a statement of the cost, and an apportionment of it to the lots of land to be assessed. Thereupon the city clerk, in compliance with § 30, published a notice stating, *inter alia*, that the written complaints or objections of the owners, if filed within thirty days, would be "heard and determined by the city council before the pas-

sage of any ordinance assessing the cost." Those interested, therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing, and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of *Paulsen* v. *Portland*, 149 U. S. 30, because there was an implied power in the city council to give notice of the time for hearing. We think that the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it. Resting upon the assurance that they would be heard, the plaintiffs in error filed within the thirty days the following paper:

"Denver, Colorado, January 13, 1900.

"To the Honorable Board of Public Works and the Honorable Mayor and City Council of the City of Denver:

"The undersigned, by Joshua Grozier, their attorney, do hereby most earnestly and strenuously protest and object to the passage of the contemplated or any assessing ordinance against the property in Eighth Avenue Paving District No. 1, so called, for each of the following reasons, to wit:

"1st. That said assessment and all and each of the proceedings leading up to the same were and are illegal, voidable and void, and the attempted assessment if made will be void and uncollectible.

"2nd. That said assessment and the cost of said pretended improvement should be collected, if at all, as a general tax against the city at large and not as a special assessment.

"3d. That property in said city not assessed is benefited by the said pretended improvement and certain property assessed is not benefited by said pretended improvement and other property assessed is not benefited by said pretended improvement to the extent of the assessment; that the individual pieces of property in said district are not benefited to the extent assessed against them and each of them respectively; that the assessment is abitrary and property assessed in an equal amount is not benefited equally; that the boundaries of said pretended district were arbitrarily created without regard to the benefits or any other method of assessment known to law; that said assessment is outrageously large.

"4th. That each of the laws and each section thereof under which the proceedings in said pretended district were attempted to be had do not confer the authority for such proceedings; that the 1893 city charter was not properly passed and is not a law of the State of Colorado by reason of not properly or at all passing the legislature; that each of the provisions of said charter under which said proceedings were attempted are unconstitutional and violative of fundamental principles of law, the Constitution of the United States and the state constitution, or some one or more of the provisions of one or more of the same.

"5th. Because the pretended notice of assessment is invalid and was not published in accordance with the law, and is in fact no notice at all; because there was and is no valid ordinance creating said district; because each notice required by the 1893 city charter to be given, where it was attempted to give such notice, was insufficient, and was not properly given or properly published.

"6th. Because of non-compliance by the contractor with his contract and failure to complete the work in accordance with the contract; because the contract for said work was let without right or authority; because said pretended district is incomplete and the work under said contract has not been completed in accordance with said contract; because items too

numerous to mention, which were not a proper charge in the said assessment, are included therein.

"7th. Because the work was done under pretended grants of authority contained in pretended laws, which laws were violative of the constitution and fundamental laws of the State and Union.

"8th. Because the city had no jurisdiction in the premises. No petition subscribed by the owners of a majority of the frontage in the district to be assessed for said improvements was ever obtained or presented.

"9th. Because of delay by the board of public works in attempting to let the contract and because the said pretended improvement was never properly nor sufficiently petitioned for; because the contracts were not let nor the work done in accordance with the petitions, if any, for the work, and because the city had no jurisdiction in the premises.

"10th. Because before ordering the pretended improvement full details and specifications for the same, permitting and encouraging competition and determining the number of installments and time within which the costs shall be payable, the rate of interest on unpaid installments, and the district of lands to be assessed, together with a map showing the approximate amounts to be assessed, were not adopted by the board of public works before the letting of the contract for the work and furnishing of material; because advertisement for 20 days in two daily newspapers of general circulation, giving notice to the owners of real estate in the district of the kind of improvements proposed, the number of installments and time in which payable, rate of interest and extent of the district, probable cost and time when a resolution ordering the improvement would be considered, was not made either properly or at all, and if ever attempted to be made was not made according to law or as required by the law or charter.

"11th. Because the attempted advertisement for bids on the contract attempted to be let were not properly published and were published and let, and the proceedings had, if at all,

in such a way as to be prejudicial to the competition of bidders and to deter bidders; and the completion of the contracts after being attempted to be let was permitted to lag in such a manner as not to comply with the contract, charter or laws, and the power to let the contract attempted to be let was not within the power of the parties attempting to let the same; because the city council is or was by some of the proceedings deprived of legislative discretion, and the board of public works and other pretended bodies given such discretion, which discretion they delegated to others having no right or power to exercise the same; and executive functions were conferred on bodies having no right, power or authority to exercise the same and taken away from others to whom such power was attempted to be granted or given or who should properly exercise the same; that judicial power was attempted to be conferred on the board of public works, so called, and the city council, and other bodies or pretended bodies not judicial or *quasi*-judicial in character, having no right, power or authority to exercise the same, and the courts attempted to be deprived thereof.

"Wherefore, because of the foregoing and numerous other good and sufficient reasons, the undersigned object and protest against the passage of the said proposed assessing ordinance."

This certainly was a complaint against and objection to the proposed assessment. Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of equalization, not in a stated but in a specially called session, and, without any hearing, adopted the following resolution:

"Whereas, complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth Avenue Paving District No. 1, of the city of Denver against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the city clerk; and

"Whereas, no complaint or objection has been filed or made

against the apportionment of said assessment made by the board of public works of the city of Denver, but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it

"Resolved, by the city council of the city of Denver, sitting as a board of equalization, that the apportionments of said assessment made by said board of public works be, and the same are hereby, confirmed and approved."

Subsequently, without further notice or hearing, the city council enacted the ordinance of assessment whose validity is to be determined in this case. The facts out of which the question on this assignment arises may be compressed into small compass. The first step in the assessment proceedings was by the certificate of the board of public works of the cost of the improvement and a preliminary apportionment of it. The last step was the enactment of the assessment ordinance. From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts was there a denial by the State of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this court has regarded substance and not form. But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place

of the hearing. *Hager* v. *Reclamation District*, 111 U. S. 701; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537; *Lent* v. *Tillson*, 140 U. S. 316; *Glidden* v. *Harrington*, 189 U. S. 255; *Hibben* v. *Smith*, 191 U. S. 310; *Security Trust Co.* v. *Lexington*, 203 U. S. 323; *Central of Georgia* v. *Wright*, 207 U. S. 127. It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. *Pittsburg &c. Railway Co.* v. *Backus*, 154 U. S. 421, 426; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 171, *et seq.* It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it. It is not now necessary to consider the tenth assignment of error.

Judgment reversed.

THE CHIEF JUSTICE and MR. JUSTICE HOLMES dissent.

PIERCE *v.* CREECY, CHIEF OF POLICE OF THE CITY OF ST. LOUIS.

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

No. 357. Argued April 20, 21, 1908.—Decided June 1, 1908.

Whether or not the indictment on which the demand for petitioner's surrender for interstate extradition is based charges him with crime within the requirements of Article IV, § 2, par. 2, of the Federal Constitution, involves the construction of that instrument, and a direct appeal lies to this court from the Circuit Court under § 5 of the Judiciary Act of 1891.

While no person may be lawfully extradited from one State to another under Article IV, § 2, par. 2 of the Federal Constitution unless he has been charged with crime in the latter State, there is no constitutional requirement that there should be anything more than a charge of crime, and an indictment which clearly describes the crime charged is sufficient even though it may possibly be bad as a pleading.

The Federal courts cannot, on *habeas corpus*, inquire into the truth of an allegation presenting mixed questions of law and fact in the indictment on which the demand for petitioner's interstate extradition is based; and *quære* whether it may inquire whether such indictment was or was not found in good faith.

A Federal court should not, unless plainly required so to do by the Constitution, assume a duty the exercise of which might lead to a miscarriage of justice prejudicial to the interests of a State.

THIS is an appeal directly to this court from a judgment of the Circuit Court upon a writ of *habeas corpus*, remanding the petitioner, now appellant, to the custody of the respondent, now appellee. The petition for the writ of *habeas corpus* alleges that the petitioner was "imprisoned, detained, confined and restrained of his liberty, at the city of St. Louis, within the district aforesaid, by Edmund P. Creecy, the chief of police of said city of St. Louis, in violation of the laws and Constitution of the United States." There is no dispute about the facts, which, as they appear in the petition and the return, are as follows.

The Governor of the State of Texas made a requisition upon the Governor of the State of Missouri, which is as follows:

"To the Governor of the State of Missouri:

"Whereas, it appears by the annexed documents, which are hereby certified to be authentic, that H. Clay Pierce stands charged with false swearing, committed in the State of Texas, and information having been received that the said H. Clay Pierce has fled from justice and has taken refuge in Missouri.

"Now, therefore, I, T. M. Campbell, Governor of the State of Texas, have thought proper, in pursuance of the provisions of the Constitution and laws of the United States, to demand the surrender of the said H. Clay Pierce as fugitive from justice, and that he be delivered to G. S. Mathews, who is hereby appointed the agent, on the part of the State of Texas, to receive H. Clay Pierce.

"Given under my hand and seal of the State, affixed at the city of Austin, this 11th day of February, A. D. 1907, and of the independence of the United States of America, the one hundred and thirty-first, and of Texas the seventy-first year.

"T. M. CAMPBELL, *Governor.*"

To this requisition was attached a certified copy of an indictment against the petitioner. The indictment is as follows:

"In the name and by the authority of the State of Texas.

"The grand jurors of Travis County, in said State, duly empaneled, sworn and charged as such at the September term, A. D. 1906, of the District Court of said county, in and for the Fifty-third Judicial District, upon their oaths, in said court, present: That Henry Clay Pierce, in said county and State, on or about the 31st day of May, in the year of our Lord nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting notary public within and for the county of Travis and State of Texas, who was then and there duly authorized by law as such officer and notary public to administer an oath; and the said

Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and notary public, did then and there unlawfully, deliberately, corruptly and willfully, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing, as follows:

"*Affidavit.*

"The State of Texas, County of Travis:

"I, Henry Clay Pierce, do solemnly swear that I am the President (President, Secretary, Treasurer or Director) of the corporation known and styled Waters-Pierce Oil Company, duly incorporated under the laws of Missouri, on the 29th day of May, 1900, and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said corporation in making this affidavit, and I do further solemnly swear that the said Waters-Pierce Oil Company, known and styled as aforesaid, has not since the 31st day of January, 1900, created, entered into or become a member of, or a party to, and was not, on the 31st day of January, 1900, nor at any day since that date, and is not now, a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing what-

soever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employé, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract, or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee, or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A. D. 1900, and is not now, a monopoly by reason of any conduct on its part, which would constitute it a monopoly under the provisions of sections 2, 3, 4, 5, 6, 10, and 11 of this act, and is not the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw material or preparing the same for market by any wrapping, baling or other process, and while leasing, renting or operating the same, refuses or fails to put the same on the market for sale; that it has not issued and does not own any trust certificates, and has not, for any corporation or any agent, officer or employé thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with the stockholders, director or any officer, agent, or employé of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in section 1 of this act, or to

create a monopoly, as defined in sections 2, 3, 4, 5, 6, 10 and 11 of this act.

"HENRY CLAY PIERCE,
"(*President, Secretary, Treasurer or Director*).

'Subscribed and sworn to before me, a notary public within and for the county of Travis, this 31st day of May, 1900.

(Signed) "N. H. NAGLE,
"*Notary Public.*

"Whereas in truth and in fact the said Waters-Pierce Oil Company, mentioned in the above false statement and declaration in writing, had since the 31st day of January, 1900, created, entered into, and became a member of, and a party to, and was on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of, and a party to, a pool, trust, agreement, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to wit, with the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names and a description of whom are to said grand jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum, being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing: and, whereas, in truth and in fact the said Waters-Pierce Oil Company, hereinbefore mentioned, had, since the 31st day of January, 1900, created, entered into and become a member of, and a party to, and was on the 31st day of January, 1900, and was on every day since the said 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a party to a pool, trust, agree-

ment, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to wit, the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names and a description of whom are to said grand jury unknown after diligent inquiry, to fix and limit the amount of supply and quantity of petroleum and all of the products of petroleum, the said petroleum and all the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and whereas in truth and in fact the said Waters-Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, and on every day since said 31st day of January, 1900, up to the 31st day of May, 1900, issued, and did then and on the 31st day of May, 1900, issue trust certificates to another corporation, to wit, the Standard Oil Company of New Jersey, hereinbefore described, its agents, officer and employee, to wit, one J. P. Gruet, and one John D. Johnson, and other agents, officers and employees of said Standard Oil Company of New Jersey, whose names and descriptions are to said grand jurors unknown, after diligent inquiry, whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters-Pierce Oil Company and the owner of a controlling interest in said Waters-Pierce Oil Company, which said false statement, so made as aforesaid by the said Henry Clay Pierce, was not then and there required by law, nor made in the course of judicial proceedings. Yet the same was then and there, nevertheless, willfully and deliberately made, and was willfully and deliberately false, as he, the said Henry Clay Pierce, then and there well knew.

"Against the peace and dignity of the State."

To this petition the Governor of Missouri responded by issuing a warrant for the arrest of the petitioner and his delivery to the agent of the State of Texas.

While the respondent held the petitioner in custody upon this warrant the writ of *habeas corpus* was issued. The petitioner, after alleging that he was held in custody by the respondent solely by virtue of the warrant issued by the Governor of Missouri, further alleged in his petition:

"That said restraint, imprisonment, detention and confinement are illegal, and that the illegality thereof consists in this, to wit:

"First. It is not shown by any sufficient averments in the said indictment that the facts stated or opinions expressed by petitioner in the affidavit set forth in said indictment were false when the said affidavit was made, and hence the indictment charges no offense under the laws of the State of Texas. That so far as the averments of the said indictment are concerned, the conclusion, judgment and opinion of petitioner expressed in the affidavit are only alleged to be false in the conclusion, judgment and opinion of the grand jury preferring said indictment.

"Second. That the affidavit made by your petitioner was in the form prescribed by an act of the legislature of the State of Texas, entitled 'An act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles; to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this act, and to authorize the institution and prosecution of suits therefor,' which was approved May 25th, 1899, and became effective January 31st, 1900 (Gen. Laws Texas, 1899, p. 246), and that the language of said affidavit must be construed and interpreted in connection with the related text of the act of which it forms a part; that the pools, trusts, combinations, conspiracies and monopolies prohibited by said act were such only as were formed by such natural or artificial legal entities as were then engaged in business in the State of Texas,

and the indictment does not show or charge, that the Waters-Pierce Oil Company, organized on May 29, 1900, as stated by petitioner in said affidavit, contrary to the fact stated by your petitioner in said affidavit, was a member of, or party to, any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any person or association of persons, then or theretofore transacting or doing business in the State of Texas, for the purpose of fixing the price or limiting the output or quantity of any article or thing whatsoever to be sold or marketed in said State of Texas.

"Third. That no charge of perjury or false swearing could legally be predicated upon any matter or thing stated in said affidavit, for the reason that the statements therein contained are mere expressions of legal conclusions or opinions upon a state of facts existent in the belief of the affiant.

"Fourth. The affidavit, being required by law, if false, could not be false swearing under the laws of the State of Texas.

"Fifth. For that it appears upon the face of the said indictment that more than four years elapsed between the date of the commission of the alleged offense and the finding of the said indictment."

No other grounds of the illegality of the petitioner's imprisonment than these were alleged in the petition.

Mr. Joseph H. Choate and *Mr. Joseph H. Choate, Jr.*, with whom *Mr. Henry S. Priest* was on the brief, for appellant:

Where a petition to a Circuit Court of the United States for a writ of *habeas corpus* raises a question of the construction or application of the Constitution of the United States, the case falls within § 5 of the act of March 3, 1891, and an appeal may be taken directly to this court. *Boske* v. *Comingore*, 177 U. S. 459; *Craemer* v. *Washington*, 168 U. S. 124; *In re Marmo*, 138 Fed. Rep. 201.

In this case the petition distinctly alleged that the detention of the appellant was in violation of the Constitution of the

United States, in that the indictment upon which the extradition proceedings were based did not constitute a "charge of crime" within the meaning of Art. IV, § 2, subd. 2 of the Constitution and therefore did not justify the arrest. This raised a question of the construction and application of the Constitution. *Roberts* v. *Reilly*, 116 U. S. 80; *Matter of Strauss*, 197 U. S. 324, which was the substantial question litigated as appears from the opinion below, to which the court may and should refer. *Loeb* v. *Columbia Township*, 179 U. S. 472.

The appeal to this court was properly taken and the fact that a separate appeal was subsequently taken to the Circuit Court of Appeals could not affect the jurisdiction of this court, which had already attached. *Columbus Co.* v. *Crane Co.*, 174 U. S. 600. Nor could the subsequent appeal constitute a waiver of this appeal. *Pullman Co.* v. *Central Co.*, 171 U. S. 138.

The validity of the warrant on which the appellant was arrested depends upon the substantial sufficiency of the indictment on which it was based. Unless that indictment, when tested as on motion in arrest of judgment, is capable of supporting a conviction, the requirements of the Constitution are not fulfilled and the extradition is unauthorized.

The right of interstate extradition does not exist by comity. It rests upon Art. IV, § 2, subd. 2, of the Constitution and upon the legislation of Congress (Rev. Stat. § 5278, act of February 12, 1793, c. 7, 1 Stat. 302). *Ex parte Morgan*, 20 Fed. Rep. 298; *In re Kopel*, 145 Fed. Rep. 505. Whenever a State attempts to exercise the power to extradite, the proceedings must conform to the requirements of the Constitution and of the act of Congress or they will be unauthorized and void.

The meaning of the words "charged with crime" as used in the Constitution, is that the person whose surrender is demanded shall have been "charged in due form of law in some proper judicial proceeding instituted in the State from which he is a fugitive. This charge is to be the foundation for the demand and for the warrant of surrender; and it cannot be

sufficient unless it contains all the legal requisites for the arrest of the accused and his detention for trial if he were within the State." Cooley, J., in Princeton Review, January, 1879, p. 165; Spear on Extradition (2d ed.), p. 376; *Ex parte Smith*, 3 MacLean, 121; *People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182; *Roberts* v. *Reilly*, 116 U. S. 80, and cases cited.

The strictly analogous cases where, on *habeas corpus*, the release is sought of prisoners held for removal from one judicial district of the United States to another, also support the view above stated. *Stewart* v. *United States*, 119 Fed. Rep. 89; *In re Terrell*, 51 Fed. Rep. 213; *Greene* v. *Henkel*, 183 U. S. 249; *Tinsley* v. *Treat*, 205 U. S. 20; *In re Buell*, 3 Dill. 116; *In re James*, 18 Fed. Rep. 853; *United States* v. *Brawner*, 7 Fed. Rep. 86; *In re Dana*, 68 Fed. Rep. 886.

The indictment involved in this proceeding was fatally defective.

An indictment alleging merely that the accused made the statement and that it was false is insufficient, not because of any mere rule of pleading, but because of the omission to allege the facts inconsistent with the statements, which facts are part, not merely of the proper statement of the crime, but of the crime itself. In the absence of these facts the allegations that the statement was false is a mere conclusion of the pleader. The facts which constitute the truth must, therefore, be distinctly alleged, not because they are a requirement of the indictment as a pleading, but because without them the crime of false swearing can be shown only by conclusions.

The assignments of perjury or false swearing, moreover, must not only allege distinctly, and not by way of conclusion, what the true facts were, but must serve to demonstrate the falsity of the facts sworn to. If all that the assignments set out may be true and still be entirely consistent with the truth of the matter alleged to be false, there can be no substantial charge of false swearing, since nothing in the facts alleged would serve to impeach or destroy the truth of the facts sworn to by the accused. If the facts alleged to be true by the as-

signments of false swearing, and the facts sworn to by the accused are not inconsistent, the indictment is equivalent to a charge that the accused perjured himself in swearing to statements which were true. The statements alleged to be false and the statements alleged by the assignment to be true must in tenor and meaning be inconsistent so that both cannot by the same tokens of interpretation or inference be true. *Reg* v. *Whitehouse*, 3 Cox, C. C. 86; 2 Bishop's New Crim. Procedure, § 918.

The fact that the crime of perjury or false swearing cannot legally be charged without assignments of falsity sufficient within the above reasoning, is perfectly established in Texas. *Gabrielsky* v. *State*, 13 Tex. App. 428; *Higgins* v. *State*, 38 Tex. Crim. App. 539; *S. C.*, 43 S. W. Rep. 1012 (1898); *McMurtry* v. *State*, 38 Tex. Crim. App. 521; *S. C.*, 43 S. W. Rep. 1010 (Texas, 1885); *Morris* v. *State*, 83 S. W. Rep. 1126; *Turner* v. *State*, 30 Tex. Crim. App. 691. The indictment fails substantially to charge the crime of false swearing, because the statements alleged in the indictment to have been falsely sworn to by the appellant, are not statements of fact, but are expressions of mere opinions, beliefs and conclusions, upon which the crime of false swearing cannot be predicated.

The assignments of falsity are insufficient. No facts are alleged which are necessarily inconsistent with the statements of the appellant's affidavit.

The indictment fails to inform appellant of the charge against him with that degree of reasonable certainty which will enable him to prepare his defense.

The indictment discloses upon its face that, at the time it was filed, the prosecution was barred by the statute of limitations.

The indictment itself discloses the fact that it was not found in good faith.

The indictment is based upon an affidavit required by law, which cannot be the subject of a prosecution for the statutory crime of false swearing.

Mr. F. J. McCord and *Mr. Shepard Barclay*, with whom *Mr. Thomas T. Fauntleroy* was on the brief, for appellee:

There is no Federal question presented by this record. No one of the defects alleged to exist in the indictment involves the construction or application of the Constitution or of any law of the United States; no one of them invokes or asserts any right, privilege or immunity under the Federal Constitution or laws. *World's Exposition* v. *United States*, 56 Fed. Rep. 657; *Mining Co.* v. *Hanley*, 205 U. S. 233; *Carfer* v. *Caldwell*, 200 U. S. 292.

A mere charge of a crime, defined by the criminal law of a State, formulated upon affidavit before some magistrate, without indictment by a grand jury, is a sufficient basis for extradition, under the Federal law. *Day* v. *Inhabitants*, 8 Allen, 478.

Other cases likewise hold that a charge of crime need not be by indictment. *Ryan* v. *People*, 79 N. Y. 593; *Drinkall* v. *Spiegel*, 68 Connecticut, 441; *In re De Giacomo*, 7 Fed. Cas., p. 366; *People* v. *Garnett*, 129 California, 364; *Rex* v. *Maynard*, Russ. & Ry. 240.

Every contention of illegality must be solved by interpretation of Texas law. Who shall make the interpretation? In the first instance, at least, the courts of that Commonwealth. The real issue of law is what the duly appointed courts of Texas hold as to the sufficiency of the indictment. *In re Voorhees*, 32 N. J. L. 141.

If those courts should err in the interpretation of their local enactments, the case would not thereby become one of Federal cognizance, unless in such ruling (or in the consequences thereof) some right, privilege, or immunity secured to petitioner by the Federal law was infringed. No such claim appears as yet and if it did, *habeas corpus* is rather a collateral method of raising such an issue. The petition for *habeas corpus* asserts that the indictment is insufficient according to the Texas law. Perhaps the courts of that State will agree with the petitioner. The Federal judiciary will not in advance of

any Texas interpretation of Texas law, interpose and assume that duty. *Carfer* v. *Caldwell*, 200 U. S. 292; *In re Lennon*, 150 U. S. 393. See also *Ex parte Moebus*, 148 Fed. Rep. 39; *Storti* v. *Massachusetts*, 183 U. S. 142; *Spencer* v. *Silk Co.*, 191 U. S. 530; *Drury* v. *Lewis*, 200 U. S. 1; *Empire Co.* v. *Hanley*, 205 U. S. 1.

If jurisdiction here exists, there is still no merit in this appeal.

Where the local court in question has jurisdiction of the subject-matter of the charge, mere insufficiency in the indictment in alleging facts to support the charge does not warrant a discharge on *habeas corpus*.

Whether facts charged in an indictment constitute a crime under the state statutes, the courts of the State should decide. It is their province to determine that question if they have jurisdiction of the subject-matter. *In re Belt*, 159 U. S. 95; *Hyde* v. *Shine*, 199 U. S. 62; *Riggins* v. *United States*, 199 U. S. 547; *Rogers* v. *Peck*, 199 U. S. 425; *Ex parte Moran*, 144 Fed. Rep. 594.

The use of *habeas corpus* (as sought in this case) is a collateral attack on the pending proceeding in the court of Texas, and is only maintainable if that court has no power to proceed at all. *Ex parte Watkins*, 3 Pet. 203; *United States* v. *Pridgeon*, 153 U. S. 59; *In re Kowalsky*, 73 California, 120.

The leading question on this branch of the case is whether the Texas court has jurisdiction of the offense alleged or of the charge, whatever may be said as to the sufficiency of the indictment.

If the facts are alleged in such way in the indictment as not to render the judgment of conviction thereon void on a collateral attack, then there is no ground to discharge on *habeas corpus*—for that only is available where the prisoner is held without jurisdiction. *Benson* v. *Henkel*, 198 U. S. 10; *Felts* v. *Murphy*, 201 U. S. 123; *Pierce* v. *Texas*, 155 U. S. 311; *Urquhart* v. *Brown*, 205 U. S. 179; *Hyde* v. *Shine*, 199 U. S. 62; *Carfer* v. *Caldwell*, 200 U. S. 293; *In re Lancaster*, 137 U. S. 393.

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

The first inquiry must be whether there is jurisdiction of this appeal, which was taken from the Circuit Court directly to this court. Since the passage of the act establishing the Circuit Court of Appeals (26 Stat. 826), appeals in *habeas corpus* cases from the District and Circuit Courts can only be taken to the Circuit Court of Appeals, unless they are of the kind specified in § 5 of the act, wherein a direct appeal to this court is allowed. *In re Lennon*, 150 U. S. 393. Of the latter class is "any case that involves the construction or application of the Constitution of the United States." In the case at bar the position of the appellant is that his detention in custody is unlawful, because the indictment, which is its only excuse, is not a charge of crime within the meaning of the provision of the Constitution regulating interstate extradition. Art. IV, § 2, par. 2. The precise and only question to be determined is whether the indictment constituted such a charge. The decision of this question requires us to ascertain and declare the meaning of the extradition clause, and therefore "involves the construction of the Constitution of the United States." *Craemer* v. *Washington*, 168 U. S. 124; *Boske* v. *Comingore*, 177 U. S. 459. And see *Wiley* v. *Sinkler*, 179 U. S. 58; *Motes* v. *United States*, 178 U. S. 458; *Cummings* v. *Chicago*, 188 U. S. 410. Against this view it is argued that the question whether this indictment is good under the laws of Texas brings under consideration only the laws of that State, and that, as there is no pretense that they violate the Constitution of the United States, there can be involved no construction or application of that Constitution. But the answer to this is that the laws of Texas are considered only as they are embraced in the ultimate inquiry whether the indictment constitutes a charge of crime in that State, and for no other purpose. It is further said by the appellee that the delivery up in this case was by virtue of state laws only, and we are invited to determine how far the State may make

laws for interstate extradition, independent of, though consistent with, the Federal Constitution. We decline to accept the invitation, because in the case at bar the demand of the Governor of Texas, which was complied with, was expressed to be "in pursuance of the provisions of the Constitution and laws of the United States." There is jurisdiction of the appeal.

The Constitution provides that "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." No person may be lawfully removed from one State to another by virtue of this provision, unless: 1, He is charged in one State with treason, felony or other crime; 2, he has fled from justice; 3, a demand is made for his delivery to the State wherein he is charged with crime. If either of these conditions are absent the Constitution affords no warrant for a restraint of the liberty of any person. Here the only condition which it is insisted is absent is the charge of a crime. The only evidence of a charge of crime is the indictment, and the contention to be examined is that the indictment is insufficient proof that a charge has been made.

The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over seasonable challenge, to bring the accused to the bar for trial. Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending. We are unable to adopt the test

suggested by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different States, there is nothing in principle or authority which supports it. Of course, such a test would be utterly inapplicable to cases of a charge of crime by affidavit, which was held to be within the Constitution. *In the Matter of Strauss*, 197 U. S. 324. The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled. *Roberts* v. *Reilly*, 116 U. S. 80, 95; *Pearce* v. *Texas*, 155 U. S. 311, 313; *Hyatt* v. *Corkran*, 188 U. S. 691, 709; *Munsey* v. *Clough*, 196 U. S. 364, 372; *Davise's Case*, 122 Massachusetts, 324; *State* v. *O'Connor*, 38 Minnesota, 243; *State* v. *Goss*, 66 Minnesota, 291; *Matter of Voorhees*, 32 N. J. L. 141; *Ex parte Pearce*, 32 Tex. Crim. 301; *In re Van Sciever*, 42 Nebraska, 772; *State* v. *Clough*, 71 N. H. 594.

Before proceeding further, it is well to set forth all the objections to the indictment made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed.

The objections to the indictment which were advanced in the argument are six in number:

1. The statements in respect to which false swearing is alleged are not statements of facts but of opinion, and therefore, however falsely made, cannot amount to the crime of false swearing.

2. The assignments of falsity are insufficient, for no facts are

alleged which are necessarily inconsistent with the alleged false affidavit.

3. The charge is not alleged with the certainty required in an indictment.

4. Upon the face of the indictment the prosecution is barred by the statute of limitations.

5. The indictment discloses the fact that it was not found in good faith.

6. The affidavit was required by law, and therefore, if false, under the Texas law, lays the foundation for a prosecution for perjury, but not for false swearing.

The fifth and sixth objections require separate discussion. We are not informed of any principle by which we may inquire whether an indictment, duly found, was returned in good faith, but, whether that power exists or not, it is enough to say here that this objection does not seem to be true in fact.

Under the Texas law the crime of false swearing, as distinguished from perjury, can only be committed by a false oath to a voluntary declaration or affidavit, "not required by law or made in the course of a judicial proceeding." The sixth objection asserts that the affidavit set forth in this indictment was one required by law. But this assertion is in the teeth of the allegation of the indictment, that the affidavit "was not then and there required by law nor made in the course of judicial proceedings." We cannot inquire into the truth of this allegation, which may present a mixed question of law and fact.

All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment. They are attacks upon the indictment as a criminal pleading, the right to make which counsel expressly renounce. If well founded, they show that the indictment is bad. But the Constitution does not require, as an indispensable prerequisite to interstate extradition, that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime. Congress, in aid of the execution of the constitutional

provision, has enacted a law (§ 5278, Rev. Stat.), directing that the charge shall be made either by "an indictment found" or "an affidavit made before a magistrate;" and, as we have seen, this court has held that such an affidavit is sufficient, saying (197 U. S. 331), "doubtless the word 'charged' was used in its broad signification to cover any proceeding which a State might see fit to adopt, by which a formal accusation was made against an alleged criminal." But it is obvious that an objection which, if well founded, would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime. Are then the objections made to the indictment of that nature? Let it be assumed that these are all well taken. Let it be assumed, without decision, that the false statements contained in the affidavit were statements of opinion; that the assignments of falsity were bad, because no facts necessarily inconsistent with them were alleged; that the certainty required in criminal pleading was not observed; and that the time alleged antedates the indictment by more than the period of the statute of limitations. Nevertheless, the indictment alleges that on a day named the petitioner deliberately and willfully made, under the sanction of an oath, legally administered, a voluntary false statement and declaration in writing, to wit, the affidavit, and that the affidavit was not required by law or made in the course of a judicial proceeding. The indictment, whether good or bad, as a pleading, unmistakably describes every element of the crime of false swearing, as it is defined in the Texas Penal Code, in art. 209, which follows.

"If any person shall deliberately and willfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing, and shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

This court, in the cases already cited, has said, somewhat vaguely but with as much precision as the subject admits, that

the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required it would impose upon courts, in the trial of writs of *habeas corpus*, the duty of a critical examination of the laws of States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance.

Judgment affirmed.

CONTINENTAL PAPER BAG COMPANY *v.* EASTERN PAPER BAG COMPANY.

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

No. 202. Argued April 15, 1908.—Decided June 1, 1908.

The previous decisions of this court are not to be construed as holding that only pioneer patents are entitled to invoke the doctrine of equivalents, but that the range of equivalents depends upon the degree of invention; and infringement of a patent not primary is therefore not averted merely because defendant's machine may be differentiated.

Under § 4888, Rev. Stat., the claims measure the invention, and while the inventor must describe the best mode of applying the principle of his invention the description does not necessarily measure the invention.

Where both of the lower courts find that complainant did with his machine what had never been done before and that defendant's machine infringed, this court will not disturb those findings unless they appear to be clearly wrong.

Patents are property and entitled to the same rights and sanctions as other property.

An inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute, and this right is not dependent on his using the device or affected by his non-use thereof, and, except in a case where the public interest is involved, the remedy of injunction to prevent infringement of his patent will not be denied merely on the ground of non-user of the invention.

150 Fed. Rep. 741, affirmed.

THIS is a bill in equity to restrain the infringement of letters patent No. 558,969, issued to William Liddell for an improvement in paper bag machines for making what are designated in the trade as self-opening square bags. The claims in suit do not include mechanism for making a complete bag, but only mechanism for distending one end of a tucked or bellows folded paper tube made by other mechanism, and folding it down into a form known in the art as the "diamond fold." This fold is flattened and pasted by other mechanism and forms a square bottom to the bag.

The bill is in the usual form and alleges infringement of the claims by the Continental Paper Bag Company, hereafter called the Continental Company, and prays for an accounting and an injunction.

The answer interposed the defense of non-jurisdiction of a court of equity, non-infringement of the Liddell patent by defendant (Continental Company) and want of invention.

The allegation of the answer as to the jurisdiction of the court is as follows:

"The defendant says, on information, advice and belief, that a court of equity has no jurisdiction to grant any prayer of the bill of complaint, even if the said Liddell patent, No. 558,969, were valid, and even if the defendant's paper bag machines were to be held to infringe that patent, because the said patent, No. 558,969, is a mere paper proposition which the complainant has never put into effect or use, and because it is contrary to equity to suppress a useful and established business, like that which the defendant is prosecuting with its paper bag machines, at the request of a complainant which simply owns one paper bag machine patent that has never been employed by

that complainant in any way in any paper bag machinery, and because the complainant in this case has a plain, adequate and complete remedy at law for any infringement which may have been done upon Liddell letters patent, No. 558,969."

The Circuit Court adjudged the patent valid as to the first, second and seventh claims thereof; that the Eastern Paper Bag Company was the owner of the letters patent; that Liddell was the original and first inventor of the improvements described in the claims, and that the Continental Company had infringed the same. It was also adjudged that the Eastern Company recover of the Continental Company the profit the latter had made or received by the infringement. An account was ordered and a perpetual injunction decreed. 142 Fed. Rep. 479. The decree was affirmed by the Circuit Court of Appeals. 150 Fed. Rep. 741. This certiorari was then granted.

Mr. Albert H. Walker for petitioner:

The owner of any patent who, beginning with the granting of that patent, long and always and unreasonably holds in non-use the invention covered thereby, is not equitably entitled to a writ of injunction to enable him to prevent others from introducing that invention into use in the art to which it belongs, and thus causing it to promote the progress of that art.

To permit the owner of a patent held in non-use to invoke the aid of courts of equity to enjoin the use by others of an invention which he refuses to use himself, would defeat the very object of the patent laws and of the constitutional provision to which they owe their existence, and such a course, had it been pursued in the past, would have blocked the road along which the great historic inventions of the nineteenth century have proceeded to their present state of perfection.

Injunctions should not be issued in behalf of patents held in non-use for the additional reason that the alleged infringers are often acting under independently made inventions of their own, which were so nearly contemporaneous in time of origin

with the inventions of the patents in suit that it is difficult and sometimes impossible to ascertain which of them is entitled to priority in the art to which they belong, and such was the fact in the case at bar.

Under the circumstances of this case, it was incumbent upon the owner of the Liddell patent either to put the Liddell invention into regular manufacturing use, or to license others to do so for a reasonable royalty, and having always omitted so to do either from April, 1896, until this action was brought more than five years later, and indeed until now, nearly seven years later yet, the owner of that patent is ethically limited to actions at law for its alleged infringement, and is not entitled, "according to the course and principles of courts of equity," to an injunction with which to stop the numerous and costly machines of the defendant from operating.

An injunction should not be issued in favor of a non-used patent, because the patent laws of nearly every foreign country forbid such assistance in favor of any patent held in non-use, and to grant such injunctions here would be to give to foreign inventors advantages in our own country which are denied to our citizens abroad.

The cases cited in the Circuit Court of Appeals, opinion on the question of law above discussed, do not really support the conclusion reached. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Fuller* v. *Berger*, 120 Fed. Rep. 274; *Heaton Peninsular Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288; *Crown Cork & Seal Co.* v. *Aluminum Stopper Co.*, 108 Fed. Rep. 845; *Broadnax* v. *Central Stockyard Co.*, 4 Fed. Rep. 214; *Consolidated Roller Mill Co.* v. *Coombs*, 39 Fed. Rep. 803; *Campbell Printing Press Co.* v. *Manhattan Ry. Co.*, 49 Fed. Rep. 930, discussed and distinguished.

The following cases sustain the contention of petitioner herein that the aid of equity should not be granted in cases of this character. *Isaacs* v. *Cooper*, 4 Wash. C. C. 259; *Ogle* v. *Ege*, 4 Wash. C. C. 584; *Mott* v. *Bennett*, 2 Fisher, 642; *Sullivan* v. *Redfield*, 1 Paine, 441; *Magic Ruffle Co.* v. *Douglas*, 2

Fisher, 333; *Hoe* v. *Knap*, 27 Fed. Rep. 212; *Germain* v. *Wilgus*, 67 Fed. Rep. 600; *Campbell Printing Press Co.* v. *Duplex Printing Press Co.*, 86 Fed. Rep. 331; 1 Robinson on Patents, § 43, pp. 65, 66; Curtis on Patents, 1st ed. and 2d ed., § 320; and 3d ed. and 4th ed., § 406.

Upon the question of infringement it is contended that:

First. The Liddell patent is the twentieth, in the particular department of the general art to which it belongs; nineteen prior patents showed and described nineteen combinations of machinery, for doing exactly the same work as that which the Liddell patent shows a twentieth combination of machinery for doing.

Second. That combination of machinery which is specified in claims 1, 2 and 7 of the Liddell patent, is both analytically and synthetically very different from that combination of machinery, in the defendant's machines, which was held by the Circuit Court of Appeals for the First Circuit, to infringe those claims.

Third. That decision cannot be affirmed by the Supreme Court, without reversing all of those twelve prior decisions in which, during fifty years, the Supreme Court has established, enforced and formulated, as one of the patent laws of the United States, the rule that: "Where the patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machines can be differentiated, the charge of infringement is not sustained." *McCormick* v. *Talcott*, 20 How. 405 (1857); *Railway Co.* v. *Sayles*, 97 U. S. 556 (1878); *Morley Machine Co.* v. *Lancaster*, 129 U. S. 273 (1889); *Pope Mfg. Co.* v. *Gormully Mfg. Co.*, 144 U. S. 242 (1892); *Sessions* v. *Romadka*, 145 U. S. 45 (1892); *Knapp* v. *Morss*, 150 U. S. 230 (1893); *Miller* v. *Eagle Co.*, 151 U. S. 204 (1894); *Duff* v. *Pump Co.*, 107 U. S. 639 (1882): *Boyd* v. *Janesville Hay Tool Co.*, 158 U. S. 267 (1895); *Dashiell* v. *Grosvenor*, 162 U. S. 432 (1896); *Kokomo Fence Machine Co.* v. *Kitselman*, 189 U. S. 8 (1903); *Cimiotti Unhairing Co.* v. *American Fur Refining Co.*, 198 U. S. 399 (1905).

Mr. Samuel R. Betts and *Mr. Francis T. Chambers*, with whom *Mr. James J. Cosgrove* was on the brief, for respondent:

Under the principles of law and equity which must govern the right to injunctions restraining the infringement of patents for inventions, the court committed no error in entertaining jurisdiction, even though there had been no commercial use of the invention.

After the inventor has made a full and complete disclosure of his invention, he is under no moral or legal obligation to any portion of the public. He is not required by the patent statute to directly or indirectly put it into commercial use, nor is he obliged to permit others to do so, directly or indirectly, except upon his own lawful terms. Having disclosed his invention, he is legally and equitably entitled to all the benefits of the laws, whether administered by a court of law or equity. He has an absolute legal and equitable right to avail himself of all means which the law provides and the machinery of its courts, for preventing others from taking advantage of his invention before his patent expires. The public, acting through the Government, induced him to disclose to it his invention, and has granted him these rights and has agreed and promised to enforce and protect them. The inventor, having fully complied with all of his obligations, the Government cannot indirectly, by withholding an injunction, permit any portion of the public to take advantage of his invention (unless there is a special equity in favor of some portion of the public against the inventor), and thus force him to make use thereof or permit infringers to do so, perhaps on their terms, without failing in its duty and violating its moral and legal obligation as well as its solemn statutory promise, by which it persuaded the inventor to part with his secret property and to disclose the invention, so that the public might obtain immediate knowledge of it and share in and have the full benefit of it after the expiration of the patent.

Therefore, considerations of any alleged immediate public benefit resulting from the inventor putting the invention into

commercial use, should not induce the courts to deprive the inventor of any of his rights, either directly or indirectly, by withholding its most effective process for the preservation of these rights, viz: that of injunction. *Grant* v. *Raymond*, 6 Peters, 218, 243 (opinion by Chief Justice Marshall); *Wilson* v. *Rousseau*, 4 How. 646–674; *Bloomer* v. *McQuewan*, 14 How. 539; *Seymour* v. *Osborne*, 11 Wall. 516, 533; *Cammeyer* v. *Newton*, 94 U. S. 226; *Patterson* v. *Kentucky*, 97 U. S. 501; *Densmore* v. *Scofield*, 102 U. S. 375; *United States* v. *Bell Telephone Co.*, 167 U. S. 249; *Connolly* v. *Union Sewer Co.*, 184 U. S. 540, 546; *Bement* v. *National Harrow Co.*, 186 U. S. 70, 90; *Edison* v. *Mt. Morris Co.*, 57 Fed. Rep. 542, 644 (2d Cir.); *Heaton Peninsular Co.* v. *Eureka Co.*, 77 Fed. Rep. 294 (6th Cir.); *Crown Cork & Seal Co.* v. *Aluminum Stopper Co.*, 108 Fed. Rep. 845, 868 (4th Cir.); *Fuller* v. *Berger*, 120 Fed. Rep. 274, 277 (7th Cir.); *Lamson Consolidated Service Co.* v. *Hillman*, 123 Fed. Rep. 416, 422 (7th Cir.); *Victor Talking Mach. Co.* v. *Fair*, 123 Fed. Rep. 425 (7th Cir.); *U. S. Seeded Raisin Co.* v. *Griffin*, 126 Fed. Rep. 364, 368 (9th Cir.); *Rupp* v. *Elliott*, 131 Fed. Rep. 730 (6th Cir.); *Munroe* v. *Railway Appliance Co.*, 145 Fed. Rep. 646, 648 (7th Cir.); *Filter Co.* v. *Jackson*, 140 Fed. Rep. 340, 343 (8th Cir.); *U. S. Fastener Co.* v. *Bradley*, 149 Fed. Rep. 222 (2d Cir.); *Rubber Tire Co.* v. *Milwaukee*, 154 Fed. Rep. 358, 361 (7th Cir.); *Indiana Mfg. Co.* v. *J. I. Case Co.*, 154 Fed. Rep. 365 (7th Cir.); *Carr* v. *Rice*, 1 Fish. 198, 200 (N. Y.); *Wintermute* v. *Redington*, 1 Fish. 243 (Ohio); *Ransom* v. *Mayor*, 1 Fish. 255 (N. Y.); *Pitts* v. *Wemple*, 2 Fish. 15 (Ill.); *Whitney* v. *Emmett*, 1 Bald. 304; *Broadnax* v. *Central Stock Yard*, 4 Fed. Rep. 214, 216 (N. J.); *In re Brosnahan*, 18 Fed. Rep. 62 (Justice Miller) (Mo.); *Consolidated* v. *Coombs*, 39 Fed. Rep. 803 (Mich.); *Wirt* v. *Hicks*, 46 Fed. Rep. 71 (N. Y.); *Campbell* v. *Manhattan Railway*, 49 Fed. Rep. 930 (N. Y.); *Edison* v. *Mt. Morris*, 57 Fed. Rep. 642, 644 (N. Y.); *Masseth* v. *Reiber*, 59 Fed. Rep. 612 (Pa.); *Bonsak* v. *Smith*, 70 Fed. Rep. 383 (N. C.); *Columbia* v. *Freeman*, 71 Fed. Rep. 302, 306 (Mo.); *Wyckoff* v.

Wagner, 88 Fed. Rep. 515 (N. Y.); *White* v. *Peerless*, 111 Fed. Rep. 190 (Pa.); *Brodrick* v. *Mayhew*, 131 Fed. Rep. 92 (Wis.); *National Co.* v. *Daab*, 135 Fed. Rep. 891, 895 (N. J.); *Hoe* v. *Miehle*, 141 Fed. Rep. 115 (N. Y.); *Hartmann* v. *Park & Son*, 145 Fed. Rep. 358 (Ky.).

Withholding the injunction restraining the petitioner's infringement of the valid Liddell patent, on the ground of non-use of the invention thereof, would be a violation of respondent's constitutional and statutory rights, and contrary to the "course and principles of equity."

The court below was not in error in holding that the invention of claims 1, 2 and 7 of the Liddell patent was of sufficient breadth to cover the defendant's machine.

The courts below having found as matters of fact that the petitioner's evidence was insufficient to overcome the presumption of priority of invention of the patent in suit, and that the patent was a broad one and that the evidence disclosed no material difference in structure and mode of operation and results between the petitioner's machine and the machine of the patent, the decisions on these matters of fact will not be reëxamined by this court. *Bement* v. *National Harrow Co.*, 186 U. S. 70.

No one of the claims in suit is limited to the use of the specific form of mechanism illustrated in the drawings for giving the described movements to the characteristic parts of the combination. It is also evident from a consideration of the detailed mechanisms pointed out in the drawing, as illustrative, or efficient, or operative mechanisms, for carrying out the invention, and referable as detailed mechanisms to the broad elements of the claims, that if said claims are to be construed as limited to the details of such mechanisms as shown in the patent, they become of no protective value or force. It is undoubtedly within the skill of mechanics skilled in the art to construct machines embodying the essence of Liddell's invention and construction, and yet to actuate the moving parts by well-known mechanical devices, widely different in detail

from those shown in his drawings and described in his specification, but clearly mechanical equivalents thereof.

A patent can certainly be very broad in scope, and broad enough to cover very broad differences of details in mechanism, under the doctrine of equivalency, without requiring that it shall occupy the position held by so few patents, of being of a strictly "primary" or "pioneer" character. It is enough in this particular case, if it be given a fair application of the doctrine of equivalents, as the first machine for making the diamond fold for S. O. S. [self opening, square] bags, involving the combination of a continuously-rotating cylinder with a forming plate, not sharing the rotative motion of the cylinder, but oscillating about its rear edge on said cylinder, in regular and properly related and timed succession, to make the diamond fold on the bag blanks.

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

The defense of want of invention in the Liddell machine is not urged here, because it is said that the decision of that question depends upon mechanical comparisons, too numerous and complicated to be conveniently made by a bench of judges, and because, though the Liddell patent approaches closely the prior art, it "perhaps covers a margin of differentiation sufficient, though barely sufficient, to constitute invention."

The two questions, therefore, which remain for decision are the jurisdiction of the court and the question of infringement. We will consider the latter question first. It does not depend, counsel for the Continental Company says, "upon any issue of fact, but does depend, as questions of infringement" sometimes do, upon a "point of law." This point of law, it is further said, has been formulated in a decision of this court as follows: "Where the patent does not embody a primary invention, but only an improvement on the prior art, and defendant's machines can be differentiated, the charge of infringement is

not sustained." Counsel for respondent do not contend that the Liddell invention is primary within the definition given of that term by petitioner. Their concession is that it is "not basic in the sense of covering the first machine ever produced to make self-opening square bags by machinery." They do contend, however, that it is one of high rank, and if it be given a "fair construction and scope, no matter whether we call it basic, primary or broad, or even merely entitled to be construed as covering obvious mechanical equivalents, the question of infringement of the claims in suit by petitioner's machine becomes mechanically, and from a patent law standpoint, a simple one, in spite of slight differences of operation, and of reversal of some of the moving parts." The lower courts did not designate the invention as either primary or secondary. They did, however, as we shall presently see, decide that it was one of high rank and entitled to a broad range of equivalents. It becomes necessary, therefore, to consider the point of law upon which petitioner contends the question of infringement depends.

The citation is from *Cimiotti Unhairing Company* v. *American Fur Refining Company*, 198 U. S. 399, and the *Kokomo Fence Machine Case*, 189 U. S. 8, was adduced to sustain the proposition. But the whole opinion must be considered, and it will be seen from the language which we shall presently quote that it was not intended to say that the doctrine of equivalents applied only to primary patents.

We do not think it is necessary to follow counsel for petitioner in his review of other cases which, he urges, sustain his contention. The right view is expressed in *Miller* v. *Eagle Manufacturing Company*, 151 U. S. 186, 207, as follows: "The range of equivalents depends upon the extent and nature of the invention. If the invention is broad and primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions." And this was what was decided in *Kokomo Fence Machine Case, supra, Cimiotti Unhairing Com-*

pany v. *American Fur Refining Company, supra,* and *Computing Scale Company* v. *Automatic Scale Company,* 204 U. S. 609. It is from the second of those cases, as we have seen, that the citation is made which petitioner contends the point of law upon which infringement depends is formulated; but it was said in that case: "It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, may be the last and successful step, in the art theretofore partially developed by other inventors in the same field."

It is manifest, therefore, that it was not meant to decide that only pioneer patents are entitled to invoke the doctrine of equivalents, but that it was decided that the range of equivalents depends upon and varies with the degree of invention. See *Ives et al.* v. *Hamilton, Executor,* 92 U. S. 426; *Hoyt* v. *Horne,* 145 U. S. 302; *Deering* v. *Winona Harvester Works,* 155 U. S. 286; Walker on Patents, § 362; Robinson on Patents, § 258.

We start, then, with the proposition that the Eastern Company may invoke for the Liddell patent the doctrine of equivalents, but without deciding now how broadly, we proceed to the consideration of the question of infringement. Invention is conceded to the Liddell machine, as we have seen, by the Continental Company. The concession, however, is qualified by the assertion that it covers only a "margin of differentiation" from the prior art. The Circuit Court and the Circuit Court of Appeals had a higher estimate of it. The Circuit Court said that the nature of its invention "was clear . . . was disconnected from what precedes it by such a hiatus, that, if the claims are as extensive as the invention, there is no difficulty so far as concerns the application to the case of the rules with reference to equivalents." And answering the contention that it was the twentieth in the line of patents in its branch of the arts, and that it should be limited to the details described in its specifications, it was said that there was "such

a hiatus between them and what appears on the face of the Liddell patent, that they have no effect either in narrowing or broadening the alleged Liddell invention." The Circuit Court of Appeals affirmed the decree of the Circuit Court. It was less circumstantial than the Circuit Court in describing the invention. It said, however, after stating the claims, that their breadth "would imperil the patent, were the real invention less broad; but the defendant (the Continental Company) has not pointed out, and we have been unable to find, any operative combination of a rotary cylinder and forming plate oscillating thereon earlier than the patent in suit. If, therefore, the patent is valid, it has a wide scope, and the mechanical arrangement used by the defendant is fairly within its terms." The lower courts, therefore, found that the invention was a broad one and that the machine used by the Continental Company was an infringement. And these were questions of fact upon which, both of the courts concurring, their findings will not be disturbed, unless clearly wrong. See the case of *La Bourgogne, ante*, p. 95. To decide the question of invention an examination of the prior art was necessary and a consideration of what step in advance of that art, if any, the Liddell patent was. To decide the question of infringement a comparison of the Liddell machine with the machine used by the Continental Company was necessary and a determination of their similarity or difference. What was involved in these inquiries of fact and the conclusions from them is indicated by a record of many hundred pages of expert testimony and exhibits.

We shall proceed, then, to consider upon what grounds the Circuit Court and Circuit Court of Appeals proceeded and their sufficiency to sustain the judgments rendered within the rule announced.

The bill alleges the infringement of claims 1, 2 and 7. The courts below selected claim 1 for consideration, as determinative of the questions arising, as well on the other two claims as on it. In this counsel for the Continental Company ac-

quiesced. Claim 1 is as follows: "In a paper bag machine, the combination of a rotating cylinder provided with one or more pairs of side forming fingers adapted to be moved toward or from each other, a forming plate also provided with side forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder, the whole operating for the purpose of opening and forming the bottom of the bag tube, and means to move the bag tube with the cylinder." [1]

"The pith of the invention," the Circuit Court said, "is the combination of the rotary cylinder with means of operating the forming plate in connection therewith, limited, however, to means which cause the plate to oscillate about its rear edge." The court expressed the opinion that the invention extended to every means by which that result could be at-

[1] 2. In a paper bag machine, the combination of the rotating cylinder provided with one or more pairs of side folding fingers adapted to be moved toward or from each other, a forming plate also provided with side forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder for the purpose of opening and forming the bottom of the bag tube, a finger moving with the forming plate for receiving the upper sheet of the tube and lifting it during the formative action, power devices for returning the forming plate to its original position to receive a new bag tube, and means to move the bag tube with the cylinder.

7. In a paper bag machine, the combination of the rotating cylinder for the bag tube provided with one or more pairs of folding fingers adapted to be moved toward or from each other, a forming plate also provided with forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder for the purpose of opening and forming the bottom of the bag tube, and connecting mechanism for timing the movements of the rotating cylinder and the forming plate.

tained, and rejected the contention of the Continental Company that the invention was no broader than the details described in the specification. The court said that it was unable to see upon what the proposition could be based. And further said that there was nothing in the prior art which either broadened or narrowed the Liddell invention. "If any of the nineteen patents which had been put in evidence," the court added, "pointed out any form of combining the forming-plate with a rotating cylinder, they would of course narrow what Liddell could claim; but they have nothing of that kind." And speaking of the claims and their limitation by the description, it was said: "Nothing in the manner in which the claims are expressed adopts as the elements the detailed description contained in the specification. So far as the details of the description are concerned, they come within the ordinary rule of preferable method."

We think it is clear that the court considered that Liddell sought to comply with § 4888 of the Revised Statutes.[1] In other words, he filed a description of his invention, explained its principle and the best mode in which he "contemplated applying that principle," and did not intend to give up all other modes of application. An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. "The principle of the invention is a unit, and invariably the

[1] SEC. 4888. Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor and attested by two witnesses.

modes of its embodiment in a concrete invention may be numerous and in appearance very different from each other." Robinson on Patents, § 485. The invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention. They may be explained and illustrated by the description. They cannot be enlarged by it. *Yale Lock Co.* v. *Greenleaf*, 117 U. S. 554. *Snow* v. *Lake Shore &c. Railway Co.*, 121 U. S. 617, is a case where a claim was limited by a description of the device, with reference to drawings. The court, in rejecting the contention that the description of the particular device was to be taken as a mere recommendation of the patentee of the manner in which he contemplated to arrange the parts of his machine, said there was nothing in the context to indicate that the patentee contemplated any alternative for the arrangement of the parts of the device. Therein the description is distinguished from the description in the Liddell patent. Liddell was explicit in the declaration that there might be alternatives for the device described and illustrated by him. He was explicit in saying that in place of the device for controlling the movement of the forming plate relatively to the cylinder that the plate might "be moved or operated by any other suitable means."

This court said in *Cimiotti Unhairing Company* v. *American Fur Refining Company, supra:* "In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim." See also *Howe Machine Co.* v. *National Needle Co.*, 134 U. S. 388, 394.

The discussion thus far brings us to two propositions: that infringement is not averted merely because the machine alleged to infringe may be differentiated from the patented machine, even though the invention embodied in the latter be not primary; and, second, that the description does not necessarily limit the claims. It is probably not contended

abstractly by the Continental Company that the description necessarily limits the claims, but only in the case at bar as following from the first proposition, that is, as resulting from the alleged narrow character of the Liddell invention. A few words more may be necessary to develop fully the contention. Counsel separates the claims of the Liddell machine into divisions, and says that the fourth division of the claimed mechanism in each of the three claims alleged to be infringed is in exactly the same words, which words are: "Operating means for the forming plate, adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder." And it is argued that neither claim designates "operating means," either by names or by reference letters or numerals, and recourse must therefore be had to the descriptive part of the specification to ascertain what "operating means" are meant, and then construe the claim as calling for those "operating means" or their equivalents. The other way, it is said, is to ignore the descriptive part of the specification "and to construe the claim as being satisfied by any 'operating means' which can perform the particular function designated in the claim." Under the second method, it is insisted, identity of function constitutes infringement. Under the first method identity of function must be accompanied by substantial identity of character and substantial identity of mode of operation in order to constitute that result. The second method was adopted, it is urged, by the Circuit Court, and led it into the error of deciding that "Liddell's alleged invention covers every method of combining the rotary cylinder with the forming plate to oscillate about its rear edge on the surface of the cylinder, and the claims are as broad as the invention."

It may be well before considering these contentions to refer again to the view which the Circuit Court and the Circuit Court of Appeals had of Liddell's patent. The Circuit Court said that the "pith" of the invention "is the combination of the rotary cylinder with means for operating the forming plate

in connection therewith, limited, however, to means which cause the plate to oscillate about its rear edge on the surface thereof," and distinguished the invention from the prior art, as follows: "Aside from the cylinder and the forming plate oscillating about its rear edge everything in these claims [the claims of the patent] is necessarily old in the arts." It was this peculiar feature of novelty, it was said, which clearly distinguished it from all that went before it. This conclusion was in effect affirmed by the Circuit Court of Appeals. The latter court said that the folding of the bottoms of S. O. S. paper bags had been accomplished in the prior art "both by a folding plate reciprocating upon a plane, and by the operation of fingers upon a cylinder. The folding plate and the cylinder had never been combined. The complainant urges with much probability that the reason why they had not been combined lay in the difficulty of operating a pivoted folding form upon the surface of a cylinder. Two circles external to each can be in contact at but one point, while, in order that the folding plate may operate, its end, as it moves upon a pivot, must remain for some distance in contact with the surface of the revolving cylinder. The problem may be solved by causing the pivot or axis of the folding plate to yield away from the cylinder, or by causing the surface of the cylinder to be depressed away from the folding plate. The patent in suit adopts the first device, the defendant's machine the second, and the crucial question before the court is this: Under all the circumstances of the case, is the second method, as compared with the first, within the doctrine of equivalents?"

The court, as we have seen, concluded, from the character of the Liddell patent, that "the second method," that is, the method of the Continental Company's machine, was "within the doctrine of equivalents."

Counsel, however, contends that the Circuit Court, in its decision, virtually gave Liddell a patent for a function by holding that he was entitled to every means to cause the forming plate to oscillate about its rear edge.

The distinction between a practically operative mechanism and its function is said to be difficult to define. Robinson on Patents, § 144, *et seq.* It becomes more difficult when a definition is attempted of a function of an element of a combination which are the means by which other elements are connected and by which they coäct and make complete and efficient the invention. But abstractions need not engage us. The claim is not for a function, but for mechanical means to bring into working relation the folding plate and the cylinder. This relation is the very essence of the invention, and marks the advance upon the prior art. It is the thing that never had been done before, and both the lower courts found that the machines of the Continental Company were infringements of it. It is not possible to say that the findings of those courts on that fact or on the fact of invention were clearly wrong, notwithstanding the great ability of the argument submitted against them.

2. The next contention of the petitioner is that a court of equity has no jurisdiction to restrain the "infringement of letters patent the invention covered by which has long and always and unreasonably been held in non-use . . . instead of being made beneficial to the art to which it belongs." It will be observed that it is not urged that non-use merely of the patent takes jurisdiction from equity, but an unreasonable non-use. And counsel concedes indulgence to a non-use which is "non-chargeable to the owner of the patent," as lack of means, or lack of ability or opportunity to induce others to put the patent to use. In other words, a question is presented, not of the construction of the law simply but of the conduct of the patentee as contravening the supposed public policy of the law.

The foundation of the argument of the petitioner is, as we have intimated, the policy of the patent laws executing the purpose of the Constitution of the United States to promote the progress of science and useful arts by securing for limited times to inventors the exclusive right to their respective dis-

coveries. Art. I, § 8. And it is urged that the non-use of an invention for seventeen years (of course, the whole term of the patent may be selected to test the argument) is not to promote the progress of the useful arts, and the contention is that equity should not give its aid to defeat the policy of the statute, but remit the derelict patentee to his legal remedy. The penalty does not seem to fit the case. It is conceded that the patent is not defeated; only that a particular remedy is taken away. It is conceded that the remedy at law remains. It is conceded, therefore, that a right has been conferred, but it is said that it may be infringed, though the policy of the law is violated. The petitioner, further to sustain its side of the question, refers to the provision in § 4921, giving power to the courts to grant injunctions. The provision is: "The several courts vested with jurisdiction of cases arising under the patent law shall have power to grant injunctions according to the course and principles of equity, to prevent the violation of any right secured by the patent, . . ." and the petitioner cites *Root* v. *Railway Company*, 105 U. S. 183, 216, for the contention that the statute does not confer power to grant the injunction, except as incidental to some other equity.

It may be well, however, before considering what remedies a patentee is entitled to, to consider what rights are conferred upon him. The source of the rights is, of course, the law, and we are admonished at the outset that we must look for the policy of a statute, not in matters outside of it—not to circumstances of expediency and to supposed purposes not expressed by the words. The patent law is the execution of a policy having its first expression in the Constitution, and it may be supposed that all that was deemed necessary to accomplish and safeguard it must have been studied and provided for. It is worthy of note that all that has been deemed necessary for that purpose, through the experience of years, has been to provide for an exclusive right to inventors to make, use and vend their inventions. In other words, the language of complete monopoly has been employed, and though at first

only a remedy at law was given for a violation of the right, a remedy in equity was given as early as 1819. There has been no qualification, however, of the right, except as hereinafter stated. An exception which, we may now say, shows the extent of the right—a right so explicitly given and so complete that it would seem to need no further explanation than the word of the statute. It has, however, received explanation in a number of cases which bring out clearly the services rendered by an inventor to the arts and sciences and to the public. Those cases declare that he receives nothing from the law that he did not have before, and that the only effect of the patent is to restrain others from manufacturing and using that which he has invented. *United States* v. *Bell Telephone Company*, 167 U. S. 224, 249. And it was further said in that case that the inventor could have kept his discovery to himself, but to induce a disclosure of it Congress has, by its legislation, made in pursuance of the Constitution, guaranteed to him an exclusive right to it for a limited time, and the purpose of the patent is to protect him in this monopoly—not to give him a use which he did not have before, "but only to separate to him an exclusive use." And it was pointed out that the monopoly which he receives is only for a few years. The court further said: "Counsel seem to argue that one who has made an invention and thereupon applies for a patent therefor occupies, as it were, the position of a *quasi*-trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention."

And the same relative rights of the patentee and the public were expressed in prior cases, and we cite them because there is something more than the repetition of the same thought

by doing so. It shows that whenever this court has had occasion to speak it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. "And for his exclusive enjoyment of it during that time the public faith is forever pledged." (Chief Justice Marshall in *Grant* v. *Raymond*, 6 Pet. 243, p. 242.)

And, in *Bloomer* v. *McQuewan*, 14 How. 539, 549, Chief Justice Taney said: "The franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent."

In *Patterson* v. *Kentucky*, 97 U. S. 501, it was said that an inventor's own right to the use was not enlarged or affected by a patent. See also *Wilson* v. *Rousseau*, 4 How. 646, 674; *Seymour* v. *Osborne*, 11 Wall. 516, 533; *Cammeyer* v. *Newton*, 94 U. S. 225; *Densmore* v. *Scofield*, 102 U. S. 375.

It may be said that these cases deal only with the right of a patentee, and not with the remedy, whether at law or equity, that he may, at any time, or in all his situations, be entitled to. And there is no case in this court that explicitly does so. However, in the three last cases cited it was decided that patents are property, and entitled to the same rights and sanctions as other property.

In *Bement* v. *National Harrow Company*, 186 U. S. 70, 90, adopting the language of the Circuit Court of Appeals for the Sixth Circuit in *Heaton Peninsular Company* v. *Eureka Specialty Company*, 77 Fed. Rep. 294, it was said: "If he [a patentee] sees fit, he may reserve to himself the exclusive use of the invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own, . . . his title is exclusive, and so clearly within the constitutional provisions in respect to private property that he is neither bound to use his discovery himself or permit others to use it. The dictum found in *Hoe* v. *Knapp*, 17 Fed. Rep. 204, is not supported by reason or authority."

In *Hoe* v. *Knapp*, Judge Blodgett refused an injunction

against the infringer, holding that "under a patent which gives a patentee a monopoly, he is bound to either use the patent himself or allow others to use it on reasonable terms." In a number of the Circuit Courts of Appeals it has been decided that as a consequence of the exclusive right of the patentee he is entitled to an injunction against an infringer, even though he (the patentee) does not use the patented device. The cases are inserted in the margin,[1] also decisions of the Circuit Courts,[2] some of which define the right of a patentee and others holding that as incident to the right he is entitled to an injunction, though he had not used his invention.

Counsel for petitioner cites counter cases, which he contends are more direct authority.[3] He also reviews the cases cited

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[1] *Edison* v. *Mt. Morris Co.*, 57 Fed. Rep. 642, 644 (2d Cir.); *Heaton-Peninsular Co.* v. *Eureka Co.*, 77 Fed. Rep. 294 (6th Cir.); *Crown Cork & Seal Co.* v. *Aluminum Stopper Co.*, 108 Fed. Rep. 845, 868 (4th Cir.); *Fuller* v. *Berger*, 120 Fed. Rep. 274, 277 (7th Cir.); *Lamson Consolidated Service Co.* v. *Hillman*, 123 Fed. Rep. 416, 422 (7th Cir.); *Victor Talking Machine Co.* v. *Fair*, 123 Fed. Rep. 425 (7th Cir.); *U. S. Seeded Raisin Co.* v. *Griffin*, 126 Fed. Rep. 364, 368 (9th Cir.); *Rupp* v. *Elliott*, 131 Fed. Rep. 730 (6th Cir.); *Munroe* v. *Railway Appliance Co.*, 145 Fed. Rep. 646, 648 (7th Cir.); *Filter Co.* v. *Jackson*, 140 Fed. Rep. 340, 343 (8th Cir.); *U. S. Fastener Co.* v. *Bradley*, 149 Fed. Rep. 222 (2d Cir.); *Rubber Tire Co.* v. *Milwaukee*, 154 Fed. Rep. 358, 361 (7th Cir.); *Indiana Mfg. Co.* v. *J. I. Case Co.*, 154 Fed. Rep. 365 (7th Cir.).

[2] *Carr* v. *Rice*, 1 Fish. 198, 200 (N. Y.); *Wintermute* v. *Redington*, 1 Fish. 243 (Ohio); *Ransom* v. *Mayor*, 1 Fish. 255 (N. Y.); *Pitts* v. *Wemple*, 2 Fish. 15 (Ill.); *Whitney* v. *Emmett*, 1 Bald. 304; *Broadnax* v. *Central Stock Yard*, 4 Fed. Rep. 214, 216 (N. J.); *In re Brosnahan, Jr.*, 18 Fed. Rep. 62 (Justice Miller) (Mo.); *Consolidated Roller Mill Co.* v. *Coombs*, 39 Fed. Rep. 803 (Mich.); *Wirt* v. *Hicks*, 46 Fed. Rep. 71 (N. Y.); *Campbell* v. *Manhattan Railway*, 49 Fed. Rep. 930 (N. Y.); *Edison* v. *Mt. Morris*, 57 Fed. Rep. 642, 644 (N. Y.); *Masseth* v. *Johnston*, 59 Fed. Rep. 612 (Pa.); *Bonsack* v. *Smith*, 70 Fed. Rep. 383 (N. C.); *Columbia* v. *Freeman*, 71 Fed. Rep. 302, 306 (Mo.); *Wyckoff* v. *Wagner*, 88 Fed. Rep. 515 (N. Y.); *White* v. *Peerless*, 111 Fed. Rep. 190 (Pa.); *Brodrick* v. *Mayhew*, 131 Fed. Rep. 92 (Wis.); *National Co.* v. *Daab*, 136 Fed. Rep. 891, 895 (N. J.); *Hoe* v. *Miehle*, 141 Fed. Rep. 115 (N. Y.); *Hartman* v. *Park & Son*, 145 Fed. Rep. 358 (Ky.).

[3] *Isaacs* v. *Holland*, 4 Wash. C. C. 54; *Ogle* v. *Ege*, 4 Wash. C. C. 584; *Mott* v. *Bennett*, 2 Fisher, 642; *Sullivan* v. *Redfield*, 1 Paine, 441; *Magic Ruffle Co.* v. *Daughlas*, 2 Fisher, 333; *Hoe* v. *Knapp*, 27 Fed. Rep. 204; *Germain* v. *Wilgus*, 67 Fed. Rep. 600, C. C. A. Ninth Circuit; *Campbell Printing Press Co.* v. *Duplex Printing Press Co.*, 86 Fed. Rep. 331; Robinson on

by respondent, and contends that they are not relevant to the question in the case at bar, which is not that of the simple non-use of a patent, but a long and unreasonable non-use of it. Judge Aldrich, in his dissenting opinion in the Court of Appeals, excluded the cases as authoritative for a different reason than counsel expresses. The learned judge said:

"Simple non-use is one thing. Standing alone, non-use is no efficient reason for withholding injunction. There are many reasons for non-use which, upon explanation, are cogent, but when acquiring, holding and non-use are only explainable upon the hypothesis of a purpose to abnormally force trade into unnatural channels—a hypothesis involving an attitude which offends public policy, the conscience of equity, and the very spirit and intention of the law upon which the legal right is founded—it is quite another thing. This is an aspect which has not been considered in a case like the one here."

Respondent attacks the conclusion of Judge Aldrich and that of petitioner, and insists that there is nothing in the record to show that the non-use of the patent was either unreasonable or sinister. A very strong argument is presented by respondent. Its counsel pointedly say that "there is no record evidence at all on the subject or character of complainants' [respondents'] use or non-use," and points out that neither the assignments of error on appeal to the Circuit Court of Appeals nor the petition for rehearing in that court presented the question that the injunction should be denied on the ground of mere non-use or unreasonable non-use. Let us see what the courts say and what petitioner says. The Circuit Court says:

"We have stated that no machine for practical manufacturing purposes was ever constructed under the Liddell patent. The record also shows that the complainant, so to speak, locked up its patent. It has never attempted to make any

Patents, vol. 1, § 43; Curtis on Patents, § 320 of the two first editions and § 406 of the third and fourth editions.

practical use of it, either itself or through licenses, and, apparently, its proposed policy has been to avoid this. In this respect it has not the common excuse of a lack of means, as it is unquestioned that the complainant is a powerful and wealthy corporation. We have no doubt that the complainant stands in the common class of manufacturers who accumulate patents merely for the purpose of protecting their general industries and shutting out competitors."

The comment of the Circuit Court of Appeals is:

"The machine of the patent in suit is mechanically operative, as was shown experimentally for the purposes of this suit, but it has not been put into commercial use. No reason for the non-user appears in the evidence, so far as we can discover. The defendant's machine has been an assured commercial success for some years. It was suggested at the oral argument that an unused patent is not entitled to the protection given by the extraordinary remedy of an injunction. This contention was not made in the defendant's printed brief. While this question has not been directly passed upon, so far as we are informed, in any considered decision of the Supreme Court, yet the weight of authority is in favor of the complainant." The cases were cited.

If these statements are to be reconciled it can only be by supposing that the Circuit Court inferred the motive of the respondents from the unexplained non-use of the patent. But petitioner has given its explanation of the purpose of respondent. Quoting Judge Aldrich, that the patent in suit has been "deliberately held in non-use for a wrongful purpose," petitioner asks, "What was that wrongful purpose? It was the purpose to make more money with the existing old reciprocating Lorenz & Honiss machines and the existing old complicated Stilwell machines than could be made with new Liddell machines, when the cost of building the latter was taken into account. And this purpose was effective to cause the long and invariable non-use of the Liddell invention, notwithstanding that new Liddell machines might have produced

better paper bags than the old Lorenz & Honiss machines or the old Stilwell machines were producing."

But, granting all this, it is certainly disputable that the non-use was unreasonable or that the rights of the public were involved. There was no question of a diminished supply or of increase of prices, and can it be said, as a matter of law, that a non-use was unreasonable which had for its motive the saving of the expense that would have been involved by changing the equipment of a factory from one set of machines to another? And even if the old machines could have been altered, the expense would have been considerable. As to the suggestion that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 546.

The right which a patentee receives does not need much further explanation. We have seen that it has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by giving an exclusive right to an inventor. The only qualification ever made was against aliens in the act of 1832. That act extended the privilege of the patent law to aliens, but required them "to introduce into public use in the United States the invention or improvement within one year from the issuing thereof," and indulged no intermission of the public use for any period longer than six months. A violation of the law rendered the patent void. The act was repealed in 1836. It is manifest, as is said in Walker on Patents, § 106, that Congress has not "overlooked the subject of non-user of patented inventions." And another fact may be mentioned. In some foreign countries the right granted to an inventor is affected by non-use. This policy, we must assume, Congress has not been ignorant of nor of its effects. It has, nevertheless, selected another policy; it has continued that policy through many years. We may assume that ex-

perience has demonstrated its wisdom and beneficial effect upon the arts and sciences.

From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee. If the conception of the law that a judgment in an action at law is reparation for the trespass, it is only for the particular trespass that is the ground of the action. There may be other trespasses and continuing wrongs and the vexation of many actions. These are well-recognized grounds of equity jurisdiction, especially in patent cases, and a citation of cases is unnecessary. Whether, however, a case cannot arise where, regarding the situation of the parties in view of the public interest, a court of equity might be justified in withholding relief by injunction we do not decide.

Decree affirmed.

MR. JUSTICE HARLAN thinks that the original bill should have been dismissed. He thinks the facts are such that the court should have declined, upon grounds of public policy, to give any relief to the plaintiff by injunction, and he dissents from the opinion and judgment.

OPINIONS PER CURIAM, ETC., MAY 18 AND JUNE 1, 1908.

No. 221. FIRST NATIONAL BANK OF DECATUR, PLAINTIFF IN ERROR, *v.* ALBERT G. HENRY. In error to the Supreme Court of the State of Alabama. Argued April 30 and May 1, 1908. Decided June 1, 1908. *Per Curiam.* Dismissed with costs on the authority of *Missouri, Kansas & Texas Ry. Co. of Texas* v. *Evans*, 175 U. S. 723; *Mason* v. *United States*, 136 U. S. 581; *Eastland* v. *Jones*, Minor (Ala.), 275 (1824). See act of February 7, 1818, Toulmin's Digest, 448. *Mr. Edgar W. Godbey* and *Mr. Hannis Taylor* for plaintiff in error. *Mr. Amos E. Goodhue* for defendant in error.

No. 18. Original. *Ex parte:* IN THE MATTER OF THE PERTH AMBOY DRY DOCK COMPANY, PETITIONER. Submitted May 4, 1908. Decided June 1, 1908. *Per Curiam.* Rule discharged and petition dismissed without prejudice. *In re Rice*, 155 U. S. 396, 402; *In re N. Y. & Porto Rico Steamship Company*, 155 U. S. 523; *In re Alix*, 166 U. S. 136. *Mr. James D. Dewell, Jr.*, for petitioner. *Mr. Charles R. Snyder* for respondent.

Decisions on Petitions for Writs of Certiorari, May 18 and June 1, 1908.

No. 713. FULGENCIO SEGRERA ET AL., PETITIONERS, *v.* THE STEAMSHIP FRI, ETC. May 18, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Arnold Charles Weil* for petitioners. *Mr. Frederick M. Brown* for respondents.

No. 735. JAMES A. SHINE ET AL., PETITIONERS, *v.* FOX BROTHERS MANUFACTURING COMPANY. May 18, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Shepard Barclay, Mr. Thomas T. Fauntleroy* and *Mr. C. H. Fauntleroy* for petitioners. *Mr. Herbert R. Marlatt* for respondent.

No. 716. EUGENE MARTIN, PETITIONER, *v.* RICHARD T. WILSON, ETC. May 18, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William J. Harding* for petitioner. *Mr. John G. Milburn* for respondent.

No. 725. THE NOVELTY TUFTING MACHINE COMPANY, PETITIONER, *v.* THE CHAMPION BED LOUNGE COMPANY ET AL. May 18, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter F. Murray* and *Mr. Everett Dufour* for petitioner. *Mr. Arthur Stem* for respondents.

No. 736. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* MRS. JOSEPHINE KING; and No. 737. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* INEZ KING, ETC. May 18, 1908. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. John J. Strickland* for petitioner. *Mr. Charles D. Hill* for respondents.

No. 764. THE CITY OF OMAHA, PETITIONER, *v.* OMAHA WATER COMPANY. June 1, 1908. Petition for a writ of certio-

rari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. John L. Webster* and *Mr. C. C. Wright* for petitioner. *Mr. Howard Mansfield* and *Mr. R. S. Hall* for respondent.

No. 771. THE UNITED STATES, PETITIONER, *v.* CHARLES R. EVANS ET AL. June 1, 1908. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *The Attorney General* and *The Solicitor General* for petitioner. No appearance for respondents.

No. 729. AJAX METAL COMPANY, PETITIONER, *v.* BRADY BRASS COMPANY. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John G. Johnson* and *Mr. A. B. Stoughton* for petitioner. *Mr. Frank H. Platt* for respondent.

No. 738. THE PULLMAN COMPANY, PETITIONER, *v.* WILLIE C. BACON. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. Knox* for petitioner. *Mr. Joseph J. Willett* and *Mr. Alex. C. Birch* for respondent.

No. 761. DELLA B. SWEETING, PETITIONER, *v.* THE STEAMER WESTERN STATES, ETC. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. H. Metcalf* for petitioner, *Mr. Adelbert Moot* for respondent.

No. 763. D. S. HESSE & BRO., PETITIONERS, *v.* THE UNITED STATES. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert H. Washburn* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 766. R. R. HAZLEWOOD ET AL., PETITIONERS, *v.* ANNIE E. SNOW ET AL. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. R. Hazlewood pro se,* and *Mr. Horace Chilton* for the members of the Hogg-Swayne Syndicate. *Mr. W. D. Gordon* for respondents.

No. 768. JAMES G. LOWDON, PETITIONER, *v.* THE UNITED STATES. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. L. Crawford* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 770. THE WESTERN TRANSIT COMPANY, PETITIONER, *v.* JOHN CROSBY BROWN. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harvey D. Goulder, Mr. S. H. Holding* and *Mr. Frank S. Masten* for petitioner. *Mr. Harrington Putnam* and *Mr. Frederick M. Brown* for respondent.

No. 776. GEORGE H. BALLANTINE ET AL., PETITIONERS, *v.* GEORGE G. FRELINGHUYSEN ET AL. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Third Circuit denied. *Mr. John G. Johnson, Mr. Reynolds D. Brown* and *Mr. Malcolm Lloyd, Jr.*, for petitioners. *Mr. John O. H. Pitney* for respondents.

No. 777. ARTHUR McMULLEN, PETITIONER, *v.* THE O'ROURKE ENGINEERING CONSTRUCTION COMPANY. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Livingston Gifford* and *Mr. J. Edgar Bull* for petitioner. No appearance for respondent.

No. 779. THE UNITED STATES, PETITIONER, *v.* THE BUEHNE STEEL WOOL COMPANY. June 1, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Sanford* for petitioner. *Mr. Albert H. Washburn* for respondent.

No. 412. RUMFORD CHEMICAL WORKS, PETITIONER, *v.* HYGIENIC CHEMICAL CO. June 1, 1908. Order denying petition for writ of certiorari set aside and writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Philip Mauro* for petitioner. *Mr. Willard Parker Butler* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, MAY 18 AND JUNE 1, 1908.

No. 398. B. PENDLETON FERRIDAY ET AL., APPELLANTS, *v.* THE MIDDLESEX BANKING COMPANY ET AL. Appeal from the

Circuit Court of the United States for the Western District of Louisiana. May 18, 1908. Dismissed with costs. *Mr. Wade R. Young* for appellants. *Mr. H. R. Boyd* and *Mr. Edgar H. Farrar* for appellees.

No. 387. SUCRERIE CENTRALE "COLOSO" DE PORTO RICO, PLAINTIFF IN ERROR, *v.* JOSE FRANCISCO ESTEVES. In error to the District Court of the United States for Porto Rico. May 18, 1908. Dismissed with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error. *Mr. Francis H. Dexter* and *Mr. Frederic D. McKenney* for plaintiff in error. No appearance for defendant in error.

No. 526. BERNARR MACFADDEN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for the District of New Jersey. May 18, 1908. Dismissed on motion of counsel for plaintiff in error. *Mr. Alan H. Strong, Mr. Henry M. Earle* and *Mr. John C. Gittings* for plaintiff in error. *The Attorney General* for defendant in error.

No. 676. CITIZENS' NATIONAL BANK OF LOUISVILLE, APPELLANT, *v.* S. W. HAGER, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF KENTUCKY ET AL. Appeal from the United States Circuit Court of Appeals for the Sixth Circuit. May 18, 1908. Dismissed with costs on motion of counsel for the appellant. *Mr. James P. Helm* for appellant. *Mr. James Breathitt* for appellees.

Nos. 802, 803 and 804. HARRY B. MULFORD, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court

of the Philippine Islands. June 1, 1908. Motion to docket and dismiss granted. *The Attorney General* and *The Solicitor General* for defendant in error. No one opposing.

No. 805. QUINTIN GONZALES, PLAINTIFF IN ERROR, *v.* THE UNITED STATES; No. 806. GERTRUDIS MONTINOLA, PLAINTIFF IN ERROR, *v.* THE UNITED STATES; No. 807. GERTRUDIS MONTINOLA, PLAINTIFF IN ERROR, *v.* THE UNITED STATES; No. 808. JOAQUIN CELIS, PLAINTIFF IN ERROR, *v.* THE UNITED STATES; No. 809. JOAQUIN CELIS, PLAINTIFF IN ERROR, *v.* THE UNITED STATES; and No. 810. C. W. NEY ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. June 1, 1908. Docketed and dismissed on motion of *Mr. Solicitor-General Hoyt* for the defendant in error. *The Attorney General* and *The Solicitor General* for defendant in error. No one opposing.

No. 811. SOL. COHN, PLAINTIFF IN ERROR, *v.* THE STATE OF TENNESSEE; No. 812. WM. HARTMAN, PLAINTIFF IN ERROR, *v.* THE STATE OF TENNESSEE; and No. 813. CHARLES PERKINS ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF TENNESSEE. In error to the Supreme Court of the State of Tennessee. June 1, 1908. Docketed and dismissed with costs, on motion of *Mr. Charles T. Cates, Jr.*, for the defendant in error. *Mr. Charles T. Cates, Jr.*, for defendant in error. No one opposing.

No. 814. PEDRO ROMERO, APPELLANT, *v.* CARLOS LE BRUN ET AL. Appeal from the District Court of the United States for Porto Rico. June 1, 1908. Docketed and dismissed with costs, on motion of *Mr. George H. Lamar* for the appellees. *Mr.*

George H. Lamar and *Mr. N. B. K. Pettingill* for appellees. No one opposing.

No. 458. MIGUEL GUERRA, PLAINTIFF IN ERROR, *v.* CARLOS CONDE. In error to the District Court of the United States for Porto Rico. June 1, 1908. Dismissed with costs, on authority of counsel for plaintiff in error and on motion of *Mr. Frederic D. McKenney*, for the defendant in error. *Mr. Thomas D. Mott, Jr.*, for plaintiff in error. *Mr. Frederic D. McKenney* and *Mr. Francis H. Dexter* for defendant in error.

No. 7, Original. *Ex parte:* IN THE MATTER OF WILLIAM O'GORMAN, JR., PETITIONER. June 1, 1908. Petition for writ of mandamus dismissed on motion of counsel for petitioner. *Mr. E. B. Whitney* for petitioner.

No. 314. ALFRED BERGFELDT, PLAINTIFF IN ERROR, *v.* THE STATE OF WASHINGTON. In error to the Supreme Court of the State of Washington. June 1, 1908. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Harold Preston* for plaintiff in error. No appearance for defendant in error.

No. 369. THE J. C. TURNER CYPRESS LUMBER COMPANY OF NEW JERSEY AND NEW YORK, PLAINTIFF IN ERROR, *v.* SEABOARD AIR LINE RAILWAY. In error to the Circuit Court of the United States for the Southern District of Florida. June 1, 1908. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. H. Bisbee* and *Mr. George C. Bedell* for plaintiff in error. *Mr. J. C. Cooper* and *Mr. H. A. Herbert* for defendant in error.

No. 436. SAMUEL BURAK, APPELLANT, *v.* MILO D. CAMPBELL, UNITED STATES MARSHAL, ETC. Appeal from the District Court of the United States for the Eastern District of Michigan. June 1, 1908. Dismissed with costs, on motion of counsel for appellant. *Mr. Bernard B. Selling* for appellant. *The Attorney General* for appellee.

No. 460. THE MILWAUKEE RUBBER WORKS COMPANY, PETITIONER, *v.* THE RUBBER TIRE WHEEL COMPANY. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. June 1, 1908. Dismissed per stipulation. *Mr. John C. Spooner, Mr. Charles Quarles* and *Mr. J. L. Bishop* for petitioner. *Mr. Augustine L. Humes* for respondent.

No. 712. NATIONAL BANK OF KENTUCKY, OF LOUISVILLE, APPELLANT, *v.* FRANK P. JAMES ET AL. Appeal from the Circuit Court of the United States for the Eastern District of Kentucky. June 1, 1908. Dismissed with costs, on motion of counsel for the appellant. *Mr. Alexander Pope Humphrey* for appellant. No appearance for appellees.

AMERICAN RAILROAD COMPANY OF PORTO RICO *v.* DE CASTRO.[1]

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

No. 467. Argued January 14, 1907.—Decided February 25, 1907.

Decided on the authority of *American Railroad Company* v. *Castro*, 204 U. S. 453.

THE facts are stated in the opinion.

Mr. Frederick McKenney, with whom *Mr. Francis H. Dexter* and *Mr. John Spalding Flannery* were on the brief, for plaintiff in error.

Mr. Frederic L. Cornwell for defendant in error submitted.

MR. JUSTICE WHITE delivered the opinion of the court.

This case is similar in character to that of *American Railroad Co.* v. *Julio P. Castro*, No. 151, this (1906) term, just decided (204 U. S. 453), having been brought to recover for damages resulting from injuries sustained by the wife in the same accident which occasioned the death of the daughter Eloisa. The right of this court in the case at bar to review a judgment for the plaintiffs below, entered upon the verdict of a jury, is based upon an objection to the jurisdiction of the trial court similar to that which was made in No. 151. For the reasons stated in the opinion in that case the writ of error in this case must also be

Dismissed.

[1] This case should have been reported immediately after *American Railroad Co.* v. *Castro*, 204 U. S. 453, but was inadvertently omitted.

APPENDIX

RULES OF

THE SUPREME COURT OF THE UNITED STATES

ADOPTED JANUARY 7, 1884
AND AS SINCE PROMULGATED AND AMENDED

RULES OF PRACTICE FOR THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES IN EQUITY AND ADMIRALTY CASES

ORDERS IN REFERENCE TO APPEALS FROM COURT OF CLAIMS

GENERAL ORDERS IN BANKRUPTCY

AND

RECOMMENDATIONS FOR RULES OF THE CIRCUIT COURTS OF APPEALS

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RULES OF THE SUPREME COURT OF THE UNITED STATES.[1]

THE COMMENCEMENT OF THE TERM OF COURT IS FIXED BY STATUTE.

An Act to fix the time for holding the annual session of the Supreme Court of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act the annual session of the Supreme Court of the United States shall commence on the second Monday of October, in each year, and all actions, suits, appeals, recognizances, processes, writs, and proceedings whatever, pending or which may be pending in said court, or returnable thereto, shall have day therein, and be heard, tried, proceeded with, and decided, in like manner as if the time of holding said sessions had not been hereby altered.

Approved, January 24, 1873, c. 64, 17 Stat. 419.

1.[2]

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

See 1 Cranch, xv; 1 Wheat. xiii; 1 Pet. v; 1 How. xxiii; 21 How. v; 108 U. S. 573.

2. The clerk shall not permit any original record or paper

[1] For the general rules of the Supreme Court of the United States, as they have been revised and published in collected form in the Reports, see 1 Cranch, xv; 1 Wheat. xiii; 1 Pet. v; 1 How. xxiii; 21 How. v; 108 U. S. 573.

[2] The first rule or order actually promulgated by the court was on September 26, 1789, in regard to the seal of the court; it was as follows:

By the court:—I. *Ordered*, That the seal of the court shall be the arms of the United States, engraved on a piece of steel of the size of a dollar, with these words in the margin: "The Seal of the Supreme Court of the United

to be taken from the court room, or from the office, without an order from the court, except as provided by Rule 10.

3 Dall. 377; 1 Cranch, xvi; 1 Wheat. xv; 1 Pet. vii, xi; 106 U. S. vii; 1 How. xxv, xxxii; 21 How. v; 106 U. S. vii; 108 U. S. 573.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

3 Dall. 399, 400; 1 Cranch, xv, xvii; 1 Wheat. xiii; 1 Pet. vi, vii; 1 How. xxiii, xxiv, xxv; 21 How. v; 108 U. S. 573.

2. They shall respectively take and subscribe the following oath or affirmation, viz:

I, —— ——, do solemnly swear [or affirm] that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

3 Dall. 399; 1 Cranch, xv; 1 Wheat. xiii, xiv, xvi; 1 Pet. vi; 21 How. v; 2 Wall. vii; 4 Wall. vii; 108 U. S. 573.

3.

PRACTICE.

This court considers the former practice of the courts of

States;" and that the seals of the Circuit Courts shall be the arms of the United States, engraven on circular pieces of silver of the size of ½ dollar, with these words in the margin, viz., in the upper part, "the Seal of the Circuit Court;" and in the lower part the name of the district for which it is intended.

May 31, 1904, *Ordered*, That the clerk of the court be, and he is hereby authorized and directed to procure a new seal for the court. Said seal shall be the arms of the United States, with these words in the margin, "Seal of the Supreme Court of the United States," engraved on a circular piece of steel, not exceeding two and one-fourth inches in diameter.

The act of September 29, 1889, c. 21, regulating processes in the courts of the United States, 1 Stat. 93, provided: "The seals of the Supreme Court and Circuit Courts to be provided by the Supreme Court and of the District Courts, by the respective judges of the same."

king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

3 Dall. 413; 1 Cranch, xvi; 1 Wheat. xiv; 1 Pet. vi; 1 How. xxiv; 21 How. v 108 U. S. 574.

4.

BILL OF EXCEPTIONS.

The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

6 Pet. iv; 1 How. xxxiv; 21 How. vi; 108 U. S. 574.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

3 Dall. 399; 1 Cranch, xv; 1 Wheat. xiii; 1 Pet. vi; 1 How. xxiv; 21 How. vi; 108 U. S. 574; 180 U. S. 641.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3 Dall. 335; 3 Pet. xvii; 12 Pet. 757; 1 How. xxiv; 21 How. vi; 108 U. S. 574.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the

return day, the complainant shall be at liberty to proceed *ex parte*.

See 3 Dall. 335, 339; 1 Cranch, xvi; 1 Wheat. xv; 1 Pet. vi; 1 How. xxiv; 21 How. vi; 108 U. S. 574.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

1 Cranch, xvi; 12 Pet. viii; 1 How. xxxvii; 21 How. vi; 21 Wall. v; 108 U. S. 574.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

93 U. S. vii; 108 U. S. 575.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

6 Wall. v; 108 U. S. 575.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time

fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

See 13 Wall. xi; 108 U. S. 575.

5. There may be united with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

91 U. S. vii; 97 U. S. vii; 108 U. S. 575.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

9 Wheat. iv; 20 Wall. xv; 1 Pet. xi; 1 How. xxxii; 21 How. xv; 108 U. S. 575.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same

shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

7 Pet. iv; 1 How. xxxiv; 21 How. vi; 108 U. S. 575.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

91 U. S. vii; 108 U. S. 576.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

See 7 Pet. iv; 1 How. xxxiv; xxxvii, 21 How. vii; 108 U. S. 576.

8.

WRIT OF ERROR, RETURN, AND RECORD.[1]

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

1 Cranch, xvi; 1 Wheat. xv; 1 Pet. vii; 1 How. xxv; 21 How. vii; 108 U. S. 576.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

15 Wall. v; 108 U. S. 576.

3. No case will be heard until a complete record, containing

[1] On May 29, 1850 it was ordered that the Reporter and Clerk digest a plan for making up the records. 9 How. iv.

in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

8 Wheat. vi; 1 Pet. x; 1 How. xxxi; 21 How. vii; 108 U. S. 577; 142 U. S. 704.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

2 Wheat. vii; 1 Pet. ix; 1 How. xxix; 21 How. vii; 108 U. S. 577.

5.[1] All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

See 3 Wall. vi; 108 U. S. 577; 137 U. S. 710.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

103 U. S. xiii; 108 U. S. 577.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of

[1] For par. 5 of Rule 8, prior to its amendment, see 108 U. S. 577.

this court by or before the return-day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

1 Wheat. xv; 6 Wheat. vi; 1 Pet. viii, x; 9 Pet. vii; 10 Pet. 24; 15 Pet. 211; 1 How. xxvi, xxx, xxxv; 16 How. ix; 21 How. vii; 108 U. S. 577; 137 U. S. 710.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of the court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

16 How. ix; 21 How. viii; 108 U. S. 578; 137 U. S. 710.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

108 U. S. 578.

4. In all cases where the period of thirty days is mentioned in Rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico,

and to one hundred and twenty days from the Philippine Islands.

16 How. ix; 21 How. viii; 2 Wall. viii; 108 U. S. 578; 137 U. S. 711; 200 U. S. 626.

10.

PRINTING RECORDS.[1]

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

5 Pet. vii; 21 How. viii; 91 U. S. vii; 108 U. S. 578.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

93 U. S. vii; 108 U. S. 579.

3. Upon payment by either party of the amount estimated

[1] During the January Term, 1831, the court promulgated the following rule, 5 Pet. vii, and see at page 724, opinion of Mr. Justice Baldwin, giving his reasons for dissenting from the third paragraph of such rule. And see 1 How. xxxiii; 21 How. viii.

1. In all cases, the clerk shall take of the plaintiff a bond with competent security, to respond the costs, in the penalty of two hundred dollars; or a deposit of that amount, to be placed in bank subject to his draft.

2. In all cases the clerk shall have fifteen copies of the record printed for the court: provided the government will admit the item in the expenses of the court.

3. In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismission (except for want of jurisdiction), or affirmance; one copy of the record shall be taxed against the plaintiff; which charge includes the charge for the copy furnished him. In cases of reversal, and dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

See 91 U. S. vii; 106 U. S. vii; 108 U. S. 579.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

106 U. S. vii; 108 U. S. 579.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

106 U. S. vii; 108 U. S. 579.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

106 U. S. vii; 108 U. S. 579.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

See 106 U. S. vii; 108 U. S. 579.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an at-

tachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

1 Wheat. xviii; 1 Pet. viii; 1 How. xxvii; 21 How. ix; 108 U. S. 579.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

120 U. S. 785.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the

record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

12 How. xi; 21 How. ix; 108 U. S. 580.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any Circuit Court of the United States.

3 Dall. 120; 1 Cranch, xvi; 1 Wheat. xix; 1 Pet. ix; 1 How. xxviii; 21 How. ix; 108 U. S. 580.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

See 2 Wheat. vii; 4 Wheat. 84; 1 Pet. ix; 1 How. xxix; 21 How. x; 108 U. S. 580.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but

the same shall otherwise be deemed to have been admitted by consent.

9 Wheat. iv; 1 Pet. xi; 1 How. xxxi; 21 How. x; 108 U. S. 580.

14.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

9 Wheat. iv; 1 Pet. x; 1 How. xxxi; 21 How. x; 108 U. S. 581; 142 U. S. 704.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive

weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

6 Wheat. v, 260; 1 Pet. ix; 1 How. xxix; 13 How. v; 21 How. x; 100 U. S. ix; 108 U. S. 581.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

21 How. xi; 108 U. S. 582.

3. When either party to a suit in a Circuit Court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the Circuit Court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representa-

tive shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his reidence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

20 Wall. xv; 108 U. S. 582.

16.

NO APPEARANCE OF PLAINTIFF.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

3 Cranch, 249; 3 Pet. xvii; 1 How. xxvii; 21 How. xi; 108 U. S. 583; see 142 U. S. 705.

17.

NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

1 Cranch, xvii; 1 Wheat. xvi; 1 Pet. vii; 1 How. xxv; 21 How. xi; 108 U. S. 583.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

12 How. xi; 8 How. v; 21 How. xi; 108 U. S. 583.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

21 How. xii; 108 U. S. 583.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

7 Pet. iv; 16 Pet. viii; 1 How. xxxv, xxxviii; 8 How. vi; 21 How. xii; 2 Wall. viii; 3 Wall. viii; 21 Wall. v; 108 U. S. 584; 119 U. S. 703; 123 U. S. 759.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

11 Pet. vii; 1 How. xxxvi; 21 How. xii; 108 U. S. 584.

3. When a case is taken up for trial upon the regular call of

the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

10 How. v; 21 How. xii; 11 Wall. x; 108 U. S. 584.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

20 Wall. xvi; 108 U. S. 584.

21.

BRIEFS.[1]

1. The counsel for the plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

3 Dall. 120; 1 Cranch, xvi; 1 Wheat. xiv; 1 Pet. vi, ix; 6 Pet. iv; 14 Wall. xi; 1 How. xxiv, xxx; 2 Wall. viii; 11 Wall. x; 108 U. S. 584.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification

[1] Par. 9, Rule 21, May 1, 1871, 11 Wall. x, "The same (brief) shall be signed by an attorney or counsellor of this court."

shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

6 Wheat. v; 1 Pet. ix; 11 Wall. ix; 14 Wall. xi, xii; 108 U. S. 584.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

14 Wall. xi; 108 U. S. 585.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

11 Wall. ix, x; 14 Wall. xi; 108 U. S. 585.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

14 Wall. xi; 108 U. S. 585.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

21 How. xiii; 11 Wall. x; 14 Wall. xi; 108 U. S. 585; 150 U. S. 713.

22.

ORAL ARGUMENTS. [1]

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

12 How. xiii; 108 U. S. 586.

2. Only two counsel will be heard for each party on the argument of a case.

7 Cranch, 2; 1 Wheat. xviii; 1 Pet. ix; 1 How. xxviii; 14 Wall. xi; 21 How. xii; 11 Wall. ix; 108 U. S. 586.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: Provided, always, That a fair opening of the case shall be made by the party having the opening and closing arguments.

7 How. v; 8 How. vi; 21 How. 12; 11 Wall. ix; 14 Wall. xi; 108 U. S. 586.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court,

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[1] January Term, 1850, 8 How. 5. *Ordered:* that no counsel will be permitted to speak, in the argument of any case in this court, more than two hours, without the special leave of the court, granted before the argument begins.

Counsel will not be heard, unless a printed abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points. And no other book or case can be referred to in the argument.

If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte*, upon the argument of the party by whom the statement is filed.

This rule to take effect on the first day of December Term, 1894.

WAYNE, J., dissents from this rule.

WOODBURY, J., does not concur in this rule.

and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

Rule No. 62. In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

The same rule shall be applied to decrees for the payment of money, in cases in chancery, unless otherwise ordered by this court.

This rule to take effect on the first day of December Term, 1852. Promulgated December Term, 1851. 13 How. 5.

21 How. xiii; 108 U. S. 586.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

Rule XVII, 1803, February Term. 1 Cranch, 17. In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum, on the amount of the judgment.

Rule XVIII, 1803, February Term. 1 Cranch, 17. In such cases, where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases, the interest is to be computed as part of the damages.

1 Wheat. xvi; 1 Pet. vi; 12 Pet. 84; 1 How. xxvi, xxvii; 21 How. xiii; 11 Wall. x; 108 U. S. 586.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

21 How. xiii; 108 U. S. 586.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

108 U. S. 586; 133 U. S. 711.

24.

COSTS.[1]

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2 Cranch, 249; 12 Pet. vii; 1 How. xxxvi; 21 How. xiii; 108 U. S. 587. And see February Term, 1808, 4 Cranch, 537.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

12 Pet. vii; 1 How. xxxvi; 21 How. xiv; 108 U. S. 587.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

12 Pet. vii; 1 How. xxxvii; 21 How. xiv; 1 Wall. vii; 108 U. S. 587.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

12 Pet. vii; 1 How. xxxvii; 21 How. xiv; 108 U. S. 587.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other

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[1] February Term, 1808, *Ordered*, That all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court to be entered on the record. 1 Wheat. xvii; 1 Pet. viii; 1 How. xxvii.

February Term, 1810, *Ordered*, That upon the reversal of a judgment or decree of the Circuit Court, the party in whose favor the reversal is, shall recover his costs in the Circuit Court. 1 Wheat. xviii; 1 Pet. viii; 1 How. xxviii.

For costs in Circuit Court of Appeals established by the Supreme Court of the United States, pursuant to act of February 19, 1897, c. 263, 29 Stat. 536, see 168 U. S. 720; 169 U. S. 740.

proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

12 Pet. vii; 1 How. xxxvii; 21 How. xiv; 108 U. S. 587.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

12 Pet. vii; 1 How. xxxvii; 21 How. xiv; 108 U. S. 587.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

108 U. S. 587.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

3 Pet. 397; 1 How. xxxv; 21 How. xiv; 108 U. S. 588.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.[1]

21 How. xiv; 108 U. S. 588.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

108 U. S. 588.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will com-

[1] December Term, 1858, Par. 2, Rule No. 25. And all the opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby. 21 How. xiv.

mence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order: (except as hereinafter provided;) and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

3 Pet. xvi; 1 How. xxxiii; 21 How. xv; 4 Wall. vii; 108 U. S. 589.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

1 How. xxxiii; 21 How. xv; 108 U. S. 589; 130 U. S. 706.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4 Wall. vii; 108 U. S. 589.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

108 U. S. 589.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the attorney-general.

4 Wall. vii; 108 U. S. 589.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved with the reasons for the application.

21 Wall. v; 108 U. S. 589.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

14 Pet. xi; 8 How. vi; 108 U. S. 589.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

4 Wall. vii; 108 U. S. 589.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

20 Wall. xvi; 108 U. S. 589.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

20 Wall. xvi; 108 U. S. 590.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

12 Pet. viii; 21 How. xv; 108 U. S. 590.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error

pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

20 How. iv; 21 How. xvi; 108 U. S. 590.

29.

SUPERSEDEAS.

Supersedeas bonds in the Circuit Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

6 Wall. v; 108 U. S. 590.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by

special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

108 U. S. 591.

31.[1]

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

100 U. S. ix; 108 U. S. 591; 178 U. S. 618.

32.[2]

WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236, OR UNDER § 5 OF THE ACT OF MARCH 3, 1891, CHAPTER 517.

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, chapter 236, or under § 5 of the act of March 3, 1891, chapter 517, where the only question in

[1] Rule 31. All records and arguments printed for the use of the court must be in such form and size that they can be conveniently cut and bound so as to make an ordinary octavo volume. After the first day of October, 1880, the clerk will not receive or file records or arguments intended for distribution to the judges that do not conform to the requirements of this rule. 100 U. S. ix.

Whereas, upon an inspection of the printed argument of Thomas Washington, Esq., of counsel for the plaintiffs in error in this cause, it appears to the court that some of the passages thereof, and more particularly those on pages, etc., are reflecting on a member of the court, and thereby disrespectful to the whole court: It is thereupon now here ordered by this court, that the said passages or parts of said argument, and all others which may be deemed disrespectful to any member of the court, be, and the same are hereby, stricken out; and that this order be entered on the Minutes of this court. *Scott* v. *Reid*, 13 Pet. x.

[2] Rule 32 as originally promulgated, January 16, 1882, related to writs

issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.

133 U. S. 711; 146 U. S. 707.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIALS.

1. Models, diagrams, and exhibits of material forming part

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of error and appeals under § 5 of the act of March 3, 1875, 18 Stat. 470 and was as follows:

RULE 32.

WRITS OF ERROR AND APPEALS UNDER § 5 OF THE ACT OF MARCH 3, 1875.

1. Writs of error and citations under § 5 of the Act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes," for the review of orders of the Circuit Courts dismissing suits, or remanding suits to a state court, must be made returnable within thirty days after date, and be served before the return-day.

2. In all cases where a writ of error or an appeal is brought to this court under the provisions of such act, it shall be the duty of the plaintiff in error or the appellant to docket the cause and file the record in this court within thirty-six days after the date of the writ, or the taking of the appeal, if there shall be a term of the court pending at that time; and, if not, then during the first six days of the next term. If default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

3. As soon as such a case is docketed, the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the clerk.

4. All such cases will be advanced on motion, and heard under the rules applicable to motions to dismiss.

5. When a writ of error or an appeal has already been brought, or may hereafter be brought before this rule takes effect, the defendant in error or the appellee may docket the cause and file the record without waiting for the return-day, and move under this rule.

6. In all cases where a period of thirty days is included in the times fixed by this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, and Nevada.

7. This rule shall take effect from and after the first day of May next. Promulgated January 16, 1882. 104 U. S. ix; but see also 108 U. S. 591.

October Term, 1883. Ordered that § 3, of Rule 32, be amended so as to read as follows:

3. All such cases will be advanced on motion. The motion may be made *ex parte*. If granted, the party on whose motion the case shall have been advanced may have the case submitted on printed briefs, on serving, with

of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

115 U. S. 701.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

106 U. S. vii; 108 U. S. 592; 115 U. S. 701.

34.[1]

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

117 U. S. 708.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

117 U. S. 708.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon

a copy of his brief, on the adverse party, a notice of intention to submit, such as is required by Rule 6, to be given upon motions to dismiss writs of error and appeals. 111 U. S. v; 108 U. S. 591.

[1] See § 765, Rev. Stat.

recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

117 U. S. 708.

35.[1]

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a District Court or a Circuit Court direct to this court, under § 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891,[2] the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

137 U. S. 709; 139 U. S. 705.

2. The plaintiff in error or appellant shall cause the record

[1] Originally adapted to writs of error under § 6 of the Act of February 6, 1889, c. 113, 25 Stat. 656. Rules 35, 36, 37, 38, were originally promulgated May 11, 1891, after the passage of the Circuit Court of Appeals Act; 139 U. S. 705, 707; see order, p. 707.

[2] 26 Stat. 826; and published at length, 138 U. S. 709.

to be printed, according to the provisions of §§ 2, 3, 4, 5, 6, and 9, of Rule 10.

137 U. S. 709; 139 U. S. 705.

36.

APPEALS AND WRITS OF ERROR.

1. An appeal or a writ of error from a Circuit Court or a District Court direct to this court, in the cases provided for in §§ 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any Circuit Judge within his circuit, or by any District Judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

139 U. S. 706.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said §§ 5 and 6, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

139 U. S. 706; see 3 Dall. 120; 1 Cranch, xvi; 1 Wheat. xv; 1 Pet. vi; 1 How. xxiv.

37.

CASES FROM CIRCUIT COURT OF APPEALS.

1. Where, under § 6 of the said act, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

139 U. S. 706.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

139 U. S. 706.

3. Where application is made to this court under § 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant, as part of the application.

139 U. S. 707.

38.

INTEREST, COSTS, AND FEES.

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of §§ 5 and 6 of the said act.

139 U. S. 707.

39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

159 U. S. 709.

APPLICATIONS FOR CERTIORARI.

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

INSTRUCTIONS AS TO APPLICATIONS FOR WRITS OF CERTIORARI UNDER ACT OF MARCH 3, 1891.

The following are the requirements on applications for writs of certiorari under the act of March 3, 1891:

Petitions are docketed in this court as ————, Petitioner, *v.* ————, Respondent.

Before the petition will be docketed there must be furnished this office:

1. An original petition with written signature of counsel.
2. A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals.
3. An appearance of counsel for petitioner, signed by a member of the bar of this court.
4. A deposit of twenty-five dollars ($25) on account of costs.

Before submission of the petition there must be furnished:

1. Proof of service of notice of date fixed for submission and of copies of petition and brief upon counsel for the respondent. About two weeks' notice should be given.
2. Twenty-five (25) printed copies of the petition.
3. Twenty-five (25) printed copies of brief in support of petition, if any such brief is to be filed.
4. At least nine (9) uncertified copies of record, which must contain all the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that court. If a sufficient number of records thus made up can not be obtained, making it necessary to reprint the record for use on the hearing of the

petition, fifty (50) copies must be printed under my supervision, in order that, should the petition be granted, there may be a sufficient number for use on the final hearing.

Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions, but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

If a respondent desires to oppose a petition, twenty-five (25) copies of a brief for such respondent must be filed. These briefs must bear the name of a member of the bar of this court, who should also enter an appearance for the respondent. It is not necessary, however, for such counsel to be present in court when the petition is submitted.

All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

ORDER IN REFERENCE TO APPEALS FROM THE COURT OF CLAIMS.[1]

REGULATIONS PRESCRIBED BY THE SUPREME COURT OF THE UNITED STATES UNDER WHICH APPEALS MAY BE TAKEN FROM THE COURT OF CLAIMS TO SAID SUPREME COURT

RULE 1.

In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

3 Wall. vii; and see order of October Term, 1882, extending this rule, *post*, p. 507.

[2]2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts

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[1] Originally promulgated December Term, 1865.

[2] Par. 2 of Rule I, as originally promulgated December Term, 1863, 3 Wall. 7, was as follows:

2. A finding of the facts in the case by the said Court of Claims, and the conclusions of law on said facts on which the court founds its judgment or decree.

The finding of the facts and the conclusion of law to be stated separately, and certified to this court as part of the record.

The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which these ultimate facts are founded. See *Burr* v. *Des Moines Co.*, 1 Wall. 102.

and conclusions of law to be certified to this court as a part of the record.

17 Wall. xvii; 107 U. S. vii.

Rule 2.

In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of the alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.

3 Wall. vii.

Rule 3.

In all cases an order of allowance of appeal by the Court of Claims, or the chief-justice thereof in vacation, is essential, and the limitation of time for *granting* such appeal shall cease to run from the time an application is made for the allowance of appeal.

3 Wall. vii.

Rule 4.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

9 Wall. vii.

RULE 5.[1]

In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

9 Wall. vii; 97 U. S. viii.

OCTOBER TERM, 1882.

Ordered, That Rule 1, in reference to appeals from the Court of Claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the act of June 16, 1880, c. 243, "to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes."

107 U. S. vii; 21 Stat. 284.

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[1] Rule 5 was originally promulgated at December Term, 1869, in the following form. 9 Wall. vii:

5. In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal, to this court.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.[1]

PRELIMINARY REGULATIONS.

1.

The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or

[1] Under the authority given to the Supreme Court of the United States by an Act of Congress passed May 8, 1792, c. 36, 1 Stat. at L. 275, 276, certain rules were ordered by the court at the February Term, 1822, to be the rules of practice for the courts of equity of the United States. These rules, thirty-three in number, appear in 7 Wheat. v–xiii.

The original rules were construed and amended in several particulars, prior to 1842, see 9 Wheat. 4; 8 Pet. 262; 11 Pet. 351; 13 Pet. 23; 17 Pet. 28. They continued in force until the January Term, 1842, when they were superseded by ninety-two new rules which were then adopted; see 1 How. xxxix *et seq;* 17 Pet. lxi–lxxvii.

The rules as then adopted have since continued in force except as amended individually; several new rules have been adopted since that time. Such amendments and the dates of promulgation of the additional rules are referred to in footnotes under each rule affected.

In each case where there is no footnote the rule was promulgated January Term, 1842, and has not been amended.

For Index to These Rules, See Pages 448 to 455, *ante.*

their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3.

Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte,* and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9.

When any decree or order is for the delivery or possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

SERVICE OF PROCESS.

11.

No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12.

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof.[1] At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

13.

The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Amended to this form May 3, 1875, 21 Wall. v. For original form see 1 How. xlv.

14.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another

[1] This sentence amended so as to read in this form, December 17, 1900, 180 U. S. 641.

subpœna, *toties quoties*, against such defendant, if he shall require it, until due service is made.

15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17.

The appearance-day of the defendant shall be the rule-day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso;* and

thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Promulgated in this form, as amended October 28, 1878, 97 U. S. viii. For original form see 1 How. xlvi.

19.

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Promulgated in this form, as amended October 28, 1878, 97 U. S. viii. For original form see 1 How. xlvi.

FRAME OF BILLS.

20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties,

plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the Circuit Court of the United States for the district of ——: A. B., of ——, and a citizen of the State of ——, brings this his bill against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says that," etc.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they can not be joined without ousting the jurisdic-

tion of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23.

The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of $3.00 for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms

as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENT OF BILLS.

28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in mat-

ters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill

shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

ANSWERS.

39.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the

parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona-fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be, and the same is hereby, repealed and annulled.

And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery. 10 How. v.

The rule repealed and annulled by the foregoing order, was as follows: A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent. 1 How. liii.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.)

is required to answer the interrogatories numbered respectively 1, 2, 3, etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

December Term, 1871.

(13 Wall. xi.)

Amendment to Forty-first Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator

should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the court that persons,

who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48.

Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50.

In suits to execute the trusts of a will, it shall not be neces-

sary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court. or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion

of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

59.[1]

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory, or before any notary public.

[1] Amended by adding the words, "or before any notary public," March 5 1889, 129 U. S. 701.

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were

necessary or proper, and ought not to have been joined together.

63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY—HOW TAKEN.

67.[1]

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

[1] This rule was promulgated in this form (except the last sentence thereof), May 2, 1892, 144 U. S. 689.

For its form as originally promulgated and the amendments, see 1 How. lxii; 17 How. vii; 1 Black, 6; 9 Wall. vii; 139 U. S. 707; 149 U. S. 793.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or other agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and reëxamination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the

costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the

court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

This last sentence was promulgated May 15, 1893, 149 U. S. 793.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact,

the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

CROSS-BILL.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are out-

standing or undisposed of, unless the court shall otherwise direct.

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge,

affidavit, deposition, examination, or answer were so brought in or used.

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court.

But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

82.

The Circuit Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the Circuit Judges, and the District Judge for the district, concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and

the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Promulgated in this form, April 16, 1894, 152 U. S. 709. For original form see 1 How. lxviii.

EXCEPTIONS TO REPORT OF MASTER.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the cost to be fixed in each case by the court, by a standing rule of the Circuit Court.

DECREES.

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by

order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:" [Here insert the decree or order.]

GUARDIANS AND PROCHEIN AMIS.

87.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein amis;* subject, however, to such orders as the court may direct for the protection of infants and other persons.

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

89.

The Circuit Courts (a majority of all the judges thereof,

including the justice of the Supreme Court, the Circuit Judges, and the District Judge for the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Practically the same as old Rule XXXII. 7 Wheat. xiii and promulgated in this form, April 16, 1894, 152 U. S. 710. See 1 How. lxix.

90.

In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Practically the same as old Rule XXXIII. 7 Wheat. xiii.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulat-

ing the equity practice, where the decree is solely for the payment of money.

Rule 92, as originally promulgated, related to when the rules should take effect. Being *functus officio*, it is not now regarded as a rule. It was as follows, see 1 How. lxx:

XCII. These rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by a Circuit Court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the rules of practice for the Circuit Courts in equity suits, promulgated and prescribed by this court in March, 1822, shall henceforth cease, and be of no further force or effect. And the clerk of this court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

Present Rule 92 was promulgated April 18, 1864. 1 Wall. vii.

October Term, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

Originally promulgated January 13, 1879. 97 U. S. vii

October Term, 1881–2.

94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a

collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

Originally promulgated January 23, 1882. 104 U. S. ix.

The following provisions relating to equity practice are to be found in the act of June 1, 1872, c. 255, 17 Stat. 197, 198.

SEC. 7. That whenever notice is given of a motion for an injunction out of a Circuit or District Court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application can not be heard by the circuit judge of the circuit, or the district judge of the district.

SEC. 13. That when in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such a manner as

the court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

RULES OF PRACTICE FOR THE COURTS OF THE UNITED STATES [1]

IN

ADMIRALTY AND MARITIME JURISDICTION, ON THE INSTANCE SIDE OF THE COURT, IN PURSUANCE OF THE ACT OF THE 23D OF AUGUST, 1842, CHAPTER 188, 5 STAT. 516.

1.

No mesne process shall issue from the District Courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

2.

In suits *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he can not be found, to attach his goods and chattels to the amount sued for; or if such property can not be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

3.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail, with suffi-

[1] Most of these rules of practice were promulgated at the January Term, 1845, and will be found in 3 How. xiv.

Except as they have been individually mentioned or supplementary rules have been promulgated they continue in force as there published.

The amendments and promulgations appear in notes to the rules affected.

FOR INDEX TO THESE RULES, SEE PAGES 456 TO 465, *ante*.

cient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

4.

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

5.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

Originally promulgated as follows:

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court, who is authorized by the court to take affidavits of bail and depositions in cases pending before the court. 3 How. iv, and amended to read in its present form, 13 Wall. xiv.

6.

In all suits *in personam*, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

7.

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

8.

In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

9.

In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the dis-

trict as the District Court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

10.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy in decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

11.

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

12.

In all suits by material-men for supplies or repairs, or other

necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.

Rule 12 was originally promulgated in the following form: XII. In all suits by material men for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, or other necessaries. 3 How. vi.

It was amended, December Term, 1858, to read as follows: XII. In all suits by material-men for supplies or repairs, or other necessaries, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, or other necessaries.

It was amended to read in its present form, December Term, 1871. 13 Wall. xiv.

13.

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone *in personam*.

14.

In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone *in personam*.

15.

In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*.

16.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

17.

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either *in rem* or against the master or the owner alone *in personam*.

18.

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer.

19.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

20.

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by

a monition to the adverse party or parties to appear and make answer to the suit.

21.

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

Rule 21 was originally promulgated in the following form. 3 How. vii. XXI. In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fieri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. In all other cases the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court.

It was amended so as to read in its present form, December Term, 1861. 1 Black. 6.

22.

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.

23.

All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

24.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

25.

In all cases of libels *in personam*, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the

court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

26.

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bona fide* owner, and that no other person is the owner thereof. And, where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

27.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.[1]

28.

The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid,

[1] See forty-eighth rule, *post*, p. 559.

the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

29.

If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

30.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

31.

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense.

32.

The defendant shall have a right to require the personal

answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

33.

Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

34.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the cause of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final

decree, whether it is rendered in the original or appellate court.

35.

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

Rule 35 was originally promulgated in the following form. January Term, 1845. 3 How. xi. XXXV. Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court, who is a standing commissioner of the court, and is now by law authorized to take affidavits of bail, and also depositions in civil causes pending in the courts of the United States.

36.

Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

37.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

38.

In cases of mariners' wages, or bottomry, or salvage, or other proceeding *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require

the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

39.

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

40.

The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

41.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

42.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be

so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

43.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

44.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

45.

All appeals from the District to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit;

or in case no such rule or order be made, then within thirty days from the rendering of the decree.

Rule 45 was originally promulgated in the following form, January Term, 1845. 3 How. xiii:

XLV. All appeals from the District to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit.

It was amended so as to read in its present form, May Term, 1872. 13 Wall. xiv.

46.

In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts, respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

47.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the state courts.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a state court.

Rule 47 was originally promulgated in the following form, January Term, 1845. 3 How. 14:

XLVII. These rules shall be in force in all the Circuit and District Courts of the United States from and after the first day of September next (1845).

It is Ordered by the court, That the foregoing rules be and they are adopted and promulgated as rules for the regulation and government of the practice of the Circuit Courts and District Courts of the United States in suits in admiralty on the instance side of the courts. And that the reporter of the court do cause the same to be published in the next volume of his reports; and that he do cause such additional copies thereof to be published as he may deem expedient for the due information of the bar and bench in the respective districts and circuits.

The present Rule 47 was promulgated December Term, 1850. 10 How. v.

48.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

Promulgated December Term, 1850. 10 How. vi.

49.

Further proof, taken in a Circuit Court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the twenty-fourth of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

Promulgated December Term, 1851. 13 How. vi.

50.

When oral evidence shall be taken down by the clerk of the

District Court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the Circuit Court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

Promulgated December Term, 1851. 13 How. vi.

51.

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

Originally promulgated December Term, 1854. 17 How. vi. Promulgated in this form October Term, 1896. 160 U. S. 693.

52.

The clerks of the District Courts shall make up the records to be transmitted to the Circuit Courts on appeals, so that the same shall contain the following:

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the District Court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.

2. All motions, rules, and orders not excepted to, which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more of these; in which case, so much of either of them as may be [involved in the exception shall] be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

2. The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

Promulgated January 22, 1855. 17 How. vi.

3. Hereafter, in making up the record to be transmitted to

the circuit clerk on appeal, the clerk of the District Court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

This paragraph promulgated May 2, 1881. 103 U. S. xiii.

53.

Whenever a cross-libel is filed upon any counterclaim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

Promulgated December Term, 1868. 7 Wall. v.

54.[1]

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of shipowners and for other purposes," now embodied in §§ 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which

[1] Rules 54, 55, 56, 57 were promulgated May 6, 1872, as supplementary Rules of Practice in Admiralty under the act of March 3, 1851, entitled, "An act to limit the liability of shipowners and for other purposes." 9 Stat. 635; 13 Wall. xii; and see 13 Wall. 125.

such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice reserved through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

Rule 54 was originally promulgated May 6, 1872. 13 Wall. xii. It was promulgated, as amended in this form, January 26, 1891. 137 U. S. 712.

55.

Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship

or vessel and freight (after payment of costs and expense), shall be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

Promulgated May 6, 1872. 13 Wall. xiii.

56.

In the proceedings aforesaid the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

Promulgated May 6, 1872. 13 Wall. xiii.

57.

The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of

such court for the purposes of the case as hereinbefore provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

Rule 57 was originally promulgated May 6, 1872. 13 Wall. xiii. It was promulgated in this form April 22, 1889. 130 U. S. 705.

58.

All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of the United States where such cases are or shall be pending in said courts upon appeal from the District Courts.

Promulgated March 30, 1881. 103 U. S. xiii.

59.

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon

the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

Promulgated March 26, 1883. 112 U. S. 743.

GENERAL ORDERS IN BANKRUPTCY.[1]

ADOPTED AND ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 28, 1898.

OCTOBER TERM, 1898.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this twenty-eighth day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 [2] and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the refer-

[1] These General Orders in Bankruptcy were adopted and established November 28, 1898, and were first published in 172 U. S. 653 *et seq.;* with the exception of General Order 35 they have not been annulled or amended.

[2] General Orders in Bankruptcy under the act of 1867, were promulgated May 16, 1867 and recorded in the Clerk's office, but were not published in the Reports.

ence of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons, and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the Circuit or District Court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required

to be served on the party personally may be served upon his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of

parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded

against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X.

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions

and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before

him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed

to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices

shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the reëxamination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such reëxamination, and thereupon the referee shall make an order fixing a time for hearing the

petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any

creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the

proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party,

the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

Last paragraph of subd. 4, promulgated December 11, 1905, 199 U. S. 618, as amendment to General Order No. 35.

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

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

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

of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY.

The forms not having been altered since originally promulgated, are not repeated but will be found in Volume 172, United States Reports, as follows:

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

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RECOMMENDATIONS BY THE JUSTICES

OF THE SUPREME COURT OF THE UNITED STATES FOR RULES TO BE ADOPTED BY THE CIRCUIT COURTS OF APPEALS ESTABLISHED BY THE ACT OF MARCH 3, 1891.

The Justices of the Supreme Court of the United States recommend to each Circuit Court of Appeals that it adopt the following Rules (with such other rules as it may make under the provision of § 2 of "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891).

MELVILLE W. FULLER.
Chief Justice.

RULES.

1.

NAME.

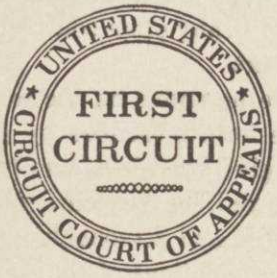
The court adopts "United States Circuit Court of Appeals for the First Circuit" as the title of the court. [Change the word "First" as necessary.]

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "First Circuit" in two lines, in

the centre, with a dash beneath. [Change the word "First" as necessary.] [See specimen of seal below.]



3.

TERMS.

One term of this court shall be held annually at the city of Boston on the of October, and shall be adjourned to such times and places as the court may from time to time designate. [Fill the blank and change the word "Boston" as necessary, according to the act.]

4.

QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in

the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by § 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office, without an order from the court.

6.

MARSHAL, CRIER, AND OTHER OFFICERS.

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by § 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, shall become attorneys and counsellors

in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

10.

BILL OF EXCEPTIONS.

The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assign-

ment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the Circuit and District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount

sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a Circuit or District Court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such Circuit or District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

14.

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit or District Court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing

the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

16.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after

the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

17.

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: *Provided, however,* That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a Circuit or District Court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the Circuit or District Court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now

allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: *Provided, however,* That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: *Provided, also,* That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: *And provided, also,* That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed and be heard and determined as in other cases.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall by their attorneys of record, sign and file with the clerk

an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

23.

PRINTING RECORDS.

The counsel for the plaintiff in error or appellant shall print

and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party, at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in

instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But

when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

26.

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

28.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into

one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

29.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of juris-

diction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

32.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo*, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court

or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

34.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

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ACTIONS.

1. *Exclusiveness of special statutory remedy.*

While a general liability or right created by statute without a remedy may be enforced by an appropriate common-law action, when a special remedy is coupled therewith that remedy is exclusive. (*Pollard* v. *Bailey*, 20 Wall. 520). *Globe Newspaper Co.* v. *Walker*, 356.

2. *Courts cannot enlarge remedies given by statute.*

Although remedies given by a statute to protect property in copyright may be inadequate for the purpose intended, the courts cannot enlarge the remedy. Congress alone has power so to do by amending the statute. *Ib.*

See ADMIRALTY, 9;
BANKRUPTCY, 2, 3;
COPYRIGHT, 9.

ACTS OF CONGRESS.

ADMIRALTY, Rev. Stat. §§ 4282, 4289 (see Admiralty, 3, 4, 7): *La Bourgogne*, 95. Rev. Stat. §§ 4405, 4488, 4489 (see Admiralty, 5): *Ib.* Act of August 7, 1882, c. 441: *Ib.*

BANKRUPTCY, act of July 1, 1898, § 60*d* (see Bankruptcy, 2): *In re Wood and Henderson*, 246.

COPYRIGHTS, Rev. Stat. § 4952 (see Copyrights, 5, 6): *Bobbs-Merrill Co.* v. *Straus*, 339; *Scribner* v. *Straus*, 352. Rev. Stat. §§ 4965–4970 (see Copyrights, 9): *Globe Newspaper Co.* v. *Walker*, 356.

COURT OF CLAIMS, Rev. Stat. § 1088 (see Court of Claims, 1, 3): *Sanderson* v. *United States*, 168. Rules regulating appeals from, 505.

HAWAII, Organic Act (see Local Law): *Keaoha* v. *Castle*, 149.

INDIANS, Indian Depredations Act of March 3, 1891 (see Court of Claims, 1): *Sanderson* v. *United States*, 168. Appropriation acts of 1895, 1896, 1897, 1898 and 1899 (see Indians, 2): *Quick Bear* v. *Leupp*, 50.

JUDICIARY, act of March 3, 1891, § 5 (see Appeal and Error; Jurisdiction, A 2, 3; Removal of Causes): *Boston & Maine R. R.* v. *Gokey*, 155; *Pierce* v. *Creecy*, 387; *Kansas City N. W. R. R. Co.* v. *Zimmerman*, 336. Rev. Stat. § 709 (see Federal Question, 2; Jurisdiction, A 1): *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281. Rev. Stat. § 914 (see Practice and Procedure, 4): *Western Loan Co.* v. *Butte & Boston Min. Co.*, 368. Rev. Stat. § 918 (see Practice and Procedure, 5): *Ib.*

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PORTO RICO, Organic Act of March 2, 1901 (see Territories, 1): *Ponce* v. *Roman Catholic Church*, 296.

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SAFETY APPLIANCE ACT of March 2, 1893 (see Constitutional Law, 13; Safety Appliance Act): *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281.

TERRITORIES, act of July 30, 1886 (see Territories, 4): *Ponce* v. *Roman Catholic Church*, 296.

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See STATES, 4.

ADMIRALTY.

1. *Limitation of liability; law governing.*

In a proceeding to limit liability instituted by the owners of a foreign vessel lost on the high seas, the right to exemption must be determined by the law as administered in the courts of the United States. *La Bourgogne*, 95.

2. *Same; practice on failure of petitioners to produce log books.*

In a proceeding for limitation of liability the remedy of claimants against the fund for the failure of the petitioners to produce log books ordered to be produced by the court is to offer secondary evidence or ask for dismissal of the proceeding; they cannot proceed and ask the court to decide the case, not according to the proof but on presumption of wrongdoing and suppresssion of evidence. *Ib.*

3. *Same; privity of owner of vessel at fault in collision.*

Under the circumstances of this case the fault of the officers and crew of the steamship La Bourgogne resulting in collision and loss of the vessel and its passengers, crew and cargo, was not committed with the fault and privity of its owner, so as to deprive it of the right to a limitation of liability under §§ 4282, 4289, Rev. Stat. *Ib.*

4. *Same; effect of negligence of officers and crew of vessel.*

Mere negligence of the officers and crew of a vessel, pure and simple and of itself, does not necessarily establish the existence on the part of the owner of the vessel of privity and knowledge within the meaning of the limited liability act of 1851 as reënacted in §§ 4282–4287, Rev. Stat. *The Main*, 152 U. S. 122, distinguished. *Ib.*

5. *Same; effect of compliance with regulations of Treasury Department inconsistent with statute.*

Under § 4405, Rev. Stat., the regulations of the supervising inspectors and the supervising inspector general when approved by the Secretary of the Treasury in regard to carrying out the provisions of §§ 4488, 4489, Rev. Stat., have the force of law, and the owner of a foreign vessel is required to comply therewith by the act of August 7, 1882, c. 441, 22 Stat. 346, and, even if such regulations are inconsistent with

the statute, compliance therewith does not amount to a violation of the statute and deprive the owner of the right to a limitation of liability on account of privity with the negligence causing the loss. *Ib.*

6. *Same; freight to be surrendered.*
In the case of a foreign vessel making regular trans-oceanic trips the freight for the voyage to be surrendered by the owner in a proceeding for limitation of liability when the vessel is lost on the return trip is that for the distinct sailing between the regular termini and does not include the freight earned on the outward trip. *Ib.*

7. *Same.*
Notwithstanding that where a contract of transportation is unperformed and no freight is earned no freight is to be surrendered, such freight and passage money as are received under absolute agreement that they shall be retained by the carrier in any event must be surrendered by the owner of a vessel seeking to limit his liability under the provisions of §§ 4283–4287, Rev. Stat. *Ib.*

8. *Same; subsidy as freight to be surrendered.*
An annual subsidy contract made by a foreign government and a steamship company for carrying the mails was held under its conditions not to be divisible, and no part thereof constituted freight for the particular voyage on which the vessel was lost which should be surrendered by the owner in a proceeding for limitation of liability. *Ib.*

9. *Foreign law; enforcement in courts of United States.*
Where the law of the State to which a vessel belongs gives a right of action for wrongful death occurring on such vessel while on the high seas, such right of action is enforceable in the admiralty courts of the United States against the fund arising in a proceeding to limit liability, *The Hamilton*, 207 U. S. 398; and the law of France does give such right of action for wrongful death. *Ib.*

10. *Limitation of liability—Law governing question whether vessel in fault and fund liable.*
In determining whether claims for wrongful death are enforceable against the fund in a limited liability proceeding, notwithstanding the right to enforce such claims is based on the right of action given by the law of the country to which the vessel belongs, the question of whether the vessel was in fault and the fund liable must be determined by the law of the United States courts. The duty to enforce the cause of action given by the foreign law does not carry with it the obligation to give the proof the same effect as it would have in the courts of that country if the effect is different from that which such proof would have in the courts of the United States. *Ib.*

11. *Limitation of liability; effect of non-payment of freight adjudicated on right to.*
Where there is an honest controversy as what the pending freight for the

voyage includes, and in the absence of too contumacious conduct, a limitation of liability should not be refused because the petitioner has not, pending the determination of such controversy, actually paid over to the trustee the entire amount of the pending freight as finally adjudicated. *Ib.*

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For special index, *see* p. 456.

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Fourteenth. See CONSTITUTIONAL LAW, 5;
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APPEAL AND ERROR.

Right of party to take whole case to Circuit Court of Appeals from Circuit Court where question of jurisdiction of latter court involved in proceedings therein.

A defendant defeated on the merits after having specially assailed the jurisdiction of the Circuit Court because of defective writ and service is not bound to bring the jurisdictional question directly to this court on certificate under § 5 of the act of March 3, 1891; he may take the entire case to the Circuit Court of Appeals and on such appeal it is the duty of that court to decide all questions in the record; and, if jurisdiction was originally invoked for diversity of citizenship, the decision would be final except as subject to review by this court on certiorari. *Boston & Maine R. R.* v. *Gokey*, 155.

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Quære as to the effect of the death of either party on an arbitration under a contract of submission made independently of judicial proceedings where the contract provides that the arbitration shall in such event continue and the award be binding upon the representatives of the deceased party. *Brown* v. *Fletcher's Estate*, 82.

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See BANKRUPTCY, 2, 3.

BANKRUPTCY.

1. *Courts of bankruptcy; powers of.*
Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular court to administer the property, that court may, in some proper way, call upon all parties interested to appear and assert their rights. *In re Wood and Henderson*, 246.

2. *Courts of bankruptcy; jurisdiction to reëxamine validity of payments or transfers by bankrupt to attorney.*
The bankruptcy court, or its referee, in which the bankruptcy proceedings are pending, has jurisdiction under § 60*d* of the bankruptcy act to reexamine, on petition of the trustee, the validity of a payment or transfer made by the bankrupt in contemplation of bankruptcy to an attorney for legal services to be rendered by him, and to ascertain and adjudge what is a reasonable amount to be allowed for such services and to direct repayment of any excess to the trustee; and if the attorney is a non-resident of the district an order directing him to show cause or a citation or notice of the proposed hearing may be served without the district. Jurisdiction to reëxamine such a transfer was not conferred upon any state court. *Ib.*

3. *Trustee; suits by; service of process on non-resident defendant.*
The trustee may not maintain a plenary suit instituted in the District Court where the bankruptcy proceeding is pending against such attorney upon service of process made on such attorney, if he is a non-resident of that district, outside of the district. *Ib.*

4. *Leasehold rights of bankrupt; jurisdiction to determine lessor's claim of forfeiture, at suit of trustee.*
Where the trustee can only sell a lease subject to the claim of the lessors that the transfer of the bankrupt's interest in the lease gives a right of reëntry under a condition therein, the bankruptcy court has jurisdiction of a proceeding, initiated by the trustee and to which the lessors are parties, to determine the validity of the lessor's claim and remove the cloud caused by the lessor's claim. *Gazlay* v. *Williams*, 41.

5. *Trustee's title to leasehold interest of bankrupt, where lease provides for reëntry in case of assignment.*
The passage of a lease from the bankrupt to the trustee is by operation of

law and not by the act of the bankrupt nor by sale, and a sale by the trustee of the bankrupt's interest is not forbidden by, nor is it a breach of, a covenant for reëntry in case of assignment by the lessee or sale of his interest under execution or other legal process, where, as in this case, there is no covenant against transfer by operation of law. *Ib.*

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See ante, p. 567.
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Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217, distinguished in *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 217.

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Where on writ and cross-writ of certiorari the judgment is affirmed neither party prevails and each must pay his own costs in this court. *La Bourgogne*, 95.

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COMMON CARRIERS.
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The duty that may rest on a carrier under normal conditions to transport merchandise by a particular, and the most advantageous, route is restrained and limited by the right of the carrier, in case of necessity, to resort to such other reasonable direct route as may be available under the existing conditions to carry the freight to its destination, and if such necessity exists, in the absence of negligence in selecting the changed route, the carrier is not responsible for damages resulting from the change even if such change may be, in law, a concurring and proximate cause of such damages. *Empire State Cattle Co.* v. *Atchison &c. Ry. Co.*, 1.

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CONSTITUTIONAL LAW.
1. *Commerce clause; tax by State as burden on interstate commerce.*
The statute of Texas of April 17, 1905, c. 141, imposing a tax upon railroad companies equal to one per cent of their gross receipts is, as to those companies whose receipts include receipts from interstate business, a burden on interstate commerce and as such violative of the commerce clause of the Federal Constitution. *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, followed; *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, distinguished, and held that latter case did not overrule the former. *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 217.

2. *Commerce clause; effect on validity of state tax regulating commerce of name given it.*

Neither the state courts nor the legislatures, by giving a tax a particular name, or by the use of some form of words, can take away the duty of this court to consider the nature and effect of a tax, and if it bears upon interstate commerce so directly as to amount to a regulation it cannot be saved by name or form. *Ib.*

3. *Contract impairment; what amounts to contract with railway company for use of streets.*

The fact that a street railway company has agreed to pay for the use of the streets of a city for a given period does not, in the absence of unequivocal terms to that effect, create an inviolable contract within the meaning and protection of the contract clause of the Federal Constitution which will prevent the exaction of a license tax within the acknowledged power of the city. (*New Orleans City and Lake Railway Company* v. *New Orleans*, 143 U. S. 192.) *St. Louis* v. *United Railways Co.*, 266.

4. *Contract impairment clause; effect of city ordinance imposing license or taxes on railroad granted use of streets.*

The ordinances of the city of St. Louis, granting rights of construction and operation to street railways involved in this case, do not contain any clearly expressed obligation on the part of the city to surrender its right to impose further license or taxes upon street railway cars which is within the meaning and protection of the contract clause of the Federal Constitution. *Ib.*

Copyrights. *See* COPYRIGHTS, 3.

5. *Due process of law; hearing and notice to which taxpayer entitled.*

There are few constitutional restrictions on the power of the States to assess, apportion and collect taxes, and in the enforcement of such restrictions this court has regard to substance and not form, but where the legislature commits the determination of the tax to a subordinate body, due process of law requires that the taxpayer be afforded a hearing of which he must have notice, and this requirement is not satisfied by the mere right to file objections; and where, as in Colorado, the taxpayer has no right to object to an assessment in court, due process of law as guaranteed by the Fourteenth Amendment requires that he have the opportunity to support his objections by argument and proof at some time and place. *Londoner* v. *Denver*, 373.

6. *Due process of law; municipal authorization of public improvement without a hearing.*

The legislature of a State may authorize municipal improvements without any petition of landowners to be assessed therefor, and proceedings of a municipality in accordance with charter provisions and without hearings authorizing an improvement do not deny due process of law to landowners who are afforded a hearing upon the assessment itself. *Ib.*

7. *Due process of law; denial by municipal officers as denial by State.*
The denial of due process of law by municipal authorities while acting as a board of equalization amounts to a denial by the State. *Ib.*

See FEDERAL QUESTION, 5;
LOCAL LAW (IND.);
STATES, 1.

Equal protection of laws. *See* STATES, 1.

8. *Extradition; constitutional essentials.*
While no person may be lawfully extradited from one State to another under Article IV, § 2, par. 2, of the Federal Constitution, unless he has been charged with crime in the latter State, there is no constitutional requirement that there should be anything more than a charge of crime, and an indictment which clearly describes the crime charged is sufficient even though it may possibly be bad as a pleading. *Pierce* v. *Creecy*, 387.

9. *Full faith and credit; right of court of one State to inquire into jurisdiction of court of other State in which judgment rendered.*
The full faith and credit clause of the Federal Constitution does not preclude the courts of a State in which the judgment of a sister State is presented from inquiry as to jurisdiction of the court by which the judgment is rendered, nor is this inquiry precluded by a recital in the record of jurisdictional facts. *Brown* v. *Fletcher's Estate*, 82.

10. *Full faith and credit—Privity between executor and administrator c. t. a. appointed in another State.*
There is no privity between the executor and an administrator with the will annexed appointed in another State which makes a decree in a court of such State against the latter binding under the full faith and credit clause of the Federal Constitution upon the former in the courts of the State in which such executor is appointed. *Ib.*

11. *Full faith and credit; judgments entitled to; effect of judgment against administrator c. t. a. on executor in another State.*
Where a party dies pending a suit which is subsequently revived against an administrator with the will annexed, appointed in the State in the courts of which the suit is pending, the judgment is binding only upon the parties against which it is revived and who are within the jurisdiction of the court, and the courts of another State are not bound under the full faith and credit clause of the Federal Constitution to give effect to such judgment against the executors of such deceased party; and this applies to a judgment entered on an arbitration had in pursuance of a stipulation that it should be conducted under control of the court and that it should continue notwithstanding the decease of either party. *Ib.*

12. *Full faith and credit; effect of judgment in one State on award of arbitration of claim not enforceable in State where judgment sought to be enforced.*
A judgment of a court of a State in which the cause of action did not arise,

but based on an award of arbitration had in the State in which the cause did arise, is conclusive, and, under the full faith and credit clause of the Federal Constitution, must be given effect in the latter State, notwithstanding the award was for a claim which could not, under the laws of that State, have been enforced in any of its courts. *Fauntleroy* v. *Lum*, 230.

Judiciary. *See* JURISDICTION, A 1.

13. *Legislative power; delegation of; validity of § 5 of Safety Appliance Act.* The provision in § 5 of the Safety Appliance Act of March 2, 1893, 27 Stat. 531, referring it to the American Railway Association and the Interstate Commerce Commission to designate and promulgate the standard height and maximum variation of draw bars for freight cars is not unconstitutional as a delegation of legislative power. (*Buttfield* v. *Stranahan*, 192 U. S. 470.) *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281.

See TERRITORIES, 2.

Religious freedom. *See* INDIANS, 3.

States. *See* FEDERAL QUESTION, 3.

CONSTRUCTION OF STATUTES.

See STATUTES.

CONTRACTS.

See CONSTITUTIONAL LAW, 3, 4;
STATES, 3.

CONTRIBUTORY INFRINGEMENT OF COPYRIGHT.

See PRACTICE AND PROCEDURE, 3.

COPYRIGHTS.

1. *Patent and copyright statutes distinguished.* There are differences between the patent, and the copyright, statutes in the extent of the protection granted by them, and the rights of a patentee are not necessarily to be applied by analogy to those claiming under copyright. *Bobbs-Merrill Co.* v. *Straus*, 339.

2. *Common-law right of author.* At common law an author had a property in his manuscript and might have redress against anyone undertaking to publish it without his authority. *Ib.*

3. *Extent of copyright property under Federal law.* Copyright property under the Federal law is wholly statutory and depends upon the rights created under acts of Congress passed in pursuance of authority conferred by § 8 of Art. I of the Federal Constitution. *Ib.*

4. *Rule of construction of statute relating to.*
The copyright statutes are to be reasonably construed. They will not by judicial construction either be unduly extended to include privileges not intended to be conferred, nor so narrowed as to exclude those benefits that Congress did intend to confer. *Ib.*

5. *Right of owner of copyright to qualify or restrict sales by vendee.*
The sole right to vend granted by § 4952, Rev. Stat., does not secure to the owner of the copyright the right to qualify future sales by his vendee or to limit or restrict such future sales at a specified price, and a notice in the book that a sale at a different price will be treated as an infringement is ineffectual as against one not bound by contract or license agreement. *Ib.*

6. *Right to vend copyrighted article.*
Bobbs-Merrill Co. v. *Straus, ante,* p. 339, followed as to construction of § 4952, Rev. Stat., and the extent of the exclusive right to vend thereby granted to the owner of a statutory copyright. *Scribner* v. *Straus,* 352.

7. *Jurisdiction of Circuit Court; limitations concerning questions of contract.*
Where the jurisdiction of the Circuit Court is invoked for the protection of rights under the copyright statute that court cannot consider questions of contract right not dependent on the statute where diverse citizenship does not exist, or if it does exist, where the statutory amount is not involved. *Ib.*

8. *Right of author to multiply copies of his works.*
The right of an author in the United States to multiply copies of his works after publication is the creation of a new right by Federal statute under constitutional authority and not a continuation of a common-law right. (*Wheaton* v. *Peters,* 8 Pet. 590.) *Globe Newspaper Co.* v. *Walker,* 356.

9. *Remedy for infringement.*
Congress having by §§ 4965–4970, Rev. Stat., provided a remedy for those whose copyrights in maps are infringed, a civil action at common law for money damages cannot be maintained against the infringers. *Ib.*

See ACTIONS;
PRACTICE AND PROCEDURE, 3.

CORPORATIONS.

1. *Effect on identity, of changes in members and increase of capital stock.*
A corporation remains unchanged and unaffected in its identity by changes in its members, nor does it change its identity by increasing its capital stock; and its legal action is equally binding on itself after such an increase as it was prior thereto. *Old Dominion Co.* v. *Lewisohn,* 206.

2. *Disregard of previous assent to transaction.*
A corporation should not be allowed to disregard its assent previously given

in order to charge a single member with the whole results of a transaction to which the greater part—in this case thirteen-fifteenths—of its stock were parties for the benefit of the guilty and innocent alike. *Ib.*

See FEDERAL QUESTION, 5;
LOCAL LAW (VT.);
STATUTES, A 2.

COSTS.

See CERTIORARI.

COURTS.

1. *Duty of Federal court to protect interest of State.*

A Federal court should not, unless plainly required so to do by the Constitution, assume a duty the exercise of which might lead to a miscarriage of justice prejudicial to the interests of a State. *Pierce* v. *Creecy*, 387.

2. *Duty as to construction of statutes.*

The courts have no responsibility for the justice or wisdom of legislation. They must enforce the statute, unless clearly unconstitutional, as it is written, and when Congress has prescribed by statute a duty upon a carrier the courts cannot avoid a true construction thereof simply because such construction is a harsh one. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281.

3. *Judicial notice of Spanish law affecting insular possessions.*

As to our insular possessions the Spanish law is no longer foreign law, and the courts will take judicial notice thereof so far as it affects those possessions. *Ponce* v. *Roman Catholic Church*, 296.

4. *Porto Rican; legislative power to enact law respecting jurisdiction of claims by Roman Catholic Church.*

The act of legislative assembly of Porto Rico of March 10, 1904, conferring jurisdiction on the Supreme Court of Porto Rico for the trial and adjudication of property claimed by the Roman Catholic Church was within its legislative power. *Ib.*

5. *Rules.* *See* SPECIAL INDEX TO APPENDIX, p. 443.

See ACTIONS;
HABEAS CORPUS;
PRACTICE AND PROCEDURE.

COURT OF CLAIMS.

1. *New trials in; application of* § 1088, *Rev. Stat.*

The provisions of § 1088, Rev. Stat., relative to new trials in Court of Claims cases are applicable to cases brought under the Indian Depredations Act of March 3, 1891, 26 Stat. 851. *Sanderson* v. *United States*, 168.

2. *New trial in; right of United States to apply for after term.*
While ordinarily a court has no power to grant a new trial after the adjournment of the term if no application was made previous to the adjournment, the power so to do can be given by statute, and where a government consents to be sued, as the United States has in the Court of Claims, it may attach whatever conditions it sees fit to the consent and give to itself distinct advantages, such as right to apply for new trial after the term, although such right is not given to claimants. *Ib.*

3. *New trials in; timeliness of motion for.*
The motion for new trial on behalf of the United States in Court of Claims cases under the provisions of § 1088, Rev. Stat., may be made any time within two years after final disposition of the claim, and, if so made, the motion may be decided by the court after the expiration of the two years' period. *Ib.*

4. *Rules regulating appeals from,* see p. 505.

COURT AND JURY.
See TRIAL, 1, 2.

CRIMINAL LAW.
See CONSTITUTIONAL LAW, 8;
JURISDICTION, A 2.

DAMAGES.
See COMMON CARRIERS.

DEATH.
See ARBITRATION AND AWARD.

DELEGATION OF POWER.
See CONSTITUTIONAL LAW, 5, 13;
TERRITORIES, 2.

DEPARTMENTAL REGULATIONS.
See ADMIRALTY, 5.

DUE PROCESS OF LAW.
See CONSTITUTIONAL LAW, 5, 6, 7; LOCAL LAW (IND.);
FEDERAL QUESTION, 5; STATES, 1.

DRAW-BARS.
See SAFETY APPLIANCE ACT.

EDUCATION.
See INDIANS.

EMPLOYER AND EMPLOYÉ.

See SAFETY APPLIANCE ACT, 3.

EQUAL PROTECTION OF LAWS.

See STATES, 1.

EQUITY RULES.

See ante, p. 508 (special index, p. 448).

EQUIVALENTS.

See PATENT, 1.

ESTATES OF DECEDENTS.

See STATES, 4.

EVIDENCE.

See ADMIRALTY, 2;
PUBLIC LANDS, 5.

EXECUTORS AND ADMINISTRATORS.

See CONSTITUTIONAL LAW, 10, 11.

EXEMPTIONS.

See ADMIRALTY, 1;
STATES, 3.

EXTRADITION.

See CONSTITUTIONAL LAW, 8;
HABEAS CORPUS;
JURISDICTION, A 2.

FACTS.

See PATENTS, 3;
PRACTICE AND PROCEDURE.

FEDERAL COURTS.

Rules of. *See* special index to appendix, 443.
See COURTS;
JURISDICTION.

FEDERAL QUESTION.

1. *Whether state statute creates a contract and is valid under state constitution are non-Federal questions.*

How a state statute should be construed, whether a contract is created thereby, and whether the statute is constitutional under the state constitution, are not, in the absence of any claim that the contract, if any, has been impaired by subsequent state action, Federal questions. *Mobile, Jackson &c. R. R. Co.* v. *Mississippi*, 187.

2. *What amounts to denial of right or immunity under laws of United States.*

The denial by the state court to give to a Federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the United States and presents a Federal question reviewable by this court under § 709, Rev. Stat. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281.

3. *A decision by the highest court of a State sustaining jurisdiction of an action, the cause of which arose outside the State, does not present a Federal question.*

Each State may, subject to restrictions of the Federal Constitution, determine the limit of the jurisdiction of its courts, and the decision of the highest court sustaining jurisdiction, although the cause of action arose outside the border of the State, is final and does not present a Federal question. *Ib.*

4. *Groundless contention that judgment of state court affected Federal immunities does not create Federal question.*

The mere assertion by plaintiff in error that the judgment of the state court deprived him of his property by unequal enforcement of the law in violation of Federal immunities specially set up does not create a Federal question where there is no ground for such a contention, and the state court followed its conception of the rules of pleading as expounded in its previous decisions. *Delmar Jockey Club* v. *Missouri*, 324.

5. *Question of forfeiture of charter of corporation by nonuser or misuser under law of State not Federal.*

Whether a Missouri corporation has forfeited its charter by nonuser and misuser under the law of the State does not involve a Federal question, and a proceeding regularly brought by the Attorney General in the nature of *quo warranto* constitutes due process of law. (*New Orleans Waterworks* v. *Louisiana*, 185 U. S. 336.) *Ib.*

6. *Decision of state court that subordinate municipal body acted within its jurisdiction does not involve Federal question.*

The decision of a state court that a city council properly determined that the board of public works had acted within its jurisdiction under the city charter does not involve a Federal question reviewable by this court. *Londoner* v. *Denver*, 373.

See PRACTICE AND PROCEDURE, 1.

FINDINGS OF FACT.

See PATENTS, 3;
PRACTICE AND PROCEDURE.

FOREIGN VESSELS.

See ADMIRALTY.

FORMS IN BANKRUPTCY.
For index to, *see ante*, p. 584.

FOURTEENTH AMENDMENT.
See JURISDICTION, A 6.

FRANCE.
See ADMIRALTY, 9.

FREIGHT.
See ADMIRALTY, 6, 7, 8, 11;
COMMON CARRIERS.

FRIVOLOUS QUESTIONS.
See PRACTICE AND PROCEDURE, 1.

FULL FAITH AND CREDIT.
See CONSTITUTIONAL LAW, 9, 10, 11, 12.

GENERAL ORDERS IN BANKRUPTCY.
See ante, p. 567.
For special index, *see* p. 466.

GRANTS.

Dedication to public or charitable use.

A dedication to a public or charitable use may exist, even where there is no specific corporate entity to take as grantee. (*Werlein* v. *New Orleans*, 177 U. S. 390.) *Ponce* v. *Roman Catholic Church*, 296.

See STATES, 3.

HABEAS CORPUS.

Scope of inquiry by Federal courts.

The Federal courts cannot, on *habeas corpus*, inquire into the truth of an allegation presenting mixed questions of law and fact in the indictment on which the demand for petitioner's interstate extradition is based; and *quære* whether it may inquire whether such indictment was or was not found in good faith. *Pierce* v. *Creecy*, 387.

HAWAII.
See LOCAL LAW.

HOMESTEADS.
See PUBLIC LANDS, 1, 2.

IMPAIRMENT OF CONTRACT OBLIGATION.
See CONSTITUTIONAL LAW, 3, 4.

INDEMNITY LANDS.

See PUBLIC LANDS, 2.

INDIANS.

1. *Treaty and trust funds; effect on, of statutory limitations as to expenditures of public funds.*

A statutory limitation on expenditures of the public funds does not, in the absence of special provision to that effect, relate to expenditures of treaty and trust funds administered by the government for the Indians. *Quick Bear* v. *Leupp*, 50.

2. *Treaty and trust funds; application to sectarian schools.*

The provisions in the Indian Appropriation Acts of 1895, 1896, 1897, 1898 and 1899 limiting and forbidding contracts for education of Indians in sectarian schools relate only to appropriations of public moneys raised by general taxation from persons of all creeds and faith and gratuitously appropriated and do not relate to the disposition of the tribal and trust funds which belong to the Indians—in this case the Sioux Tribe—themselves, and the officers of the Government will not be enjoined from carrying out contracts with sectarian schools entered into on the petition of Indians and to the pro rata extent that the petitioning Indians are interested in the fund. *Ib.*

3. *Treaty and trust funds; appropriations of, for sectarian schools, not within religion clauses of Constitution.*

A declaration by Congress that the Government shall not make appropriations for sectarian schools does not apply to Indian treaty and trust funds on the ground that such a declaration should be extended thereto under the religion clauses of the Federal Constitution. *Ib.*

INDIAN DEPREDATIONS ACT.

See COURT OF CLAIMS, 1.

INDICTMENT.

See CONSTITUTIONAL LAW, 8.

INFRINGEMENT OF COPYRIGHT.

See COPYRIGHT, 5;
PRACTICE AND PROCEDURE, 3.

INFRINGEMENT OF PATENT.

See PATENTS.

INJUNCTION.

See INDIANS, 2;
PATENTS, 5.

INSPECTION OF VESSELS.

See ADMIRALTY, 5.

INSTRUCTED VERDICT.

See TRIAL, 2.

INSTRUCTIONS TO JURY.

See SAFETY APPLIANCE ACT, 2;
TRIAL, 1, 2.

INSULAR POSSESSIONS.

See COURTS, 3.

INTERLOCUTORY DECREES.

See JURISDICTION, B 1.

INTERSTATE COMMERCE.

State interference; regulating construction of railroad within State.

A decree of a state court requiring a railroad company which does an interstate business to construct its lines within the State in accordance with the provisions of its charter and the directions of the state railroad commission is not an interference with interstate commerce because compliance therewith entails expense or requires the exercise of eminent domain. *Mobile, Jackson &c. R. R. Co.* v. *Mississippi*, 187.

See CONSTITUTIONAL LAW, 1, 2;
SAFETY APPLIANCE ACT.

INVENTION.

See PATENTS.

JUDGMENTS AND DECREES.

Conclusiveness of judgment.

A judgment is conclusive as to all the *media concludendi*, and it cannot be impeached either in or out of the State, by showing that it was based on a mistake of law. *Fauntleroy* v. *Lum*, 230.

See CONSTITUTIONAL LAW, 9, 10, 11, 12;
JURISDICTION, B 1;
RES JUDICATA.

JUDICIAL NOTICE.

See COURTS, 3;
TERRITORIES, 3.

JURISDICTION.

A. OF THIS COURT.

1. *Extent limited by* § 709, *Rev. Stat.*

Although the constitutional grant of power to this court to review judgments of the state courts may be wider than the statutory grant in § 709, Rev. Stat., the jurisdiction of the court extends only to the

cases enumerated in that section. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281.

2. *Direct appeal from Circuit Court—Involution of construction of Federal Constitution.*

Whether or not the indictment on which the demand for petitioner's surrender for interstate extradition is based charges him with crime within the requirements of Article IV, § 2, par. 2, of the Federal Constitution, involves the construction of that instrument, and a direct appeal lies to this court from the Circuit Court under § 5 of the Judiciary Act of 1891. *Pierce* v. *Creecy*, 387.

3. *Direct appeal from Circuit Court; involution of question of jurisdiction.*

It is not open to a defendant who has secured a removal and successfully resisted a motion to remand to raise the question that the removal was improper on a certificate of jurisdiction to this court under § 5 of the Judiciary Act of 1891. *Kansas City N. W. R. R. Co.* v. *Zimmerman*, 336.

4. *To review judgment of state court.*

Even if the state court erred in a proceeding over which it has exclusive jurisdiction such error would not afford a basis for reviewing its judgment in this court. *Delmar Jockey Club* v. *Missouri*, 324.

5. *Right to review judgment of state court where Federal question disposed of on ground of estoppel.*

Where the contention of plaintiff in error that a charter right has been impaired by subsequent state action was disposed of by the state court on the non-Federal ground that if any such right ever existed plaintiff in error was estopped by its own conduct from asserting it, this court cannot review the judgment on the alleged Federal ground of impairment of the contract. *Mobile, Jackson &c. R. R. Co.* v. *Mississippi*, 187.

6. *Under Fourteenth Amendment; exercise by state court of legislative power.*

Where the state court has construed a state statute so as to bring it into harmony with the Federal and state constitutions, nothing in the Fourteenth Amendment gives this court power to review the decision on the ground that the state court exercised legislative power in construing the statute in that manner and thereby violated that Amendment. *Londoner* v. *Denver*, 373.

See FEDERAL QUESTION;
REMOVAL OF CAUSES.

B. OF CIRCUIT COURTS.

1. *Interlocutory nature of decree of District Court, from which appeal will not lie.*

The decree of the District Court in a proceeding for limitation of liability adjudging that the petitioner is entitled to the limitation and declaring that one class of claims cannot be proved against the fund and remitting

all questions concerning other claims for proof prior to final decree, is interlocutory, and an appeal to the Circuit Court does not lie therefrom, but from the subsequent decree adjudicating all the claims filed against the fund. *La Bourgogne*, 95.

2. *Waiver of objection to.*

Where diversity of citizenship exists so that the suit is cognizable in some Circuit Court the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits. *In re Moore*, 209 U. S. 490, overruling anything to the contrary in *Ex parte Wisner*, 203 U. S. 449. *Western Loan Co.* v. *Butte & Boston Min. Co.*, 368.

3. *Waiver of objection to.*

In a State where objection that the court has not jurisdiction of the person must—as in Montana under code § 1820—be taken by special appearance and motion aimed at the jurisdiction, the interposition by defendant of a demurrer going to the merits as well as to the jurisdiction amounts to a waiver of the objection that the particular Circuit Court in which he is sued is without jurisdiction. *Ib.*

See COPYRIGHT, 7;
REMOVAL OF CAUSES.

C. OF BANKRUPTCY COURTS.

See BANKRUPTCY, 1, 2, 4.

D. OF ADMIRALTY COURTS.

See ADMIRALTY, 9.

E. OF FEDERAL COURTS GENERALLY.

See HABEAS CORPUS.

F. OF TERRITORIAL COURTS.

See COURTS;
TERRITORIES, 1, 2.

G. OF STATE COURTS.

See BANKRUPTCY, 2;
FEDERAL QUESTION;
STATES, 2.

H. OF STATES.

See STATES, 4.

KANSAS CITY FLOOD.

See NEGLIGENCE.

LAND GRANTS.
See PUBLIC LANDS.

LAW GOVERNING.
See ADMIRALTY, 1, 10.

LEASEHOLDS.
See BANKRUPTCY, 4, 5.

LEGISLATIVE POWER.
See COURTS, 4;
TERRITORIES, 1.

LEGITIMATION OF CHILDREN.
See LOCAL LAWS (HAWAII);
STATUTES, A 3.

LICENSE TAXES.
See CONSTITUTIONAL LAW, 3, 4.

LIMITATION OF LIABILITY.
See ADMIRALTY;
JURISDICTION, B 1.

LOCAL LAW.

Colorado. Assessment for taxation (see Constitutional Law, 5). *Londoner* v. *Denver*, 373.

France. Right of action for death by wrongful act at sea (see Admiralty, 9). *La Bourgogne*, 95.

Hawaii. Application of act of May 24, 1866, *legitimating children.* The courts of Hawaii having prior to the annexation construed the statute of May 24, 1866, legitimatizing children born out of wedlock by the subsequent marriage of the parents as not applicable to the offspring of adulterous intercourse, and the organizing act of the Hawaii territory having continued the laws of Hawaii not inconsistent with the Constitution or laws of the United States, this court adopts the construction of the Hawaiian statute given by the courts of that country. *Keaoha* v. *Castle*, 149.

Indiana. Constitutionality of Barrett paving law. The Barrett paving law of Indiana, the constitutionality of which was sustained by this court as to abutting property owners in *Shæffer* v. *Werling*, 188 U. S. 516; *Hibben* v. *Smith*, 191 U. S. 310, sustained also as to back lying property owners following *Voris* v. *Pittsburg Plate Glass Co.*, 163 Indiana, 599. *Cleveland & St. Louis Ry.* v. *Porter*, 177.

Montana. Code, § 1820. Objection to jurisdiction of person (see Jurisdiction, B 3). *Western Loan Co.* v. *Butte & Boston Min. Co.*, 368.

Porto Rico. Act of legislative assembly of March 10, 1904, relative to trial and adjudication of property claimed by Roman Catholic Church (see Courts, 4). *Ponce* v. *Roman Catholic Church*, 296.

Texas. Act of April 17, 1905, c. 141, imposing tax upon railroad companies (see Constitutional Law, 1). *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 217.

Vermont. Service of process on corporation. Under §§ 1109, 3948, 3949, Vermont Statutes, the service of process on a division superintendent in charge of the property attached belonging to a defendant railroad corporation *held* to be sufficient. *Boston & Maine R. R.* v. *Gokey*, 155.

MAPS.

See COPYRIGHTS, 9.

MARITIME LAW.

See ADMIRALTY.

MARRIAGE.

See LOCAL LAW (HAWAII);
STATUTES, A 3.

MASTER AND SERVANT.

See SAFETY APPLIANCE ACT, 3.

MINES AND MINING.

See PUBLIC LANDS, 3, 4, 5.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW, 3, 4, 6, 7;
STATES, 3.

MUNICIPAL IMPROVEMENTS.

See CONSTITUTIONAL LAW, 6.

NEGLIGENCE.

Act of God—Kansas City flood of 1903—*Liability of railroad for loss of cattle.* The Kansas City flood of 1903 was so unexpected and of such an unprecedented character that a railroad company was not, under the circumstances of this case, chargeable with negligence in sending cattle trains *via* Kansas City or for failing to move the cattle from the stock yards before the climax of the flood. *Empire State Cattle Co.* v. *Atchison &c. Ry. Co.*, 1.

See ADMIRALTY, 4;
SAFETY APPLIANCE ACT, 2.

NEW TRIAL.

See COURT OF CLAIMS.

NON-RESIDENTS.

See BANKRUPTCY, 2, 3.

NON-USER OF PATENT.

See PATENTS, 5.

NOTICE.

See CONSTITUTIONAL LAW, 5, 6.

PATENTS.

1. *Range of equivalents dependent upon degree of invention.*

The previous decisions of this court are not to be construed as holding that only pioneer patents are entitled to invoke the doctrine of equivalents, but that the range of equivalents depends upon the degree of invention; and infringement of a patent not primary is therefore not averted merely because defendant's machine may be differentiated. *Paper Bag Patent Case*, 405.

2. *Invention; measurement of.*

Under § 4888, Rev. Stat., the claims measure the invention, and while the inventor must describe the best mode of applying the principle of his invention the description does not necessarily measure the invention. *Ib.*

3. *Infringement; force of findings of lower courts.*

Where both of the lower courts find that complainant did with his machine what had never been done before and that defendant's machine infringed, this court will not disturb those findings unless they appear to be clearly wrong. *Ib.*

4. *Property in.*

Patents are property and entitled to the same rights and sanctions as other property. *Ib.*

5. *Right of exclusive use; effect of non-user.*

An inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute, and this right is not dependent on his using the device or affected by his non-use thereof, and, except in a case where the public interest is involved, the remedy of injunction to prevent infringement of his patent will not be denied merely on the ground of non-user of the invention. *Ib.*

PLEADING.

See JURISDICTION, B 2, 3;
RES JUDICATA.

PORTO RICO.

See COURTS, 4;
TERRITORIES;
TITLE.

POWER OF CONGRESS.

See ACTIONS;
BANKRUPTCY, 1;
TERRITORIES, 1, 2.

PRACTICE AND PROCEDURE.

1. *Dismissal where Federal question frivolous.*

Where the asserted Federal questions are so plainly devoid of merit as not to constitute a basis for the writ of error the writ will be dismissed. *Delmar Jockey Club* v. *Missouri*, 324.

2. *Following findings of fact concurred in by lower courts.*

This court will not disturb the concurrent findings of fact of both the courts below unless so unwarranted by the evidence as to be clearly erroneous, and a finding that the rate of speed of a vessel on the high seas during a fog was immoderate under the international rules, will not be disturbed because based on the conceptions of immoderate speed prevailing in the United States courts and not on those prevailing in the courts of the country to which the vessel belonged. *La Bourgogne*, 95.

3. *Following findings of fact concurred in by lower courts.*

Both the courts below having found that there was no satisfactory proof to support complainants' claim against defendants for contributory infringement by inducing others to violate contracts of conditional sale this court applies the usual rule and will not disturb such findings. *Scribner* v. *Straus*, 352.

4. *Limitation of rule as to conformity by Federal courts with rules of state courts.*

While, under § 194, Rev. Stat., practice in civil causes other than those in equity or admiralty in United States courts must conform to the state practice, where the jurisdiction of the Federal courts is involved this court alone is the ultimate arbiter of questions arising in regard thereto. *Western Loan Co.* v. *Butte & Boston Min. Co.*, 368.

5. *Circuit Court need not alter rule so as to conform to altered state practice.*

Where under §§ 914, 918, Rev. Stat., the Circuit Court has adopted a rule of practice as to form and service of process in conformity with the state practice, it is not bound to alter the rule so as to conform to subsequent alterations made in the state practice. *Boston & Maine R. R.* v. *Gokey*, 155.

6. *On refusal of Circuit Court of Appeals to decide a question.*

Where the Circuit Court of Appeals has refused to decide a question, this court may either remand with instructions, or it may render such judg-

ment as the Circuit Court of Appeals should have rendered, and where the new trial would, as in this case, involve a hardship on the successful party, it will adopt the latter course. *Ib.*

See PATENTS, 3.

PRIVITY.

See ADMIRALTY;
CONSTITUTIONAL LAW, 10.

PROCESS.

See BANKRUPTCY, 2, 3;
LOCAL LAW (VT.);
PRACTICE AND PROCEDURE, 5.

PUBLIC IMPROVEMENT.

See STATES, 1.

PUBLIC LANDS.

1. *Homestead entries—Right of homesteader to embrace in claim contiguous quarter-sections.*

A homesteader who initiates a right to either surveyed or unsurveyed land and complies with the legal requirements may, when he enters the land, embrace in his claim land in contiguous quarter-sections if he does not exceed the quantity allowed by law and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice as to the extent of his claim. (*Ferguson* v. *McLaughlin*, 96 U. S. 174, distinguished.) *St. Paul, Minn. & Man. Ry. Co.* v. *Donohue*, 21.

2. *Homestead entries; right of railway, under act of August 5, 1892, in respect of.*

Under the land grant act of August 5, 1892, 27 Stat. 390, chap. 382, the right of the railway company to select indemnity lands, non-mineral and not reserved and to which no adverse right or claim had attached or been initiated, does not include land which had been entered in good faith by a homesteader at the time of the supplementary selection, and on a relinquishment being properly filed by the homesteader the land becomes open to settlement and the railway company is not entitled to the land under a selection filed prior to such relinquishment. *Ib.*

3. *Mining locations; reversion to public domain.*

Ground embraced in a mining location may become part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor if, at the time when the second location is made, there has been an actual abandonment of the claim by the first locator. *Farrell* v. *Lockhart*, 142.

4. *Mining locations; right of subsequent locator to test lawfulness of prior location.*

Lavignino v. *Uhlig*, 198 U. S. 443, qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim. *Ib.*

5. *Mining locations; burden of proving invalidity of former location.*

Where three mining locations cover the same ground and the senior locator after forfeiture does not adverse, the burden of proof is on the third locator to establish the invalidity of the second location. *Ib.*

QUO WARRANTO.

See FEDERAL QUESTION, 5.

RAILROADS.

See COMMON CARRIERS;
CONSTITUTIONAL LAW, 1, 3, 4, 13;
INTERSTATE COMMERCE;
NEGLIGENCE;
PUBLIC LANDS, 2;
SAFETY APPLIANCE ACT;
STATES, 2.

RAILROAD COMMISSIONS.

See STATES, 2.

RANGE OF EQUIVALENTS.

See PATENTS, 1.

RELIGION.

See INDIANS, 3.

RELIGIOUS USES.

See TITLE.

REMEDIES.

See ACTIONS;
ADMIRALTY, 2;
COPYRIGHTS, 9.

REMOVAL OF CAUSES.

One procuring removal to Circuit Court precluded from disputing propriety thereof on certificate of jurisdiction to Supreme Court.

Where the ground on which the jurisdiction of the Circuit Court was denied did not go to its jurisdiction as a Federal court as such, but its jurisdiction was denied on the ground that the state court where the proceedings started had no jurisdiction, a direct appeal on the jurisdictional

question will not lie to this court under § 5 of the Judiciary Act of 1891. *Kansas City N. W. R. R. Co.* v. *Zimmerman*, 336.

See JURISDICTION, A 3.

RES JUDICATA.

Ex parte proceeding construing statute as.

An *ex parte* and uncontested proceeding construing a statute and directing payments in accordance with such construction cannot be pleaded as *res judicata* in a subsequent contested proceeding. *Keaoha* v. *Castle*, 149.

ROMAN CATHOLIC CHURCH.

See COURTS;
TITLE;
TREATIES.

RULES OF COURT.

See APPENDIX, pp. 441–602;
SPECIAL INDEX, p. 443.

SAFETY APPLIANCE ACT.

1. *Draw bars; variation of.*

Under the Safety Appliance Act of 1893, 27 Stat. 531, the center of the draw bars of freight cars used on standard gauges shall be, when the cars are empty, thirty-four and a half inches above the rails, and the statute permits when a car is loaded or partly loaded a maximum variation in the height downwards of three inches. The statute does not require that the variation shall be proportioned to the load or that a fully loaded car shall exhaust the entire variation. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281.

2. *Same.*

An instruction that under the statute the draw bars of fully loaded freight cars must be of a uniform height of thirty-one and a half inches and that a variation between two loaded cars constitutes negligence under the statute, is prejudicial error. *Ib.*

3. *Effect to supplant common-law rule as to duty of master to furnish safe appliances.*

The Safety Appliance Act of March 2, 1893, 27 Stat. 531, supplants the common-law rule of reasonable care on the part of the employer as to providing the appliances defined and specified therein, and imposes upon interstate carriers an absolute duty; and the common-law rule of reasonable care is not a defense where in point of fact the cars used were not equipped with appliances complying with the standards established by the act. *Ib.*

See CONSTITUTIONAL LAW, 13.

SECTARIAN SCHOOLS.
See INDIANS.

SERVICE OF PROCESS.
See PRACTICE AND PROCEDURE, 5.

SIOUX INDIANS.
See INDIANS.

SPAIN.
See TREATIES.

SPANISH LAW.
See COURTS, 3.

SPECIAL LAWS.
See STATUTES, A 2;
TERRITORIES, 4.

STATES.

1. *Power to create special taxing districts and classify property-owners for purposes of taxation.*

It is within the legislative power of a State to create special taxing districts and to charge the cost of local improvements, in whole or in part, upon the property in said district either according to valuation or area, and the legislature may also classify the owners of property abutting on the improvement made and those whose property lies a certain distance back of it, and if all property-owners have an equal opportunity to be heard when the assessment is made the owners of the "back lying" property are not deprived of their property without due process of law or denied the equal protection of the laws. *Cleveland & St. Louis Ry.* v. *Porter*, 177.

2. *Power to regulate railroads of own creation.*

The creation of a board of railroad commissioners and the extent of its powers; what the route of railroad companies created by the State may be; and whether parallel and competing lines may consolidate, are all matters which a State may regulate by its statutes and the state courts are the absolute interpreters of such statutes. *Mobile, Jackson &c. R. R. Co.* v. *Mississippi*, 187.

3. *Power to contract away power; exemption from taxation.*

While a State, or a municipal corporation acting under the authority of the State, may deprive itself by contract of its lawful power to impose certain taxes or license fees, such deprivation only follows the use of clear and unambiguous terms; any doubt in the interpretation of the alleged contract is fatal to the exemption. *St. Louis* v. *United Railways Co.*, 266.

4. *Jurisdiction over property within borders.*

Every State has exclusive jurisdiction over property within its borders, and where testator has property in more than one State each State has jurisdiction over the property within its limits and can, in its own courts, provide for the disposition thereof in conformity with its laws. *Brown* v. *Fletcher's Estate*, 82.

See CONSTITUTIONAL LAW, 5, 6, 7; COURTS; FEDERAL QUESTIONS, 3; INTERSTATE COMMERCE.

STATUTES.

A. CONSTRUCTION OF.

1. *Uniformity of construction of Federal statutes.*

It is only by reviewing in this court the construction given by the state courts to Federal statutes that a uniform construction of such statutes throughout all the States can be secured. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 281.

2. *Special laws; what constitute.*

Because it gives a certain corporation a right to maintain an action, a law cannot be regarded as a special law granting an exclusive privilege where it confers equal rights upon the people and the municipalities affected by the right and interested in matters affected. *Ponce* v. *Roman Catholic Church*, 296.

3. *Effect on construction of statute of Territory of interpretation given by local court.*

While in different jurisdictions statutes legitimatizing children born out of wedlock by the subsequent marriage of the parents have been differently construed as to the application thereof to the offspring of adulterous intercourse, in construing such a statute of a Territory this court will lean towards the interpretation of the local court. *Keaoha* v. *Castle*, 149.

4. *Construction as part of law.*

The construction of a statute affixed thereto for many years before territory is acquired by the United States should be considered as written into the law itself. *Ib.*

See COPYRIGHTS, 1, 4; COURTS, 2; FEDERAL QUESTION; LOCAL LAW (HAWAII); SAFETY APPLIANCE ACT; STATES, 2.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STREET RAILWAYS.

See CONSTITUTIONAL LAW, 3, 4.

SUBSIDIES.

See ADMIRALTY, 8.

TAXES AND TAXATION.

See CONSTITUTIONAL LAW, 1, 2, 3, 4, 5;
LOCAL LAW (IND.);
STATES, 1.

TERRITORIES.

1. *Porto Rico; power of legislative assembly to legislate as to jurisdiction and procedure of courts.*

Under the organic act of Porto Rico, March 2, 1901, 31 Stat. 77, the legislative assembly has express authority to legislate regarding the jurisdiction and procedure of its courts, and it has been usual for Congress to give such power to the legislatures of the Territories. *Ponce* v. *Roman Catholic Church*, 296.

2. *Constitutionality of delegation of such power by Congress.*

Such legislation was not contrary to the Constitution and was in conformity with the power conferred by Congress upon the legislative assembly to regulate the jurisdiction of the courts. *Ib.*

3. *Porto Rico; status as American territory.*

Since April 11, 1899, Porto Rico has been *de facto* and *de jure* American territory, and its history and its legal and political institutions up to the time of its annexation will be recognized by this court. *Ib.*

4. *Application of prohibition against enactment of special laws.*

The general prohibition in the act of July 30, 1886, 24 Stat. 170, against territorial legislatures passing special laws does not apply where specific permission is granted by the organic act of a particular Territory. *Ib.*

TITLE.

Effect on title of Roman Catholic Church in Porto Rico to church property, of donations by municipality.

The fact that a municipality in Porto Rico furnished some of the funds for building or repairing the churches cannot affect the title of the Roman Catholic Church, to whom such funds were thus irrevocably donated and by whom these temples were erected and dedicated to religious uses. *Ponce* v. *Roman Catholic Church*, 296.

TREATIES.

Treaty of Paris with Spain of 1898; effect on church property in Porto Rico.

The Roman Catholic Church has been recognized as possessing legal personality by the treaty of Paris with Spain of 1898 and its property rights solemnly safeguarded. In so doing the treaty followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession. The

juristic personality of the Roman Catholic Church and its ownership of property was formally recognized by the concordats between Spain and the papacy and by the Spanish laws from the beginning of settlements in the Indies. Such recognition has also been accorded the church by all systems of European law from the fourth century of the Christian era. *Ponce* v. *Roman Catholic Church*, 296.

See INDIANS.

TRIAL.

1. *Effect of request by each party for instructed verdict on right to go to jury.* The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom. (*Beuttell* v. *Magone*, 157 U. S. 154, distinguished.) *Empire State Cattle Co.* v. *Atchison &c. Ry. Co.*, 1.

2. *Same.* Although a peremptory instruction of the trial court cannot be sustained on the ground that both parties having asked a peremptory instruction the case was taken from the jury notwithstanding special instructions had been asked by the defeated party, the verdict will be sustained if the evidence was of such a conclusive character that it would have been the duty of the court to set aside the verdict had it been for the other party. *Ib.*

UNITED STATES.

See COURT OF CLAIMS.

USES AND TRUSTS.

See GRANTS.

VENDOR AND VENDEE.

See COPYRIGHTS, 5, 6.

VERDICT.

See TRIAL.

VESSELS.

See ADMIRALTY.

WAIVER.

See JURISDICTION, B 2, 3.

WRIT AND PROCESS.

See BANKRUPTCY, 2, 3.