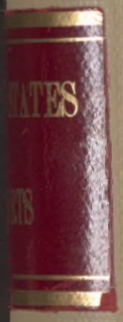

UNITED STATES REPORTS

VOLUME 219

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1910

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1911

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE,[2] Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
HORACE HARMON LURTON, Associate Justice.
CHARLES EVANS HUGHES, Associate Justice.
WILLIS VAN DeVANTER,[3] Associate Justice.
JOSEPH RUCKER LAMAR,[4] Associate Justice.

GEORGE WOODWARD WICKERSHAM, Attorney General.
FREDERICK W. LEHMANN,[5] 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 page v, *post*.

[2] Chief Jistice Fuller (see 218 U. S. v and *post*, p. vii) died July 4, 1910, at his home in Sorrento, Maine, during vacation. He was buried in Chicago, Illinois. On December 12, 1910, President Taft appointed Edward Douglass White, Associate Justice of this court, Chief Justice of the United States, to succeed Mr. Chief Justice Fuller. He was confirmed by the Senate on the same day and on December 19 took the oath as Chief Justice.

[3] Of Wyoming: Appointed December 12, by President Taft, to succeed Mr. Justice Moody, resigned (see 218 U. S. v). He was

confirmed by the Senate on December 15, 1910, and qualified and took his seat upon the bench on January 3, 1911. He took no part in any of the decisions reported in this volume in cases argued or submitted prior to January 3, 1911.

[4] Of Georgia: Appointed December 12, 1910, by President Taft, to succeed MR. JUSTICE WHITE appointed to be Chief Justice of the United States. He was confirmed by Senate December 15, 1910, and took his seat upon the bench January 3, 1911. He took no part in any of the decisions reported in this volume in cases argued or submitted prior to January 3, 1911.

[5] Of Missouri: Appointed by President Taft December 12, 1910, to succeed Mr. Solicitor General Bowers who died September 9, 1910. His commission was filed with the court December 19, 1910.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, JANUARY 9, 1911.

ORDER: There having been a Chief Justice and three Associate Justices of this court appointed since the last allotment of the Chief Justice and Associate Justices among the circuits.

Therefore, in pursuance of Section 606 of the Revised Statutes, it is now here ordered by the court that the following allotment of the Chief Justice and Associate Justices among the circuits be, and the same is hereby, made, and that such allotment be entered of record, viz.:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Charles E. Hughes, Associate Justice.

For the Third Circuit, Horace H. Lurton, Associate Justice.

For the Fourth Circuit, Edward D. White, Chief Justice.

For the Fifth Circuit, Joseph R. Lamar, Associate Justice.

For the Sixth Circuit, John M. Harlan, Associate Justice.

For the Seventh Circuit, William R. Day, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

PROCEEDINGS ON THE DEATH OF MR. CHIEF JUSTICE FULLER.

MELVILLE WESTON FULLER, Chief Justice of the United States, died at his summer residence in Sorrento, Maine, on July 4, 1910, while the court was in vacation. He was buried in Chicago, Illinois.

A meeting of the Bar of the Supreme Court of the United States was held in the Court Room on Saturday, December 10, 1910.

On motion of Mr. A. S. Worthington, Mr. Richard Olney of Massachusetts, was elected Chairman and the Clerk of the Court acted as Secretary.

Addresses were made by Mr. Olney, Mr. Stephen S. Gregory, Mr. Elihu Root, Mr. Lee S. Overman, Mr. Charles E. Littlefield, Mr. George E. Price, Mr. Marcus Pollasky, Mr. A. J. Montague, Mr. A. S. Worthington, Mr. William L. Marbury, Mr. Henry A. M. Smith and Mr. John S. Miller.

A committee consisting of Mr. S. S. Gregory, Mr. Alton B. Parker, Mr. C. E. Littlefield, Mr. William L. Marbury, Mr. A. S. Worthington, Mr. George E. Price, Mr. A. J. Montague, Mr. Lee S. Overman, Mr. Henry A. M. Smith, Mr. Elihu Root, Mr. P. C. Knox, Mr. John W. Griggs, Mr. John W. Noble, Mr. J. M. Dickinson, Mr. U. M. Rose, Mr. John S. Miller, Mr. Frank P. Flint, Mr. Alexander Pope Humphrey, Mr. Henry M. Teller and Mr. Frank B. Kellogg, prepared and presented resolutions which were adopted and the Attorney General was requested to present them to the court.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 9, 1911.

Present: THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY, MR. JUSTICE LURTON, MR. JUSTICE HUGHES, MR. JUSTICE VAN DEVANTER and MR. JUSTICE LAMAR.

Mr. Attorney General Wickersham presented to the court the following resolutions which had been adopted:

Resolved, That the members of the Bar of the Supreme Court desire to express their profound regret at the death of MELVILLE WESTON FULLER, eighth Chief Justice of the United States, and to record their high appreciation of his life and character and of his conspicuous and faithful service to his country.

Born in the State of Maine, he went to Chicago at the age of twenty-three, when that great city was in its infancy, and there entered upon his long and distinguished professional career, which culminated in his elevation to the most exalted judicial station in our government.

He secured the advantages of an academic and classical education at Bowdoin College, and always retained the habits and tastes of the student and scholar.

He was a man of the most extensive and varied reading in the profession, in governmental and political discussion and in general literature.

He rapidly achieved a commanding position at the then exceptionally brilliant bar of the city of his adoption, and for thirty-two years carried on an extended and diversified practice in the courts of his State; nor did he infrequently appear before the great tribunal over which he afterwards, and for twenty-two years, presided with such marked ability and distinction.

He was a man of singular beauty and purity of character.

While he was at the bar no one harbored a suspicion that the exigency of forensic controversy, in which he was almost constantly engaged, could ever tempt him to aught that was unfair or unworthy of the highest ideals of a noble and honorable profession.

As Chief Justice it is enough to say that with conspicuous fidelity he fully and consistently maintained the best traditions of that high office. He took a deep interest in the efforts to secure peace between nations by international arbitration, and was appointed by our government to membership in the permanent court established in 1899 by the First Peace Conference and served in that capacity.

His character was marked by a gentle courtesy and consideration which constantly illuminated and attended upon the discharge of his important public duties, always marked his relations with the bar, and earned that popular confidence which goes out to him whom the people believe to be a merciful and considerate as well as a just and impartial judge.

All this he was; and, endowed by nature with talents not inferior to those of his predecessors, possessed of attainments, training and experience adequate to the exacting requirements of his great office, he filled it at all times in such a manner as to command the admiration and respect of the bar and the grateful appreciation of his countrymen.

On the morning of July 4 last, at his beautiful summer home, on the soil of the State in which he was born, and to which he remained always deeply attached, his long, useful and honorable life ended; and when the sad announcement was made we who had practised in the great tribunal where he so long presided felt a deep sense of personal loss and personal bereavement that he had gone from us forever.

Resolved, also, That the Attorney General be asked to present these resolutions to the court and to request that they be inscribed upon its permanent records.

And that the Chairman of this meeting be requested to transmit a copy of the resolutions to the family of the late Chief Justice and an expression of our sincere sympathy with them in the great and irreparable loss which they have sustained.

THE ATTORNEY GENERAL then said:

On the last day of the last term of this court CHIEF JUSTICE FULLER, responding to resolutions of the bar and observations in commemoration of Mr. Justice Brewer, spoke sadly of the procession of his brethren who had passed before him to their reward: "They were all men of marked ability, of untiring industry, and of intense devotion to duty, but they were not alike; they differed, as one star differeth from another star in glory."

A few days later, and he too joined that procession, leaving but one survivor of that body of great judges—Miller, Field, Bradley, Harlan, Matthews, Gray, Blatchford and Lamar—over which he was called to preside when he succeeded Chief Justice Waite in October, 1888.

"The oldest members of this court," said Mr. Justice Miller in speaking of Chief Justice Waite, "know of no one who was better fitted to discharge the administrative duties of the office of its Chief Justice, or who ever did so with more acceptability to his associates and to the public at large." [1]

Mr. Waite's successor was to fully earn a like encomium. He was peculiarly well fitted to the discharge of those duties. As the presiding officer and spokesman of the court, during his long incumbency, his gentle, dignified bearing and kindly considerate manner won for him the

---

[1] 126 U. S. Appx.

sympathetic appreciation of the bar, and the respect and affection of his associates.

Campbell wrote of Lord Eldon, "Among his qualifications for the judgment seat must be reckoned his fine temper and delightful manners. . . ."

These attributes in a judge are entirely consistent with the possession of a discriminating intellect, clear perceptions and decisiveness of character. They tend to the preservation of that relation of cordial respect which must exist between bench and bar in order that the court may get from the bar the advantage of clear, temperate, candid statement, and the bar may feel assured of patient hearing and thorough comprehension by the court.

The life of a Justice of this court is one of unremitting toil. The creation of the Circuit Courts of Appeals in 1891 afforded it but temporary relief. Only by the most arduous labor has the court been able to keep measurably abreast of the business which the expanding exercise of Federal power has brought upon its dockets. The period of CHIEF JUSTICE FULLER'S incumbency was one of unprecedented national growth. Even the twenty years following the Civil War did not give rise to the great number and variety of new questions which have been pressed upon the court since the year 1888.

The attempts to solve by legislation economic questions resulting from our industrial growth, of which the income-tax law, the bankruptcy law of 1898, the acts concerning carriers in interstate commerce, the law against unlawful trusts and monopolies, the meat-inspection laws, the food and drugs act, the tea-inspection law and the oleomargarine laws, the Chinese-exclusion acts and the other immigration and naturalization laws are illustrative, have required this court to construe and apply with patient study and statesmanlike comprehension the principles of the Federal Constitution, in the effort to preserve inviolate the dual nature of our governmental system; not hesitating to assert the paramountcy of the National Gov-

ernment over those subjects where the Constitution declares it to be supreme, nor to check the usurpation by Federal authority of those powers which, not being expressly or by implication delegated to the General Government, are reserved "to the States respectively or to the people."

The war with Spain made us a world power and brought to the decision of this court novel questions as to the relations of our Government to territory acquired by conquest or purchase. In dealing with all of these great questions CHIEF JUSTICE FULLER played no inconsiderable rôle. During his twenty-two years of service he wrote eight hundred and twenty-nine opinions, of which but twenty-nine expressed the views of a minority of the court. He wrote the opinion of the court in the *Behring Sea cases* (*In re Cooper*, 143 U. S. 472), in the first case arising under the Sherman anti-trust law (*United States* v. *Knight*, 156 U. S. 1), and in one of the latest, the so-called *Danbury Hatters' case* (*Loewe* v. *Lawlor*, 208 U. S. 274); in the income-tax cases (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429; 158 U. S. 601); in *Kansas* v. *Colorado* (185 U. S. 125); in the case arising under the first safety-appliance law (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1), and in the contempt proceedings against the sheriff of Chattanooga, Tenn., and his deputies (*United States* v. *Shipp*, 214 U. S. 386).

He wrote dissenting opinions in the case of *Mormon Church* v. *United States* (136 U. S. 1), where he denied the power of Congress to enact the law of February 19, 1887, repealing the charter of the Mormon Church and directing legal proceedings to be taken to wind up its affairs and dispose of its property; in the *Chinese Exclusion case* (*Fong Yue Ting* v. *United States*, 149 U. S. 698), and in the case of the *United States* v. *Wong Kim Ark* (169 U. S. 649), where the court held that a child of Chinese parents born in the United States became at birth a citizen of the United States; in the *Lottery case* (188 U. S. 321); in the

Insular cases (*Dooley* v. *United States*, 183 U. S. 151); and he concurred in the dissenting opinion of Mr. Justice Lamar in *In re Neagle* (135 U. S. 1), the case in which it was held that petitioner, a deputy United States marshal, was justified in killing an assailant of a Justice of this court whom he had been detailed to protect from violence; in the dissenting opinion of Mr. Justice White, in *The Northern Securities case* (193 U. S. 197); and in the dissenting opinion of Mr. Justice Brewer, in *Hale* v. *Henkel* (201 U. S. 43).

It is difficult to select from the great volume of CHIEF JUSTICE FULLER'S contributions to the work of this court those of his opinions which best illustrate the extent of his learning and the nature of his acumen, without unduly extending these remarks.

CHIEF JUSTICE FULLER'S opinions are all characterized by a simple lucidity of statement and a directness of reasoning free from subtlety. His mind naturally tended to resist the broadening application of Federal control over subjects which until recent years had been left entirely to State regulation.

"In my opinion," he wrote, in the *Mormon Church case* (136 U. S. 1, 67), "Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, expressed or implied in that instrument. . . . I regard it of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated and not inherent, and is therefore limited. I agree that the power to make needful rules and regulations for the Territories necessarily comprehends the power to suppress crime; and it is immaterial even though that crime assumes the form of a religious belief or creed. Congress has the power to extirpate polygamy in any of the Territories by the enactment of a criminal code di-

rected to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals or corporations, without office found, because they may have been guilty of criminal practices.

"The doctrine of *cy-près* is one of construction and not of administration. By it a fund devoted to a particular charity is applied to a cognate purpose, and if the purpose for which this property was accumulated was such as has been depicted it cannot be brought within the rule of application to a purpose as nearly as possible resembling that denounced. Nor is there here any counterpart in congressional power to the exercise of the royal prerogative in the disposition of a charity. If this property was accumulated for purposes declared illegal, that does not justify its arbitrary disposition by judicial legislation. In my judgment, its diversion under this act of Congress is in contravention of specific limitations in the Constitution, unauthorized, expressly or by implication, by any of its provisions, and in disregard of the fundamental principle that the legislative power of the United States as exercised by the agents of the people of this republic is delegated and not inherent."

Chief Justice Fuller wrote the opinions of the court in deciding a number of controversies between States of the Union (*Kansas* v. *Colorado*, 185 U. S. 125; *Virginia* v. *West Virginia*, 206 U. S. 290; *Louisiana* v. *Mississippi*, 202 U. S. 1), and in the prize cases which resulted from the Spanish War (*The Carlos F. Roses*, 177 U. S. 655; *The Pedro*, 175 U. S. 354; *The Benito Estenger*, 176 U. S. 558; the *Manila Prize Cases*, 188 U. S. 254; the *Infanta Maria Teresa*, 188 U. S. 283). In the case of *Ponce* v. *Roman Catholic Church* (210 U. S. 296), by an interesting historical review, he sustained the proposition that the Roman Catholic Church in Porto Rico was a juridical person, whose property was entitled to protection under the

terms of the treaty between the United States and Spain.

The Talmud compares the study of the law to a huge heap of dust that is to be cleared away. "The foolish man says, 'It is impossible that I should be able to remove this immense heap. I will not attempt it.' But the wise man says, 'I will remove a little to-day, some more to-morrow, and more the day after, and thus in time I shall have removed it all.' " It was in this spirit that CHIEF JUSTICE FULLER toiled during the years that he presided over this court. Much of the work of all courts is of but transitory importance, save in so far as it keeps ever burning the sacred lamp of justice to lighten the footsteps of men. But the labors of this tribunal are essential to the preservation of the liberties of a free people. In the largest proportion of causes submitted to its judgment every decision becomes a page of history, and may become part of a rampart against anarchy. To this court men look for the maintenance of those rights which our forefathers wrung from a reluctant monarch at Runnymede eight hundred years ago, which are now embodied in the Constitution of the United States, and which are as essential to the protection of the citizen against the tyranny of a hydra-headed tyrant of the future as they were against the monarchs of the past.

The labors of the eighth Chief Justice are over, and his work in this court is submitted to the judgment of men. As he said of Justice Brewer, "he died suddenly, but not the unprepared death from which we pray to be delivered," and having finished his course in faith he doth now rest from his labors.

THE CHIEF JUSTICE responded:

MR. ATTORNEY GENERAL: The resolutions which you present are consoling, since they show how poignantly our brethren of the bar share with us the sorrow caused by the death of our cherished and venerated Chief Justice.

When the shadow which the bereavement resulting from his loss casts upon the path of duty which lies before us is considered the resolutions are additionally consoling, since they strengthen our conviction that, whatever may be our infirmities, we may always rely upon the generous judgment of our brethren of the bar if only we bring to the discharge of our duties the singleness of purpose which ever characterized the judicial labors of our late Chief Justice.

Those labors find an enduring memorial in the reported decisions of the court rendered during the long period of his service. Their potency, whether in enforcing and protecting individual right or in perpetuating representative government by upholding our constitutional institutions, has passed beyond the influence of praise or blame. They have become the heritage of his countrymen, for whose good he labored with untiring devotion.

The darkness of the valley of the shadow of death yet so obscures vision as to render it impossible for me to attempt now to fix the result of the labors of the Chief Justice or to define with accuracy the scope of the blessings to his countrymen and to mankind which have arisen from his work. I therefore do not attempt to supplement the brief statement on that subject which you, Mr. Attorney General, have so eloquently made. So, also, I shall forbear to comment upon the wide attainments of the late Chief Justice, his engaging literary fancy, his great familiarity with precedents, and his grasp of fundamental principles. I leave these special attributes, as well as the wider considerations which would be required to be taken into view in order to symmetrically analyze the judicial work of the late Chief Justice, not only because some other occasion would be more appropriate and some more masterful hand than mine be required to do justice to those subjects, but also because my purpose now is only briefly to refer to some of the more

endearing and admirable personal traits of the Chief Justice which were manifested to those associated with him in judicial labor, and at the same time to mark the attributes from which those traits were derived and sustained.

Briefly, those qualities were his untiring attention to his judicial duties and the dedication which he made to the efficient and wise performance of those duties of every intellectual and moral power which he possessed; his love of justice for justice's sake, his kindness, his gentleness, associated, however, with a courage which gave him always the power fearlessly to do what he thought was right, without fear or favor. The source whence these endearing and noble qualities were derived was not far to seek. It was faith in the power of good over evil; faith in the capacity of his fellow-men for self-government; faith in the wisdom of the fathers of our institutions; faith, unshaken faith, in the efficiency of the system of constitutional government which they established and its adequacy to protect the rights and liberties of the people. And, above all, there was an abounding faith in Divine Providence, the faith of a Christian, which dominated his being and welded all his faculties into an harmonious whole, causing his nature to be resonant with the melody of hope and charity, which made him what he was—a simple, kindly, generous, true, brave, and devoted public servant, treading with unswerving step the path of duty, until the tender voice of the All-Wise and Merciful Father called him from labor to rest, from solicitude to peace, and to his exceeding and enduring reward.

Mr. Attorney General, the resolutions of our brethren of the bar will be made a part of the records of the court. In making this order the thought comes unbidden to the mind that if there be in the future, by either the bench or the bar, a failure to discharge duty because of the want of an honest effort to do so, the resolutions will become the test of our moral insufficiency and be a relentless in-

strument for our condemnation. But the shadow created by these misgivings is at once dispelled by our conviction that although the Chief Justice has gone before, yet doth he abide with us by his precept and example, which I cannot refrain from hoping will be a spiritual beacon leading both bench and bar to a perfect dedication of all their powers to the complete discharge of their whole duty. Ah! In the luminosity afforded by that example and precept, and with the benign vision given by that faith which is the proof of things unseen, may the hope not be indulged in that the result of such a consecration to duty will enable us to behold a continued righteous administration of justice, a preservation of our constitutional government, the fructification of all the activities of our vast country for the benefit of the whole people, the abiding of tranquility and happiness in all the homes of all our land, and the continued enjoyment by all our countrymen of individual liberty restrained from license and safeguarded from oppression.

The resolutions of the bar and the remarks of the Attorney General will be spread upon the minutes, and any other tributes that may be received will be placed upon the files.

THE FOLLOWING TRIBUTES IN MEMORY OF MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, HAVE BEEN RECEIVED AND PLACED ON FILE:

Tribute from the Supreme Court of Brazil.

Embaixada do Brazil,
Washington, *July 9th, 1910.*

Sir: In accordance with telegraphic instructions just received from Chief Justice Pindahyba de Mattos, I have the honor to inform you that the Supreme Court of Brazil, in its sitting of to-day, by proposal of Mr. Justice Amaxo

Cavalcanti, unanimously approved, has resolved to insert in the record of proceedings the expression of its deep grief for the demise of the eminent jurist, CHIEF JUSTICE FULLER.

I avail myself of this opportunity to renew to you, Sir, the assurances of my highest consideration.

R. DE LIMAE SILVA,
Chargé d'Affaires.

The honorable CHIEF JUSTICE of the Supreme Court of the United States of America.

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C., *October 24th, 1910.*

SIR: Upon the reassembling, recently, of the Supreme Court of the United States its attention was called by me to your communication in which you stated that the Supreme Court of Brazil had unanimously resolved to insert in the record of its proceedings an expression of deep grief on account of the death of the late Chief Justice of this court, MR. CHIEF JUSTICE FULLER.

This court directs me to express its grateful acknowledgements to the Supreme Court of Brazil for this kindly, considerate action on its part. I have the honor to request, on behalf of this court and by its direction, that you will convey to the Supreme Court of Brazil, through its eminent Chief Justice, an expression of the thanks of this court for its action touching the great loss this country has sustained.

With profound respect for the highest judicial tribunal of Brazil, and with assurances of personal esteem,

I am, my dear sir, your obedient servant,

JOHN M. HARLAN,
Senior Associate Justice of the Supreme Court of the United States.

Chargé d'Affaires, Brazilian Embassy,
Washington, D. C.

PROCEEDINGS OF THE BOARD OF MANAGERS OF THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS AND SAILORS, SEPT. 6, 1910.

The president of the board having announced the death, on July 4, 1910, of HON. MELVILLE W. FULLER, Chief Justice of the United States, a member of the board of managers, General Smith, upon motion, was appointed a committee to prepare a suitable memorial resolution and presented the following, which, upon motion, was ordered upon the minutes:

MELVILLE WESTON FULLER.

The death of MELVILLE WESTON FULLER, which occurred on July 4, 1910, at Sorrento, Maine, his summer home, removes from our rolls an honored name.

CHIEF JUSTICE FULLER was a native of Maine. Born in Augusta, February 11, 1833, he entered college when sixteen years of age and was graduated at Bowdoin four years later. After pursuing legal studies at the Harvard Law School he was admitted to the bar in 1855, and commenced the practice of his profession in the city of his birth. At the same time, interested in literature and politics, he devoted himself to editorial work as editor of The New Age. But visions of a new empire were already drawing him westward and he soon removed to Chicago, where at the bar he rapidly won high reputation for industry, good judgment and distinguished ability. On October 8, 1888, he became Chief Justice of the United States, and for twenty-two years he performed the duties of this high office with entire satisfaction to the members of the bar and his colleagues on the bench.

At the same time, *ex officio*, CHIEF JUSTICE FULLER became a member of the Board of Managers of the National Home for Disabled Volunteer Soldiers. No other *ex offico* member of the board took a deeper interest in all matters pertaining to the comfort and welfare of the soldiers of the Civil War than did he. At the meetings of the board

in Washington he not only aimed to be present, but he brought to the discharge of his duties as a member of the board the same unfailing courtesy and sound judgment that distinguished his career at the bar and on the bench.

His loss is not only the loss of an ever-charming personality, but of an associate with whom it was an honor to act in the administration of a trust that appeals alike to patriotic feeling and endeavor, and we deem it a privilege, therefore, to place on record our high appreciation of his noble character and valuable services.

TRIBUTE OF THE BAR OF THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO, July 19, 1910.

Court met pursuant to adjournment at 10 o'clock A. M.

Present: Honorable John J. Jenkins, Judge.

The following proceedings were had, that is to say:

In re the demise of HONORABLE MELVILLE W. FULLER, late Chief Justice of the Supreme Court of the United States.

And now on this day, the same being the time therefor, as heretofore ordered, to receive from the committee appointed in that behalf, resolutions regarding the demise and the life and work of the HONORABLE MELVILLE W. FULLER, late Chief Justice of the Supreme Court of the United States—

Comes N. B. K. Pettingill, Esq., on behalf of the committee so appointed and in open court reads said resolutions and presents additional pertinent observations eulogistic of the deceased and his great work as a jurist and a man, all of which is done in the presence of a large number of the members of the bar. Whereupon, no other members of the bar desiring to be heard, the court makes suitable response from the bench and in answer to Mr. Pettingill's motion, the court and members of the bar arise, and it is then solemnly:

Ordered, That the resolution so prepared and presented regarding the life, work, and the demise of the late Chief

Justice of the Supreme Court of the United States, be, and they are hereby, spread upon the records of the court as a permanent tribute in memory of the deceased. And the clerk of this court is directed to forward to the clerk of the Supreme Court of the United States a certified copy of the resolution and same is entered of record as follows, that is to say:

To the Honorable JOHN J. JENKINS,
Judge of the District Court of the
United States for Porto Rico:

Availing ourselves of the permission given to present a memorial to this court in memory of MELVILLE W. FULLER, late Chief Justice of the United States, the members of this bar desire in this manner to perpetuate upon its records their profound appreciation of the purity and nobility of his character, the pre-eminence of his juristic learning, and the exalted self-denial of his public service.

Born in Augusta, Maine, of a family in whose veins ran the best blood of New England, the traditions of his ancestors gave inspiration toward a life devoted to the pursuit of those high ideals associated with the refinement of learning and culture rather than to the strife of the political or commercial arena. He chose as the vehicle of those attainments our profession of the law, and was naturally drawn to the wide field of labor and achievement offered by the largest city of the expanding West.

Although practically beginning his career in a new community without influential friends, continually exposed to the stress of sharp competition and the rivalry of intellects as keen and powerful as any in our country, and surrounded by the increasing spirit of commercialism which had begun to assail our profession, he remained true to the severest interpretation of its ethics and was noted for his ardent sympathy with the cause of the poor and the oppressed, and for his absorption in the purely legal aspects of questions involved in the litigation in-

trusted to him, irrespective of the celebrity of the cause, the fame of the client, or the prospect of compensation. Nevertheless, his mental power and moral force were such that he achieved the undisputed leadership of the bar of his adopted State and gained the friendship and admiration of that great lawyer-President who placed him at the head of the greatest tribunal of the world.

His work of more than twenty years as Chief Justice of that tribunal is perpetuated on the pages of ninety volumes of its reports, and his opinions constitute a worthy monument to the breadth and soundness of his legal attainments, his remarkable power of clear statement, his uniform freedom from prejudice, and his unswerving judicial impartiality.

It has been the good fortune of this bar to be brought into closer contact with the exalted bench which the late Chief Justice ornamented than any other bar in the United States, except that of the District of Columbia. From that contact has resulted a high appreciation of those qualities above so inadequately portrayed, and his death brings with it to some of us a sense of personal sorrow and loss.

To the personal character and attributes of the lamented Chief Justice no higher tribute can be paid than that he was most respected, best loved and most revered by those who had known him longest and most intimately. Familiarity could not breed contempt, because there was in him nothing contemptible. None knew him but to love him, because in him were combined only elements altogether lovely.

From youth to old age he was the upright man, the loyal friend, the unpretentious gentleman, the patriotic statesman and the impartial judge. The world mourns his death and knows itself made better by the example of his life. May the inspiration of that example long influence to higher thought and nobler action the profession which he honored!

It is respectfully requested that this memorial be spread upon the minutes of this day's proceedings, and that, as a further mark of respect, the court adjourn for the day.

For the bar of the United States District Court of Porto Rico.

N. B. K. PETTINGILL,
FRANCIS H. DEXTER,
MARTIN TRAVIESO,
Committee.

Whereupon the court, as a mark of respect to the late CHIEF JUSTICE MELVILLE W. FULLER, adjourns until Wednesday, July the 20th, 1910, at 10 o'clock A. M.

TRIBUTE OF THE BAR OF THE UNITED STATES COURTS FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

CHIEF JUSTICE FULLER.

Whereas, the bar of the United States Courts for the Western District of North Carolina have learned with profound regret of the recent death of HONORABLE MELVILLE W. FULLER, for many years Chief Justice of the United States of America; and

Whereas, during his tenure of that exalted office many difficult and intricate causes came before the court for adjudication, causes involving questions arising out of the war between the States, the Spanish War, the acquisition of the Hawaiian and Philippine Islands, and the island of Porto Rico; the occupation of Cuba by the United States, the collection of duties from the products of our newly-acquired possessions, and the controversies growing out of disputes between capital and labor, all as vital as those arising in the formative period of our government; and

Whereas, his opinion in all cases coming before that court, whether of concurrence or dissent, revealed profound learning, great industry, untiring patience and a broad and comprehensive grasp, not only of the immedi-

ate, but the ultimate effects involved in the decision of the questions involved; and

Whereas, his bearing as the presiding officer of the greatest judicial tribunal of Christendom was marked by conspicuous dignity, urbanity and consideration for all having business with that exalted tribunal of justice: Therefore,

Resolved, First. That in the life and career of CHIEF JUSTICE FULLER the American people have been blessed with the unselfish services of a profound and erudite jurist, a pure and wise patriot and a well-poised presiding officer, whose ability made him the peer of Marshall or Waite, of Taney or Chase, his most illustrious predecessors.

Second. That in his death the citizens and lawyers of America have sustained a serious and lamentable loss; the world has been deprived of the example of a great and good man, the United States a true patriot and humanity and religion the walk and conversation of a true Christian of unblemished character.

Third. That this court do now adjourn out of respect to his memory; that a page of the minutes of this court be set apart for the recording of these resolutions, and that a copy of them, under the seal of this court, be filed with the Supreme Court of the United States and a copy be sent each surviving member of his immediate family.

J. H. MERRIMON,
F. A. SONDLEY,
CHAS. A. MOORE,
T. F. DAVIDSON,
LOCKE CRAIG, *Committee.*

TRIBUTE OF THE OHIO STATE BAR ASSOCIATION.

MR. MORTIMER MATTHEWS: I wish to present the report of the committee appointed to draft resolutions upon the decease of CHIEF JUSTICE FULLER of the United States Supreme Court, and JUSTICES BREWER and PECKHAM, as follows:

The recent decease of three distinguished jurists, not members of this association, but by national function and high character, entitled to an expression of its respect, should not be passed by in silence; therefore be it

Resolved, That in the death of MELVILLE W. FULLER, the late Chief Justice of the Supreme Court of the United States, on July 4, 1910, full of years and honor in the midst of his high duties, this association feels a sense of loss, fostered by kind association and extended observation of a distinguished and honorable career.

Resolved, also, That the deaths, since the last annual meeting of this association, of DAVID J. BREWER and of RUFUS W. PECKHAM, late Justices of the Supreme Court of the United States, after long terms of honorable service on that high court, are deplored by this association as a severe loss to the profession, of which they were highly valued members.

Resolved, further, That this association feels impelled to tender this expression of its sympathy in their irreparable loss to the families of these great judges, so closely joined in their careers, and to the Supreme Court of the United States, whose traditions they have so worthily upheld; and that the secretary of this association be instructed to forward copies of these resolutions to their families, and to the clerk of the Supreme Court of the United States.

We, the President and Secretary of the Ohio State Bar Association, do hereby certify that the foregoing is a full and true copy of a resolution introduced and adopted by the Ohio State Bar Association at its thirty-first annual meeting, commencing July sixth and ending July eighth, A. D. 1910.

ALLEN ANDREWS, *President.*

GILBERT H. STEWART, Jr., *Secretary.*

TRIBUTE OF THE CHICAGO BAR ASSOCIATION.

MELVILLE WESTON FULLER.

At a special meeting of the Chicago Bar Association

held on Tuesday, July the twelfth, nineteen hundred and ten, the following resolutions were adopted:

With the death, on July fourth instant, of MELVILLE WESTON FULLER, the eighth Chief Justice of the United States, the record of the life work and accomplishment of a great lawyer and judge, of a complete citizen and man, is closed. For the whole of his professional life, after the first year, he practiced at the bar of this city, to which he came as a young lawyer in eighteen hundred and fifty-six, and in which he rose, by unassuming and obvious merit, to an acknowledged leadership in his profession. From this bar he was called in eighteen hundred and eighty-eight, to be Chief Justice in the court of the greatest dignity and power. The records of the court show the great ability and the patient, conscientious thoroughness with which he administered his high office; and there will live in the recollection and esteem of all who knew or came in contact with him, his accomplishments, his gentle dignity, his pure and lofty character.

It is obviously fitting that this bar, which he so long graced and so honored, should pay their tribute to his memory: Therefore be it

Resolved, That the members of the Chicago bar recall with reverent regard his great qualities and testify to the great loss with which the country as well as his family and friends have been visited.

Resolved, That the chairman of this meeting cause these resolutions to be presented to the Supreme Court of the United States, the Federal courts in Chicago, the Supreme Court of Illinois, the Appellate Court of this district, and the courts of this county, and a copy thereof to be transmitted to the family of the late Chief Justice, with the assurance of the sincere sympathy of the members of the bar here assembled.

JOSEPH H. DEFREES,
President.

FARLIN H. BALL, *Secretary.*

TRIBUTE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW ADOPTED AT THE ANNUAL MEETING, April 22, 1911.

Judge Gray and Mr. Butler reported the following resolution which was unanimously adopted:

The American Society of International Law records with sorrow the death of MELVILLE WESTON FULLER, Chief Justice of the United States and one of the Vice-Presidents of this Society since its organization.

CHIEF JUSTICE FULLER, in his speech and by his acts, had done his valiant part in carrying forward the greatest work of modern times—that of establishing peaceful methods for the settlement of international disputes. He was a member of the Arbitration Tribunal to settle the boundary line between Venezuela and Great Britain; was a member of the permanent Court at The Hague, and served as one of the special court in the case of the Muskat Dhows in 1904; as presiding justice of a court which is, as between the States of this Union an International Court of Justice, he participated in many cases involving the determination of principles of international law and the peaceful settlement of disputes between the sovereign States of this Union, and in many of those cases he rendered opinions which will ever stand as clear enunciations of the principles of law between nations.

He was deeply interested in the work of this Society, and attended all of its annual meetings.

He was born in Augusta, Maine, February 11, 1833; was graduated from Bowdoin College in 1853; was appointed Chief Justice of the United States and took the oath of office on October 8, 1888. He died at Sorrento, Maine, July 4, 1910.

The Society expresses its sympathy to the family of the late Chief Justice and directs that a copy of this minute be sent to it, and also that a copy be transmitted to the Supreme Court of the United States.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Statutes of Foreign Nations.

(D.) Treaties.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1910.

UNITED STATES *v.* PRESS PUBLISHING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 541. Argued October 24, 1910.—Decided January 3, 1911.

The effect of § 2 of the act of July 7, 1898, c. 576, 30 Stat. 717, was to incorporate the criminal laws of the several States in force July 1, 1898, into the statute and make such criminal laws, to the extent of such incorporation, laws of the United States and applicable to the United States reservations within the States (*Franklin* v. *United States*, 216 U. S. 559), but the history of the act demonstrates that in its adoption, Congress sedulously considered the two-fold character of our constitutional government with the purpose of interfering as little as might be with the authority of the States, as to the subject-matter of the statute, over territory situated, except for the existence of a United States reservation, within state jurisdiction.

The purpose and intent leading to the adoption of an act affords a means for discerning the intent of a subsequent act relating to the same subject and superseding the earlier act.

Proceedings in Congress in the course of adoption of a statute and amending its form as originally proposed considered, in this case, in determining the purpose and scope of the act and the intent of Congress in adopting it.

The assimilative crimes act of 1898 cannot be used as a means for frustrating the laws of the State, within which a reservation of the United States is situated; and one accused of a crime consisting of several elements treated as a unit by the state law so that there can be but one trial and conviction thereunder cannot be indicted and tried in the United States court for a single separate element committed on such reservation, the other elements of the crime being committed in other portions of the State.

As the law of New York results in the unity as one criminal act of the publication of a libel and its circulation, allows but a single conviction for the combined act, and affords adequate means for punishing such circulation on a reservation of the United States within that State, resort cannot be had to the United States court, under § 2 of the act of July 7, 1898, to punish the act of such circulation on the basis that it is a separate and distinct offense from the publication.

On March 4, 1909, upon the assumed authority of the second section of an act of Congress approved July 7, 1898, c. 576, 30 Stat. 717, a grand jury in the Circuit Court of the United States for the Southern District of New York found a true bill against the Press Publishing Company, charging the commission of alleged criminal libels, set out in an indictment composed of fourteen counts. The asserted libels were contained in six issues of The World, a newspaper printed in the city of New York, of which newspaper the defendant in error, a New York corporation, was publisher. The first seven counts dealt with the publication of the libels by circulating copies of the newspaper containing the same within the reservation and military post in Orange County, N. Y., known as West Point. The remaining counts dealt with the publication of each of the libels by the delivery of a copy of the issue of The World containing the same to a post office inspector at his office in the Post Office Building in the city of New York. Both West Point and the Post Office Building were averred to be places within the exclusive jurisdiction of the United States. Those who were alleged in each count to have been criminally libeled were at the

time of the publications the President of the United States, the Secretary of War and certain private individuals. The alleged libelous articles related to the purchase by the United States of the Panama Canal. We need not state the contents of the articles, since in the view taken of the case we shall be only called upon to determine whether, conceding the publications to have been libelous as charged in the indictment, they constituted offenses against the United States within the purview of the act of 1898.

The case went to trial upon a plea of not guilty. The circulation of the newspapers containing the alleged libels on the military reservation and their delivery to the inspector at the post office as charged in the indictment was admitted by the defendant. The Government on the other hand admitted that all of the issues of The World newspaper referred to in the indictment were printed in the defendant's printing establishment in the city of New York and were circulated therefrom.

At the close of the evidence introduced by the Government the defendant moved to quash the indictment or to instruct a verdict of acquittal, upon the following grounds:

"First. The court has no jurisdiction in this case because there is no statute of the United States authorizing the prosecution.

"Second. The act of 1898 does not apply to the case as disclosed by the evidence.

"Third. If construed so as to cover the acts shown by the evidence, the act is unconstitutional.

"Fourth. The offense, if any, was committed wholly within the jurisdiction of the State of New York and was punishable there.

"Fifth. The defendant being a corporation is incapable of committing the offense charged in the indictment."

The court announced that it had concluded that the indictment was not authorized by the act of 1898, and therefore the motion to quash would be sustained. Be-

fore, however, any formal entry to that effect was made, in order to obviate any question of double jeopardy, upon motion of the attorney for the United States a juror was withdrawn, and thereafter a judgment was duly entered quashing the indictment, it being expressly recited in the judgment that it was based upon a construction of the statute. To review the action of the trial court this writ of error is prosecuted by the United States, under the authority of the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Mr. James C. McReynolds, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Stuart McNamara*, Special Assistant to the Attorney General, were on the brief, for the United States:

For history and interpretation of the assimilative statute act of July 7, 1898, see first Federal crimes act of April 30, 1790; first assimilative statute of March 3, 1825, 4 Stat. 115, prepared by Justice Story, and construed in *United States* v. *Paul*, 6 Pet. 141, to the effect that "the laws of the State" were only those in force March 3, 1825; second assimilative statute of April 5, 1866, c. 24, 14 Stat. 13; § 5391, Rev. Stat.; act of 1898, 30 Stat. 717, and of March 4, 1909, c. 321, 35 Stat. 1145; see also *Franklin* v. *United States*, 216 U. S. 559.

A post office is "a place" within the meaning of the act of 1898. *United States* v. *Andem*, 158 Fed. Rep. 996; *United States* v. *Tucker*, 122 Fed. Rep. 518; *Sharon* v. *Hill*, 24 Fed. Rep. 726, 731.

As to what constituted criminal libel under the New York statutes in 1898, see New York Penal Code of 1881, §§ 242–251. Except as thereby modified the general rule of the common law as to the place where one may be prosecuted for libel prevails in New York.

The crime of libel does not consist in the mere composition of the article, or the physical production of the paper, but in exposing or publishing the defamatory matter to

the community. 2 Roscoe, Crim. Ev. 890, 897; Wharton, Crim. Law, 8th ed., 1618; 2 Bishop, Crim. Law, 6th ed., 905, 949; Townsend, Slander and Libel, 3d ed., 144.

One who writes a libel in one county with intent to publish and who afterwards publishes it in another may be indicted in both. 18 Am. & Eng. Ency. of Law, 1119, and cases cited; *Commonwealth* v. *Blanding*, 3 Pick. 304, approved in the *Palliser Case*, 136 U. S. 257, 266; and see *In re Cook*, 49 Fed. Rep. 833; *Armour Packing Co.* v. *United States*, 153 Fed. Rep. 1, 5; *Commonwealth* v. *Macloon*, 101 Massachusetts, 1; *Commonwealth* v. *Pettes*, 114 Massachusetts, 307, 311; *In re Dana*, 7 Ben. 1; *In re Buell*, 3 Dill. 116; *Haskell* v. *Bailey*, 25 U. S. App. 99; *State* v. *Kountz*, 12 Mo. App. 511; *Burton* v. *United States*, 202 U. S. 344, 388.

The act of July 7, 1898, applies to a libel circulated in West Point or the Post Office Building, although printed outside. The same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. *Cross* v. *North Carolina*, 132 U. S. 131, 139.

West Point and the Post Office Building are places over which the United States has exclusive jurisdiction within the terms of § 2 of the act of 1898. The Constitution gives Congress plenary legislative power over such places. Offenses committed therein are against the National sovereignty.

The court below cited no direct authority and there is none to support its position. At different times Congress has passed assimilative acts without attempting to except libel from their general terms. The last was approved on March 4, 1909. On the other hand, it has distinctly recognized that all crimes were intended to be included therein.

The defense that because the offense charged may be punished in New York and therefore was not intended to

be included in the act of 1898 is without merit; the State of New York cannot punish an offense committed at West Point against the United States. Such offense must be punished as here attempted, or be "dispunishable." *United States* v. *Davis*, 5 Mason, 356.

Mr. Delancey Nicoll, with whom *Mr. John D. Lindsay* and *Mr. Raymond D. Thurber* were on the brief, for defendant in error:

The Circuit Court properly entertained and passed upon the motion to quash on the trial. 1 Bishop's New Cr. Proc., § 759; *Reg.* v. *Heane*, 9 Cox, Cr. C. 433; *Justice* v. *State*, 17 Indiana, 56; *Bell* v. *Commonwealth*, 8 Gratt. 600.

This is not a moot case, since, should the judgment of the court below be reversed, the defendant may be placed on trial again.

Even though the language of the act of July 7, 1898 were literally broad enough to cover the case at bar, it should not be so construed. If there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. *United States* v. *Clayton*, 2 Dill. 219; *United States* v. *Reese*, 5 Dill. 405, 414; *United States* v. *Whittier*, 5 Dill. 35; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Garretson*, 42 Fed. Rep. 22, 25.

The general acquiescence of legal minds for nearly a century in the negative of the proposition, now asserted for the first time by the Government, forbids the interpretation of the statute in accordance with that proposition. *United States* v. *Hudson*, 7 Cranch, 32.

A literal construction of the statute would lead to injustice, oppression and absurd consequences. *United States* v. *Kirby*, 7 Wall. 482, 486.

According to the theory of the Government, the publication of a single newspaper article might constitute as many

distinct crimes as there are places under the jurisdiction of the United States, in the whole country. It would thus be possible to crush an owner or editor, under an intolerable burden of crime. Such a construction will not be put upon the act if it can be avoided, for it contravenes the fundamental principle of criminal jurisprudence that crime is not divisible. Wharton, Crim. Law., 10th ed., § 27; *State* v. *Commissioners*, 2 Murphy (N. C.), 371; *State* v. *Cooper*, 13 N. J. L. 361, 375.

The constitutional objection is also grave, for such a law does, in substance, abridge the liberty of speech and of the press,—that is, if to abridge such liberty means to so curtail it that no owner or editor of a paper could with safety freely discuss public affairs.

The construction contended for by the Government is not only unnecessary to remedy the definite evil aimed at by Congress, but would create an evil which it was the intention of Congress to avoid. *United States* v. *Palmer*, 3 Wheat. 610, 630, 632; *Holy Trinity Church* v. *United States*, 143 U. S. 457.

As to history of the assimilative acts see 1 Life of Joseph Story, Boston, 1851, pp. 244, 293, 297; The American Nation, Hart, 1819–1829; "Reaction toward State Sovereignty", 299; Annals of Congress, 17th Cong., 2nd Sess. 1822–1823, 929; 1 Debates in Congress, Gales & Seaton, 1824–1825, 157, including debate of Mr. Wickliffe, of Kentucky, Daniel Wesbter and Mr. Barbour.

The whole history and life of the country condemn the construction asserted by the Government. This is shown by the history of the sedition law of July 14, 1798, 1 Stat. 596. See McMaster's Hist. of People of U. S. 397; Von Holst, Const. Hist. of U. S. 142; 3 Wilson, Hist. of Am. People, 167; 2 Curtis, Const. Hist. of U. S. 3; 7 Jefferson's Writings, Putnam ed., 267, 295, 309.

The offense charged in the indictment is not even within the letter of the statute.

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

As we have stated, the indictment was based on the act of July 7, 1898, 30 Stat. 717, § 2. The effect of the act, as pointed out in *Franklin* v. *United States*, 216 U. S. 559, 568–569, was to incorporate the criminal laws of the several States in force on July 1, 1898, into the statute and to make such criminal laws to the extent of such incorporation laws of the United States. The text of the second section of the act of 1898 is this:

"That when any offense is committed in any place, jurisdiction over which has been retained by the United States, or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall upon conviction in a Circuit or District Court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such state law shall affect any such prosecution. (30 Stat. 717.)"

As it is conceded that there is no statute of the United States expressly defining and punishing the crime of criminal libel when committed on a United States reservation, etc., it follows that in order to determine the correctness of the ruling of the court below we are called upon, *a*, to accurately fix the extent to which, by the effect of the act of 1898, the criminal laws of the States were incorporated therein so as to authorize the punishment of crimes

defined by such laws as offenses against the United States, and, *b*, this being done to make an analysis of the criminal laws of the State of New York to ascertain whether the particular offenses here charged were made punishable by those laws, and if so, whether by virtue of the act of 1898 they constituted offenses against the laws of the United States punishable in the courts of the United States.

It is certain, on the face of the quoted section, that it exclusively relates to offenses committed on United States reservations, etc., which are "not provided for by any law of the United States," and that as to such offenses the state law, when they are by that law defined and punished, is adopted and made applicable. That is to say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several States are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United

States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the State. While this meaning, we think, stands out in bold relief from the text of the section, the correctness of such meaning will be nevertheless readily demonstrated, even if, for the sake of argument, it be conceded that the text is ambiguous. We say this because a consideration of the genesis and development of the legislation which the act of 1898 embodies will leave no doubt that the construction we have given to the act enforces the exclusive and only purpose intended to be accomplished by its adoption.

It is undoubted, as pointed out in *Franklin* v. *United States*, *supra*, that the forerunner of the act of 1898 was the act of March 3, 1825 (ch. 65, 4 Stat. 115), since the act of 1898 is virtually a repetition of the act of 1825, except as to provisions plainly inserted merely for the purpose of bringing under the sway of the act United States reservations which on account of the restrictive terms of the act of 1825 were not embraced within the sphere of its operations. The act of 1825 was entitled "An act more effectually to provide for the punishment of certain crimes against the United States and for other purposes." Sections 1 and 2 of the act provided for the punishment of arson when committed within any fort, dockyard and other enumerated places, "the site whereof is ceded to, and under the jurisdiction of, the United States." The third section was as follows:

"SEC. 3. *And be it further enacted*, That if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not especially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having

cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such fort, dockyard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such State."

This section came under consideration in *United States* v. *Paul*, 6 Pet. 141, and it was held that its provisions referred only to the laws of the States existing at the time of the passage of the act, that is, those which were in force on March 3, 1825. It came also to pass that in considering the words "whereof is ceded" in the first section it was held that those words limited the operation of the act to places which had been ceded to the United States prior to the enactment of the act of 1825. *State* v. *Barney*, 5 Blatch. 294.

By the second section of the act of April 5, 1866 (ch. 24, 14 Stat. 13), Congress substantially reënacted the third section of the act of 1825, changing, however, its phraseology so as to cause its provisions to apply not only, as did the act of 1825, to a place ceded to the United States, but to "any place which has been or shall hereafter be ceded." As thus adopted the act passed into the Revised Statutes as § 5391 and continued in force until the passage of the act of 1898, which, it will be at once observed, makes no substantial change concerning the fundamental scope and purpose of the prior statute, since it simply enlarged the extent of its operation by causing the statute not only to embrace reservations which had been ceded to the United States, but those which had been carved out of the public domain.

If then the purpose and intent which led to the enactment of the act of 1825 can be discovered and made plain it must clearly result, as that act was but the precursor of the act of 1898, that the light generated by the original intent and purpose will afford an efficacious means for dis-

cerning the intent and purpose of the act of 1898. The basis of the third section of the act of 1825 was the eleventh section of a bill drawn by Mr. Justice Story, and of such eleventh section its author said (Life of Justice Story, Boston, 1851, vol. 1, p. 293):

"This is the most important section of the whole bill. The criminal code of the United States is singularly defective and inefficient. . . . Few, very few, of the practical crimes (if I may so say) are now punishable by statutes, and if the courts have no general common law jurisdiction (which is a vexed question), they are wholly dispunishable. The state courts have no jurisdiction of crimes committed on the high seas, or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity. Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction. And can it be less fit that the Government should have power to protect itself in all other places where it exercises a legitimate authority? That Congress has power to provide for all crimes against the United States is incontestible."

It is certain that the fundamental purpose thus contemplated by Mr. Justice Story was not overlooked or intended to be departed from by the writer of the act of 1825. There can be no doubt on this subject, in view of the fact that Mr. Webster, the author of that act, in referring to the third section of the bill by him drafted and reported to Congress, (which section, as we have said, was based upon the eleventh section of the bill drawn by Mr. Justice Story), said:

" 'As to the third section, it must be obvious that, where the jurisdiction of a small place, containing only a few hundreds of people (a navy yard, for instance), was ceded to the United States, some provision was required

for the punishment of offenses; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the State in which the yard, &c., might be. He was persuaded that the people would not view it as any hardship that the great class of minor offenses should continue to be punished in the same manner as they had been before the cession.' (*Id.* 338.)"

The demonstration of the purpose and scope of the act of 1825 is, if possible, made clearer by an amendment to which the act was subjected before it reached its final legislative form. As originally reported the fourth section provided for the punishment of certain designated crimes by the law of the United States when committed "upon the sea, or in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States." But this provision was qualified in the passage of the bill, by the adoption of an amendment which added the words, "and out of the jurisdiction of any particular State." This amendment as finally adopted was the result in a somewhat modified form of a prior amendment offered by Mr. Wickliffe of Kentucky. Its meaning is not left to doubt, since Mr. Wickliffe in urging the adoption of the amendment expressly stated that it was "intended to prevent collisions between the authority of the General and State Governments. . . . He conceived the State Governments to be entirely competent to inquire into and punish crimes committed within their own jurisdictions, and that, as there was no necessity, there would be no advantage, in giving the United States concurrent power to do the same." Register of Debates in Congress, Gales & Seaton, 1824–1825, vol. 1, p. 154; *Id.*, pp. 157, 165–166, 166–167, 168, 335, 335*h*, 338.

Having fixed the meaning of the act of 1898, and, as heretofore stated, there being no law of the United States specifically punishing the offense of criminal libel when committed on a reservation, etc., of the United States, it remains only to determine whether, applying the law of the State of New York, in accordance with the act of 1898, there was power in the grand jury to present the indictment here under consideration or authority in the courts of the United States to entertain jurisdiction thereof as charging a substantive and distinct offense under the laws of the United States. That is to say, was the indictment found below consistent with the application of the state law in accordance with the provisions of the act of 1898?

The provisions of the penal code of New York on the subject of criminal libel at the date mentioned were as follows (Laws of New York, 1881, vol. 3, chap. 8):

"SEC. 243. A person who publishes a libel is guilty of a misdemeanor.

"SEC. 245. To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself."

Sections 249 and 250, in substance, provided that where a person libeled is a resident of the State the prosecution shall be either in the county of such residence or the county where the paper is published, and that where the person libeled is a non-resident the prosecution shall be in the county in which the paper, on its face, purports to be published, or, if it does not so indicate, in any county in which it was circulated.

"SEC. 251. A person cannot be indicted or tried for the publication of the same libel, against the same person, in more than one county."

Section 138 of the Code of Criminal Procedure (Laws of New York, 1881, vol. 2, p. 43) contains similar provisions as to the place for the prosecution of a libel, and the immunity from liability to prosecution in more than one county. It was further provided:

"SEC. 139. When an act charged as a crime is within the jurisdiction of another state, territory or county, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state.

"SEC. 140. When a crime is within the jurisdiction of two or more counties of this state, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another."

In view of the unity between the act of composing and the primary publication of a newspaper containing a libelous article within the State of New York, and of subsequent publications or repetitions thereof by the publisher of the newspaper which are clearly the resultant of the provisions of the laws of New York above quoted and referred to, two propositions are, we think, plainly established: First, that adequate means were afforded for punishing the circulation of the libel on a United States reservation by the state law and in the state courts without the necessity of resorting to the courts of the United States for redress. Second, that resort could not be had to the courts of the United States to punish the act of publishing a newspaper libel by circulating a copy of the newspaper on the reservation upon the theory that such publication was an independent offense, separate and distinct from the primary printing and publishing of the libelous article within the State of New York, without disregarding the laws of that State and frustrating the plain purpose of such law, which was that there should be but a single prosecution and conviction.

These propositions being true, it follows in the light

of the construction which we have given the act of 1898 that the court below was right in quashing the indictment as not authorized by that act. No other conclusion we think was possible, as the court could not have sustained the indictment without giving to the statute a meaning directly conflicting with the construction which we have affixed to it. In other words, the court could not have upheld the indictment without deciding that because the statute provided that acts when committed on United States reservations, which were not expressly made criminal by a law of the United States, might be prosecuted and punished in accordance with the state law, therefore a prosecution was authorized which was inconsistent with that law and in disregard thereof. And, further, albeit that Congress having regard for the autonomy of the States had deemed it best not to treat reservations within States as foreign to the States for the purpose of punishing crime unless expressly provided to the contrary, nevertheless the legislation enacted by Congress for this purpose had destroyed the end contemplated, since that legislation when rightly construed, while applying the state legislation to crimes committed on a reservation as if the territory was not foreign but domestic, at the same time exacted that the state law when thus applied should be enforced as if the territory was in no respects for the purpose domestic, but on the contrary was wholly foreign. The contradiction and confusion to which the contention thus reduces itself is too apparent to require anything but statement. Indeed, we think the misconception just pointed out lies at the basis of all the propositions so ably pressed at bar to secure a reversal, since they all depend upon a construction of the act of 1898, which we hold to be wrong. Great therefore as might otherwise be their potency with the foundation gone upon which they rest, all come to this, that the statute sanctions that which it by necessary implication prohibits, and, moreover, destroys the great public

purpose which its adoption was intended to foster and protect.

The ruling which we now make does not of course extend to a subject which is not before us. It follows, therefore, that we do not now intimate that the rule which in this case has controlled our decision would be applicable to a case where an indictment was found in a court of the United States for a crime which was wholly committed on a reservation, disconnected with acts committed within the jurisdiction of the State, and where the prosecution for such crime in the courts of the United States instead of being in conflict with the applicable state law was in all respects in harmony therewith.

Affirmed.

THE ATLANTIC, GULF AND PACIFIC COMPANY, *v.* GOVERNMENT OF THE PHILIPPINE ISLANDS.

APPEAL FROM AND ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 64. Argued December 6, 1910.—Decided December 19, 1910.

A Government contract for building a bulkhead in Manila provided that the contractor would be responsible for damages arising from wave action or pressure of the revetment against the timber structure, but that the Government would be responsible for break caused by pressure of the mud fill. There was a break owing to pressure of the mud fill and before it could be repaired there was a further damage caused by a typhoon but which would not have happened had the original break not existed. *Held*, as held by the courts below, that the contractor must bear the loss caused by the typhoon.

THE facts, which involve the construction of a contract

for a public work with the Government of the Philippine Islands, are stated in the opinion.

Mr. James Russell Soley, with whom *Mr. H. C. Dickinson* was on the brief, for appellant and plaintiff in error:

A demurrer should not be sustained if, upon any fair and liberal interpretation, a cause of action can be implied from the averments of the complaint. *Lockhart* v. *Leeds*, 195 U. S. 427, 435; *Swift & Co.* v. *United States*, 196 U. S. 375, 395; *Coatsworth* v. *Lehigh Valley R. Co.*, 156 N. Y. 451, 457; *Olcott* v. *Carroll*, 39 N. Y. 436; *Naylor* v. *N. Y. C. & H. R. R. R. Co.*, 119 App. Div. 22, 28; *People* v. *New York*, 28 Barb. 240, 248; *Ketchum* v. *Van Dusen*, 11 App. Div. 332.

Plaintiff has pleaded a series of averments from which a cause of action may be clearly inferred. Even if freely admitted that the pleading is inartificially drawn and in some points is obscure and contains apparent contradictions, it clearly appears that the work which was the subject of this contract suffered serious injury by reason of the pressure of the fill upon the enclosing bulkhead and under the terms of the contract, the defendant, the Government of the Philippine Islands, was required to pay for the repairs to the structure so caused and that the work was done at reasonable and proper prices.

The break of May 1, 1906, due to the pressure of the fill upon the enclosing bulkhead, was the proximate cause of the subsequent injury to the work, for the repair of which compensation is demanded in the complaint.

The question here is that of proximate cause and the pressure of the fill is distinctly pleaded as the proximate cause of the injuries both of May 18–19 and of May 1. *Mil. & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 474; *Insurance Co.* v. *Boon*, 95 U. S. 117, 130; *Insurance Co.* v. *Tweed*, 7 Wall. 44; *The G. R. Booth*, 171 U. S. 450, 460.

The court will take judicial notice of familiar natural

phenomena and of natural laws which are matters of general knowledge, such as those of meteorology, physical geography, wave action and the prevalent liability to typhoons in the waters surrounding the Philippine archipelago, and known climatic conditions. *McGhee Irrigating Ditch Co.* v. *Hudson*, 21 S. W. Rep. 125; *The Conqueror*, 166 U. S. 110, 134. The interval of a fortnight or so between the proximate efficient cause and the ultimate result is of no importance. See *Insurance Co.* v. *Boon*, *supra*.

The liability of the defendant is not affected by paragraph 5 of the specifications.

The responsibility of the contractor for damages, arising from wave action as an independent cause, so far as it is based on paragraph 5 of the specifications, is expressly limited to certain specific forms of damage, and leaves the responsibility for other resultant damages subject to the general rule.

The supplemental agreements constitute an important additional support for plaintiff's cause of action.

The question of ambiguity is in the contract, and not in the pleading.

If the provisions of the contract are ambiguous and require interpretation they cannot be settled by demurrer. If failure to state a cause of action is due in any respect to latent ambiguities in the contract, plaintiff can introduce evidence to remove these ambiguities. *Clay* v. *Field*, 138 U. S. 464, 480.

Plaintiff cannot be deprived of the right to show whether he has a cause of action or not.

Mr. Assistant Attorney General Denison for the appellee, and defendant in error:

As the break of May 28 was due directly to wave action and pressure of the revetment, and as those specific causes are charged upon the contractors by the express terms of the contract, no further inquiry into prior contributing

causes can be had. *Dudgeon* v. *Pembroke*, L. R. 2 App. Cas. 284, 297; *S. C.*, L. R. 9 Q. B. 581, 595; *Wilson* v. *The Xantho*, L. R. 12 App. Cas. 503, 509; *Insurance Co.* v. *Adams*, 123 U. S. 67; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 438; *Northwest Transp. Co.* v. *Insurance Co.*, 41 Fed. Rep. 793, 800; 2 Arnould on Mar. Ins., 6th ed., 737, 753; Hildyard, Mar. Ins. 269.

Mr. Justice Holmes delivered the opinion of the court.

This is an action upon a contract for an extension to the Luneta of the city of Manila. Both courts below decided for the Government, the defendant, upon demurrer to the complaint. Abridged, the allegations are these: A contract for the work was made on July 24, 1905. On May 1, 1906, about 200 feet of bulkhead and rock revetment were displaced by pressure from the inside fill and moved about twenty feet into the Bay of Manila, so that a large quantity of the fill that had been pumped behind the bulkhead escaped into the bay. On May 18, before the break could be repaired, a severe typhoon occurred, and the bulkhead and rock revetment, being without the support of the inside fill, were destroyed for about 1800 feet by the pressure of the rock revetment and the wind and waves from the outside, and a large additional quantity of the inside fill escaped. The question is which party must bear the last-mentioned loss. If the first break had not happened no damage would have been done by the typhoon. The plaintiff sets forth the cost of repairing the damages of May 18 and seeks to recover it in this suit.

The specifications of the contract contain the following:

"5. The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from

the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with."

"12. . . . All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill as stated in Article 5, will be measured as carefully as conditions will permit and the computed amounts deducted from the statement for the final payment."

On May 24 a supplemental contract was signed. It recited that the repairs made necessary by the break of May 1 ought to be paid for by the Government; that the original project was modified so as to fill the space that had given way with rock, with clay, etc., for the interstices; and that the change would either increase or diminish the cost. It then agreed that the plaintiff should make the repairs and the Government would pay the actual and reasonable cost, with certain qualifications, plus fifteen per centum, which last was to cover all other items, including profit. This referred to the first damage only. On the next day, May 25, the Government director telegraphed to Commissioner Forbes "For most of typhoon damage I hold contractors responsible; they claim Government responsible for all on account delay repairing first break, but wish to make repairs in manner authorized for first break leaving settlement of liability to be determined later. Repairs should be made at once, but in view of contract requirement . . . do not see how contractors can be authorized proceed before determination of liability." The answer approved "authorizing contractors to proceed immediately to make repairs on lines indicated, with the understanding that all rights reserved in regard to adjudication of liabilities." These telegrams were communicated to the plaintiff, and it was authorized to proceed to make repairs in the manner outlined in the agree-

ment of May 24. It did so and the Government now refuses to pay.

It will be understood that this case is in no way concerned with the possible difference in cost between the mode of repair adopted and that which might have been followed under the original contract. The question here is which party is responsible for the repairs, assuming no such difference to exist. We need not consider whether the effect of all that we have recited was or was not to substitute the new mode and new cost for the old as that which the parties left at risk when they agreed that the plaintiffs should go on and do the work. If the plaintiff should have any claim for the excess alone, if any, over the cost that would have been incurred under the original plan it is not suing for it here.

Both sides found their case on the division of losses made by the specification quoted. On the one hand, the accident would not have happened but for the pressure from the mud fill, on the other, the more immediate cause was wave action and the pressure of the revetment against the timber structure, the effects of which the contractor was to bear. We agree with the court below that the contractor must bear the loss. The question is not whether the responsibility of the Government might not have extended to the later consequences had it originally been a wrongdoer, and had it been sued in tort. The question is to what extent did the Government assume a risk which, but for the contract, would not have fallen upon it at all. The contract qualified the relation only cautiously and in part. If the break was caused by pressure from the mud fill the Government agreed to pay for repairs to the structure. That was all.

But for the addition in 12 quoted above it might be doubted whether 'structure' meant anything but the bulkhead and revetment. But Article 12 extends the Government liability to loss of dredged materials due to

such a break. It is suggested that the reason for the Government undertaking was that the plan was made by the Government engineers. It may have been. But the plaintiff was content to work upon that plan; it, not the Government, was doing the work, and it took the risk so far as the contract did not make a change. The Government could not be charged by it with negligence or with causing the first break. That was only something for repairing which the Government had promised to pay. Whatever the Government had not promised to pay for the contractor had to do in order to offer the completed work which it had agreed to furnish. The case is stronger for the Government than those upon policies of insurance where courts refuse to look behind the immediate cause to remoter negligence of the insured. *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351, 366; *Orient Insurance Co.* v. *Adams*, 123 U. S. 67; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284, 295. Here, as we have said, the plaintiff cannot charge the defendant with negligence, the immediate event was one of which the plaintiff took the risk, on general principles of contract it took that risk unless it was agreed otherwise, and it does not matter to the result whether we say that we cannot look farther back than the immediate cause, or that the undertaking of the Government did not extend to ulterior consequences, not specified, of the break for repairing which it undertook to pay, but which it did not cause.

Judgment affirmed.

TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNSYLVANIA, *v.* CRANE COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 67. Argued December 6, 7, 1910.—Decided December 19, 1910.

A vessel being constructed under contract for the United States is a public work within the meaning of the act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the act of February 24, 1905, c. 778, 33 Stat. 811, and materialmen can maintain an action on the bond given pursuant to such statute by the contractor.

Whether a work is public or not, depends on whether it belongs to the representative of the public and not on whether it is or is not attached to the soil.

Where title to the completed portion of a vessel being constructed for the United States passes to the United States as payments are made, laborers and materialmen cannot assert liens under the state law, but can maintain actions on the contractor's bond given under the act of 1894 as amended by the act of 1905. *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452.

The court will, in the absence of clear and established construction, reach its own conclusion in construing a statute, notwithstanding opinions of the Attorney General looking in the opposite direction.

Held, in this case, that the suit had been properly brought, and that the United States was not necessarily a party, the suit being begun in the name of the United States to the real plaintiff's use.

Although the plaintiff may not have applied for copy of the bond and filed an affidavit that the labor and materials had been supplied, the defect was formal and not vital as the intervenors had complied with the statute in that respect.

Objections to allowing claimants the benefit of the bond given by the contractor under the act of 1894 as amended by the act of 1905, either because they had a lien or because the service was too remote, if carried to an extreme, would defeat the purpose of the act.

Where a bond is under seal consideration is presumed; in this case, although the bond was not executed until ten days after execution

of the contract which it was given to secure, the transactions may be regarded as simultaneous.

Assignments of claims of materialmen on a public work held in this case not to have affected the remedy of enforcing the same against the surety on the contractor's bond.

In a suit to enforce claims of materialmen against surety on a contractor's bond, each claimant is entitled to a docket fee of $10.00. Although the claims are consolidated in a single suit the causes of action are distinct.

163 Fed. Rep. 168, affirmed.

THE facts, which involve the construction of the materialmen's act of August 13, 1894, as amended by the act of February 24, 1905, are stated in the opinion.

Mr. James B. Murphy, with whom *Mr. C. H. Winders* and *Mr. M. M. Richardson* were on the brief, for plaintiff in error:

The purpose of Congress in the passage of the act of August 13, 1894, 28 Stat. 278, as amended February 24, 1905, 33 Stat. 811, was to protect, first, the United States, and, second, to protect laborers and materialmen, who had no right of lien by reason of the building or work being upon the property of or belonging to the sovereign, by giving to them a right of action on the contractor's bond, substituting the bond for the building or public work. *Hill* v. *American Surety Co.*, 200 U. S. 197; *U. S. F. & G. Co.* v. *United States*, 191 U. S. 416; *Sica* v. *Kimpland*, 93 Fed. Rep. 403; *American Surety Co.* v. *Cement Co.*, 110 Fed. Rep. 717; *United States* v. *Burgdorf*, 13 App. D. C. 506; *United States* v. *City Trust & Safe Deposit Co.*, 21 App. D. C. 369; 123 Op. Atty. Genl. 74.

The contract in this case was neither for the erection of a "public building" or the prosecution or completion of any "public work," and further, title to the vessel under the contract not passing to the Government until its completion, delivery and acceptance, the laborer and materialman, under the statutes of the State of Washington, were

amply protected by its lien laws, hence the claims sought to be enforced here are not only without the terms of the act, but outside of the very scope and intent of Congress in its passage. *Clarkson* v. *Stevens*, 106 U. S. 505; *John B. Ketcham*, No. 2, 97 Fed. Rep. 872; Opinion Atty. Gen. Moody, Aug. 6, 1906. The rule is also announced in Benjamin on Sales, 7th ed., 298; *United States* v. *Ollinger*, 55 Fed. Rep. 959; *Yukon River St. Co.* v. *Grotto*, 69 Pac. Rep. 252 (Cal.); *William* v. *Jackson*, 16 Gray, 514; *Green* v. *Hull*, 1 Houst. 506; *West Jersey Ry. Co.* v. *Trenton Car Co.*, 32 N. J. Law, 517; *Etna* v. *Treat*, 15 Ohio St. 585; *Andrews* v. *Durant*, 11 N. Y. 35; *S. C.*, 62 Am. Dec. 55; *Hawes & Co.* v. *Trigg Co.*, 65 S. E. Rep. 538.

Title to the vessel not passing to the United States until delivery and acceptance by it, under § 5953, Ballinger, Washington Code, as amended by the Laws of 1901, p. 21, the plaintiff and intervenors herein had a right of lien upon the vessel.

Where under general principles of law there is a lien there is no right of action on the bond. *United States* v. *Hyatt*, 92 Fed. Rep. 442; *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. Rep. 717; *Laughlin Co.* v. *Morgan*, 111 Fed. Rep. 474; *Laughlin Co.* v. *American Surety Co.*, 114 Fed. Rep. 627; *Bayne* v. *United States*, 93 U. S. 643; note 29 L. R. A. 226; *United States* v. *McGee et al.*, 171 Fed. Rep. 209; *Surety Co.* v. *Guarantee Co.*, 174 Fed. Rep. 385.

Defendants in error having a right of lien, being fully protected thereby, are wholly without the scope and intent of the act. Claimants are also clearly estopped from asserting any claim as against the bond.

The Puget Sound Engine Works having been adjudged a bankrupt prior to the institution of this action, under § 3466, Rev. Stat., claims due the United States in such cases are given preference. *In re Stover*, 127 Fed. Rep. 394; *Smith* v. *United States*, 92 U. S. 618; *In re Huddell*,

47 Fed. Rep. 206; *United States* v. *Barnes*, 31 Fed. Rep. 705; *In re Strassburger*, 4 Wood, 558; *S. C.*, Fed. Cas. No. 13.

The mere fact that the Government might hold collateral or security does not require it to resort thereto before enforcing its direct remedy. Cases *supra* and *Chemical National Bank* v. *Armstrong*, 59 Fed. Rep. 375; *Merrill* v. *National Bank*, 173 U. S. 140; *Childs* v. *N. P. Carlston Co.*, 76 Fed. Rep. 86; *Doe* v. *N. W. Coal & Trans. Co.*, 78 Fed. Rep. 62; *Wheeler* v. *Walton &c. Ry. Co.*, 72 Fed. Rep. 967; *Levey Bros.* v. *Chicago Nat. Bank*, 42 N. E. Rep. 131; Storey, Eq. Jurisp., § 614.

If the surety pays the debt of the Government, it is entitled to be subrogated to its preference right. *Beaston* v. *Delaware Bank*, 12 Pet. 102; *Hunter* v. *United States*, 5 Pet. 172; *Field* v. *United States*, 9 Pet. 182; *In re Huddell*, 47 Fed. Rep. 206; *United States* v. *Barnes*, 31 Fed. Rep. 705; Federal Cases, Nos. 7843, 7731, 9682, 17,668.

The contract for building the vessel was not only without the scope of the act, but also without its express terms. A vessel is not a public work. That term "public works" includes only fixed works and does not include a sea-going vessel. *Penn Iron Co.* v. *Trigg*, 56 S. E. Rep. 329; *Hawes* v. *Trigg Co.*, 65 S. E. Rep. 538; *United States* v. *Perth Amboy Shipping Co.*, 137 Fed. Rep. 689; 23 Am. & Eng. Ency. of Law, 2d ed., 459; *United States* v. *Ollinger*, 55 Fed. Rep. 959; *Ellis* v. *Grand Rapids*, 123 Michigan, 567; *S. C.*, 82 N. W. Rep. 244; *Winters* v. *Duluth*, 82 Minnesota, 130; *S. C.*, 84 N. W. Rep. 788; 23 Op. Atty. Genl. 174; 20 Op. of Atty. Genl. 454; Op. Solicitor General Hoyt, approved by Attorney General Moody, August 3, 4, 1906.

The United States should be made a party in case of the insolvency of one engaged in the performance of a contract entered into with the United States Government.

The claim of the Government is prior and paramount to that of all other creditors, and general statutes of limitation do not cut off the Government from asserting its claim. § 3466, Rev. Stat. 2314; *In re Stover*, 127 Fed. Rep. 394; *Smith* v. *United States*, 92 U. S. 618; *In re Hubbell*, 47 Fed. Rep. 206; *United States* v. *Barnes*, 31 Fed. Rep. 705; *In re Strassburger*, 4 Wood, 558; *S. C.*, Fed. Cas. No. 13; *Bain* v. *United States*, 93 U. S. 643; *United States* v. *McGee et al.*, 171 Fed. Rep. 209; *Hill* v. *American Surety Co.*, 200 U. S. 197.

The statute provides that this suit can only be instituted upon the performance of certain conditions, which have not been complied with. *United States* v. *Freeman*, 3 How. 556.

No affidavit was filed by the plaintiff or by intervenors, and no certified copy of the bond procured, and this action was not based upon a certified copy of such bond. Even if valid, the bond is not liable for cartage, towage, wharfage and patterns from which castings are made. *United States* v. *Hyatt*, 92 Fed. Rep. 442; *S. C.*, 34 C. C. A. 445; *McAllister* v. *Fidelity & Deposit Co.*, 83 N. Y. Supp. 752; *McLaughlin* v. *Surety Co.*, 114 Fed. Rep. 627; *Laughlin Co.* v. *Morgan*, 111 Fed. Rep. 474; *Am. Surety Co.* v. *Cement Co.*, 110 Fed. Rep. 717; *Rhine* v. *Guilfoil*, 13 Washington, 373; *Webster* v. *Real Estate Imp. Co.*, 6 N. E. Rep. 71; *Wilson* v. *Nugent*, 57 Pac. Rep. 1008 (Cal.); *United States* v. *Morgan*, 111 Fed. Rep. 474; *United States* v. *Conkling*, 135 Fed. Rep. 508.

Many of the claims are not claims for material or for labor entering into and becoming a part of the public work, and are not such claims as are contemplated by the statute. *Standard Oil Co.* v. *Trust Co.*, 21 App. D. C. 639; *United States* v. *City Trust Co.*, 23 App. D. C. 153; *United States* v. *Mehl*, 25 Kansas, 205; *Basshor* v. *B. & O. Ry. Co.*, 65 Maryland, 99; *United States* v. *Kimpland*, 93 Fed. Rep. 403; *United States* v. *Simon*, 98 Fed. Rep. 73;

Central Trust Co. v. *Texas & St. L. Ry. Co.*, 27 Fed. Rep. 178.

The claim against the bond in question is a personal privilege and cannot be assigned, and if assigned the assignee has no right of action upon the bond. 20 Am. & Eng. Ency. of Law, 2d ed., 471; 1 Jones on Liens, §§ 982, 990; *Horton* v. *Sparkman*, 2 Washington, 165.

The giving of the bond was without consideration. Brandt on Suretyship, 3d ed., § 764; *Building Asso.* v. *Kleinhoffer*, 40 Mo. App. 388; *Ring* v. *Kelly*, 10 Mo. App. 411. An attorney's fee cannot be taxed to each individual laborer and materialman. Their several appearances in the Circuit Court is not brought about by any fault or default on the part of the surety. *Missouri Pacific Ry. Co.* v. *Texas & P. Ry. Co.*, 38 Fed. Rep. 775; see also *Central Trust Co.* v. *Wabash Ry. Co.*, 32 Fed. Rep. 684.

Only one docket fee is allowable. *Barron* v. *Mt. Eden*, 87 Fed. Rep. 483; *Aiken* v. *Smith*, 57 Fed. Rep. 423; *Gorse* v. *Parker*, 36 Fed. Rep. 840.

Mr. Ira Bronson for defendants in error:

A public vessel is a public work within the meaning of the statute. *Hill* v. *Am. Surety Co.*, 200 U. S. 197; *Standard Furniture Co.* v. *Henningsen*, 82 Pac. Rep. 171; *Anniston Pipe Co.* v. *Surety Co.*, 92 Fed. Rep. 551.

A narrow view of the statute, supported only by the opinions of Attorneys General, would place the construction of the work described in the contract without the purview of the statute.

As to what is a "public work" within the meaning of the statute, see *United States* v. *Shipbuilding Co.*, 137 Fed. Rep. 689; as to shore protections, *United States* v. *Farley*, 91 Fed. Rep. 474; dry dock, *United States* v. *Freel*, 92 Fed. Rep. 299; jetty, *United States* v. *Hyatt*, 92 Fed. Rep. 442; wharf and pier, *United States* v. *Kimpland*, 93 Fed. Rep. 403; lock in river, *United States* v. *Sheridan*, 119

Fed. Rep. 236; *United States* v. *American Surety Co.*, 127 Fed. Rep. 490; *United States* v. *Morgan*, 11 Fed. Rep. 476; *United States* v. *Jefferson*, 60 Fed. Rep. 736.

Under the contract laborers and materialmen are not protected by state lien laws. *The Poconoket*, 67 Fed. Rep. 262; aff'd by 70 Fed. Rep. 640; 168 U. S. 707; *United States* v. *Heaton*, 128 Fed. Rep. 417; *Insley* v. *Garside*, 121 Fed. Rep. 699.

Relators and intervenors are within the terms of the statute, and the Circuit Court had jurisdiction of the suit.

The contract was within the scope of the act and within its express terms. The materials and labor required were within the terms of the contract. Plaintiff in error entered into the engagement under the statute and is now estopped to deny liability. *Standard Furniture Co.* v. *Henningsen*, 82 Pac. Rep. 171.

The United States should not have been made a party; nor is an application by affidavit to the department under whose direction the work is performed a condition precedent to bringing suit. *United States* v. *Hegeman*, 21 Pa. Super. Ct. 459.

All the claims are within the purview of the contract and bond. *Am. Surety Co.* v. *Cement Co.*, 110 Fed. Rep. 717. The object of this statute is the protection of those furnishing labor and material for the construction of public work. It would be a narrow construction of the statute, too narrow in fact to attain its primary object, if any of these claims should be held without the purview of the statute.

The claims of laborers and materialmen are assignable under the act and the assignment does not defeat a recovery. *Fidelity Nat. Bank* v. *Rundle*, 100 Fed. Rep. 400. The bond is upon a sufficient consideration, and the taxation of costs was proper. *The Oregon*, 133 Fed. Rep. 609.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811, upon a bond given to the United States as required by that act. The contract to secure which the bond was given was a contract by the Puget Sound Engine Works to build and deliver a single screw wooden steamer for the United States, and the main question in the case is whether the statute applies to a contract for such a chattel. If not, parties like the plaintiffs, who furnished labor or materials for the work, have no standing to maintain the suit. We proceed, as soon as may be, to dispose of that question, leaving details and minor objections to be taken up later in turn. It was raised by demurrer to the declaration and subsequently by what was entitled an affirmative defence pleaded by the surety and a demurrer by the plaintiffs. The decision was for the plaintiffs against the surety in the Circuit Court of Appeals. 163 Fed. Rep. 168; *S. C.*, 89 C. C. A. 618.

The amended statute requires any person "entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work," "to execute the usual penal bond . . . with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work." It gives any person who has furnished labor or materials used in the construction or repair of any public work, which have not been paid for, the right to intervene in a suit upon the bond. In short, besides securing the United States, the act is intended to protect persons furnishing materials or labor "for the construction of public works," as the title

declares. The question narrows itself accordingly to whether the steamer was 'a public work' within the meaning of the words as used.

As a preliminary to the answer it is relevant to mention that by Article 3 of the contract partial payments are provided for as the "labor and material furnished" equal certain percentages of the total, and that by Article 4 "the portion of the vessel completed and paid for under said method of partial payments shall become the property of the United States," although the contractor remains responsible for the care of the portion paid for, and by Article 2 there is to be a final test of the vessel when completed. The vessel has been built and accepted, and is now in possession of the United States. Notwithstanding these facts, it was argued that the statute did not apply to the contract, because the laborers and materialmen had a lien by the state law; and that, even if the statute applied, they had lost their rights by not asserting them before the delivery of the vessel, as before that, it is said, the title did not pass to the United States. Among other things this ended the right to subrogation that the surety might have claimed. But the very recent decision in *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, establishes that the title to the completed portion of the vessel passed, as provided in Article 4, and that the laborers and materialmen could not have asserted the lien supposed to exist.

The case cited shows therefore that such claimants are within the policy of the statute. It also contains a strong intimation that they are within the meaning of its words. For it refers to the statute and says that it was in recognition of the inability of such persons to take liens upon the public property of the United States that Congress passed the act, and adds that in view of this purpose to provide protection for those who could not protect themselves the statute has been given liberal construction by this court.

See also *Hill* v. *American Surety Co.*, 200 U. S. 197. The reference and comment when the attempt was made to enforce a lien under state laws would have had no relevance unless they had been intended to point out the true remedy available in such a case. The argument that the vessel was not a public work loses most of its force when it appears that the title was in the United States as soon as the first payment was made. Of course public works usually are of a permanent nature and that fact leads to a certain degree of association between the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech, so absolute that we are bound to read 'any public work' as confined to work on land. It is not necessary to discuss in detail some opinions from the Attorney General's office in cases where the title to the vessel did not pass that looked rather in the opposite direction. It is enough to say that there has been no such clear and established construction as to cause us to yield our own view. On the other hand, the decision of some other courts has been in accord with the judgment below and with what we now decide. *United States* v. *Perth Amboy Shipbuilding & Engineering Co.*, 137 Fed. Rep. 689, 693. *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. Rep. 717, 719. *United States* v. *Ætna Indem. Co.*, 40 Washington, 87.

Another defence, set up in the same manner as the first, is that the United States should have been made a party, and, in connection with this, a further one that the suit cannot be maintained unless the plaintiff has applied, as provided in the statute, for a copy of the bond, and furnished an affidavit that labor or materials have been sup-

plied by him for the prosecution of the work. The latter is the more substantial, as, of course, the suit was begun in the name of the United States to the real plaintiffs' use. But the objection is not serious in either form. No suit had been brought by the United States for more than six months from the completion of the work, affidavits were made and copies filed by intervenors, and in the circumstances the omission was only a formal defect. The language of the statute that after giving the affidavit the party should be furnished with a certified copy of the contract and bond, "upon which he or they shall have a right of action," etc., may be read as meaning 'upon which bond' as easily as 'upon doing which,' and hardly can be construed as making a condition precedent. The conditions are attached in the form of provisos by later words.

Next it is objected that certain claimants are not entitled to the benefit of the bond, either because they had a lien or because the service was too remote. Of the former class are claims for cartage and towage to the spot where the work was going on. We agree with Judge Putnam in *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. Rep. 717, that in these small matters the objection if carried to an extreme would defeat the purpose of the statute, that such liens ordinarily are not insisted upon, and that it would be unreasonable to let the statute 'interfere with the convenience of minor dealings in such methods as the usual practices establish.' Of the other class are the claims for patterns furnished to the moulding department of the Puget Sound Engine Works. As was said by the judge below, those who furnish the patterns have as fair a claim to be protected as those who erect the scaffolding upon which the carpenters stand in doing their work upon the ship.

Next it is said that the bond was without consideration because the contract was made on February 17, and the bond not executed until February 27, ten days later. But

the transactions may be regarded as simultaneous in a practical sense, and the bond being under seal, consideration is presumed.

The assignment of some of the claims did not affect the remedy. *United States* v. *Rundle*, 100 Fed. Rep. 400.

The allowance of a docket fee of $10 to each claimant appears to us to be correct. Rev. Stat., § 824. The claims are several and represent distinct causes of action in different parties, although consolidated in a single suit.

Judgment affirmed.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY *v.* TURNIPSEED, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 59. Submitted November 30, 1910.—Decided December 19, 1910.

A general classification in a state statute resting upon obvious principles of public policy does not offend the equal protection provision of the Fourteenth Amendment because it includes persons not subject to a uniform degree of danger.

An employé of a railway company, although not engaged in the actual operation of trains, is nevertheless within the general line of hazard inherent in the railway business.

A state statute abrogating the fellow-servant rule as to employés of railway companies is not unconstitutional under the equal protection provision of the Fourteenth Amendment because it applies to all employés and not only to those engaged in the actual operation of trains; and so held as to § 3559 of the Mississippi constitution of 1890.

Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact is within the general power of government to enact rules of evidence; and neither due process of law nor equal protection of the law is denied if there is a rational connection between the fact and the ultimate fact presumed, and the party af-

fected is afforded reasonable opportunity to submit to the jury all the facts on the issue.

It is not an unreasonable inference that a derailment of railway cars is due to negligence in construction, maintenance or operation of the track or of the train, and the provisions of § 1985 of the Mississippi Code of 1906, making proof of injury inflicted by the running of cars or locomotives of a railway company *prima facie* evidence of negligence on the part of servants of the company, does not deprive the companies of their property without due process of law or deny to them the equal protection of the law.

Such a statute in its operation only supplies an inference of liability in the absence of other evidence contradicting such inference.

THE facts, which involve the constitutionality under the equal protection clause of the Fourteenth Amendment of certain provisions of the Code and of the constitution of the State of Mississippi, are stated in the opinion.

Mr. James N. Flowers for plaintiff in error:

Section 3559, Annotated Code, as now construed by the Supreme Court of Mississippi, violates the Fourteenth Amendment in that it denies to railroad corporations the equal protection of the laws. Said section is constitutional as construed by that court in *Ballard* v. *Cotton Oil Co*, 81 Mississippi, 507, and *Bradford Construction Co.* v. *Heflin*, 88 Mississippi, 362. That state statutes may abolish the fellow-servant rule in part as to employés of railroad companies and leave it in full operation as far as it affects the rights of servants of other masters is conceded, *Minneapolis &c. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Tullis* v. *Lake Erie &c. Ry. Co.*, 175 U. S. 348; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, but they can do so only as to such employés as are emperilled by the hazardous nature of the business of operating railroad trains. A trackman is in no more danger from the operation of trains than is a telegraph operator.

The statute cannot be consistently applied to the case

of employés, except those who take part in the actual operation of trains, or whose duties expose them to dangers from the actual operation of trains. The dangerous part of the railroad business, which justifies the classification of it as a dangerous business, is the running of trains. The statute only applies to those who take part in such dangerous business, or whose duties expose them to such dangers.

To determine whether the person injured is entitled to the protection of § 193 of the state constitution, one should not look at the character of the employment of the person whose negligence caused the injury, but to the character of the employment of the person who was himself injured.

In this case the man killed was engaged in no dangerous business. His injuries did result from a running train, the said train having been derailed and turned over on him.

The deceased was not even engaged about the duties of his employment at the time he was hurt, but had stopped at the noon hour and was walking along the track. His duties did not require him to be where he was. It was a place of his own selection. He cannot be said to have been engaged in a dangerous employment just because he worked on the track and a train running along the track might jump the track and fall on him. *Railway Co.* v. *Mackey, supra; Tullis* v. *Railroad Co.*, 175 U. S. 351; *Blomquist* v. *Great Northern R. R. Co.*, 65 Minnesota, 69; *Jemming* v. *Great Northern R. R. Co.* (Minn.), 1 L. R. A. (N. S.) 702; *Anderson* v. *Railroad Co.*, 74 Minnesota, 432.

Cases allowing the railroad employé to plead such statutes have proceeded on the idea that the particular branch of employment was hazardous. *Railroad Co.* v. *Pontius*, 157 U. S. 200; *Dunn* v. *Railroad Co.*, 107 N. W. Rep. 616; *Callahan* v. *Railroad Co.*, 170 Missouri, 473, affirmed in 194 U. S. 826.

In the effort to make it easy to fasten liability upon

railroad companies the Mississippi legislature has gone to the extreme. The necessary effect of § 1985 of the Mississippi Code of 1906 is to make railroad corporations liable in every instance of damage to persons or property unless it is able to meet successfully the burden of proving its innocence. The burden of proof is shifted to the defendant and railroad corporations are put in a class to themselves. It is legislation directed specially against railroads. There is no reason in the classification. It is arbitrary and makes it easier to recover against railroad defendants than against any other defendants. It is a burden put upon them which is put upon no other class of litigants.

The inherent danger of railroading is not a matter to be taken into consideration in the enactment of rules of evidence or of law pertaining to the enforcement of rights of action for injuries inflicted by running trains. The "difference" between railroad companies and other persons and corporations in this regard does not bear a reasonable and just relation to the subject in respect of which the classification is proposed, and therefore such classification is arbitrary. *Atchison, T. & S. F. R. R. Co.* v. *Matthews*, 174 U. S. 96.

The statute, although upheld, was recognized as being on the border line; four members of this court condemned it. *Missouri Pacific R. R. Co.* v. *Humes*, 115 U. S. 512; *Railroad Co.* v. *Paul*, 173 U. S. 404, distinguished; and see *Ballard* v. *Oil Co., supra; Bradford Construction Co.* v. *Heflin, supra; Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150.

This statute will bear upon railroad companies in a discriminating and unequal way and deprive them of their property without due process of law. No law authorizing persons to recover of railroad companies on unjust and illegal claims can be justified on grounds of public policy.

Mr. C. H. Alexander and *Mr. Chalmers Alexander* for defendant in error:

The work in which Hicks was engaged was such as habitually placed him within the hazards contemplated by the Mississippi constitution. See cases in opinion of state court and *Keatley* v. *I. C. R. R. Co.*, 103 Iowa, 282; *Haden* v. *R. R. Co.*, 92 Iowa, 227; *Dunn* v. *Chicago R. R. Co.*, 130 Iowa, 580; *Jenning* v. *R. R. Co.*, 1 L. R. A. (N. S.) 702; *Williams* v. *R. R. Co.*, 121 Iowa, 270; *Croll* v. *Atchison R. R. Co.*, 57 Kansas, 548; *Brown* v. *Yazoo R. R. Co.*, 88 Mississippi, 687. It is applicable to all railroad companies, hence there is no injustice in the operation of the statute. For similar statutes see § 3148 of the general statutes of Florida, 1906. For Arkansas see Sand. & H. Dig., § 6349. For Georgia see 73 Georgia, 499; 79 Georgia, 305. For Alabama see *Georgia Cent. R. R. Co.* v. *Turner*, 145 Alabama, 441. For North Carolina, 120 N. C. 489. For Tennessee see *Horn* v. *Railroad Co.*, 1 Coldw. 72. For Colorado, Kentucky, Maryland, Louisiana, North Dakota, South Carolina and other States see the numerous citations in 33 Cyc. 1274.

Mr. Justice Lurton delivered the opinion of the court.

This was an action in tort for the wrongful killing of Ray Hicks, a section foreman in the service of the railroad company. There was a judgment for the plaintiff in a circuit court of the State of Mississippi, which was affirmed by the Supreme Court of the State.

The Federal questions asserted, which are supposed to give this court jurisdiction to review the judgment of the Supreme Court of the State, arise out of the alleged repugnancy of §§ 3559 and 1985 of the Mississippi Code to that clause of the Fourteenth Amendment of the Constitution which guarantees to every person the equal protection of the laws.

Section 3559 of the Mississippi Code of 1892, being a rescript of § 193 of the Mississippi constitution of 1890, abrogates, substantially, the common law fellow-servant rule as to "every employé of a railroad corporation." It is urged that this legislation, applicable only to employés of a railroad company, is arbitrary, and a denial of the equal protection of law, unless it be limited in its effect to employés imperiled by the hazardous business of operating railroad trains or engines, and that the Mississippi Supreme Court had, in prior cases, so defined and construed this legislation. *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Mississippi, 532; *Bradford Construction Co.* v. *Heflin*, 88 Mississippi, 314.

It is now contended that the provision has been construed in the present case as applicable to an employé not subject to any danger or peril peculiar to the operation of railway trains, and that therefore the reason for such special classification fails, and the provision so construed and applied is invalid as a denial of the equal protection of the law.

This contention, shortly stated, comes to this, that although a classification of railway employés may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary and a denial of the equal protection of the law the moment it is found to embrace employés not exposed to hazards peculiar to railway operation.

But this court has never so construed the limitation imposed by the Fourteenth Amendment upon the power of the State to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employés generally is repugnant to the clause of the Constitution

guaranteeing the equal protection of the law merely because it is not limited to those engaged in the actual operation of trains is without merit.

The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose. The case in hand illustrates the fact that such employés, though not directly engaged in the management of trains, are nevertheless within the general line of hazard inherent in the railway business. The deceased was the foreman of a section crew. His business was to keep the track in repair. He stood by the side of the track to let a train pass by; a derailment occurred and a car fell upon him and crushed out his life.

In the late case of *L. & N. Railroad* v. *Melton*, 218 U. S. 36, an Indiana fellow-servant act was held applicable to a member of a railway construction crew who was injured while engaged in the construction of a coal tipple alongside of the railway track. This whole matter of classification was there considered. Nothing more need be said upon the subject, for the case upon this point is fully covered by the decision referred to.

The next error arises upon the constitutionality of § 1985 of the Mississippi Code of 1906. That section reads as follows:

"Injury to Persons or Property by Railroads *prima facie* Evidence of Want of Skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employés of railroad companies."

The objection made to this statute is that the railroad

companies are thereby put into a class to themselves and deprived of the benefit of the general rule of law which places upon one who sues in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.

It is to be primarily observed that the statute is not made applicable to all actions against such companies. Its operation is plainly limited, first, to injuries sustained by passengers or employés of such companies; second, to injuries arising from the actual operation of railway trains or engines, and third, the effect of evidence showing an injury due to the operation of trains or engines is only "*prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury."

The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some common law aspects of the subject see *Cincinnati &c. Ry.* v. *South Fork Coal Co.*, 139 Fed. Rep. 528 *et seq.*

Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. A few of the leading ones are *Adams* v. *New York*, 192 U. S. 585; *People* v. *Cannon*, 139 N. Y. 32; *Horne* v. *Memphis &c. Ry.*, 1 Coldwell (Tenn.), 72; *Meadowcroft* v. *The People*, 163 Illinois, 56; *Commonwealth* v. *Williams*, 6 Gray, 1; *State* v. *Thomas*, 144 Alabama, 77.

We are not impressed with the argument that the Supreme Court of Mississippi, in construing the act, has de-

clared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the *prima facie* case is enough as matter of law.

The statute does not, therefore, deny the equal protection of the law or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference.

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

Tested by these principles, the statute as construed and

applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation.

From the foregoing considerations it must be obvious that the application of the act to injuries resulting from "the running of locomotives and cars," is not an arbitrary classification, but one resting upon considerations of public policy arising out of the character of the business.

Judgment affirmed.

HERENCIA *v.* GUZMAN.

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

No. 46. Submitted November 29, 1910.—Decided December 19, 1910.

It is not the province of this court on writ of error to reverse if dissatisfied with the verdict of the jury; if there was evidence proper for the consideration of the jury, objection that the verdict was against the weight of evidence or that excessive damages were allowed cannot be considered.

An amendment to a bill of exceptions, after bond on appeal had been given and approved, so as to make the record conform to the fact as to the conditions under which certain testimony introduced by plaintiff in error on the trial was given, *held* not error, as it was not unjustified or objected to and the exception related simply to the inclusion of such testimony in the record.

A judgment cannot be set aside on an exception to the refusal of the trial court to allow an expert to testify where the record does not show what testimony the witness was expected to give or that he was qualified to give any.

THE facts are stated in the opinion.

Mr. Willis Sweet for plaintiff in error.

Mr. Frederick L. Cornwell for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought in the District Court of the United States for Porto Rico to recover damages for personal injuries resulting from the fall of a portion of the building owned by the plaintiff in error which it was alleged he had negligently allowed to remain in a dangerous condition. It was tried by a jury who gave a verdict against plaintiff in error for the sum of $9,000. Judgment was entered accordingly and the case comes here on writ of error.

The argument on behalf of the plaintiff in error proceeds upon the assumption that this court may review the evidence as to negligence and as to the damages recoverable, and may reverse the judgment if the court is dissatisfied with the findings of the jury. This, however, is not the province of the court upon writ of error. As there was evidence proper for the consideration of the jury the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered. *Express Company* v. *Ware*, 20 Wall. 543; *New York, Lake Erie & Western Railroad Company* v. *Winter's Administrator*, 143 U. S. 60, 75; *Lincoln* v. *Power*, 151 U. S. 436–438; *Humes* v. *United States*, 170 U. S. 210.

Nor was any exception taken by the plaintiff in error to the instructions which the trial court gave to the jury. The only questions which are properly before us for review are as to certain rulings upon the admissibility of testimony.

Error is assigned in admitting the testimony of a physician, Dr. Joaquin Martinez Guasp, "as correct," and it is further urged that the court "erred in changing the record

relative thereto after the bond on appeal had been given and approved." It appears that the witness was appointed by the court to examine the plaintiff below in order to ascertain his condition at the time of the trial, and that this action was taken with the consent of the counsel for the defendant (the plaintiff in error). The examination was made and the witness subsequently testified without objection. In fact, the counsel for the plaintiff in error conducted the direct examination, and there was no cross-examination. No question, therefore, is presented with respect to the admissibility of this testimony. The bill of exceptions was amended so as to show that the court stated, when the testimony was introduced, not only that the physician's examination had been made by consent, but that counsel had "agreed that his evidence should be considered as correct." This amendment, as the District Judge states, was to conform the record to the fact. Assuming, as we must, that the statement was made by the court, it does not appear that it was unjustified or that it was objected to. The exception of the plaintiff in error is simply to its inclusion in the record.

It is further insisted that the court erred in refusing to allow one Dr. Gonzalez to testify. As to this the record merely sets forth that counsel "offered to present the testimony of one Dr. Gonzalez, as an expert, which testimony is not allowed by the court and to which ruling of the court counsel for defendant thereupon noted an exception." Manifestly the judgment cannot be set aside because of this ruling, for it does not appear what testimony the witness was expected to give, or that he was qualified to give any.

We have examined the other rulings of which plaintiff in error complains, with respect to the striking out of certain testimony, and we find no error.

Judgment affirmed.

AMERICAN LAND COMPANY *v.* ZEISS.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 230. Argued October 14, 17, 1910.—Decided January 3, 1911.

The general welfare of society is involved in the security and registry of titles to real estate, and those subjects are within the police power of the State.

A State, in the exercise of its inherent power to legislate in regard to title to the soil within its confines, may, without violating the Federal Constitution, require parties owning and in possession of land to establish title by judicial proceedings before properly constituted tribunals, and this power extends to non-resident owners of land who may be brought before such tribunals by publication.

A State possesses, and, after such a disaster to a community as befell San Francisco, California, by fire and earthquake in 1906, in which nearly all the public records of registered titles to real estate were destroyed, may exercise, the power to remedy the confusion and uncertainty arising from the catastrophe.

Undisclosed and unknown claimants are as dangerous to the stability of titles to real estate as other classes, and they are not deprived of their property without due process of law if compelled to establish their titles by judicial proceeding before a properly constituted tribunal on adequate published notice, if given an opportunity to be heard and properly protected in case of fraud.

A state statute, passed after such a catastrophe as visited San Francisco in 1906 for the purpose of reëstablishing titles to real estate, which permits an action for that purpose to be brought by parties who are themselves or by those holding under them, in actual and peaceable possession of the property described in the summons, and which requires the plaintiff to make affidavit before the summons is issued that he does not know and has never been informed of any adverse claimants not named in the summons, and also requires summons to be published at least once a week for two months, posted on each parcel of the property, and to be recorded and prop-

erly indexed in the recorder's office, and served upon all claimants whose names and whereabouts could be ascertained, gives an adequate opportunity to all persons interested in the property to establish their rights and does not deprive unknown claimants of their property without due process of law.

The Fourteenth Amendment does not operate to deprive the States of their lawful power; the due process clause of that Amendment only restrains such exertions of power as are so unreasonable and unjust as to impair or destroy fundamental rights and, therefore, not really within lawful power of the State.

This court in determining the constitutionality of a state statute is bound by the construction given to it by the highest court of the State and will treat it as exacting whatever the state court has declared that it exacts either expressly or by implication.

In determining the constitutionality of a state statute under the due process clause, the criterion is not whether any injury to an individual is possible, but whether the requirements as to notice and opportunity to protect property rights affected are just and reasonable.

It being within the power of the State to determine how title to real estate shall be proved, it is also within the legislative competency of that State to establish the method of procedure.

Due process of law requires that there shall be jurisdiction of, and notice to, the parties, and opportunity to be heard; and, subject to these conditions, the State has power to regulate procedure. *Twining* v. *New Jersey*, 211 U. S. 78.

The California statute, c. 59, of June 16, 1906, to establish titles in case of loss of public records, passed after the earthquake and fire of April, 1906, as construed by the highest state court, is within the legislative power of the State, provides adequate notice and protection to unknown claimants, affords opportunity to be heard and is not unconstitutional under the Fourteenth Amendment as depriving unknown claimants of their property without due process of law.

As a result of the conditions caused in San Francisco by the great calamity of earthquake and fire, which befell that city in April, 1906, an extraordinary session of the legislature of California was convoked. One reason stated for the call was the necessity of providing for restoring the record title to land in San Francisco. An act to ac-

complish that purpose became a law upon its approval on June 16, 1906. It is copied on the margin.[1]

The Circuit Court of Appeals has certified the issues involved in a pending cause, the determination of which rests upon the validity of the statute just referred to. The pertinent facts arising on the record of the cause are stated in the certificate, and are hereafter set forth. The purpose contemplated is to obtain instructions as to

---

[1] Chapter 59.

An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records.

[Approved June 16, 1906.]

The people of the State of California, represented in Senate and Assembly, do enact as follows:

SEC. 1. Whenever the public records in the office of a county recorder have been, or shall hereafter be, lost or destroyed, in whole or in any material part, by flood, fire or earthquake, any person who claims an estate of inheritance, or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property in such county, may bring and maintain an action *in rem* against all the world, in the Superior Court for the county in which such real property is situate, to establish his title to such property and to determine all adverse claims thereto. Any number of separate parcels of land claimed by the plaintiff may be included in the same action.

SEC. 2. The action shall be commenced by the filing of a verified complaint, in which the party so commencing the same shall be named as plaintiff, and the defendants shall be described as "all persons claiming any interest in, or lien upon the real property herein described, or any part thereof," and shall contain a statement of the facts enumerated in section one of this act, a particular description of such real property, and a specification of the estate, title, or interest of the plaintiff therein.

SEC. 3. Upon the filing of the complaint a summons must be issued under the seal of the court, which shall contain the name of the court and county in which the action is brought, the name of the plaintiff and a particular description of the real property involved, and shall be directed to "all persons claiming any interest in, or lien upon the

whether the act in question "is violative of the Fourteenth Amendment of the Constitution of the United States," and whether by virtue of a decree rendered by the Su-

---

real property herein described, or any part thereof," as defendants, and shall be substantially in the following form:

"In the Superior Court of the State of California, in and for the County (or City and County) of ———.

Action No. —.

——— ———, Plaintiff,

vs.

All Persons Claiming Any Interest in, or Lien upon the Real Property Herein Described, or Any Part Thereof, Defendants.

The People of the State of California, to all persons claiming any interest in, or liens upon, the real property herein described, or any part thereof, defendants, Greetings:

You are hereby required to appear and answer the complaint of ——— ———, plaintiff, filed with the clerk of the above entitled court and county, within three months after the first publication of this summons, and to set forth what interest or lien, if any, you have in or upon that certain real property or any part thereof, situated in the county (or city and county) of ———, State of California, particularly described as follows: (Here insert description.)

And you are hereby notified that, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit: (Here insert a statement of the relief so demanded.)

Witness my hand and the seal of said court, this — day of ———, A. D. ———.

[SEAL] ——— ———, *Clerk.*"

SEC. 4. The summons shall be published in a newspaper of general circulation, published in the county in which the action is brought. The newspaper in which such publication is to be made shall be designated by an order of the court or a judge thereof to be signed and filed with the clerk. No other order for the publication of the summons shall be necessary, nor shall any affidavit therefor be required, nor need any copy of the complaint be served, except as hereinafter required. The summons shall be published at least once a week for a period of two months, and to each publication thereof shall be appended a memorandum in substance as follows:

"The first publication of this summons was made in ——— (here

perior Court of the city and county of San Francisco, referred to in the recital of facts, the American Land Company "has been deprived of its property without due process of law."

---

insert the name) newspaper on the — day of ——— A. D. ———; (inserting the date)."

And if the affidavit provided for in section five of this act discloses the name of any person claiming an interest in the property, or a lien thereon adverse to the plaintiff, that fact together with the name and address (if given) of said person shall be stated in a memorandum to be appended to the summons in substance as follows:

"The following persons are said to claim an interest in, or lien upon said property adverse to plaintiff, (giving their names and addresses as above provided). A copy of the summons, together with a copy of the foregoing memoranda, shall be posted in a conspicuous place on each parcel of the property described in the complaint within fifteen days after the first publication of the summons."

SEC. 5. At the time of filing the complaint, the plaintiff shall file with the same his affidavit, fully and explicitly setting forth and showing (1) the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained; (2) whether or not he has ever made any conveyance of the property, or any part thereof, or any interests therein, and if so, when and to whom; also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims or who may claim, any interest in, or lien upon, the property or any part thereof, adversely to him, or if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability. Such affidavit shall constitute a part of the judgment roll. If the plaintiff be a corporation, the affidavit shall be made by an officer thereof. If the plaintiff be a person under guardianship the affidavit shall be made by his guardian.

SEC. 6. If the said affidavit discloses the name of any person claiming any interest in, or lien upon, the property adverse to the plaintiff, the summons shall also be personally served upon such person if he can be found within the State, together with a copy of the complaint and a copy of said affidavit during the period of the publications of the summons; and to the copy of the summons delivered to any such per-

The following are the facts recited in the certificate:

"The appellant as complainant in the court below brought its bill in equity against the appellee to remove

---

son there shall be appended a copy of the memoranda provided for in section four hereof.

If such person resides out of this State a copy of the summons, memoranda, complaint and affidavit shall be within fifteen days after the first publication of the summons deposited in the United States post office, enclosed in a sealed envelope, postage prepaid, addressed to such person at the address given in the affidavit, or if no address be given therein, then at the county seat at the county in which the action is brought. If such person resides within this State and could not with due diligence be found within the State, within the period of the publication of the summons, then said copies aforesaid shall be mailed to him as above provided forthwith upon the expiration of said period of publication.

SEC. 7. Upon the completion of the publication and posting of the summons and its service upon and mailing to the person, if any, upon whom it is hereby directed to be so specially served the court shall have full and complete jurisdiction over the plaintiff and the said property and of the person of every one claiming any estate, right, title or interest, in or to, or lien upon, said property, or any part thereof, and shall be deemed to have obtained the possession and control of said property for the purposes of the action, and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act.

SEC. 8. At any time within three months from the first publication of the summons, or within such further time, not exceeding thirty days, as the court may, for good cause, grant, any person having or claiming any estate, right, title or interest, in or to, or lien upon, said property, or any part thereof, may appear and make himself a party to the action by pleading to the complaint. All answers must be verified and must specifically set forth the estate, right, title, interest, or lien, so claimed.

SEC. 9. The plaintiff must, at the time of filing the complaint, and every defendant claiming any affirmative relief must, at the time of filing his answer, record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action containing the object of the action or defense, and a particular description of the property affected thereby; and the recorder shall record the same in a book devoted exclusively to the recordation of such notices

a cloud from its title to real property and to quiet its title thereto. The bill alleges on April 10, 1908, and at all the times prior thereto referred to in the bill, George H. Lent

---

and shall enter, upon a map or plat of the parcels of land, to be kept by him for that purpose, on that part of the map or plat representing the parcel or parcels so described a reference to the date of the filing of such notice and, when recorded, to the book and page of the record thereof.

SEC. 10. No judgment in any such action shall be given by default; but the court must require proof of the facts alleged in the complaint and other pleadings.

SEC. 11. The judgment shall ascertain and determine all estates, rights, titles and interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consist of mortgages or liens of any description and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action. A certified copy of the judgment in such action shall be recorded in the office of the recorder of the county in which said action was commenced, and any party or the successor in interest of any party to said action may, at his option, file for record in the office of the recorder of such county the entire judgment roll in said action.

SEC. 12. Except as herein otherwise provided, all the provisions and rules of law relating to evidence, pleading, practice, new trials and appeals, applicable to other civil actions, shall apply to the actions hereby authorized.

At any time after the issuance of the summons, any party to the action may take depositions therein, in conformity to law, upon notice to the adverse party sought to be bound by such depositions, and who have appeared in the action (if any) and upon notice filed with the clerk. The depositions may be used by any party against any other party giving or receiving the notice (except the clerk) subject to all just exceptions.

SEC. 13. The clerk shall number consecutively in a distinct series all actions hereby authorized, and shall keep an index and register thereof devoted exclusively to such actions.

SEC. 14. Whenever judgment in an action hereby authorized shall have been entered as to any real property, no other action relative to

and Mary G. Coggeshall were severally the owners in fee simple of two adjacent lots of land in San Francisco, which lots are described in the bill. The lots and others similarly situated are known as City Slip and Water Lots. Under the provisions of an act of the legislature of the State of California, approved March 5, 1851 (Stats. of 1851, page 764), the State leased this property to the city of San Francisco for the term of ninety-nine years. The appellee is alleged to be the owner of the unexpired portion of this lease as successor in interest of the city's right, and to be entitled to the possession thereof until March 26, 1950. The bill alleges that the appellee has no right whatever other than this right of possession and occupation; that notwithstanding the premises, the appellee claims to be the owner in fee simple of said lands under a judgment and decree of the Superior Court of the State of California in and for the city and county of San Francisco, made and entered December 19, 1906, in a proceeding entitled 'Louis Zeiss, plaintiff, vs. All persons claiming any interest in, or lien upon the real property herein

---

the same property or any part thereof maintained under this act shall be tried until proof shall first have been made to the court that all persons who appeared in the first action, or their successors in interest, have been personally served with the papers mentioned in section 6 of this act, either within or without this State, more than one month before the time to plead expired.

SEC. 15. An executor, administrator or guardian or other person holding the possession of property in the right of another may maintain as plaintiff, and may appear and defend in the action herein provided for.

SEC. 16. The word "county" whenever used in this act includes and applies to a consolidated city and county.

SEC. 17. The remedies provided for by this act shall be deemed cumulative, and in addition to any other remedy now or hereafter provided by law for quieting or establishing title to real property.

SEC. 18. All actions authorized hereby must be commenced before July 1st, 1909.

SEC. 19. This act shall be in force thirty days after its passage.

described, or any part thereof, defendants;' that said proceeding was brought under an act of the legislature of the State of California, entitled 'An Act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records,' approved June 16, 1906; that said claim of the appellee under said decree is without right, and said decree is void; that in the complaint in that proceeding the appellee, after properly setting forth the destruction of the records, alleged that he was the owner in fee simple, free of incumbrance, of the lands which are described in the bill in this case, and that he prayed for a decree of the Superior Court adjudging his title to be as set forth by him; that at the time of filing his complaint he filed his affidavit setting forth the character of the estate, the source of his title, his possession, and stating that he had made no conveyance of the land, that there were no liens on it, and that he did not know and that he had never been informed of any other person who claimed or may claim any interest or lien upon the property, or any part thereof, adversely to him. The affidavit contained no averment that inquiry of any kind had been made to ascertain whether such adverse claim did exist. It is shown in the bill that in said proceeding under said act of the legislature, summons was published in the Law Recorder for the space of two months, and was also posted on the land, and that after the period of publication of the summons the appellee herein obtained a decree of the court as prayed for by him. The bill further alleges that although the appellant's grantors were at all times citizens and residents of California, not seeking to evade but ready to accept service of summons, and easily reached for that purpose, no service was made upon them, nor did they in any way receive notice of the pendency of the action, nor did they gain any knowledge of the existence of the decree until more than a year after its entry. A demur-

rer was interposed to the bill in the court below for want of equity, which demurrer was sustained by the court and the bill was dismissed."

Mr. C. Irving Wright, with whom *Mr. Charles Page*, *Mr. Edward J. McCutchen* and *Mr. Samuel Knight* were on the brief, for appellant:

To constitute due process of law in judicial proceedings involving adversary rights of property there must be actual and adequate notice, giving a real and substantial, and not merely a formal and illusory, opportunity to controvert the plaintiff's allegations. *Roller* v. *Holly*, 176 U. S. 398.

A judgment in such cases can conclude the rights of parties and privies only. This in an immutable principle of justice. *Hollingsworth* v. *Barbour*, 4 Pet. 466, 475.

Res judicata according to the law of any civilized country is that the court after argument and consideration, came to a decision on a contested matter. *Jenkins* v. *Robertson*, 1 Scotch App. 117; *Tregea* v. *Modesto*, 164 U. S. 179.

Such actions differ among other things from actions which are strictly *in rem* in that the interest of the defendant is alone sought to be affected, that citation to him is required and that judgment therein is only conclusive between the parties.

In proceedings termed *quasi in rem* there is a suit against a personal defendant by name. *The Ad. Hine*, 4 Wall. 571, and see *Freeman* v. *Alderson*, 119 U. S. 185; *Mayor* v. *Shareholders*, 6 A. C. House of Lords, 393; *Fisher* v. *Lane*, 3 Wils. 297.

No reasonable notice can be imparted by a publication not naming or describing the person to be cited and not making any allegation against him. The naming of the party is "of the very life of the notice."

The act is invalid, even within the extreme doctrine of the Massachusetts case, for not requiring any effort to

ascertain claimants before concluding the rights of those who are unnotified because alleged to be unknown. *Tyler* v. *The Judges*, 175 Massachusetts, 71; *State* v. *Guilbert*, 56 Ohio St. 575; *People* v. *Simon*, 176 Illinois, 165; *State* v. *Westfall*, 85 Minnesota, 437; *Dewey* v. *Kimball*, 89 Minnesota, 454.

Proceedings under the act cannot, without violation of the principles of natural justice, be brought within the class of cases where constructive service is permissible. Cases *supra* and *Bruce* v. *Watt*, 1 M. & G. 1; 39 E. C. L. 612; but see also *Mayor* v. *Cox*, L. R. 2 H. L. 239; *Hart* v. *Samson*, 110 U. S. 151.

While a court may be empowered to determine the title to real estate within its limits, as against a non-resident defendant, notified only by publication, this, however, will not justify a pretended notice against natural justice. *Arndt* v. *Griggs*, 134 U. S. 316; *Meyer* v. *Kuhn*, 65 Fed. Rep. 705.

Only conflicting titles can be adjudicated upon constructive service even as against named non-residents. The McEnerney Act, however, attempts to conclude non-adversary interests. *Remer* v. *McKay*, 54 Fed. Rep. 432. It does not provide reasonable constructive service upon claimants who have not been ascertained, even if it could be conceived that it does require any precautions to ascertain claimants.

No reasonable notice can be imparted by a publication not naming or deseribing the person to be cited, and not making any allegation against him. *Pennsylvania Co.* v. *Sears*, 136 Indiana, 460; *Fanning* v. *Krapft*, 61 Iowa, 417; *Skelton* v. *Sacket*, 91 Missouri, 377; *Corrigan* v. *Schmidt*, 126 Missouri, 304; *Detroit* v. *Detroit City Ry. Co.*, 54 Fed. Rep. 1; *Netzorg* v. *Green*, 26 Tex. Civ. App. 119; *Ohlmann* v. *Clarkson*, 120 S. W. Rep. 1155.

The declaration of rights upon mere *ex parte* applications is not the exercise of judicial power. The property

of appellant cannot be transferred to appellee except by the exercise of judicial power. Austin, Philosophy of Jurisprudence, § 1036; Bouvier's Dictionary; *Tregea* v. *Modesto*, 164 U. S. 179; *Cushing* v. *Laird*, 107 U. S. 69.

If the complaint does not show a controversy, jurisdiction cannot be subsequently acquired. No anticipation of defenses or defendants suffices. *Blagge* v. *Moore*, 6 Tex. Civ. App. 359; *Third St. R. R. Co.* v. *Lewis*, 173 U. S. 457; *Attorney General* v. *Avon*, 3 De G., J. & S. 637; 333 L. J., Ch. 172; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. 600; *Case of Prohibitions*, 12 Coke's Rep. 63; Blackstone, Book III, p. 25; Montesquieu, L'Esprit des Lois, livre xi, c. vi.

The court does not go to meet the question. It waits for the question to come to it. Bryce's Am. Com. 252; Miller on Constitution, p. 348; *Georgia* v. *Stanton*, 6 Wall. 50; *De Camp* v. *Archibald*, 35 N. E. Rep. 1056, 1058; *In re Canadian Northern Ry.*, 7 Fed. Rep. 653; *Brewington* v. *Lowe*, 1 Indiana, 21; *Fuller* v. *Colfax County*, 14 Fed. Rep. 177, 178; *Lord* v. *Veazie*, 8 How. 255; *Livingston* v. *D'Orgenoy*, 108 Fed. Rep. 469.

Mr. Otto tum Suden for appellee.

Mr. Garret W. McEnerney, with whom *Mr. Walter Rothchild* was on the brief, by leave of the court as *amici curiæ* in support of the validity of the McEnerney Act, for appellee.

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

Although not objecting to an answer to the questions, nevertheless the American Land Company, which was the appellant below, suggests at bar a want of power to reply to the questions for a twofold reason: First, because

the certificate on its face indicates that the court below was not in a state of mind which required the instruction of this court, but was merely desirous of provoking a direct decision by this court, to avoid the delay and the public inconvenience which otherwise might result. Second, because the certificate is so broad as simply to refer the whole case to this court for decision instead of presenting definite propositions of law for solution. While it may be that these suggestions find possible support, considering the record in a detached way, we think when the certificate is considered as a whole and the subject with which it deals is properly weighed the suggestions are without merit. We therefore pass to a consideration of the questions propounded.

It is apparent that the substantial considerations involved in the questions certified are embraced in the following, *a*, the authority of the State to deal with the subject with which the statute is concerned; *b*, upon the hypothesis of the existence of power, the sufficiency of the safeguards provided in the statute; *c*, upon the like hypothesis the adequacy of the proceedings had in the particular cause with which the certificate deals. We shall consider these subjects separately.

As to the power of the State.

The conditions which led to the legislation in question were stated by the Supreme Court of California in *Title & Document Restoration Co.* v. *Kerrigan, Judge,* 150 California, 289, 305. The court said:

"It is also a matter of common knowledge that in the city and county of San Francisco, at least, if not in other counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness of certainty. That some provision was necessary to enable the holders and owners of real estate in this city to secure to themselves such evidence of title as would enable them, not only to

defend their possession, but to enjoy and exercise the equally important right of disposition, is clear."

As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below. We might well pursue no further the subject of the power of the State to enact the law in question, and thus leave its authority to depend upon the demonstration necessarily resulting from the obvious considerations just stated. As, however, the question of power is intimately interwoven with the sufficiency of the procedure adopted, and as a clear comprehension of the scope of the power will serve to elucidate the question of procedure, we shall briefly refer to some of the leading cases by which the elementary doctrine of power over the subject of titles to real estate and the application of that doctrine to a case like the one in hand is settled beyond question. That a State has the power, generally speaking, to provide for and protect individual rights to the soil within its confines and declare what shall form a cloud on the title to such soil was recognized in *Clark* v. *Smith*, 13 Pet. 195. So, also, it is conclusively established that when the public interests demand the law may require even a party in actual possession of land and claiming a perfect title to appear before a properly constituted tribunal and establish that title by a judicial proceeding. Such was the method employed by the United States in settling as between itself and claimants under Mexican grants the title to property in California. *Barker* v. *Harvey*, 181 U. S. 481; *Mitchell* v. *Furman*, 180 U. S. 402; *Botiller* v. *Dominguez*, 130 U. S. 238; *More* v. *Steinbach*, 127 U. S. 70.

The question of what authority a State possesses over titles to real estate, and what jurisdiction over the subject it may confer upon its courts, received much consideration in *Arndt* v. *Griggs*, 134 U. S. 316. It was there held that, even as to ordinary controversies respecting title to land arising between rival claimants, the State possessed the power to provide for the adjudication of titles to real estate not only as against residents, but as against non-residents, who might be brought into court by publication. In the course of the opinion the court said (p. 320):

"It [the State] has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless it conflict with some special inhibitions of the Constitution, or against natural justice."

Manifestly, under circumstances like those here presented, the principle applies with equal force in the case of unknown claimants. Undisclosed and unknown claim-

ants are, to say the least, as dangerous to the stability of titles as other classes. This principle received recognition and was applied in *Hamilton* v. *Brown*, 161 U. S. 256, where it was held to be competent for a State to make provision for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to property upon the death of a person leaving such property within the State. It was said (p. 275):

"If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the State, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the State or from a private person."

The application of the doctrine of governmental power, as just stated, to a condition like the one here in question was aptly pointed out by the Supreme Court of Illinois in *Bertrand* v. *Taylor*, 87 Illinois, 235, where, in considering the Illinois Burnt Record Act, the court said:

"It was demanded as a matter of safety in a great emergency. It was not calculated to take any reasonable being by surprise. It was known throughout the civilized world that a large part of the city of Chicago had been destroyed by fire and that the records of courts and the records of deeds were all destroyed. This naturally commanded the attention of all reasonable persons everywhere, and called upon them to attend and see what means would be adopted to mitigate the evils and dangers incident to the destruction. This legislation was not done

in a corner, but before the observation of a civilized world. We cannot doubt the power of the general assembly to pass the act."

The Supreme Court of California, in the *Kerrigan case, supra*, addressing itself to the same subject, pertinently observed (pp. 313, 314):

"Applying the principles which have led the courts in cases like *Arndt* v. *Griggs*, 134 U. S. 316, and *Perkins* v. *Wakeham*, 86 California, 580, to sustain judgments quieting titles against non-residents upon substituted service, why should not the legislature have power to give similar effect to such judgments against unknown claimants where the notice is reasonably full and complete? The validity of such judgments against known residents is based upon the ground that the State has power to provide for the determination of titles to real estate within its borders, and that, as against non-resident defendants or others, who cannot be served in the State, a substituted service is permissible, as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the State as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent, it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes, C. J., in *Tyler* v. *Judges of the Court of Registration*, 175 Massachusetts, 71, in speaking of a statute which, in the particular under discussion, was similar to ours: 'If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainty against the unknown may be said to be its chief end—and unknown claimants cannot be dealt with by personal service upon the claimant.' "

The power exerted by the act being then clearly within

the legislative authority, we are brought to consider whether the lawful power was manifested in such a manner as to cause the act to be repugnant to the Fourteenth Amendment. And this brings us to the second proposition heretofore stated, viz.:

The adequacy of the safeguards which the statute provides.

As no complaint is made concerning the provisions of the statute relating to the designation of and notice to known claimants, we put that subject out of view and address ourselves to the provisions relating to unknown claimants or claims. The action which the statute authorizes may be brought by "Any person who claims an estate of inheritance, or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property" situated in a county where "the public records in the office of a county recorder have been lost or destroyed, in whole or in any material part, by flood, fire or earthquake." In the caption of the complaint the statute requires that the defendants shall be described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The summons is required to contain a description of the property affected by the suit and to be directed to "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The summons is to be published at least once a week for two months, and the defendants are commanded to appear and answer within three months after the first publication of the summons. A copy of the summons is required to be posted in a conspicuous place on each separate parcel of the property described in the complaint within fifteen days after the first publication of the summons. At the time of filing the complaint a notice of the pendency of the action, giving among other things a particular description of the property affected thereby, must be re-

corded in the office of the recorder of the county in which the property is situated, and it is made the duty of the recorder to enter, "upon a map or plat of the parcels of land, to be kept by him for that purpose, on that part of the map or plat representing the parcel or parcels so described a reference to the date of the filing of such notice and, when recorded, to the book and page of the record thereof." In considering the statute we are bound by the construction affixed to it by the Supreme Court of the State, and therefore treat as embraced within its terms that which the highest court of the State has declared the statute exacts, either expressly or by necessary implication. In the *Kerrigan case, supra,* it was held that the result of the provisions of the statute was "to require the complainant to designate and to serve as known claimants all whom, with reasonable diligence, he could ascertain to be claimants," a construction which, in effect declared that the statute prohibited the omission of a known claim or claimant, upon the conception that the rights of such claim or claimant would be foreclosed by the general designation and notice prescribed for unknown claimants. And in *Hoffman* v. *Superior Court,* 151 California, 386, where the doctrine of the *Kerrigan case* was reiterated and applied, the court, after holding that the statute requires the plaintiff in his affidavit to allege in terms "that he does not know and has never been informed" of any adverse claimants whom he has not specifically named, pointed out that failure of the plaintiff to make inquiry or to avail himself of knowledge which would be imputed to him because of facts sufficient to put him on inquiry as to the existence of adverse claims would be available "in any subsequent attack upon the decree, upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction."

It is to be borne in mind that it has been settled (*Griffith* v. *Connecticut,* 218 U. S. 563, and cases cited) that

the Fourteenth Amendment does not operate to deprive the States of their lawful power, and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights.

It is to be observed that the statute not only requires a disclosure by the plaintiff of all known claimants, but moreover at the very outset contains words of limitation that no one not in the actual and peaceable possession of property can maintain the action which it authorizes. No person can therefore be deprived of his property under the statute unless he had not only gone out of possession of such property and allowed another to acquire possession, or if he had a claim to such property or an interest therein, had so entirely failed to disclose that fact as to enable a possessor to truthfully make the affidavit which the statute exacts of a want of all knowledge of the existence of other claimants than as disclosed in his affidavit. Besides, it is to be considered that the statute, as construed by the California court, imposed upon the one in possession seeking the establishment of an alleged title the duty to make diligent inquiry to ascertain the names of all claimants. Instead, therefore, of the statute amounting to the exertion of a purely unreasonable and arbitrary power, its provisions leave no room for that contention. On the contrary, we think the statute manifests the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. To argue that the provi-

sions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals. The doctrine on this subject was clearly expressed by the Court of Appeals of New York in *In re Empire City Bank*, 18 N. Y. 199, 215, where, speaking of the right of a State to prescribe in a suitable case for constructive service, it was said:

"Various prudential regulations are made with respect to these remedies, but it may possibly happen, notwithstanding all these precautions, that a citizen who owes nothing, and has done none of the acts mentioned in the statutes, may be deprived of his estate without any actual knowledge of the process by which it has been taken from him. If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him."

And in accordance with this view, the Supreme Court of California, in the *Kerrigan case*, pointed out that the statute furnished all the safeguards for which, in reason, it could have been expected to provide consistently with the condition dealt with. The court said (p. 312):

"Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff, and the relief sought, is posted upon the prop-

erty, and is published in a newspaper for two months, and a '*lis pendens*' containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns the possible claimants who are not known to the plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected."

The case of *Ballard* v. *Hunter*, 204 U. S. 241, is instructive on this feature of the case. In that case a judgment of the Circuit Court of Arkansas was affirmed which sustained the validity of a sale of lands for levee taxes. The Arkansas statute authorized the proceedings which had resulted in the sale, upon constructive publication against non-residents and unknown owners. Lands of Josephine Ballard were sold under the statutory proceeding, she not having knowledge of the existence of the suit or of the fact that the taxes had been assessed against her property. In the course of the opinion the court, speaking through Mr. Justice McKenna, said (p. 261):

"It is said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county showed that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case.

" It should be kept in mind that the laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical

affairs of man. The law cannot give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in *Huling* v. *Kaw Valley Railway & Improvement Company*, 130 U. S. 559, where it was declared to be the 'duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to give notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

While we are of opinion that the views just stated demonstrate the want of merit in the contention that the statute, because of the insufficiency of its requirements, was repugnant to the Fourteenth Amendment, a consideration of a provision of the general law of California, which by the construction of the Supreme Court of California is incorporated into the statute under consideration, would lead to the same result. Thus, in the *Hoffman Case*, 151 California, 386, 393, the court said:

"In this connection it is proper to say that in determining whether or not due process of law is afforded, other statutes applicable to the proceeding may be considered. The provisions of § 473 of the Code of Civil Procedure

apply in such cases. Any person interested in the property and having no actual notice of the decree, may come in at any time within a year after its rendition and by showing that he has not been personally served with process and stating facts constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property—he may have the decree vacated, as to him and be allowed to answer to the merits."

The right conferred by § 473 of the code, it is to be observed, is an absolute right, although the section declares that the court may impose "such terms as may be just." *Holiness Church* v. *Metropolitan Church Association* (Cal. App.), 107 Pac. Rep. 633; *Gray* v. *Lawlor*, 151 California, 352.

Under this construction it might well be held, if it were necessary to do so, as establishing a rule of limitation which it was in the power of the State to prescribe, in view of the circumstances to which the limitation was made applicable. See *Tyler* v. *Judges*, 175 Massachusetts, 71, and *State* v. *Westfall*, 85 Minnesota, 437. See also Illinois cases concerning the power to fix a short period of limitation to meet a disaster like the one to which the statute in question relates, collected in *Gormley* v. *Clark*, 134 U. S. 346, 347.

These views dispose of all the contentions concerning the repugnancy of the statute to the Fourteenth Amendment which we think it necessary to separately consider. In saying this we are not unmindful of a multitude of subordinate propositions pressed in the voluminous brief of counsel and which were all in effect urged upon the Supreme Court of California in the *Kerrigan* and *Hoffman cases* and were in those cases adversely disposed of, and which we also find to be without merit. Some of them we briefly refer to. We do not think it is important to determine the precise nature of the action authorized by

the statute, since the method of procedure which was prescribed was within the legislative competency. So, also, we do not deem it important to discuss what constitutes a judicial proceeding, since the statutory proceeding provided by the act was within the authority of the State to enact, and that it was judicial in character has been expressly determined by the court of last resort of the State. Indeed, not only these, but all the contentions proceed upon a misconception as to the legislative authority of the State and the effect thereon of the due process clause of the Constitution of the United States. The error which all the propositions involve was pointed out in *Twining* v. *New Jersey*, 211 U. S. 78, where, speaking by Mr. Justice Moody, the court said:

Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (citing cases) and that there shall be notice and opportunity for hearing given the parties, (citing cases). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

3. *The adequacy of the proceedings pursued in the case referred to in the certificate.*

As there is no claim that fraud, actual or constructive, was employed by Zeiss in obtaining the judgment complained of, and the proceedings conformed to the California statute, the considerations previously stated entirely dispose of this question.

It follows that both of the questions certified must be answered in the negative.

And it is so ordered.

UNITED STATES *v.* BARBER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 444. Argued October 17, 18, 1910.—Decided January 3, 1911.

On an appeal under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, this court can only look to the judgment which was actually entered to determine what the action of the court below was, and not to any stipulation between the parties.

The designation of a plea does not change its essential nature, and the fact that the statute of limitations is designated as a plea in abatement and not a plea in bar, is untenable.

Even if this court has not jurisdiction under the act of March 2, 1907, of an appeal by the United States from a judgment sustaining a plea in abatement, it has jurisdiction if the plea sustained was in fact one in bar and based solely on the statute of limitations.

United States v. *Kissel*, 218 U. S. 601, followed to effect that a special plea in bar, based on the statute of limitations, to an indictment for conspiracy under § 5440, Rev. Stat., containing allegations of continuance of conspiracy to the date of filing, is not permissible; that defense must be made under the general issue.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Fowler for the United States.

Mr. C. T. Bundy, with whom *Mr. James H. Hawley*, *Mr. A. A. Fraser*, *Mr. N. H. Clapp*, *Mr. A. E. McCartney*, *Mr. Joseph G. Dudley* and *Mr. Roy P. Wilcox* were on the brief, for defendants in error.

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

On April 14, 1908, in the District Court of the United States for the District of Idaho, an indictment was re-

turned, which, in four counts, charged James T. Barber, Sumner G. Moon, Frank Martin and Albert E. Palmer with having violated the conspiracy section of the Revised Statutes, viz., § 5440. In the court below Frank Martin was dismissed from the indictment. Palmer made no appearance, presumably not having been arrested.

The final judgment, to reverse which this writ of error was sued out, is as follows:

"Now came the attorneys for the respective parties herein and thereupon the demurrer to the third count in the indictment herein is withdrawn by the defendants. The demurrer to the second count of the indictment is confessed by complainant, and it is ordered that the demurrer and plea in abatement to the first count of the indictment be and is hereby overruled and denied. It is further ordered that plea in abatement to the fourth count of the indictment be and is hereby sustained. Thereupon counsel for the Government moved and asked that the three first counts of the indictment in the above-entitled action be *nollied;* thereupon said motion was granted and the cause dismissed; all in accordance with the direction of Hon. Robert S. Bean, district judge, who heretofore heard and took under advisement said demurrer and plea in abatement."

As by this judgment the first, second and third counts of the indictment were dismissed by the court at the request of the United States, only the action of the court on the fourth count is open for consideration. It is for the purpose of correcting such action that the United States has prosecuted this writ, doing so upon the assumption that the judgment complained of is embraced within the third class of judgments which it is provided by the act of March 2, 1907, c. 2564, 34 Stat. 1246, may be removed to this court by writ of error, viz., a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy."

It is at once to be observed that the text of the judgment purports to sustain a plea in abatement to the fourth count of the indictment, and as the act of 1907 contains no provision authorizing the review of a judgment sustaining a plea in abatement, counsel for defendants in error now urge that we are without jurisdiction, because each of the pleas upon which the judgment dismissing the indictment was based was filed as a plea in abatement and was argued as such, and the judgment "is an abatement and dismissal of the pending cause only."

Briefly the state of the record on the subject is this. By the fourth count of the indictment it was charged as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin, in the State and District of Idaho, and within the jurisdiction of this court, heretofore, to wit, on the first day of September, in the year nineteen hundred and one, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said first day of September, in the year nineteen hundred and one, and the day of the presenting and filing of this indictment, did unlawfully conspire, combine, confederate, and agree together and with Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and divers other persons whose names are to the grand jurors unknown, knowingly, wickedly, falsely, and corruptly to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States situate in township six north, ranges four, five, six, seven, and eight east of the Boise meridian, township seven north, ranges four, five, six, seven, and eight east of the Boise meridian, and township eight north, range five east of the Boise meridian, in the county

of Boise, in the State of Idaho, and within the Boise, Idaho, land district of the United States, all of which lands were then and there public lands of the United States, with the intent and purpose unlawfully to obtain the title to said lands for the use, benefit, and profit of themselves and a certain corporation thereafter to be organized, to wit, the Barber Lumber Company, a corporation organized under the laws of the State of Wisconsin and doing business in the State of Idaho, with an office and agent at the city of Boise in said State, and ultimately to obtain the transfer of the title to said lands to said corporation. . . ."

The count next averred in substance that the object of the conspiracy was to be accomplished by unlawfully, etc., procuring a large number of persons to apply for and enter lands under the timber laws of the United States, for the use and benefit of the conspirators, upon the following understandings and agreements to be had with the proposed applicants prior to and at the time of the first application to enter the lands: *a*, that the title to lands to be applied for when acquired should enure to the use and benefit of the conspirators and the corporation; *b*, that the conspirators should select the land, furnish a description of the same to each applicant, prepare all necessary papers in connection with each application and represent the applicants before the Land Department; and, *c*, that the conspirators should advance any money needed to make a final payment, and without expense to the applicants should prepare the necessary conveyances to vest a record title to the land acquired in the conspirators and the corporation. The remainder of the count dealt with the overt acts charged to have been done in furtherance of the conspiracy. Some of the overt acts were alleged to have been committed upon dates more than three years before and others upon dates within three years of the filing of the indictment.

Barber and Moon demurred to the count, on the ground that it did not state facts sufficient to constitute an offense against or under the laws of the United States. The demurrer was argued, and at the close of the hearing leave was given "to file plea in abatement and motion to quash the indictment on account of duplicity." Each defendant thereupon filed what was denominated a "plea in abatement," which concluded with the prayer that the particular defendant might be "dismissed and discharged . . . from the premises" as to such count. The ground upon which it was insisted that the United States ought not to further prosecute was stated to be that the offense was barred "by the provisions of section 1044 of the Revised Statutes of the United States of America, in this, that more than three years have elapsed between the date of the commission of the alleged crime . . . and the date of the finding of the said indictment." Recitals were made in the plea tending to support the claim that the particular defendant was not a fugitive from justice at any time between the dates of the commission of the offense alleged and the finding of the indictment. The United States demurred to each of the pleas, and argument was had thereon. Subsequently, the judgment which we have heretofore excerpted was entered. On the same day the following stipulation was signed by counsel and filed with the papers in the case:

"The court, by order duly filed, having sustained the demurrer and plea in abatement of the defendants James T. Barber and Sumner G. Moon to the fourth count of the indictment heretofore returned and filed in the above-entitled action, it is hereby stipulated as follows:

"1st. That a nolle and order of dismissal shall, under the consent of the court, be entered in the above-entitled proceedings as to counts numbered one, two, and three thereof.

"2nd. That the demurrer and plea in abatement of the defendants to the fourth count of said indictment shall be heard and determined together, and that the order or ruling made on either shall be deemed to have been made on both."

In support of the contention that the pleas of the statute of limitations filed below should be regarded in this court, as they were designated below, as pleas in abatement, it is urged by counsel for defendants in error that the pleas presented the following propositions:

"First, conceding that the indictment alleged the *existence* of a conspiracy within three years, there was no allegation of any act within that time which could, by any possible interpretation be said to have been done to effectuate its purpose; and therefore the right to prosecute had not accrued; and second, that as all acts therein alleged which could be said to effectuate the purpose of the conspiracy were performed more than three years before filing the indictment, the government should proceed no further on this indictment."

The claim is then made "That in cases of conspiracy a plea in abatement is the proper method of raising the defense that the right to prosecute has not accrued, because no one of the conspirators has 'done an act to effectuate the object of the conspiracy.' "

Following this claim, it is urged that the defendants have by reason of the stipulation heretofore referred to, "the right to a formal judgment dismissing the action on demurrer for the reason that it does not state facts sufficient to constitute an offense." Upon this assumption it seems to be contended that the judgment should be regarded as entered on the demurrer, and as the judgment does not show that the trial court decided any question in passing on such demurrer which would give this court jurisdiction, the writ of error should be dismissed.

So far as the claim based upon the stipulation is con-

cerned, it is plainly without merit, since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and the court in that judgment expressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations. The claim that the pleas were not in bar but merely in abatement is we think equally untenable. The designation of the respective pleas, as a plea in abatement, did not change their essential nature. As said by counsel for the Government, "the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action; and it has been universally classed, in both civil and criminal procedure, as a plea in bar and not one in abatement." The motion to dismiss the writ of error for want of jurisdiction is overruled.

Many propositions have been urged at bar in support of the contention that the judgment complained of was erroneous. We find it necessary, however, to consider but one, wherein it is claimed that "a special plea in bar is not permissible in a criminal case, but the defense of the statute of limitations must be made under the general issue." This contention, as applied to the character of case now under consideration, must be sustained, upon the authority of the recent decision in *United States* v. *Kissel*, 218 U. S. 601. In that case it was held that where an indictment charges a continuing conspiracy, which is expressly alleged to have continued to the date of the filing of the indictment, such allegation must be denied under the general issue and not by a special plea, and it was further decided that in reviewing, under the act of 1907, the action of a trial court upon such a plea "we are not concerned with the technical sufficiency or

redundancy of the indictment, or even . . . with any consideration of the nature of the overt acts alleged." That the fourth count of the indictment in the case at bar to which the pleas were directed charged a continuing conspiracy is manifest. The charge is that the defendants "did unlawfully conspire," etc., "on the first day of September, in the year nineteen hundred and one, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said first day of September, in the year nineteen hundred and one, and date of the presenting and filing of this indictment." The indictment also explicitly charges a continuing object of the conspiracy, viz., the acquisition of public land within a large area of country, which was necessarily to be obtained in small parcels, and the ability to secure which in a great measure was dependent upon the power of the conspirators from time to time to procure persons willing to make the desired unlawful entries.

Judgment reversed.

HENDRIX *v.* UNITED STATES.

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

No. 319. Argued November 28, 29, 1910.—Decided January 3, 1911.

The United States court at a particular place named is a sufficient designation of the only court of the United States held at that place, which has jurisdiction of the case; and an order transmitting a case under the act of June 28, 1898, c. 517, 30 Stat. 511, to the United States court at Paris, Texas, is sufficient to transfer the case to the District Court of the United States for the Eastern District of Texas and to give that court jurisdiction.

Where the record is not here, and the jurisdictional facts are admitted, and the order recited that the court was well advised in the premises, this court will not hold that the court to which the case was removed on petition of plaintiff in error himself did not acquire jurisdiction because the petition did not state all the jurisdictional facts required by the statute authorizing the removal.

While the repeal of a statute giving special jurisdiction to a court may operate to deprive that court of the jurisdiction so conferred, the mere enactment of a subsequent statute which obviates future application of the earlier statute does not amount to its repeal or affect jurisdiction already acquired.

The provisions of the Oklahoma enabling act of June 16, 1906, c. 3335, 34 Stat. 267, as amended March 4, 1907, c. 2911, 34 Stat. 1287, transferring criminal cases pending in the United States courts of the Indian Territory to the courts of Oklahoma, did not repeal the act of June 28, 1898, c. 517, 30 Stat. 511, or affect cases which had already been transferred under that act to the United States District Court for the Eastern District of Texas.

In this case *held* that it was not error for the trial court to refuse to allow the wife of one accused of murder to testify. *Logan* v. *United States*, 144 U. S. 263.

There was no error on the part of the trial court in denying a motion for a new trial based on affidavits of some of the jurors that they agreed to the verdict on the understanding between themselves and other jurors that the punishment of the degree found would be less than that imposed by the court. *Mattox* v. *United States*, 146 U. S. 140.

THE facts are stated in the opinion.

Mr. James G. Dudley for plaintiff in error:

Jurisdiction in a criminal case is never presumed, but must always be shown, is never waived by a defendant, and want of jurisdiction can be attacked at any stage of a criminal proceeding or even collaterally. *In re Neilson*, 131 U. S. 176; *United States* v. *Rogers*, 23 Fed. Rep. 662; *In re Mills*, 135 U. S. 270; *In re Graham*, 138 U. S. 451.

District Courts of the United States have no jurisdiction to try capital cases, no jurisdiction to try a person indicted for murder, charged to have been committed on land, and no power or jurisdiction to sentence a person for a capital

offense so committed, either to suffer death or life imprisonment. Section 563, Rev. Stat. The Circuit Courts of the United States have exclusive jurisdiction of all capital cases. Section 629, Rev. Stat., subd. 20.

The indictment in this case charges a crime (murder) punishable by death, § 5339, Rev. Stat., and the offense is no less capital, although the jury by their verdict found defendant guilty as charged "without capital punishment." *Fitzpatrick* v. *United States*, 178 U. S. 304; *Goodshot* v. *United States*, 104 Fed. Rep. 257.

The United States court in the Indian Territory had jurisdiction until taken away by the enabling act. Jurisdiction was taken away without saving and excepting cases pending by § 20 of the enabling act, as amended by the act of March 4, 1907.

When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute. *United States* v. *Boisdore*, 8 How. 113; *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398; *United States* v. *Tymen*, 11 Wall. 88; *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 88; *McNulty* v. *Batty*, 10 How. 79; *Ex parte McCradle*, 7 Wall. 514; *Downes* v. *Bidwell*, 182 U. S. 675; *Murphy* v. *Utter*, 186 U. S. 109; *Bird* v. *United States*, 187 U. S. 124; *Colt* v. *Young*, 2 Blatchf. 473; *United States* v. *Barr*, 4 Sawy. 255; *United States* v. *Hague*, 22 Fed. Rep. 706; *United States* v. *Van Vliet*, 23 Fed. Rep. 35; *Manley* v. *Olney*, 32 Fed. Rep. 709; *Birdseye* v. *Sheffer*, 37 Fed. Rep. 825; *Aspley* v. *Murphy*, 50 Fed. Rep. 377; *Postal Tel. Cable Co.* v. *Southern R. R. Co.*, 89 Fed. Rep. 194; *Fairchild* v. *United States*, 91 Fed. Rep. 298; *Strong* v. *United States*, 93 Fed. Rep. 258; *Emblen* v. *Lincoln Land Co.*, 94 Fed. Rep. 713; 102 Fed. Rep. 562; *United States* v. *Jacobus*, 96 Fed. Rep. 262; *United States* v. *Kelley*, 97 Fed. Rep. 461; *Cincinnati Brewing Co.* v. *Betteman*, 102 Fed. Rep. 17; *McClain* v. *Williams*, 10 S. Dak. 336; *Raush* v. *Mor-*

rison, 47 Indiana, 416; *Atty. Genl.* v. *Wharton*, 25 La. Ann. 32; *Waimsley* v. *Nichols*, 36 La. Ann. 801; *Church* v. *Weeks*, 38 Mo. App. 579; *Olcott* v. *Maclean*, 10 Hun, 282; *State* v. *Bank of Tennessee*, 3 Baxt. 409; *Texas Mexican R. R. Co.* v. *Jarvis*, 80 Texas, 464; *S. C.*, 15 S. W. Rep. 1089.

So if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it. *Sherman* v. *Grinnell*, 123 U. S. 679; *National Bank* v. *Peters*, 144 U. S. 570; *Gurnee* v. *Patrick County*, 137 U. S. 141; *United States* v. *Kelley*, 97 Fed. Rep. 461; *Sims* v. *Black Dog*, 9 Oklahoma, 671.

"When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute." *United States* v. *Boisdore*, 8 How. 113; *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398; *United States* v. *Tymen*, 11 Wall. 88; *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 541; *McNulty* v. *Batty*, 10 How. 79; *Ex parte McCradle*, 7 Wall. 514; *Downes* v. *Bidwell*, 182 U. S. 248; *Gwin* v. *United States*, 184 U. S. 675; *Murphy* v. *Utter*, 186 U. S. 109; *Bird* v. *United States*, 187 U. S. 124; *Colt* v. *Young*, 2 Blatchf. 473.

If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. *Trenholm* v. *Gillard*, 101 U. S. 433; *Tex. Mex. R. R. Co.* v. *Jarvis*, 80 Texas, 464; *Larkin* v. *Safians*, 15 Fed. Rep. 153; *Vance* v. *Rankin*, 198 Illinois, 627; *Griffis* v. *Payne*, 22 Tex. Civ. App. 522; *Burlington* v. *Burlington Traction Co.*, 70 Vermont, 495; *Dulin* v. *Lillard*, 91 Virginia, 725.

The District Court of the United States for the Eastern District of Texas, to have had jurisdiction in this case by the order transferring the same, must not only have had jurisdiction of the offense, but must have obtained jurisdiction of the person of the defendant, by some means known to the law. *In re Johnson*, 167 U. S. 124; § 858,

Rev. Stat.; *Logan* v. *United States*, 144 U. S. 263, is not conclusive. See *Lucas* v. *Brooks*, 18 Wall. 436; Art. 775, Code of Crim. Proc.; Wilson's Statutes of Okla., 1903; Crim. Proc., 1232, § 5495; Snyder's Comp. Laws of Okla., 1909; Crim. Proc., 1399, § 6834; Laws of Okla., 1895, 201; Const. of Okla., Art. 24.

Under § 729, Rev. Stat., the trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

A law intended by Congress specially for the benefit of members of the Choctaw and Chickasaw tribes, and for their protection against prejudice, should not operate as a snare and a delusion. *Texas &c. R. R. Co.* v. *Humble*, 181 U. S. 60.

The rule that jurors cannot be permitted to impeach their verdict, *Mattox* v. *United States*, 146 U. S. 140, does not apply here.

It is clear from the affidavits filed that the jury in this case discussed the punishment, and did not intend their verdict to carry a greater punishment than that for manslaughter. Unanimity is one of the essential features of trial by jury; it was so at the common law, and is preserved and protected by constitutional guarantee. *American Pub. Co.* v. *Fisher*, 166 U. S. 464; *Springfield* v. *Thomas*, 166 U. S. 707.

Mr. Assistant Attorney General Fowler for the United States:

The United States District Court for the Eastern District of Texas had jurisdiction to try this case, and it was not error for that court to overrule plaintiff in error's motion to remove the case to the District Court of Garvin County, State of Oklahoma. Section 4, act of March 1, 1895, c. 145, 28 Stat. 693; ch. 45, Mansfield's Digest General Laws of Arkansas; § 1, act of January 15, 1897, c. 29,

29 Stat. 487; act of March 3, 1885, c. 341, § 9, 23 Stat. 385; act of June 7, 1897, c. 3, 30 Stat. 62, pt. 6; agreement between Commission to the Five Civilized Tribes and the Choctaw and Chickasaw Nations of Indians, ratified by act of June 28, 1898, c. 517, 30 Stat. 495, 511, statutes relating to jurisdiction.

A United States court having jurisdiction over the Indian Territory was established by the act of March 31, 1889, c. 23, 25 Stat. 783, §§ 5, 17, 18; act of March 1, 1895, c. 145, 28 Stat. 693; act of June 28, 1898, c. 517, 30 Stat. § 29.

The admission of Oklahoma into the Union as a State did not abrogate the offense which plaintiff in error had committed, nor did it deprive the proper court of the power to proceed with the prosecution to a final judgment.

The statute creating the offense committed by plaintiff in error was not repealed by the admission of the State of Oklahoma, which embraced the territory wherein this crime was committed. *Holt* v. *United States*, 218 U. S. 245; *United States* v. *Baum*, 74 Fed. Rep. 43, 46; *Stevens* v. *Diamond*, 6 N. H. 330; Bishop, Stat. Crimes, § 182.

If the creation of Oklahoma into a State had the effect of repealing § 5339, Rev. Stat., under which this indictment was drawn, in so far as it applied to the territory embraced within said State, yet this offense was kept alive by § 13, Rev. Stat. *United States* v. *Reisinger*, 128 U. S. 398. The United States District Court at Paris, Texas, was the only court which, after the creation of the State of Oklahoma, had jurisdiction to try this case.

The authorities cited by plaintiff in error do not contradict this position.

There being no exception taken by plaintiff in error the order is not before this court on appeal, and it is not open to such collateral attack. *Voorhees* v. *United States Bank*, 10 Pet. 449, 472; *Grignon* v. *Astor*, 2 How. 318, 319, 338; *Harvey* v. *Tyler*, 2 Wall. 328, 342; *Applegate* v. *Lexington Mining Co.*, 117 U. S. 255, 270.

The change of venue was made on plaintiff in error's own motion, and he cannot now be heard to impeach its validity on the ground that the facts authorizing the transfer did not exist. *Murphy* v. *Massachusetts*, 177 U. S. 155; *Perteet* v. *The People*, 70 Illinois, 171, 178; *State* v. *McEvoy*, 68 Iowa, 355; *People* v. *Court Special Sessions*, 4 Hun, 441.

The failure to designate in the order that the case was removed to the District Court at Paris was immaterial, as the statute expressly directed that it was to that court alone it could be removed, and it was that court alone which was vested with jurisdiction to try the same.

Under the statutes directing the enrollment of the Indians, records thereof must be kept in the Interior Department, and the courts will take judicial knowledge of such records. *Knight* v. *United States Land Asso.*, 142 U. S. 161, 169.

The court did not err in refusing to permit Evelina Hendrix, the wife of plaintiff in error, to testify in his behalf. Section 858, Rev. Stat., has no application to criminal trials; rules of evidence in such cases, unless expressly modified by Congress, are those which existed when the judiciary act of 1789 was passed. *United States* v. *Reid*, 12 How. 361, 366; *Logan* v. *United States*, 144 U. S. 263, 298; *United States* v. *Black*, 1 Hask. 570; *United States* v. *Hawthorne*, 1 Dillon, 422; *United States* v. *Brown*, 1 Sawyer, 531; *United States* v. *Hall*, 53 Fed. Rep. 352. *Lucas* v. *Brooks*, 18 Wall. 436, 453, was a civil case, and does not apply.

Plaintiff in error is not entitled to a new trial for the reasons set forth in certain affidavits which it is claimed were made by members of the jury. *Mattox* v. *United States*, 146 U. S. 140, 149.

Whether a new trial should be granted being within the court's discretion is not reviewable by this court. *Henderson* v. *Moore*, 5 Cranch, 11, 12; *Marine Ins. Co.* v.

Young, 5 Cranch, 187, 191; *McLanahan* v. *Insurance Co.*, 1 Pet. 187; *United States* v. *Beaufort*, 3 Pet. 12, 32; *Mattox* v. *United States*, 146 U. S. 140, 147.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Hendrix was indicted in the United States court in the Indian Territory for the crime of murder, for killing one Roler W. Voss. On his motion the case was transferred for trial to the United States court for the Eastern District of Texas, at Paris, Texas. The order transferring the case recited that it was made on the motion of Hendrix, "the court being well advised in the premises."

On the fourth of March, 1909, in the District Court, he objected to the jurisdiction of the court on the ground that the crime was committed in the State of Oklahoma, and "that under the act of Congress known as the 'Enabling act,' passed June 16, 1906, all criminal cases pending in the United States court within the Indian Territory were transferred to the district courts of the State of Oklahoma and of the county of said State where the alleged offense is said to have been committed."

A motion was made to send the cause to such county, to the end that the offense "be tried in the county and State where alleged to have been committed, in pursuance of the Constitution of the United States and the statutes made in pursuance thereof."

The motion was supported by the affidavit of the attorney of Hendrix, which stated that he was instrumental in having the cause removed to Paris, Texas, on account of the prejudice of the presiding judge of the Southern District of the Indian Territory, and that "under the Federal statute permitting said removal to be made, the same was done by Will Hendrix on my advice and suggestion, especially for the reason before mentioned. . . ."

The motion was denied. Hendrix was convicted and sentenced to hard labor for life in the penitentiary of the United States at Atlanta, Georgia.

A motion for a new trial was made, stating as the grounds thereof certain rulings upon evidence, and the action of the court in denying the motion to transfer the case to Garvin County, Oklahoma. And the same grounds constitute the assignments of error in this court.

Another ground is urged in the argument. It is urged that the District Court at Paris, Texas, did not have jurisdiction of the person of Hendrix because, as it is contended, the order of the court changing the venue of the case directed it to be transmitted "to the United States court at Paris, Texas," and did not designate the District Court as required by the statute. "There were district and circuit courts," it is said, "for the Eastern District of Texas, at Paris, Texas, but no court by the name of the 'United States court.'" And it is asked, "to which of these courts was this case transferred?" The question is easily answered. The statute under which the change of venue was made provides "that whenever a member of the Choctaw and Chickasaw Nations is indicted for homicide, he may, within thirty days after such indictment . . . file . . . his affidavit that he cannot get a fair trial, . . . and it thereupon shall be the duty of the judge to order a change of venue in such case to the United States district court for the Western District of Arkansas, at Fort Smith, Arkansas, or to the United States district court for the Eastern District of Texas, at Paris, Texas . . ." June 28, 1898, c. 517, 30 Stat. 511. Reading the order of the court changing the venue of the case in connection with the statute, the order is not uncertain. Besides, the record was transferred and filed in the District Court at Paris, Texas, and Hendrix was tried in that court. In other words, the case was removed to the only United States court at Paris, Texas, designated by the statute,

and tried in the only United States court there in which it could be tried.

It is further contended that such District Court had no jurisdiction of the person of Hendrix, because the order of removal did not recite "the jurisdictional facts or findings authorizing such change of venue," nor are such facts or findings shown by the record. That is, it is not shown that he was a member of the Choctaw and Chickasaw Nations. To both objections it might be immediately answered that a complete record of the case is not here. The affidavit upon which the order of removal was made is not here. It is not denied that an affidavit was filed as required by the statute, and it may be assumed that it was sufficient to justify the action of the court. It is admitted that Hendrix is an Indian and a member of the Choctaw and Chickasaw Nations. The motion for change of venue was made by him, and could only have been made by him, and the order recites that the court granted the motion, "being well advised in the premises." This means advised by Hendrix in the way provided by the statute. And it has indubitable confirmation in the affidavit of his attorney, filed in support of the motion to send the case back to Oklahoma. It stated that the motion for removal was made "under the Federal statute permitting said removal to be made."

The inference is palpable that the jurisdictional fact that Hendrix was an Indian was presented to the court and constituted its ground of action—action which, we may say, was imperatively required by the statute.

The next contention of Hendrix is that jurisdiction was taken from the District Court in Texas by § 20 of the act to enable the people of Oklahoma to form a constitution and a state government, as amended March 4, 1907. By that section it was provided that all causes, civil and criminal, pending in the United States courts of Oklahoma Territory, or in the United States courts in the Indian

Territory, at the time those Territories should become a State, not transferred to the United States Circuit Court or District Courts in the State of Oklahoma, should be proceeded with, held and determined by the courts of the State, with rights of appeal to the final appellate court of the State and to the Supreme Court of the United States. And it is provided that "all criminal cases pending in the United States courts in the Indian Territory not transferred to the United States circuit or district courts in the State of Oklahoma shall be prosecuted to a final determination in the state courts of Oklahoma under the law now in force in that Territory." March 4, 1907, Chap. 2911, 34 Stat. 1286.

The argument is that by certain acts of Congress, explained in *In re Johnson*, 167 U. S. 120, the United States courts in the Indian Territory were given jurisdiction of offences committed in the Territory against the laws of the United States, and that the laws which conferred jurisdiction on the United States courts held in Arkansas, Kansas and Texas outside of the limits of the Territory were repealed. But we have seen that by § 29 of the act of June 28, 1898, a change of venue of cases in the United States courts of the Territory could be invoked by a member of the Choctaw and Chickasaw Nations, and that under the statute the venue of the pending case was, on the motion of Hendrix, changed to the District Court at Paris, Texas. It is, however, contended that the power of the court to make the order "had been taken away and repealed by the act of Congress known as the 'Enabling act,' and the State of Oklahoma had been erected and the state courts had succeeded to the jurisdiction of the United States courts in the Indian Territory." The "Enabling act," it is urged, "makes no exception or provision saving cases pending in the United States court in the Indian Territory, nor any provision saving cases then pending in any of the United States courts" at Paris,

Texas, or in the Eastern District of Texas, on change of venue, and, therefore, the court had no jurisdiction to try Hendrix. To support the contention it is argued that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction and causes pending at the time fall, unless saved by provision of the statute. Many cases are cited to support the proposition and other cases to sustain the view that, "if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it." The effect would have to be admitted if the imputed cause existed. The act of June 28, 1898, under which the change of venue was ordered, was not repealed. The conditions of its future application, of course, disappeared with the admission of the State into the Union, but what had been done before that time was not abrogated, nor was the statute repealed. It had performed its office as to the pending case, but even if we should consider it necessarily as a continuing power, not completely fulfilling its purpose by the transfer simply of a case from one court to another, we cannot regard it as having been repealed nor that jurisdiction had been taken from the District Court at Paris, Texas. The "Enabling act" provides only for the transfer of cases to the courts of Oklahoma which were pending in the District Court of the Territory of Oklahoma and in the United States courts of Indian Territory. That this case was so pending was the conception of counsel when the motion was made to transfer it to the District Court of Garvin County, Oklahoma, and the same conception is expressed in the argument. And it is necessary to meet the words of the enabling act, which embraced, as we have seen, only cases pending in the courts of Oklahoma and Indian Territories. The foundation of the conception seems to be that the venue of the case was not legally changed to the District Court at Paris, Texas, and that it was still pending in the United States court in

the Indian Territory when the enabling act was passed and was transferred by the act to the courts of the State. To this operation of the act we cannot assent. The act is explicit in its terms and provisions. It was careful in its accommodations for the new conditions—the change of the Territories into a State, and in the adjustments made necessary by the creation of new jurisdictions, state and Federal. There was no such necessity for cases transferred to other jurisdictions still adequate to dispose of them. The contention is therefore untenable.

It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were "vitally material to his defense." The ruling was not error. *Logan* v. *United States*, 144 U. S. 263.

On the motion for new trial affidavits of four jurors were offered, stating with some detail that they did not understand the legal effect of the verdict. Only one of the affidavits is in the record. The maker states that, by finding the defendant guilty, as charged in the indictment, without capital punishment, "he did not understand what the punishment would be on such a verdict, and agreed to it on the understanding that the punishment would only be two years in the penitentiary." He further states that he was in favor of a verdict for manslaughter, and would never had consented to the verdict had he thought or believed it "would carry with it a life penalty." The motion for new trial, as we have said, was denied. We see no error in the ruling. *Mattox* v. *United States*, 146 U. S. 140.

The other errors assigned are not pressed in the argument.

Judgment affirmed.

MR. JUSTICE HARLAN dissents.

WEST SIDE BELT RAILROAD COMPANY *v.* PITTSBURGH CONSTRUCTION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 681. Motion to dismiss or affirm. Submitted December 5, 1910.—Decided January 3, 1911.

When plaintiff in error asserts that the state court has not given due faith and credit to a prior judgment of a Federal court between the same parties, he asserts a right under the Constitution of the United States and a Federal question is raised, and, unless manifestly frivolous, the writ of error will not be dismissed.

In this case the consideration given to the Federal question by the state court demonstrates that it is not so far frivolous as to sustain a motion to dismiss.

Where the action is based on counts upon a contract and also upon *quantum meruit* and the evidence to sustain the latter is ruled out, the action rests solely on the contract and the right to maintain it is determined as though brought solely on the contract.

Where an action was dismissed by the Circuit Court of the United States on the sole ground that plaintiff, a foreign corporation, could not sue owing to non-compliance with a state statute, the effect to be given to that judgment in a subsequent action between the same parties in the state court after a curative statute has been enacted raises a Federal question.

Where the State by statute gives a person the right to avoid a contract for a purpose of its own and not because of the merits of the obligation, it may, so long as the matter remains *in fieri*, take that right away; and so held that a curative statute allowing foreign corporations who had not complied with the registration statute to sue, on complying therewith, on contracts made before registration, is within the power of the State, and a judgment entered in an action on a contract in the state court brought after the curative statute does not deny full faith and credit to a judgment of the Federal court entered in an action between the same parties dismissing the complaint on same cause of action solely on the ground that plaintiff had not complied with the registration laws.

The act of Pennsylvania of May 23, 1907, P. L. 205, validating contracts made by foreign corporations which had not complied with registration laws, was within the power of the State and in this case was held to apply to a contract which the courts theretofore had refused to enforce on account of the non-compliance with such registration laws.

227 Pa. St. 90, affirmed.

THE facts, which involve the validity of a statute of Pennsylvania validating contracts made by foreign corporations and the effect to be given to a judgment of the Federal court, are stated in the opinion.

Mr. Thomas Patterson, for plaintiff in error, in opposition to the motion:

The effect to be given a Federal judgment in any subsequent proceeding in a state court, where such judgment is pleaded, raises a Federal question that is reviewable here. *Pittsburgh R. R. Co.* v. *Loan & Trust Co.*, 172 U. S. 493; *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The judgment of a court of record in Pennsylvania being conclusive upon the parties, and not open to collateral attack or inquiry, the effect necessarily to be given by the court of Pennsylvania to the judgment of the Federal court, is that of a judgment which is as a plea a bar and as evidence conclusive in any further litigation between the parties. *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Stevens* v. *Hughes*, 31 Pa. St. 384.

Full force and effect was not given in the case at bar to the judgment of the Circuit Court of the United States for the reason that the contract, which was the basis of the suit in the Federal court and by it declared void, was held valid and binding in the later suit in the state court. The contract was the same as that sued on in the Federal court, the parties the same, and the judgment of the state court was a direct reversal of that of the Federal court.

The defendant in error has never sued solely for its

services performed, but always on its contract and award. Plaintiffs in error have never objected that the defendant in error could not sue on a *quantum meruit* for services performed, but have always fought the allowance of the award.

A disposition of a case upon its merits arises where the cause of action is determined finally as either good or bad. It is not as where the case goes off on some collateral matter. *Roney* v. *Westlake*, 216 Pa. St. 374. In this case the contract itself was before the court and declared void. *Coppell* v. *Hare*, 7 Wall. 558.

The act of May 23, 1907, did not revitalize the contract which the United States court had declared invalid, so that it might furnish the basis of a new cause of action.

A man has a vested right in his title, in his freedom from obligation which he has not legally entered into, and in a defense adjudged in his favor. *United States* v. *Leffler*, 11 Pet. 86; *Ewell* v. *Daggs*, 108 U. S. 151; *Gross* v. *U. S. Mortgage Co.*, 108 U. S. 488; *Erskine* v. *Steele Co.*, 87 Fed. Rep. 630; aff'd 98 Fed. Rep. 215.

The obligations of private parties must be determined by the law in force at the time of the transaction out of which they accrue. *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, 120 U. S. 141; Cooley's Const. Lim. 528; Sutherland on Stat. Const., § 480; *Lewis* v. *Penna. R. R. Co.*, 220 Pa. St. 317; Potter's Dwarris, 167; *McMullen* v. *Hoffman*, 174 U. S. 654.

The curative act of 1907 does not change the facts upon which the opinion of the Federal court was reached.

The legislature cannot, and has no power to, alter the character of the acts of the parties at the time this contract was entered into. To concede such a power would be to give to it a greater control over the judgments of the Federal courts than is given to the highest appellate courts of any State.

An appellate court must decide cases pending before it

in accordance with the existing laws, even though the law may not have been passed until after the judgment in the lower court was rendered. And it matters not that to give effect to the new law the appellate court must set aside a judgment rightful when entered. *United States* v. *Schooner Peggy*, 1 Cranch, 103; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Day* v. *Day*, 22 Maryland, 530; *Simpson* v. *Stoddard Co.*, 173 Missouri, 423; *Pelt* v. *Payne*, 30 S. W. Rep. 426; *Sidway* v. *Lawson*, 58 Arkansas, 117.

The question of the effect of the act of 1907 was before the Circuit Court of Appeals, the act having been passed before its decision was handed down. Since the Court of Appeals has given no effect to this act, it has decided that the act of 1907 does not have the effect claimed for it by the defendant in error, to wit, the creating in the defendant in error of a new cause of action.

Mr. Edwin W. Smith and *Mr. Samuel McClay* for defendant in error and in support of the motion:

The decision of the Circuit Court was given full effect—the broadest possible. It was assumed by everybody upon the second trial that without the act of 1907 there could be no recovery on the contract—that the case had been adjudicated. The effect of the act of 1907 was not a Federal question: it was solely one for the state courts. The curative act of May 23, 1907, of the Pennsylvania legislature is constitutional. Cooley's Const. Lim., 7th ed., 535; *Mercer* v. *Watson*, 8 Pet. 876; *S. C.*, below, 1 Watts, 358; *Satterlee* v. *Matthewson*, 16 S. & R. 169; *Randall* v. *Krieger*, 23 Wall. 137, 150; and see *Gross* v. *Mortgage Co.*, 108 U. S. 477, 488; *Rosenplanter* v. *Provident Life Society*, 96 Fed. Rep. 721; *Hess* v. *Werts*, 4 S. & R. 356.

The judgment in the Circuit Court of the United States is *res judicata* only of the issues then presented, of the facts as they appeared, and of the legislation existing at

the rendition of the judgment in the court below. *Utter* v. *Franklin*, 172 U. S. 417; and see also *Barnet* v. *Barnet*, 15 S. & R. 71; *Mercer* v. *Watson*, 1 Watts, 356; *Land Co.* v. *Weidner*, 169 Pa. St. 364.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is the second action between the parties, defendant in error being plaintiff in both, and the purpose of both being the recovery of $332,750.98 upon an award of James H. McRoberts, chief engineer of the railroad company, made under the circumstances hereinafter detailed. In the present action the declaration contains a count upon a *quantum meruit*.

The first action was brought in the United States Circuit Court for the Western District of Pennsylvania. A verdict was directed for the plaintiff (defendant in error here) for the full amount of the award, subject to the court's decision upon a point reserved. Subsequently judgment *non obstante* was entered for the defendant (plaintiff in error here). One of the grounds of the motion, and, as it was the only one considered, it is not necessary to give the others, was that the action could not be maintained because the plaintiff (defendant in error here) being a foreign corporation (it was incorporated under the laws of West Virginia) did not register as required by the statutes of Pennsylvania, before making the contract on which the action was based.

An act passed in 1874 provided that no foreign corporation should do business in the State until it had established an office or offices and appointed an agent or agents for the transaction of business therein. And it was made unlawful for such corporation to do any business until it had filed in the office of the secretary of the Commonwealth a statement, under seal, signed by the president and secretary, showing the title and object of the corpora-

tion, the location of its offices, and the names of its agents. A certificate of the secretary of the Commonwealth of such filing was required to be kept for public inspection in every office. Transacting business without complying with the provisions of the act was made a misdemeanor.

An act was passed in 1889 which provided that any limited partnership, bank or joint stock association organized under the laws of the Commonwealth, or under the laws of any other State and doing business in the Commonwealth, should register, in the office of the auditor general, the place of its business and post office address, the names of certain of its officers, and the amount of capital authorized and the amount paid. Such registration was also required of every corporation then engaged in business in the Commonwealth. Annual registration was required thereafter. A penalty of $500 was imposed for violations of the act.

The plaintiff had not registered at the time the contract involved in the action was made. It, however, subsequently registered.

It was held, following the decisions of the courts of Pennsylvania, that the statutes made unlawful business transactions within the State by a foreign corporation which had not complied with their provisions. And it was said:

"Nor does the award of the engineer have any efficacy in this case. Authority on his part to act, and the obligation of parties to abide by his decision, rests in both cases on the provisions of the contract which is *contra legem*. The law will not enforce an award which is on an illegal contract. *Benton* v. *Singleton*, 114 Alabama, 556."

The opinion concluded as follows:

"Upon the whole, therefore, we are of the opinion that by reason of the non-registration of the plaintiff corporation prior to the contract here involved, the verdict for plaintiff cannot be sustained. Judgment will

therefore be entered in favor of the defendant *non obstante veredicto*, but said judgment shall not bar any subsequent suit or proceeding by the plaintiff for services performed."

The Circuit Court of Appeals, to which the case was carried, also expressed the view, applying, as it said, the decisions of the courts of the State, that the contract was illegal and its illegality made void the award made under it. The judgment of the Circuit Court was affirmed.

Then an act of the legislature of Pennsylvania was passed, entitled "An act validating contracts, bonds or obligations made by corporations of other States, without first having established known places of business and designating authorized agents for the transaction of their business within this Commonwealth, and providing for the enforcement of the same." P. L. 205.

Thereupon this action was brought not only upon the award made by James H. Roberts, but also for work and labor done as upon a *quantum meruit*. Among other defenses the judgment in the United States Circuit Court was pleaded as a bar to the action, notwithstanding the act of May 23, 1907. The trial court was of opinion that the act "cured the defect in plaintiff's contract," and accordingly the judgment was not a bar to the action. The court also ruled against the other defenses, and entered judgment for plaintiff (defendant in error here). It was sustained by the Supreme Court of the State, on the ground that the adjudication in the Circuit Court "settled nothing with respect to the merits of this case; all that was there adjudicated was the plaintiff's right to maintain its action as an unregistered foreign corporation." The Supreme Court further decided that "the effect of the act of May 23, 1907, was to remove the impediment created by the prior act to the enforcement of the contract, and the plaintiff had at once acquired the right to maintain an action thereon."

The action of the state court deciding against the judgment of the United States Circuit Court as a bar constitutes the Federal question in the case, the contention of plaintiff in error being that due faith and credit were denied the judgment. A motion, however, is made to dismiss the writ of error on the ground that no Federal question is presented by the record or alternatively to affirm the judgment.

The motion to dismiss is based on the contention that the judgment of the Circuit Court reserved to plaintiff a right of action for the services performed and that the Supreme Court of the State having decided that the present action was within the reservation, it gave, not denied, the same faith and credit it would have given to a state judgment rendered under similar circumstances.

When a party asserts that due faith and credit have not been given to a judgment rendered in an action between him and the other party he asserts a right under the Constitution of the United States, and necessarily this raises a Federal question. This is the assertion in the present case, and the consideration which the Supreme Court of Pennsylvania gave it demonstrates that it is not so far frivolous as to sustain a motion to dismiss. The motion is, therefore, denied. On the other hand, we cannot say that the motion to dismiss is without color, and pass, therefore, to the merits for the determination of which a fuller statement of the facts becomes necessary.

The West Side Belt Railroad Company, which we shall refer to as the railroad company, entered into a contract with one Petrie to construct an extension of its road. Petrie engaged to construct and complete the proposed work in the manner and within the time called for by the specifications, and the railroad company agreed to pay for the work the sum of $400,000. The contract was dated April 25, 1901. On the twenty-fourth of May following, Petrie, with the consent of the railroad company, entered

into a contract with the Pittsburgh Construction Company, referred to herein as the construction company, to do the work. This contract was a transcript of the contract between Petrie and the railroad company, except as to the consideration. Following the signatures of the parties this appears: "For value received, the Westside Belt Company and John S. Scully and T. S. Barnsdall do hereby guarantee and become surety for the payment of the money mentioned in this contract as the same becomes due and payable."

Under the contract James H. McRoberts was made the final arbitrator to determine all matters in dispute, and disputes arose which were submitted to him. He after full hearing made an award in favor of the construction company in the sum of $332,750.98.

The construction company brought the action to which we have referred in the Circuit Court of the United States against the railroad company, Scully and Barnsdall, on their contract of guaranty for the amount of the award. The proceedings in the Circuit Court and its judgment and that of the Circuit Court of Appeals have been stated.

An act of May 23, 1907, mentioned above, provided that contracts made by foreign corporations should be binding, and might be enforced in the courts of the Commonwealth, provided the corporation had subsequently and prior to the passage of the act complied with the laws of the Commonwealth by establishing a known place of business in the State and designating authorized agents for the transaction of its business, and before commencing any suit upon such contract, bond, or obligation and had paid all taxes that would have accrued to the Commonwealth if it had complied with the laws at the time of beginning business.

After the passage of the act this action was brought. The declaration contained two counts, one for the recovery of the sum of $332,750.98, with interest, for services per-

formed and materials furnished, conclusively evidenced by the award of James H. McRoberts, and the other upon a *quantum meruit* for the value of the work done and materials furnished, as of the date of the performing and furnishing the same. Judgment was rendered for the construction company, as we have stated.

The decision in this case turns upon a comparison of the two actions, and the effect of the act of May 23, 1907.

It was assumed by the trial court, and also by the Supreme Court, that the action in the Circuit Court was between the same parties and upon the same cause of action as this one. Making that assumption, the trial court said the question was, Did the act of May 23 "revitalize the contract, which the United States court declared invalid?" And, construing the statute, decided that it was its intention to legalize every contract, bond or obligation of a foreign corporation which had not complied with the laws of the State, but subsequently had done so and paid all of the taxes which would have accrued. "The act makes no distinction," the court said, "between contracts which have been litigated and those which have not been litigated," and as it was found that the plaintiff (defendant in error) had complied with all the requirements of the statute, it was held that the defect in the contract was cured and the judgment of the Circuit Court was no bar to recovery. The Supreme Court pronounced the ruling correct, and, we may assume, approved the grounds upon which it was based. It is true the learned court discussed the judgment more than it did the act of May 23, but this, we infer, was for the purpose of showing that the judgment in the Circuit Court was rendered, not upon the controversies which arose between the parties in consequence of the contract, its terms, the extent or manner of its performance or the liability of the railroad company upon its contract of guaranty, but "was based," as the court said, "exclusively on the

plaintiff's disability to maintain the action because of its failure to register within the State before the contract sued upon was entered into," and that, therefore, the judgment did not preclude a consideration of the act of May 23 or take from it the power to "revitalize" the contract. We agree, therefore, with the railroad company that the effect of the act of May 23 constitutes "the real and only issue in the case."

That the action could be maintained without it is not contended. It is true that the declaration contained a count upon a *quantum meruit*, in order to bring the case within the reservation of the judgment of the Circuit Court, but evidence to sustain it was ruled out upon the objection of plaintiff in error, on the ground substantially that the contract furnished its own measure of damages, "ascertained in the manner set forth" in the contract, that is, by an appraisement and award, and that the evidence offered was a "contradiction of the written contracts in the case," and therefore incompetent. The *quantum meruit*, therefore, is out of the case, and the action rests on the contract, as the action in the Circuit Court did, and the judgment in the latter, adjudging its invalidity, is a bar to the present action, unless such effect has been taken from it by the act of May 23, 1907. And this is admitted. Indeed, defendant in error asserts that it was assumed by everybody at the trial, but it is insisted that the effect of the act is not a Federal question, but solely one for the state courts. In this we cannot concur. It is an element in the consideration of the question whether due faith and credit were given to the judgment of the Circuit Court, and we are brought to the consideration of the curative effect of the act.

In *Walson* v. *Mercer*, 8 Pet. 88, such an act was sustained against a charge that it divested vested rights and impaired the obligation of a contract. The act considered made valid the deeds of married women which were invalid

by reason of defective acknowledgments, and avoided a judgment in ejectment rendered against one of the parties to the action because of such a defect in a deed relied on for title. The controversy was between the successor by descent of the married woman and the grantee in the deed. It was said in the argument that the descents had been confirmed by two judgments of the Supreme Court of the State against the deed, adjudicating it to be void on points involving its validity, which judgments, it was contended, were conclusive evidence that the deed was no deed, and that the rights acquired by descent were absolute vested rights. The act was nevertheless sustained, as we have stated.

Satterlee v. *Matthewson*, 2 Pet. 380, is to the same effect. Title was set up as a defense in an action of ejectment to which the plaintiff replied that, conceding it to be older and better than his, it nevertheless could not be set up against him as the defendant was his tenant. The trial court took that view and the Supreme Court of the State reversed it on the ground that by the statute law of the State the relation of landlord and tenant could not subsist under a Connecticut title. Before the second trial of the case the legislature of the State (Pennsylvania) passed a law providing that the relation of landlord and tenant should exist under such titles. This court affirmed the judgment of the Supreme Court of the State sustaining the law.

The doctrine of *Satterlee* v. *Matthewson* and *Walson* v. *Mercer* was repeated in *Randall* v. *Kreiger*, 23 Wall. 137, 150.

In *Gross* v. *United States Mortgage Company*, 108 U. S. 477, the same principles were applied to sustain an act of the State of Illinois making valid a mortgage which was inoperative under the provisions of prior laws. So also *Ewell* v. *Daggs*, 108 U. S. 143.

In *Utter* v. *Franklin*, 172 U. S. 416, it was decided that

an act of Congress validating a defect in bonds of the Territory of Arizona was within the power of Congress.

The principle of the cases is declared to be by Mr. Justice Matthews, in *Ewell* v. *Daggs, supra*, "that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation, and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy and forms no element in the rights that inhere in the contract." And such view of curative statutes is entertained by the Supreme Court of Pennsylvania, as indicated by its opinion in the present case and the cases there cited.

The Federal question having been correctly decided, the judgment is *Affirmed.*

NOBLE STATE BANK *v.* HASKELL.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 71. Argued December 7, 8, 1910.—Decided January 3, 1911.

The charter of a corporation which is subject to the usual reserved powers to alter or repeal is not impaired unless the subsequent statute deprives it of property without due process of law.

The broad words of the Fourteenth Amendment are not to be pushed to a drily logical extreme, and the courts will be slow to strike down as unconstitutional legislation of the States enacted under the police power.

Where the mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use.

The police power extends to all the great public needs, *Canfield* v. *United States*, 167 U. S. 518, and includes the enforcement of com-

[1] See also *post*, p. 575, for opinion denying motion for leave to file petition for rehearing.

mercial conditions such as the protection of bank deposits and checks drawn against them by compelling coöperation so as to prevent failure and panic.

The dividing line between what is, and what is not, constitutional under the police power of the State is pricked out by gradual approach and contact of decisions on opposing sides; and while the use of public credit to aid individuals on a large scale is unconstitutional, a statute compelling banks to contribute to a guarantee fund to protect deposits, such as that of Oklahoma, under consideration in this case, is constitutional.

The Fourteenth Amendment does not prohibit States from forbidding a man to do things simply because he might do them at common law, and so *held*, that, where public interests so demand, that Amendment does not prohibit a State placing the banking business under legislative control and prohibiting it except under prescribed conditions.

The acts of December 17, 1907, and March 11, 1909, of Oklahoma, subjecting state banks to assessments for a Depositors' Guaranty Fund are within the police power of the State and do not deprive banks assessed of their property without due process of law or deny to them the equal protection of the law, nor do they impair the obligation of the charter contracts.

22 Oklahoma, 48, affirmed.

THE facts, which involve the constitutionality of the Oklahoma Bank Depositors' Guaranty Fund Acts, are stated in the opinion.

Mr. C. B. Ames, with whom *Mr. D. T. Flynn* and *Mr. J. B. Dudley* were on the brief, for plaintiff in error:[1]

The Oklahoma Depositors' Guaranty Fund Act is unconstitutional. The assessment is compulsory, not voluntary. It is entirely unlimited and may take all of the assets of the bank. It does not operate simply upon banks chartered or re-chartered after its passage, but upon all banks both old and new.

The fund raised is not applied to any governmental pur-

[1] See also arguments for, and against, the constitutionality of the Depositors' Guaranty Fund of Nebraska, *post*, p. 114, and of Kansas, *post*, p. 121.

pose, but is donated to private citizens who happen to be depositors of an insolvent bank. The law requires a taking of the plaintiff's property for a private use. *Savings & Loan Assn.* v. *Topeka*, 20 Wall. 655; *State* v. *Osawkee*, 14 Kansas, 418; *Lowell* v. *Boston*, 111 Massachusetts, 454; *B. & E. Ry. Co.* v. *Spring*, 80 Maryland, 510; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403.

It is not an exercise of the right of eminent domain, nor is it an exercise of the power of taxation. Cases *supra* and *Innes Co.* v. *Evert*, 86 Fed. Rep. 597; *Weismer* v. *Douglas*, 64 N. Y. 91.

It is not a valid exercise of the police power. *Hannibal & St. Jo. Ry. Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313; *Lawton* v. *Steele*, 152 U. S. 133; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Lake Shore & M. S. Ry. Co.* v. *Smith*, 173 U. S. 684; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Chicago, B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561; *Adair* v. *United States*, 208 U. S. 161; *Atchison, T. & S. F. Ry. Co.* v. *Campbell*, 61 Kansas, 439; *Colon* v. *Lisk*, 47 N. E. Rep. 302.

It is, therefore, a taking of property without due process of law and violative of the Constitution of the United States. *Holden* v. *Hardy*, 169 U. S. 366; *Cotting* v. *Goddard*, 183 U. S. 79; *Harding* v. *Butts*, 18 Illinois, 503; *Embury* v. *Connor*, 3 N. Y. 512; *Attorney General* v. *Boston & Albany R. R. Co.*, 35 N. E. Rep. 252; *Mays* v. *Seaboard Air Line Ry. Co.* (S. Car.), 56 S. E. Rep. 30.

In taking the plaintiff's property, it impairs the obligation of contracts and, being a taking without due process of law, cannot be upheld as an amendment of the plaintiff's charter. Cases *supra* and *Fletcher* v. *Peck*, 6 Cranch, 135; *Sinking Fund Cases*, 99 U. S. 720, 748; *Lake Shore & M. S. Ry. Co.* v. *Smith*, 173 U. S. 684; *People* v. *O'Brien* (N. Y.), 18 N. E. Rep. 692; *Opinion of the Justices*, 33 Atl. Rep. 1079, 1083; *Hill* v. *Glasgow Ry. Co.*, 41 Fed. Rep. 615,

617; *Grand Rapids Sav. Bank* v. *Warren*, 52 Michigan, 557; 18 N. W. Rep. 356; *Hathorn* v. *Calef*, 2 Wall. 10; *McDonnell* v. *Ala. G. L. Ins. Co.* (Ala.), 5 So. Rep. 120; *Ireland* v. *Turnpike Co.*, 19 Ohio St. 369; *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453.

Property cannot be taken for private use in the exercise of the police power. Classifying a statute as an exercise of the police power does not save it if it is in conflict with the Constitution.

Regulating railroads is clearly an exercise of the police power, but in so doing the State cannot do anything which takes for private use the smallest part of the railroad's property. *Attorney General* v. *B. & A. Ry. Co.* (Mass.), 35 N. E. Rep. 252; *Atchison, T. & S. F. Ry. Co.* v. *Campbell*, 61 Kansas, 439; *Mays* v. *Seaboard Air Line Ry. Co.* (S. Car.), 56 S. E. Rep. 30; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *S. C.*, 217 U. S. 196.

The *Gibbs Case*, 142 U. S. 386, does not support a different doctrine.

Private property cannot be taken for private use by the amendment of corporate charters. *Woodward* v. *Central Vt. Ry. Co.*, 180 Massachusetts, 599; *Lake Shore & M. S. Ry. Co.* v. *Smith*, 173 U. S. 684.

Mr. Charles West, Attorney General of the State of Oklahoma, with whom *Mr. E. G. Spilman* and *Mr. W. C. Reeves* were on the brief, for defendants in error:

The security of the public in its dealings with banks is a governmental function, and the creation of a mutual reserve fund is a safety to the public and a compulsory benefit to the banks. For definition of banking see *Kiggins* v. *Munday*, 19 Washington, 233; *Niagara County Bank* v. *Baker*, 15 Ohio St. 68, 87; *American Nat. Bank* v. *Morey*, 69 S. W. Rep. 759; *Patterson* v. *Marine Nat. Bank*, 130 Pa. St. 419; *Houston* v. *Brader*, 37 S. W. Rep. 467; *People's Bank* v. *Le Grand*, 103 Pa. St. 309, 314.

As to issue of circulation and of franchise see *Bank of Augusta* v. *Earle*, 13 Pet. 519, 596; *Meyers* v. *Manhattan Bank*, 20 Ohio, 295.

As to proper exercise of police power see Freund, §§ 400, 401 and 40.

Banking is a public business. *Munn* v. *Illinois*, 94 U. S. 113; *State* v. *Rich Creek*, 5 L. R. A. (N. S.) 875.

The Constitution is to be liberally construed, *Gibbons* v. *Ogden*, 9 Wheat. 187, and the law must be held to be valid unless plainly invalid. *Hylton* v. *United States*, 3 Dall. 171, 175.

A state statute modifying a common-law rule is not necessarily deprivation of property. *Munn* v. *Illinois*, 94 U. S. 113; *Goodsil* v. *Woodmanse*, 11 L. R. A. 421; *Charlotte &c. R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Cooley* v. *Wardens*, 12 How. 298; *Tenny* v. *Lentz*, 16 Wisconsin, 566; *Vanhorn* v. *People*, 46 Michigan, 183; *Holst* v. *Row*, 29 Ohio St. 340; *Town of Wilton* v. *Town of Weston*, 48 Connecticut, 325; *Morgan Co.* v. *Louisiana Board*, 118 U. S. 455; *N., C. & St. L. R. R. Co.* v. *Alabama*, 128 U. S. 98; *Mobile* v. *Kimball*, 102 U. S. 691; *New York* v. *Squire*, 145 U. S. 175; *Head* v. *Amoskeag Manufactory Co.*, 113 U. S. 9; *Wurtson* v. *Hoagland*, 114 U. S. 606; *State* v. *Board*, 87 Minnesota, 325; 92 N. W. Rep. 216; *Swift* v. *Calnan*, 102 Iowa, 136; 37 L. R. A. 462; *Firemen* v. *Louisburg*, 21 Illinois, 511; *Milwaukee* v. *Helfenstein*, 16 Wisconsin, 142; *Firemen* v. *Roome*, 93 N. Y. 313; *Phœnix Co.* v. *Montgomery*, 42 L. R. A. 468.

All banking can be made a franchise. Zane on Banking, §§ 7, 15; Morse on Banks, § 13; *State* v. *Woodmanse*, 11 L. R. A. 420; *Myers* v. *Manhattan Bank*, 20 Ohio, 295; *State* v. *Stebbins*, 1 Stewart, 299; *Allnutt* v. *Inglis*, 12 East. Rep. 527; *Munn* v. *Illinois*, 94 U. S. 113; Hale de Portibus Maris, 1 Harg. Law Tracts, 78.

The exercise of police power over the subject of banking violates no vested rights. *Sioux City Co.* v. *Sioux City*,

138 U. S. 98; *N. Y., N. H. Co.* v. *Bristol*, 151 U. S. 556; *N. Y. & N. H.* v. *Commonwealth*, 200 U. S. 361; *Cummings* v. *Spaunhorst*, 5 Mo. App. 21; *Attorney General* v. *Insurance Co.*, 82 N. Y. 172.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding against the Governor of the State of Oklahoma and other officials who constitute the State Banking Board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the Board and directs it to levy upon every bank existing under the laws of the State an assessment of one per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be five per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the Bank Commissioner, if its cash immediately available is not enough to pay depositors in full, the Banking Board is to draw from the Depositors' Guaranty Fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the Guaranty Fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks consistently with Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States. The petition was dismissed on demurrer by the Supreme Court of the State. 22 Oklahoma, 48.

The reference to Article I, § 10, does not strengthen the

plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See *Sherman* v. *Smith*, 1 Black, 587. Whether it does so or not is the only question in the case.

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby Bank* v. *State Treasurer*, 39 Vermont, 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark* v. *Nash*, 198 U. S. 361. *Strickley*

v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. *Offield* v. *New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372. *Bacon* v. *Walker*, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not

denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, Columbia & Augusta R. R. Co.* v. *Gibbes*, 142 U. S. 386. The power to compel, beforehand, coöperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling* v. *Chicago*, 177 U. S. 183, 188. So far is that from being the case that the device is a familiar one. It was adopted by some States the better part of a century ago, and seems never to have been questioned until now. *Receiver of Danby Bank* v. *State Treasurer*, 39 Vermont, 92. *People* v. *Walker*, 17 N. Y. 502. Recent cases going not less far are *Lemieux* v. *Young*, 211 U. S. 489, 496. *Kidd, Dater and Price Co.* v. *Musselman Grocer Co.*, 217 U. S. 461.

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355. It will serve as a datum on this side, that in our opinion the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Loan Association* v. *Topeka*, 20 Wall. 655. *Lowell* v. *Boston*, 111 Massachusetts, 454.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it

will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described cooperation are necessary safeguards, this court certainly cannot say that it is wrong. *North Dakota* v. *Woodmansee*, 1 N. Dak. 246. *Brady* v. *Mattern*, 125 Iowa, 158. *Weed* v. *Bergh*, 141 Wisconsin, 569. *Commonwealth* v. *Vrooman*, 164 Pa. 306. *Myers* v. *Irwin*, 2 S. & R. 368. *Myers* v. *Manhattan Bank*, 20 Ohio, 283, 302. *Attorney General* v. *Utica Insurance Co.*, 2 Johns. Ch. 371, 377. Some further details might be mentioned, but we deem them unnecessary. Of course objections under the state constitution are not open here.

Judgment affirmed.[1]

[1] A motion for leave to file petition for rehearing was made and denied.—See opinion, p. 575, *post*.

SHALLENBERGER, GOVERNOR OF THE STATE OF NEBRASKA, *v.* FIRST STATE BANK OF HOLSTEIN, NEBRASKA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 445. Argued December 8, 1910.—Decided January 3, 1911.

Following, and on the authority of, *Noble State Bank* v. *Haskell*, *ante*, p. 104, sustaining the Bank Depositors' Guaranty Fund Acts of Oklahoma, held that a similar act of Nebraska, providing for a guaranty fund and prohibiting banking except by corporations formed under the act, is not unconstitutional.

172 Fed. Rep. 999, reversed.

THE facts, which involve the constitutionality of the banking act of Nebraska, creating a depositors' guaranty fund, are stated in the opinion.

Mr. Arthur F. Mullen, Attorney General of the State of Nebraska, *Mr. Charles O. Whedon* and *Mr. I. L. Albert*, with whom *Mr. Grant G. Martin* was on the brief, for appellants: [1]

Banking is a proper subject of legislative control. *State ex rel. Woodmansee*, 1 N. Dak. 245; Morse on Banking, 1; *People* v. *Barton*, 6 Cow. 290; *People* v. *Insurance Co.*, 15 Johns. 358; *People* v. *Brewster*, 4 Wend. 498; *Nance* v. *Hemphill*, 1 Alabama, 551; *Austin* v. *State*, 10 Missouri, 591.

It is not incompetent for the legislature to restrict the right to engage in banking to such as are authorized by a

[1] See also arguments in support of, and against, the constitutionality of the Depositors' Guaranty Fund Acts of Oklahoma in *Noble State Bank* v. *Haskell*, *ante*, p. 105, and of Kansas in *Assaria State Bank* v. *Dolley*, *post*, p. 121.

charter granted by the State; to make it, instead of a common right, a right lawfully exercisable only under a franchise granted by the State. *Mercantile National Bank* v. *New York*, 121 U. S. 138, 156; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 595; *Exchange Bank* v. *Hines*, 3 Ohio St. 1, 31; and see Banking, in Ency. Britannica, New Am. Supp., 315, 327; in *People* v. *Utica Ins. Co.*, 15 Johns. 358; Zane on Banks and Banking, 7, 15; §§ 5–7, ch. 8, Comp. Stat. Nebraska, 1895; § 16, art. 1, Const. Nebraska; § 1, art. XI*b*, Const. Nebraska.

The act is not an abuse of the power of the State to regulate and control the business of banking. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. *Sinking Fund Cases*, 99 U. S. 718; *Powell* v. *Pennsylvania*, 127 U. S. 678.

While legislation having for its object the regulation of a lawful business must be reasonable, and not unnecessarily oppressive, *Lawton* v. *Steele*, 152 U. S. 133, 137, a large discretion is vested in the legislature to determine its reasonableness and adaptation to the end sought. *Gundling* v. *Chicago*, 177 U. S. 183; *Barbier* v. *Connolly*, 113 U. S. 27; *Kidd* v. *Pearson*, 128 U. S. 1; *State* v. *Crittenden*, 107 N. W. Rep. 500; *Marbury* v. *Madison*, 1 Cranch, 137; *State* v. *Namias*, 49 La. Ann. 618; *State* v. *Vanderslius*, 42 Minnesota, 129; *Logan* v. *Postal Tel. Cable Co.*, 157 Fed. Rep. 570; *Otis* v. *Parker*, 187 U. S. 606.

For the extent to which private rights may be invaded, where the public good demands, see *Offield* v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 375; *Railway Co.* v. *Humes*, 115 U. S. 514; *Davidson* v. *New Orleans*, 96 U. S. 97; *Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561. Banking is a business *sui generis*. It is the only business that thrives on its liabilities, payable on demand, and whose solvency at all times depends upon the chance that comparatively few of

such liabilities will be presented for payment on any one day.

A banking regulation, therefore, that should not have among its objects the prevention of the involuntary closing of a bank would be obviously defective.

The provision restricting banking corporations and those providing for the guaranty of deposits are not so manifestly and unnecessarily arbitrary, unjust or oppressive that reasonable minds cannot differ with respect to them and therefore the act is constitutional. *Weed* v. *Berge*, 124 N. Y. 664; *Meyers* v. *Irwin*, 2 S. & R. 367, 372; *Commonwealth* v. *Vrooman*, 30 Atl. Rep. 217; *Brady* v. *Mattern*, 125 Iowa, 158. *State* v. *Scougal*, 3 S. Dak. 55, *contra*, is not a controlling authority.

The guaranty feature of the act is not a tax levied against banks, for the benefit of private individuals. The act has for its object, not revenue, but regulation. The guaranty feature is subsidiary to the real purpose of the act to protect the public against the disastrous consequences of bank failures. *Coster* v. *Tidewater Co.*, 18 N. J. Eq. 518, 523; *Jacobson* v. *Massachusetts*, 197 U. S. 26; *Adams Express Co.* v. *State*, 160 Indiana, 346.

The fact that the law operates to the direct advantage of depositors, does not invalidate it. *Cooley* v. *Board of Wardens*, 12 How. 298; *Town of Wilton* v. *Town of Weston*, 48 Connecticut, 325. The effect of the act in these cases was to apparently take the property of one man for the benefit of another. The court sustained the laws. See also *Tenney* v. *Lentz*, 16 Wisconsin, 566; *Van Horne* v. *People*, 46 Michigan, 183; *Holst* v. *Row*, 39 Ohio St. 340; *Charlotte &c. Ry. Co.* v. *Gibbes*, 141 U. S. 386; *New York* v. *Squire*, 145 U. S. 175; *Morgan* v. *Louisiana*, 128 U. S. 98; *Mobile* v. *Kimball*, 102 U. S. 691; *Firemen's Benevolent Assn.* v. *Louisbury*, 21 Illinois, 511; *Fire Department &c.* v. *Helfenstein*, 16 Wisconsin, 142; *Trustees &c.* v. *Roome*, 93 N. Y. 313; *Phœnix Ins. Co.* v. *Fire Department &c.*, 42

L. R. A. 468; *San Francisco* v. *Liverpool &c. Ins. Co.*, 74 California, 133.

In 1829, the legislature of New York enacted a guaranty law relating to circulation. See *Matter of Lee Bank*, 21 N. Y. 9; *Cases of Reciprocity Bank*, 22 N. Y. 9; *People* v. *Walker*, 72 N. Y. 502; and as to like law of Vermont in 1831, see *Elwood* v. *State*, 23 Vermont, 701; *Receiver* v. *State*, 39 Vermont, 92.

Mr. John Lee Webster, with whom *Mr. William V. Allen* was on the brief, for appellees:

The guaranty deposit law is unconstitutional and void. It deprives copartnerships, firms and individuals of their natural, inherent and vested right to continue their existing, established and chartered banking business, and subjects them to penalties. Their property may be seized and their business closed out by a receivership if they attempt to continue the banking business. *Bank of California* v. *San Francisco*, 142 California, 276; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *State* v. *Scougal*, 3 S. Dak. 55; *Ex parte Pittman*, 31 Nevada, 56; *Marymont* v. *Nevada State Banking Board*, 111 Pac. Rep. 295; *International Trust Co.* v. *American L. & T. Co.*, 65 N. W. Rep. 78.

The statute does more than simply prohibit private banking, it winds up the affairs of existing private banks. If they continue business through the agency of a corporation it is conditioned that they shall agree that a part of their property shall be taken to pay the private debts of other banks.

The State does not possess the right to compel a citizen to accept of a corporate charter, nor can it compel him to become a member of a corporation. *Slaughter House Cases*, 16 Wall. 97; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Allgeyer* v. *Louisiana*, 165 U. S. 578. As to the scope and meaning of "Liberty and the Pursuit of Happiness," and "Privileges and Immunities," see

State v. *Scougal*, 3 S. Dak. 55; *Matter of Jacobs*, 98 N. Y. 98; *Gillespie* v. *The People*, 188 Illinois, 183; *Braceville* v. *Marx*, 99 N. Y. 377; *Wyeth* v. *Cambridge Board of Health*, 200 Massachusetts, 474.

A statute is unconstitutional which limits the right of a citizen to become a member of a copartnership. *Schnaier* v. *Navarre Hotel Co.*, 182 N. Y. 83; and see *People* v. *Ringe*, 197 N. Y. 143. The State cannot compel private bankers to incorporate. The formation of corporations must be the voluntary act of the parties. Cook on Corps., 4th ed., § 2*a;* 1 Thompson on Corp., § 52; *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

The guaranty feature of the law is an arbitrary and capricious exercise of power. It takes the assets of solvent banks without compensation and appropriates the same to the payment of the private debts of insolvent banks in violation of § 10 of Art. I, and § 1 of Art. XIV of the Constitution of the United States and in violation of §§ 3 and 16 of Art. 1 of the constitution of Nebraska.

The taking of the assets of one bank to pay the claims of depositors of another bank is taking property for a private use without due process of law, and without compensation. *Loan Association* v. *Topeka*, 20 Wall. 655; *Cole* v. *LaGrange*, 113 U. S. 1; *Parkersburg* v. *Brown*, 106 U. S. 487; *State* v. *Osawkee*, 14 Kansas, 418; *Lowell* v. *Boston*, 111 Massachusetts, 454; *Baltimore & Eastern Shore R. R. Co.* v. *Spring*, 89 Maryland, 510; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Davidson* v. *New Orleans*, 96 U. S. 97, 102; *Dodge* v. *Mission Township*, 107 Fed. Rep. 827; *Lucas Co.* v. *State*, 75 Ohio St. 114; *State* v. *Froelich*, 118 Wisconsin, 129; *Deering* v. *Peterson*, 75 Minnesota, 118. The guaranty fund provision of the act is a phase of paternalism that is obnoxious to our system of government.

The suggestion in appellants' brief that the taking of the money from one bank to pay the debts of another

bank to its depositors is not the taking of money for a private use, is untenable. The relation between the bank and the depositor is that of debtor and creditor. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 324; *Bolton* v. *White*, 2 Cr. C. C. 426; *Rundle* v. *Del. & R. Canal*, 1 Wall. 275; *State Bank* v. *Knoop*, 16 How. 369.

Taking the money from the banks by the process of the Guaranty Fund to pay the depositors of another bank is an appropriation of the money to a private use and not for a public use. *Loan Assn.* v. *Topeka*, 20 Wall. 655; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 399; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 87.

The guaranty provision of the new banking act is not within the scope of the police powers of the State. The police power has its limitations. The police power cannot justify the invasion of any property or contract right of the citizen granted to him under the Constitution. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 237; *Gulf, Colo. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Minnesota* v. *Barber*, 136 U. S. 313; *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684; *Colon* v. *Lisk*, 153 N. Y. 188.

The police power is the law of necessity, which means more than expediency, and no necessity exists for the Nebraska Bank Guaranty Law. The exercise of the police power must stop short of infringing constitutional rights. Cases cited *supra*, and *Central of Georgia Ry. Co.* v. *Murphey*, 196 U. S. 194, 206; *Richey* v. *People*, 155 Illinois, 98, 110; *People* v. *Gillson*, 109 N. Y. 389, 398; *Fisher* v. *Wood*, 187 N. Y. 90, 94; *State* v. *Goodwill*, 33 W. Va. 179.

Whether a statute is within or without a proper exercise of the police power is a question always subject to final determination by the courts. Cases *supra* and *Jew Ho* v. *Williamson*, 103 Fed. Rep. 10, 17; *Ex parte Whit-*

well, 98 California, 73; *Hume* v. *Laurel Hill Cemetery*, 142 Fed. Rep. 552; *Rushtrat* v. *People*, 185 Illinois, 133; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Bryan* v. *City of Chester*, 212 Pa. St. 259; *Passaic* v. *Patterson Co.*, 72 N. J. Law, 285; *People* v. *Murphy*, 195 N. Y. 126; *State* v. *Redmond*, 134 Wisconsin, 89, 110; *City of Belleville* v. *Turnpike Co.*, 234 Illinois, 428, 437; *Sayre Borough* v. *Phillips*, 148 Pa. St. 482.

The principle which underlies the bank guaranty deposit laws, when carried to its ultimate legitimate result, means unrestrained socialism in state government.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by many banks to prevent the Banking Board of Nebraska from carrying out and enforcing an act similar to the Oklahoma statute just passed upon. It forbids banking except by a corporation formed under the act and provides for a guaranty fund. The Circuit Court held the statute unconstitutional and issued an injunction against the enforcement of it. 172 Fed. Rep. 999. For the reasons given in the foregoing case the decree of the Circuit Court must be reversed.

Decree reversed.

ASSARIA STATE BANK *v.* DOLLEY, BANK COMMISSIONER OF THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 617. Argued December 8, 1910.—Decided January 3, 1911.

Noble State Bank v. *Haskell, ante*, p. 104, followed to effect that a state statute establishing a Bank Depositors' Guaranty Fund and requiring banks to contribute thereto is not unconstitutional as depriving the banks of their property without due process of law or denying them the equal protection of the law.

A state law which affects the needed charges to cure an existing evil by creating motives for voluntary action instead of by compulsion, may still be a police regulation.

One who can avail of benefits given by a state statute cannot object to the statute as denying him equal protection of the law because he does not choose to put himself in the class obtaining such benefits.

The Bank Depositors' Guaranty Fund of 1907, of Kansas, is not unconstitutional as denying equal protection of the law because it applies only to banks which contribute to the fund, or on account of preferences between classes of depositors, or because incorporated banks with a surplus of ten per cent have privileges over unincorporated banks.

THE facts are stated in the opinion.

Mr. John L. Webster, Mr. Chester I. Long and *Mr. J. W. Gleed*, with whom *Mr. B. P. Waggener* and *Mr. John L. Hunt* were on the brief, for appellants: [1]

The so-called Bank Guaranty Law is not a regulation of either banks or banking. It is a law creating an insur-

[1] See also arguments in support of, and against, the constitutionality of the Depositors' Guaranty Fund Acts of Oklahoma in *Noble State Bank* v. *Haskell, ante*, p. 105, and of Nebraska in *Shallenberger* v. *First State Bank, ante*, p. 114.

ance scheme to be conducted by the State, and the expenses raised by general taxation. 27 Opin. Attorney General, 272. The insurer is the State.

The fund for the payment of losses is derived from premiums paid by banks and the fund for the payment of expenses from general taxation. These expenses will exceed the amount of annual premiums paid by all banks. Session Laws of Kansas, 1909, 18, 48.

The assured are the depositors. Nothing in which the banks have any beneficial interest is insured. The risk is the obligation of the bank to certain depositors. The loss is the amount of deposits which the assets of the banks and the double liability of their stockholders is insufficient to pay.

The premium-payers are banks (voluntarily) and taxpayers (compulsory).

Taxation for a private purpose is a taking of property without due process of law. Brannon, Fourteenth Amendment, 160; *Cole* v. *LaGrange*, 113 U. S. 1; *Loan Assn.* v. *Topeka*, 20 Wall. 655; Cooley, Taxation, 67; *Sharpless* v. *Mayor*, 59 Am. Dec. 759.

A statute to compel payment of debts is not a police regulation. *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150. This law acts by way of gift—by taking the property of one and giving it to another. Police power is simply the enforcement of the maxim, *Sic utere tuo ut alienum non lædas*, and acts by way of restraint. Tiedeman, Police Power, § 1; Freund, Police Power, §§ 3, 8, 22.

An exercise of the police power can be justified only by the necessity of the public generally. This law benefits only a limited class of bank depositors. *Lawton* v. *Steele*, 152 U. S. 133; *Hume* v. *Laurel Cemetery*, 142 Fed. Rep. 553; *Colon* v. *Lusk*, 153 N. Y. 188; *State* v. *Redmon*, 134 Wisconsin, 89; *Fisher* v. *Woods*, 187 N. Y. 90.

This law does not depend upon the necessity of those benefited—the depositors—for its existence, because it may

be put in action only by the voluntary act of private banking corporations. *Larabee* v. *Dolley*, 175 Fed. Rep. 365; Tiedeman, Police Power, § 1; Freund, Police Power, §§ 3, 8, 22; *Lochner* v. *New York*, 198 U. S. 45; *Chicago Ry. Co.* v. *Drainage Com'rs*, 200 U. S. 561; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 306; *Gardner* v. *Michigan*, 199 U. S. 325; *Ritchie* v. *People*, 155 Illinois, 98; *People* v. *Stede*, 231 Illinois, 340.

The law is therefore not an exercise of the police power. No other public purpose justifies it. A public purpose is a governmental purpose. *Dodge* v. *Mission Twp.*, 107 Fed. Rep. 827, 830.

A governmental purpose is one for the accomplishment of which, as shown by history, governments were instituted. *Loan Assn.* v. *Topeka*, 20 Wall. 655; *Opinion of Justices*, 30 N. E. Rep. (Mass.) 1142.

Governments were not instituted for the purpose of insuring deposits or any other property interests.

Considered as an act for the relief of sufferers from bank failures or as an act to pay the debts of banks, the purpose of the act is private and not public. *Baltimore Ry. Co.* v. *Spring*, 89 Maryland, 510; *State* v. *Township of Osawkee*, 14 Kansas, 418; *Lowell* v. *Boston*, 111 Massachusetts, 454; *Loan Assn.* v. *Topeka*, 20 Wall. 655.

The classification under the law is arbitrary and not reasonable as to banks not having ten per cent surplus.

Classification must rest upon some difference which bears a reasonable and just relation to the act in relation to which the classification is proposed. *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, and cases cited; *Atchison &c. Ry. Co.* v. *Matthews*, 174 U. S. 96.

The act is for the benefit of depositors. Depositors in banks which have no surplus and which are therefore presumably the weaker banks, need the benefits of the law more than depositors in stronger banks. A classification which deprives them of the benefits of the law has an

unreasonable, rather than a reasonable relation to the object sought to be accomplished by the law. *State* v. *Goodwill*, 33 W. Va. 179.

Classification in accordance with the peculiarities of the bank with which the depositor does business and not in accordance with the needs of the depositor is arbitrary. *State* v. *Haun*, 61 Kansas, 146, 153.

The effect of this arbitrary classification of depositors will be to deprive banks having no surplus of their business and force them to liquidate. These allegations are admitted by the demurrer.

Deprivation of business is deprivation of property. *Osborn* v. *U. S. Bank*, 9 Wheat. 738.

The law therefore deprives banks which have not a ten per cent surplus of property without due process of law. *Hayes* v. *Missouri*, 120 U. S. 68; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Connolly* v. *Pipe Co.*, 184 U. S. 540; *Reagan* v. *Farmers' Co.*, 154 U. S. 362; *Cotting* v. *Stock Yards*, 183 U. S. 79; *State* v. *Goodwill*, 33 W. Va. 179; *McKinster* v. *Sager*, 163 Indiana, 671.

As to banks which have a ten per cent surplus, the alternatives offered are to refuse to insure their depositors and thus lose all their business, or to submit themselves to a law which will compel them to illegally use the money invested by their stockholders, and to illegally discriminate among depositors and creditors.

Mr. F. S. Jackson, Attorney General of the State of Kansas, and *Mr. A. C. Mitchell*, with whom *Mr. G. H. Buckman* was on the brief, for appellees:

The Kansas Bank Guaranty Law is a voluntary law and applies only to those who seek and obtain admission to its benefits, and therefore cannot take property without due process of law or deny equal protection of the laws. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461; *Commonwealth* v. *Merchants' Bank*, 168 Pa. St. 309.

The appellant banks have not presented by their bill such a state of facts as will work a justiciable injury to them. *Supervisors* v. *Stanley*, 105 U. S. 305; *Clark* v. *Kansas City*, 176 U. S. 114; *Smiley* v. *Kansas*, 196 U. S. 447; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461; *Commonwealth* v. *Merchants' Bank*, 168 Pa. St. 309; *Turpin* v. *Lemon*, 187 U. S. 51; *Branton Co.* v. *West Virginia*, 208 U. S. 192; *State* v. *Smiley*, 65 Kansas, 240; *Marbury* v. *Madison*, 1 Cranch, 137; *Tyler* v. *Registration*, 179 U. S. 405.

The appellants, being all citizens of the State of Kansas, have not presented a state of facts which raises a controversy under the Constitution of the United States. *Metcalf* v. *Watertown*, 128 U. S. 586; *Tennessee* v. *Planters' Bank*, 152 U. S. 454; *Blackburn* v. *Portland Mining Co.*, 175 U. S. 571.

The banking business is a public business, and its regulation is within the police power of the State. Freund on Police Power, §§ 400, 401; Tiedeman on Limitation, § 194; *Blaker* v. *Hood*, 53 Kansas, 499; *State* v. *Richcreek*, 5 L. R. A. (N. S.) 878; *S. C.*, 77 N. E. Rep. 1085; *Bank of Augusta* v. *Earle*, 13 Pet. 519; Zane, Banks and Banking, §§ 8, 9; Morse on Banking, § 13; *Bank* v. *San Francisco*, 142 California, 246.

The Kansas Bank Guaranty Law is a regulation of banking and is a proper exercise of the police power of the State. Freund on Police Power, § 400; *Gundling* v. *Chicago*, 177 U. S. 183; *Lawton* v. *Steele*, 152 U. S. 133; *Marbury* v. *Madison*, 1 Cranch, 137; *Otis* v. *Parker*, 187 U. S. 606; *Chicago, B. & Q. Ry. Co.* v. *People*, 200 U. S. 561; *Powell* v. *Pennsylvania*, 127 U. S. 678.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by many state banks of Kansas to prevent the enforcement of the Kansas law

providing for a Bank Depositors' Guaranty Fund. The defendants demurred. The Circuit Court, while holding the act unconstitutional, dismissed the bill on the ground that the appellants did not show that their rights under the Constitution were infringed, and therefore did not state a case within the jurisdiction of the court. 175 Fed. Rep. 365, 375, 381, 382. The ground of complaint was that the law imposed certain conditions upon sharing the benefits and burdens of contributors to the Guaranty Fund, that the appellants would not or could not contribute, and that unless they did the effect of the law would be to drive them out of business. It was complained also that whereas theretofore the plaintiffs would have been entitled to share *pro rata* in the assets of an insolvent bank to which they had given credit, now depositors with such of their debtors as should go into the guaranty system would be preferred. Again, various conditions of the scheme not affecting the plaintiffs were pointed out as unreasonable and arbitrary, and the whole act was alleged to be unconstitutional and void. There was added a charge that the act required taxation to meet the expenses of carrying out the scheme. To all this the court replied that so far as the plaintiffs were concerned, it did not appear that they could not change their condition so as to enable themselves to contribute, and that the possible preference of other creditors was put as a pure speculation, it not being averred that any guaranteed bank indebted to any of the plaintiffs had failed, to which it might be added that the plaintiffs are free to withdraw their credits and collect their debts now. The charge as to taxation did not state a case under the Constitution, and violation of constitutional rights was the only ground for coming into the Circuit Court.

The case of *Noble State Bank* v. *Haskell*, just decided, *ante*, p. 104, cuts the root of the plaintiffs' case, except so far as the Kansas law shows certain minor differences from

that of Oklahoma. The most important of these is that contribution to the fund is not absolutely required. On this ground it is said, and was thought by the Circuit Judge, that the law could not be justified under the police power. We cannot agree to such a limitation. If, as we have decided, the law might compel the contribution on the grounds that we have stated, it may try to bring about the same result by the creation of motives less compulsory than command and of disadvantages in holding aloof less peremptory than an immediate stop. We shall not go through the details of minute criticism urged by the appellants, in most if not all of which they are in no way concerned. Perhaps the most striking of these subordinate matters is the preference of ordinary depositors over other creditors, a preference that seems to be overstated by the appellants. This, obviously, is in aid of what we have assumed to be the one of the chief objects and justifications of such laws, securing the currency of checks. The ordinary deposits are those that are drawn against in that way. Another discrimination complained of is that against unincorporated banks and banks not having a surplus of ten per cent. But if the State might require incorporation it may give advantages to incorporated companies. It might provide that no banking business should be done except by corporations and that corporations should not be formed or continue with less than a surplus of ten per cent, both provisions being for the purpose of assuring safety. If instead of that it allows the plaintiffs to keep on without incorporation and with a smaller surplus they cannot complain that the safer banks will outstrip them as the result of the law. We think it unnecessary to discuss the case more at length.

Decree affirmed.

ENGEL *v.* O'MALLEY.

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

No. 703. Argued December 15, 16, 1910.—Decided January 3, 1911.

The rule, that one not within the class cannot raise objections to the constitutionality of a statute on the ground of discrimination against that class, applied to effect that one who for more than five years has resided in the United States cannot object that a state statute denies equal protection of the law because it excludes those who have not so resided for that period.

Protection of banking business, especially that transacted in small amounts, (*Noble State Bank* v. *Haskell*, *ante*, p. 104), and with poor and ignorant immigrants on first arrival in this country is within the police power of the State; and a state statute imposing special and proper restrictions on those engaging in that class of banking is not unconstitutional under the due process or equal protection clauses of the Fourteenth Amendment because it excepts from its provisions other banks and bankers engaged in other classes of banking business or conducting them under other conditions.

The receipt of money by a bank where the depositor can withdraw it when and in such sums as he pleases, although creating a debt, is, in a popular sense, the receipt of money for safe-keeping.

Where the subject is within the police protection of the State, it is not for the court to determine whether the enactment is wise or not; that is within legislative discretion.

Courts will presume from general knowledge of business affairs that transmission of money through bankers is made by drafts and not by sending the identical currency.

Legislation which regulates business may well make distinctions depend upon the degree of evil; *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338; and, although where size is not an index, a law may not discriminate between the great and the small, proper regulations based thereon where size is an index of the evil to be prevented, do not offend the equal protection clause of the Fourteenth Amendment.

There are always difficulties in drawing the dividing line between that which is within, and that which is without, the constitutional power of the States, and the question in each specific case must be answered by the pertinent facts therein.

A state statute regulating the receipt of deposits of money is not a burden on, or regulation of, interstate or foreign commerce simply because such deposits are likely to be transmitted to other States or foreign countries; the deposit is an independent transaction preceding the transmission.

The provisions of the private banking act of New York of 1910, considered in this case, are not unconstitutional as depriving persons engaged in the receiving and transmitting of small sums of money of their property without due process of law or denying them the equal protection of the law either on account of the regulations to which such persons are subjected or by reason of the exception of other classes of banks and bankers therefrom.

THE facts are stated in the opinion.

Mr. Charles Dushkind for appellant:

The provision that deprives persons residing in the United States for less than five years of the right to carry on such business violates the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

A statute that is repugnant to the Constitution is not voidable by judicial decisions but is absolutely void. *Norton* v. *Shelby County*, 118 U. S. 441; *Ex parte Young*, 209 U. S. 129.

It is self-operating; it has no legal inception and never had a legal existence. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; see also *Tyler* v. *Judges*, 179 U. S. 405; *Hooker* v. *Burr*, 194 U. S. 415; *Turpin* v. *Lemon*, 187 U. S. 51; *William* v. *Eggleston*, 170 U. S. 304; *Hatch* v. *Reardon*, 204 U. S. 152; *Albany County* v. *Stanley*, 105 U. S. 305; *Southern Pacific R. R. Co.* v. *King*, 217 U. S. 534.

The statute is unconstitutional because it gives the Comptroller arbitrary power to deprive appellant of his right to carry on his business. *Yick Wo* v. *Hopkins*, 118 U. S. 356, citing *Baltimore* v. *Radecker*, 49 Maryland, 217. *Gundling* v. *Chicago*, 177 U. S. 183, and *Lieberman* v. *Van de Carr*, 199 U. S. 552, distinguished.

The statute is repugnant to the Fourteenth Amendment, because it contains unjust discriminations. *Cotting* v. *Godard*, 183 U. S. 79; Cooley, Const. Law, 556; *Corn* v. *Clark*, 195 Pa. St. 634; *State* v. *Gravette*, 65 Ohio, 289; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Magoun* v. *Ill. Trust Co.*, 170 U. S. 283; *Am. Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89. Cases upholding classifications as to sale of liquor; territorial classifications; those in respect to the learned professions; health laws or taxation, cannot be applied in the case at bar.

The right to engage in the banking business is a common law right belonging to individuals and to be exercised at their pleasure, and the State may simply regulate it; the business is inherently a lawful one that may be carried on by anyone subject only to such reasonable regulations as may be provided by statute. It has no relation to public health nor to public morals, and there is indeed a wide distinction between the banking business and the occupations where public health or public morals is involved. *Butchers' Union* v. *Crescent City*, 111 U. S. 746; *Bank of Augusta* v. *Earle*, 13 Pet. 519.

"Private banker" denotes a person engaged in banking without having special statutory privileges. Section 302, c. 409, Laws of 1882, N. Y., Ch. 236, Laws of 1888; 1 Rev. Stat. 712, § 6; *Perkins* v. *Smith*, 116 N. Y. 441. In *Musco* v. *United Surety Co.*, 196 N. Y. 459, there was no discrimination within the same class.

Hostile discriminations against any class as singled out by this act, has been repeatedly condemned by this court. *Pembina Min. Co.* v. *Pennsylvania*, 125 U. S. 181; *Gulf, Col. &c. R. R. Co.* v. *Ellis*, 165 U. S. 150, 153.

Circumstances and conditions that led to the enactment of the law cannot be considered on the question as to the constitutionality of the law. *Doyle* v. *Cont. Ins. Co.*, 94 U. S. 535; *Legal Tender Cases*, 12 Wall. 457; *Sturges* v. *Crowninshield*, 4 Wheat. 122.

The statute is violative of the commerce clause of the Constitution because it attempts to regulate interstate and foreign commerce. *Mobile County* v. *Kimball*, 102 U. S. 691, 702; Pomeroy on Const. Law, § 378; Cooley on Const. Law, 7th ed., 688; *Leisy* v. *Hardin*, 135 U. S. 100; *Wabash & St. Louis R. R. Co.* v. *Illinois*, 118 U. S. 557.

The statute in this case not only attempts to regulate interstate commerce, but it imposes a tax by way of a license fee as a condition for carrying on the business of transmitting moneys to foreign countries. *Brown* v. *Maryland*, 12 Wheat. 419; *Cook* v. *Pennsylvania*, 97 U. S. 566. See cases as to tax on transportation of goods from one State to another by rail, *State Freight Tax*, 15 Wall. 232; *Fargo* v. *Michigan*, 121 U. S. 230; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *State* v. *Woodruff &c. Co.*, 144 Indiana, 155; *Pickard* v. *Pullman &c. Co.*, 117 U. S. 34; on capital stock of ferry corporation, *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; on telegraph message sent out of the State, *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Ratterman* v. *W. U. Tel. Co.*, 127 U. S. 411; on agents engaged in selling railroad tickets, *McCall* v. *California*, 136 U. S. 104; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Ratterman* v. *W. U. Tel. Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *International Text Book Co.* v. *Pigg*, 217 U. S. 93; *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356; *Butler Bros. Co.* v. *Rubber Co.*, 156 Fed. Rep. 1, 17.

Mr. Louis Marshall, with whom *Mr. E. N. Letchworth* and *Mr. Theodore Connoly* were on the brief, for appellee:

The act does not deprive the complainant of his liberty or property without due process of law, but seeks merely to regulate the business in which he is engaged, which affects the public welfare to an important extent, by imposing reasonable safeguards, dictated by experience and found necessary for the protection of those dealing with private

bankers of a class to which the complainant belongs. *Armstrong* v. *Warden of the City Prison*, 183 N. Y. 223, 226; *Musco* v. *United Surety Co.*, 132 App. Div. 300; aff'd in 196 N. Y. 459.

For other recent legislation regulating various occupations, or imposing special taxes or conditions on, and hampering or affecting them, see as to oleomargarine, *Powell* v. *Pennsylvania*, 127 U. S. 678; *Plumley* v. *Massachusetts*, 155 U. S. 461; as to spirituous liquors, *Giozza* v. *Tiernan*, 148 U. S. 657; *Gray* v. *Connecticut*, 159 U. S. 74; as to mine inspection, *Holden* v. *Hardy*, 169 U. S. 366; as to refining sugar and molasses, *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89; as to emigrant agents, *Williams* v. *Fears*, 179 U. S. 270; as to other purposes, *Clark* v. *Titusville*, 184 U. S. 329; *St. Louis Coal Co.* v. *Illinois*, 185 U. S. 203; *Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306; *Gardner* v. *Michigan*, 199 U. S. 325; *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60; *Cox* v. *Texas*, 202 U. S. 446; *Gundling* v. *Chicago*, 177 U. S. 183; *Austin* v. *Tennessee*, 179 U. S. 343; *Booth* v. *Illinois*, 184 U. S. 425; *Dent* v. *West Virginia*, 129 U. S. 114; *Hawker* v. *New York*, 170 U. S. 194; *Watson* v. *Maryland*, 218 U. S. 173; *Smith* v. *Alabama*, 124 U. S. 465; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452; see also *Nechumcus* v. *Warden of City Prison*, 144 N. Y. 529; *Tenement House Dept.* v. *Moeschen*, 179 N. Y. 325; *Health Dept.* v. *Rector*, 145 N. Y. 32; *Grand Rapids* v. *Brandy*, 105 Michigan, 670; *S. C.*, 32 L. R. A. 116.

As to legislation directly relating to the subject of private banking, see *Attorney General* v. *Utica Ins. Co.*, 2 Johns. Ch. 375, and 15 Johns. 358; *Curtis* v. *Leavitt*, 15 N. Y. 952; *Perkins* v. *Smith*, 116 N. Y. 444; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 596; *Blaker* v. *Hood*, 53 Kansas, 499; *Youngblood* v. *Birmingham Trust Co.*, 95 Alabama, 521; *Indiana* v. *Richcreek*, 77 N. E. Rep. 1085; *Goodsill* v. *Woodmansee*, 1 N. Dak. 246; *South Dakota* v.

Scougal, 3 S. Dak. 55; Tiedeman, Pol. Pow., p. 290; *Weed* v. *Bergh*, 124 N. W. Rep. 664; *Maclaren* v. *State*, 124 N. W. Rep. 667.

The public nature of the banking business has been recognized, and the duty exists on the part of the State to protect those dealing with banks and bankers. New York Banking Law, §§ 14, 76; *People* v. *Provident Assn.*, 161 N. Y. 492; New York Ins. Law, §§ 13–17; New York Liquor Tax Law, § 16; General Corporation Law, § 22.

There is no merit in the attack on this legislation based on the claims that the right to a license depends on five years' residence in the United States and that the Comptroller is vested with discretionary power with respect to the granting of licenses; but complainant being a citizen who has carried on business in the State of New York for upwards of twenty years, cannot raise this question. *Southern Pacific Co.* v. *King*, 217 U. S. 534; *Williams* v. *Eggleston*, 170 U. S. 304; *Tyler* v. *Judges of Registration*, 179 U. S. 405; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Hooker* v. *Burr*, 194 U. S. 415; *Worcester* v. *Worcester Con. St. Ry. Co.*, 196 U. S. 538; *Hatch* v. *Reardon*, 204 U. S. 152, 160.

One whose rights or liabilities are not affected by a statute cannot question its constitutionality. *Albany County* v. *Stanley*, 105 U. S. 305; *National Bank* v. *Craig*, 181 U. S. 548; *Oil Co.* v. *Texas*, 217 U. S. 114; *Wiley* v. *Sinkler*, 179 U. S. 58; *Chadwick* v. *Kelley*, 187 U. S. 540.

The provision in the act, to the effect that, after notice of application for a license has been posted, the Comptroller may, in his discretion, approve or disapprove the application, does not confer the arbitrary power of rejection. The discretion conferred is a legal discretion, which must be reasonable. Cases *supra*.

Discretionary power may be vested in administrative boards, *Crowley* v. *Christensen*, 137 U. S. 92; 2 Willoughby on Const. 1294. The discretion conferred on the Comptroller cannot be exercised capriciously. Section 26 of act;

Munday v. *Fire Commissioners*, 73 N. Y. 445; *Mayor* v. *Nichols*, 79 N. Y. 582.

The act does not deprive the complainant and those similarly situated of the equal protection of the law. The exceptions contained therein constitute a legitimate exercise of the right of classification. All persons coming within the class to which the complainant belongs are accorded like treatment, and there is no discrimination among the members of any of the classes affected.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity to prevent the carrying out of Chapter 348 of the Laws of New York for 1910, which forbids individuals or partnerships to engage in the business of receiving deposits of money for safe keeping or for the purpose of transmission to another or for any other purpose without a license from the Comptroller. The requirements for obtaining the license, so far as they affect the plaintiff, are that the applicant shall deposit ten thousand dollars with the Comptroller and present a bond with a penalty of not more than fifty thousand or less than ten thousand dollars, to be fixed by the Comptroller, conditioned upon the faithful performance of the duties undertaken. After notice shall have been posted for two weeks the Comptroller may approve or disapprove the application in his discretion, and licensees are to pay a fee of fifty dollars. § 25. The license is revocable at all times by the Comptroller for cause shown. § 26. Carrying on the business specified, or using the word 'banking' or 'banker' on signs, letterheads or advertisements in connection with any business, without a license, is made a misdemeanor. § 27. The foregoing provisions do not apply to any corporation or 'individual banker' authorized to do business under the banking law, or to national banks; to any hotel keeper who shall receive money for safe-keeping from a

guest; to any express or telegraph company receiving money for transmission; to individuals or partnerships where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than five hundred dollars during the fiscal year preceding an affidavit to that effect; or, finally, to any individual or partnership filing a bond approved by the Comptroller for one hundred thousand dollars when the business is in a city having a million inhabitants, or, if elsewhere, for fifty thousand dollars; or money, or securities that the Comptroller approves. § 29*d*.

The plaintiff alleges that he is a citizen of the United States and has been engaged in the business specified in the statute for twenty years; that by good reputation and considerable expenditure he has made his business of great value, and that it chiefly consists in receiving deposits in very small sums from time to time until they reach an amount sufficient to be sent to other States and mainly to foreign countries. The plaintiff further alleges that he has not the means that would enable him to make the deposit and give the bond required, and that the enforcement of the law against him will compel him to close. He avers that the statute is unconstitutional as against him under the Fourteenth Amendment and under the commerce clause of the Constitution of the United States. Article I, § 8. The bill was demurred to and the demurrer was sustained by the Circuit Court.

The first objection urged by the plaintiff in argument is to a requirement that we have not mentioned, that the applicant must have been continuously for five years immediately preceding his application a resident of the United States. As the plaintiff alleges that he satisfies this requirement, he has nothing to complain of. And therefore, without intimating any doubt as to the validity of the clause, we pass at once to the matters in which he is concerned. *Southern Ry. Co.* v. *King*, 217 U. S. 524,

534. As a preliminary to his argument the plaintiff denies that he is in any sense a banker, and even goes so far as to treat the receipt of money for safe keeping or transmission within the meaning of the act as a case of bailment in which the very coins received must be returned or sent on. Of course this is not a true construction of the statute, as is sufficiently indicated by the title "Private Banking." The receipt of money by a bank, although it only creates a debt, is in a popular sense the receipt of money for safe keeping, since the depositor can draw it out again at such time and in such sums as he chooses. It is safe to assume that the transmission of money contemplated very generally is accomplished by a draft, and practically never by sending on the identical currency received. One form at least of the business aimed at and, on the face of the bill, that carried on by the plaintiff, is a branch of the banking business. Furthermore, it is a business largely done with poor and ignorant immigrants, especially on their first arrival here.

We presume that the money deposited with the plaintiff is not drawn upon by checks, so that a part of the argument in *Noble State Bank* v. *Haskell*, just decided, *ante*, p. 104, may not apply. On the other hand, experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the State may regulate that business and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will as to raise him above state laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. The *quasi*-paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived

immigrants justifies a supervision more paternal than is needed in ordinary affairs. Whether the court thinks them wise or not such laws are within the scope of the discretion which belongs to legislatures and which it is usual for them to exert.

This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the Fourteenth Amendment, the State could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force. It is said that even if the plaintiff could furnish the money and bond required, the Comptroller might refuse a license upon his arbitrary whim. No guides are given in § 25 for the discretion that he is to exercise, and a provision in § 29*e* that nothing in the article shall be construed to require the Comptroller to make any inquiry as to the solvency of any applicant is thought to exclude solvency as the test and to leave the matter at sea. We do not so understand the purpose and purport of § 29*e*, and should suppose that the discretion to be exercised in the refusal to grant the license under § 25 was similar to that exercised under § 26 in revoking one; and that in each case the Comptroller was expected to act for cause. But the nature and extent of the remedy, if any, for a breach of duty on his part we think it unnecessary to consider; for the power of the State to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached. See *Gundling* v. *Chicago*, 177 U. S. 183. *Lieberman* v. *Van de Carr*, 199 U. S. 552.

Again, it is argued that the statute makes unconstitutional discriminations by excepting the classes mentioned in § 29*d* above, especially those in whose business the average amount of each sum received is not less than $500

and those who give a bond of $100,000 or $50,000. But the former of these exceptions has the manifest purpose to confine the law as nearly as may be to the class thought by the legislature to need protection, and the latter merely substitutes a different form of security, as it well may. "Legislation which regulates business may well make distinctions depend upon the degree of evil." *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338, 355, 356. It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and small. But in this case size is an index. Where the average amount of each sum received is not less than five hundred dollars we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect. See *Musco* v. *United Surety Co.*, 196 N. Y. 459, 465. *McLean* v. *Arkansas*, 211 U. S. 539, 551.

We come to the final objection that this statute is an attempt to regulate commerce with other States. When, as in this matter, the Constitution takes from the States only a portion of their otherwise absolute control, there may be expected difficulties in drawing the dividing line, because where it shall be put is a question of more or less. The trouble is inherent in the situation, but it is the same in kind that meets us everywhere else in the law. The question is whether the state law creates a direct burden upon what it is for Congress to control, and the facts of the specific case must be weighed. In doing so we recur to what we have said above, that we cannot regard the statement of the plaintiff's business in his bill as describing the receipt of bailments for the transmission of the identical objects received to other States. Neither do we regard the law as having had such bailments primarily in mind. Under the statement in the bill and the words of the law, we must take it that the money received even when received for transmission becomes the money of the de-

positary and his obligation that of a debtor under contract to pay as may be directed. Presumably the depositor retains the right to call for his money himself or to change any direction that may have been given, until the money has left the 'private banker's' hands. The law, as was said of a similar one by the New York Court of Appeals, was passed for the purpose of regulating and safeguarding the business of receiving deposits, which precedes and is not to be confounded with the later transmission of money, although leading to it. *Musco* v. *United Surety Co.*, 196 N. Y. 459, 466, 467. The fact that it is very likely to lead to it does not change the result. *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616. The case is similar in principle to *Ware & Leland* v. *Mobile County*, 209 U. S. 405, where the nearest cases on the other side are distinguished. See further *Williams* v. *Fears*, 179 U. S. 270. We are of opinion that the commerce clause of the Constitution is not infringed, and on the whole case that the decree of the Circuit Court was right.

Decree affirmed.

KENTUCKY UNION COMPANY *v.* COMMONWEALTH OF KENTUCKY.

EASTERN KENTUCKY COAL LANDS CORPORATION *v.* SAME.

SAME *v.* SAME.

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

Nos. 22, 47, 48. Argued October 28, 31, 1910.—Decided January 3, 1911.

A State may choose its own methods of taxation and form and method of enforcing payment so far as Federal power is concerned, subject only to the restrictions of the Federal Constitution.

Where the highest court of the State has held that provisions that might render an act unconstitutional are inoperative, and the elimination of those provisions do not affect the remainder of the act, this court is bound by such construction and will construe the act as though stripped of such provisions.

An *ex post facto* law and a retroactive law are different things.

Laws of a retroactive nature imposing taxes or providing remedies for their assessment and collection and not impairing vested rights are not forbidden by the Federal Constitution. *League* v. *Texas*, 184 U. S. 156.

Ex post facto laws prohibited by the Federal Constitution are those relating to criminal punishment and not retrospective laws of a different nature. *Calder* v. *Bull*, 3 Dall. 386; *Orr* v. *Gilman*, 183 U. S. 278.

As the Kentucky statute involved in this case, as construed by the highest court of that State, does not impose penalties or punishments of a criminal nature, it is not an *ex post facto* law within the meaning of the Federal Constitution.

Summary procedure in the assessment and collection of taxes, if not arbitrary or unequal, and which allows opportunity to be heard does not deny the property owner due process of law simply because it is summary.

A state statute requiring owners to register lands and pay taxes thereon but which only forfeits them for non-compliance therewith after judicial proceeding and opportunity to be heard, does not deny the property owner due process of law.

A time not unreasonably short for beginning actions, fixed, in view of particular conditions, by the legislature, does not deny due process of law, *Terry* v. *Anderson*, 95 U. S. 628; and a state statute of limitations as to actions between individuals cannot affect the right of the State to determine by statute a reasonable period within which property owners must register their land, provisions being made for notice and opportunity to be heard.

Where the state court has held that although a sale may be ordered of an entire tract there is opportunity, if less than the whole is to be sold, to be heard, and have an ascertainment of the parts to be sold, the property owner is not deprived of his property without due process of law.

An offer to compromise not in accord with the terms of the statute under which lands have been declared forfeited does not amount to an offer to pay the taxes properly assessed thereunder.

Whether lands are properly described in a petition for sale thereof under a statute presents no Federal question unless the ruling sustaining it is so arbitrary and baseless as to deny due process of law.

While the Virginia-Kentucky compact of 1789 protects the holders of grants under Virginia from acts by Kentucky, cutting down substantial rights, *Green* v. *Biddle*, 8 Wheat. 1, it does not render them immune from constitutional enactments of Kentucky in regard to the taxation or registration of their property. *Hawkins* v. *Barney*, 5 Pet. 457.

A State may classify subjects so long as all persons similarly situated are treated alike. *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245.

A state taxing statute applicable to certain counties is not unconstitutional under the equal protection clause of the Fourteenth Amendment because its operation is confined to those counties. *Florida R. R. Co.* v. *Reynolds*, 183 U. S. 471.

The doctrine of innocent purchasers does not apply against the power of the State to assess and collect back taxes and provide for registration of titles in favor of one purchasing after delinquencies; such a purchaser is not deprived of his property without due process of law, because the State exercises its rights in a constitutional manner. *Citizens' National Bank* v. *Kentucky*, 217 U. S. 443.

Where one seeks to recover under a grant or deed which does not convey all the land within the boundary described, he must show that the land sought to be recovered is within the boundary and not within the exclusions.

The provisions of the Revenue and Taxation Act of Kentucky of

March 5, 1906, involved in this action, are not unconstitutional as depriving landowners affected thereby of their property without due process of law, or denying them equal protection of the law, nor do such provisions violate the provisions of the Virginia-Kentucky compact of 1789.

127 Kentucky, 667; 128 Kentucky, 610; 111 S. W. Rep. 362, affirmed.

THE facts, which involve the constitutionality of certain provisions as to taxation and registration of land of the Revenue and Taxation Act of Kentucky of March, 1906, are stated in the opinion.

Mr. Louis B. Wehle, with whom *Mr. William B. Dixon* was on the brief, for plaintiff in error in No. 22.

Mr. John G. Johnson and *Mr. William Jackson Hendrick*, with whom *Mr. Samuel Howland Hoppin*, *Mr. Eugene M. Berard*, *Mr. James M. Hazelrigg* and *Mr. Hannis Taylor* were on the brief, for plaintiffs in error in Nos. 47 and 48.

Mr. J. W. M. Stewart, *Mr. Z. T. Vinson* and *Mr. David W. Baird*, with whom *Mr. James Breathitt*, Attorney General of the State of Kentucky, *Mr. John F. Hager*, *Mr. John H. Holt*, *Mr. J. H. Jeffries* and *Mr. Aaron Kohn* were on the brief, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

These are writs of error to the Court of Appeals of the State of Kentucky, and involve the constitutionality of an act of the legislature of that State, passed March 15, 1906, entitled "An Act Relating to Revenue and Taxation." Acts of 1906, pp. 88–248. Article III is brought in question in these cases. It is set forth in full in the opinion of the Court of Appeals of Kentucky in case No. 47. 127 Kentucky, 667. Its salient features are:

Section 1 of the article makes it the duty of every owner or claimant of land to pay the taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant

thereof, as of the fifteenth day of September, 1901, 1902, 1903, the first day of September, 1904, and the first day of September, 1905, and provides that if the owner or claimant, or those under whom he claims, have failed to list the land, or any part thereof, for taxation, as of said dates, or any of them, it shall be his duty to have the same assessed and listed for taxation as is provided in the act, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon. It is provided that the fact that the land has been listed for taxation, or the taxes paid thereon by another claimant, shall not relieve against the duty imposed by the act; and if any such owner or claimant, or those under whom he claims, has failed to list the land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of the years for which said assessments were or should have been made, said owner and claimant and those under whom he claims are declared delinquent; and such failures, or either of them, shall be cause for forfeiture and transfer to the Commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as required in the act. But it is provided that the cause for forfeiture shall be extinguished if the owner or claimant, his heirs, representatives or assigns, shall, within the time and in the manner provided in the article, cause the land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged, and which should have been charged against him, or against those under whom he claims, as the owner or claimant thereof, for each and all of said five years for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in the case of the redemption of land sold for the non-payment of taxes.

Section 2 provides for the ascertainment of the amount of taxes unpaid and the assessment required by the preceding section by a proceeding in the county court where the land lies, upon the application of the owner or claimant, by a petition filed in the court on or before January 1, 1907, in which the land sought to be charged shall be described, so as to be identified, and the years for which it was listed and the years for which the taxes were not paid shall be stated; in which petition shall also be stated the grant under which petitioner claims, if he derives title from a grant, and the instrument through or the manner in which the title devolved upon him. A hearing is provided upon a day to be fixed by the applicant, not less than ten nor more than twenty days after the filing of the petition, after notice to the county attorney, who is required to attend and represent the State and county.

The county court is required to decide upon the application in a summary manner, upon such evidence as may be offered, having regard to the value of adjacent property; to ascertain the amount of unpaid taxes which the applicant and those under whom he claims should have paid for any and all of said years, whether assessments were originally made as of said dates or not. The court is required to find the proportion of the taxes due the county and State, at the rates fixed by law for such years; and to make a record of its findings and certify the same to the auditor of the State and county clerk. Should the court find that the land has been assessed against such owner or claimant, or those under whom he claims, as of any of said dates it shall accept such assessment as a basis upon which to ascertain the amount of unpaid taxes for the year such assessment shall have been made.

Provision is made for an appeal to the Circuit Court of the county; also for the payment of the taxes as ascertained, and for compensation to the officers whose services are required.

Section 3 provides the method of procedure against the owner or claimant by the Commonwealth's attorney, in case such owner or claimant fails to have the land assessed or fails to pay the taxes charged or which should have been charged against him, or those under whom he claims, and it is made the duty of the Commonwealth's attorney to institute in the Circuit Court of the county in which the land, or any part thereof lies, a proceeding in equity in the name of the Commonwealth of Kentucky as plaintiff against the said tract of land and the owners or claimants of said land as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as the unknown owners and claimants thereof; which proceeding is for the purpose of declaring the title or claim of said defendants forfeited to the Commonwealth, and for selling the same. It is provided that this suit shall be proceeded with to final judgment in all respects as other equity causes so far as applicable.

Provision is made for posting the notice and a copy of the petition at the door of the courthouse.

The petition is required to allege the facts constituting the cause of forfeiture under the provisions of the article, and there shall be filed with the petition a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim or possession, or continuity thereof, whether owned or claimed by the defendant or by others, is to be forfeited or in any manner affected by the proceeding. If judgment is in favor of forfeiture, it is provided that the judgment shall operate as a transfer to and vesting in the Commonwealth of the title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court finds the title is not subject to forfeiture under the provisions of the article, it shall so adjudge and dismiss the petition of the plaintiff.

It is provided that judgments under the article shall be

conclusive as against all defendants, including infants, lunatics and married women, and shall not be subject to certain provisions of the code of practice.

An appeal is provided to the Court of Appeals within thirty days after judgment.

In § 4 provision is made for the purchase back of the forfeited title, and upon the proper pleadings and hearings the court is authorized to ascertain and adjudge the amount of unpaid taxes charged, and that ought to have been charged, against the defendant and those under whom he claims, as the owner or claimant of said land, for the fifty years immediately preceding the filing of such counterclaim, and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the Commonwealth it shall enter judgment against such defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant, and those under whom he claims as the owner or claimant of the land, for said fifty years, together with interest at the rate of 15 per centum per annum from the time the said unpaid taxes for said several years were due, and the costs of the proceedings, including a reasonable fee to the Commonwealth's attorney. No person is to be entitled to purchase back from the Commonwealth the title so forfeited except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself upon which he could maintain an action of ejectment. Upon payment of the amount of the judgment the court is required to enter a judgment retransferring to such defendant the title and claim so forfeited to and vested in the Commonwealth.

Provision is made for the sale of the said title and claim in the event that the judgment is not paid.

The fifth section provides that any owner or claimant who institutes a proceeding allowed by § 2 of the article, who does not, within the time there limited, pay the

amount ascertained as charged or chargeable against him and those under whom he claims, as the owner or claimant of the land, shall not be allowed to purchase back, under the proceedings authorized by § 4 of the article.

Section 6 of the article provides that all title and claim proceeded against under the article and forfeited to and vested in the Commonwealth and not purchased back by the owner or claimant thereof, as authorized in § 4, whether such forfeiture be for past delinquencies or for future delinquencies as authorized under § 10, is transferred to and vested in any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment of forfeiture, under claim or color of title, derived from any source whatsoever, and who, or those under whom he claims, shall have paid taxes thereon for the five years in which such possession may have been or may be held; and in those in privity with such person, his heirs, representatives or assigns, as to the mineral or other interests or rights in or appurtenant to such land.

Section 7 provides that all title and claim to land transferred to and vested in the Commonwealth, under the provisions of this article, and not purchased back by the owner or claimant, as provided by § 4, and not vested in the occupant, as provided in § 6, shall be sold to the highest and best bidder for cash in hand, which sale shall be made pursuant to a judgment of the Circuit Court in said action, and shall be at public auction at the door front of the courthouse upon the first day of some regular term of the Circuit or County Court, after notice of sale shall have been advertised in the manner required by law in the case of the sales of land under execution. The commissioner shall report the sale to the court for its confirmation, and, when confirmed, the court shall order the commissioner to make a deed to the purchaser, which deed shall operate to transfer to the purchaser such title and claim to the land

so forfeited to and vested in the Commonwealth as remains in it after the operation of § 6 of the article.

The money realized from the sale is to be distributed for the payment of costs, including the commissioner's and attorney's fee; second, to the county and State the proportion to which each may be entitled, together with interest and penalty as in this article provided; third, the remainder to be paid over to the former owner or claimant or his personal representative or assigns.

Section 8 provides that no action to enforce a forfeiture as authorized and provided in the article shall be instituted after the expiration of five years from the accrual of the right thereto.

Section 9 provides that no owner or claimant of any land in the Commonwealth shall be allowed to prevent the operation of the article by the payment, after January 1, 1906, of any amount less than the whole of the unpaid taxes, interest and penalties provided by law, that were charged and that should have been charged against said owner or claimant of said land and those under whom he claims, as of each and all of said five dates first mentioned in § 1 of the article; and where such payment is made after the passage of the act, it is provided that the amount to be paid shall be ascertained and payment made as in the article provided.

Section 10 provides that when, for any five successive years after the first day of August, 1906, any owner or claimant of or to any land in the Commonwealth shall fail to list the same for taxation and cause himself to be charged with the taxes properly chargeable thereon, or fail to pay the same as provided by law, then such failure shall be cause for the forfeiture of his title and claim thereto, and the transfer of the same to the Commonwealth of Kentucky; and it is made the duty of the Commonwealth's attorney to institute an action in the Circuit Court of the county wherein the land or any part thereof lies, for the

purpose of declaring the forfeiture, and for the sale of such parts thereof as, under the provisions of the article, are liable to sale, such actions and proceedings to conform to the provisions of article III as far as the same may be applicable.

Case No. 22 originated in a petition filed by the Commonwealth of Kentucky, through the Commonwealth's attorney, against the Kentucky Union Company, for the forfeiture, for failure to list and pay taxes upon some 40,000 acres of land in Leslie County, Kentucky, granted by letters patent of the Commonwealth of Kentucky, June 12, 1872, the proceedings resulting in a judgment of forfeiture, which was affirmed in the Court of Appeals of Kentucky, 128 Kentucky, 610.

Case No. 47 was a petition brought by the Eastern Kentucky Coal Lands Corporation under article III, for the assessment and taxation of the tracts of land in controversy, consisting of large bodies of land which the Eastern Kentucky Coal Lands Corporation claimed to be the owners of under patents issued under Virginia warrants, principally antedating the year 1789; and while the petition was dismissed upon the ground that the same did not conform to the requirements of the law, the Court of Appeals of Kentucky found that the constitutionality of the act was necessarily involved, and in an elaborate opinion by the Chief Justice sustained the validity of the law. 127 Kentucky, 667.

Case No. 48 was a proceeding by the Commonwealth's attorney in behalf of the State, against the Eastern Kentucky Coal Lands Corporation and others, for the forfeiture of the lands described, for the failure to list the lands and pay taxes as required by article III of the act of March 15, 1906, which resulted in the affirmance of the judgment rendered in the lower court forfeiting the title of the Eastern Kentucky Coal Lands Corporation to lands held in Pike County, Kentucky, under the old Virginia

titles and aggregating over 300,000 acres; and while the case is not officially reported, the opinion of the Kentucky Court of Appeals is found in 111 S. W. Rep. 362.

The conditions which led to the passage of article III of the act of March, 1906, are elaborately set forth in the opinion of the Chief Justice in 127 Kentucky, *supra*. They are also more briefly stated in a report of the commission appointed by the legislature of Kentucky to investigate and revise the taxing laws of the State, upon whose recommendation the act in question was passed.

It would too greatly lengthen this opinion to quote the history of the legislation so fully set forth in the opinion of the Court of Appeals. It appears that the tracts in question were formerly a part of the State of Virginia, and prior to 1792, when Kentucky was admitted into the Union, the State of Virginia had granted large tracts of land in that part of the territory which is now eastern Kentucky. These grants, often conflicting and overlapping, were made for small sums and for large tracts, the grants ranging from 5,000 acres to 500,000 acres. Similar grants were made in what is now the southwestern portion of the State of West Virginia. The regions covered were at the time unsettled and the lands of little present value. They were not taken possession of by the original patentees or those claiming under them, nor were the taxes paid thereon, nor up to the passage of the act of 1906 had taxes in any considerable amount been paid upon such lands.

A number of acts were passed by the legislature of Kentucky seeking to reach these lands for taxation. Some of them were held unconstitutional, and up to the passage of this act no effectual means had been found of subjecting these lands to the payment of public taxes. Some of the same lands were afterwards granted by the State of Kentucky, and very considerable portions of them have been occupied under grants from that State, and have been con-

tinuously occupied and cultivated by those claiming under such grants.

With these lands thus covered by conflicting grants from the State of Virginia and the later grants under the authority of the State of Kentucky, and in view of the failure of former legislation to require the same to be taxed, and the fact that the old grants were outstanding and affording no revenue to the State, and encumbering the titles of the occupants of the land and those under whom they claimed, it was sought by the act of 1906 to subject these lands to taxation and to forfeit these old titles which had not been effectually subjected to the taxing laws of the State, and to make the forfeited titles inure to the benefit of the occupying claimants, who had paid the taxes thereon in the manner provided by the law. Similar legislation, as we shall have occasion to see, was adopted in the State of West Virginia.

In elaborate arguments at the bar and in briefs covering many pages a most severe arraignment is made of the drastic character of this legislation and its alleged unfairness to the claimants of old titles under grants from the State of Virginia.

This court is concerned only with the constitutionality of the law in view of applicable provisions of the Federal Constitution. The State is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject, so far as the Federal power is concerned, to the restricting regulations of the Constitution of the United States.

Passing questions which are purely of a state character and which were ruled upon against the contentions of the plaintiff in error by the Court of Appeals of Kentucky, we come to a consideration of the questions of a nature involving consideration of the Constitution of the United States.

It is first contended that the law in question imposes

penalties of a character which could not theretofore have been imposed upon the owner of the land, as a condition of saving the title from forfeiture under the provisions of article III. The Court of Appeals of Kentucky having intimated that the part of the law requiring the payment of penalty and interest was separable from the other features thereof, upon the rehearing, in 128 Kentucky, 610–624, held in answer to the contention that the taxes, interest and penalties provided by the act visited upon the delinquent greater penalties than he was subject to prior to the passage of the act, that the article, in so far as it required the payment of interest and penalties for the years covered by the act, is inoperative, and the delinquents for those years would be required to pay only taxes, without interest or penalty; and that the elimination of the interest and penalties for those years did not affect the other provisions of the article with respect to those years or years subsequent thereto.

We must therefore take the act as the Court of Appeals of Kentucky has construed it, stripped of the requirement to pay interest and penalties as a condition of saving the lands from forfeiture.

It is nevertheless contended—and this is the first objection of a Federal nature—that the law is *ex post facto*. It is to be noted in this connection that the law does not undertake to forfeit the lands only because of things done or undone prior to its passage, but because of the failure of the claimant to comply with the provisions of the law; and he is given until the first of January, 1907, in which to file a petition for the ascertainment of the taxes assessable and due upon his title, and until March 1, 1907, to pay the back taxes. But an *ex post facto* law and a retroactive law are entirely different things.

Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection and not impairing vested rights, are not forbidden by the Federal

Constitution. *League* v. *Texas*, 184 U. S. 156. This court had occasion in a very early case to consider the meaning of an *ex post facto* law as the term is used in the Federal Constitution, prohibiting the States from passing any law of that character. *Calder* v. *Bull*, 3 Dall. 386–390. In that case it held that such laws, within the meaning of the Federal Constitution, had reference to criminal punishments, and did not include retrospective laws of a different character. That case has been cited and followed in later cases in this court. See *Kring* v. *Missouri*, 107 U. S. 221; *Orr* v. *Gilman*, 183 U. S. 278, 285.

In the latter case a former decision of this court, in *Carpenter* v. *Pennsylvania*, 17 How. 456, 463, opinion by Mr. Justice Campbell, was quoted with approval. It was therein said:

"The debates in the Federal convention upon the Constitution show that the terms '*ex post facto* laws' were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Madison Papers, 1399, 1450, 1579.

"This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time. *Calder* v. *Bull*, 3 Dall. 386; *Fletcher* v. *Peck*, 6 Cranch, 87; 8 Pet. 88; 11 Pet. 421."

The Kentucky statute as construed by the Court of Appeals of Kentucky imposes no penalty or punishment of a criminal nature and is not an *ex post facto* law within the meaning of the Federal Constitution.

It is next contended that the Kentucky statute under consideration denies to the plaintiffs in error due process of law, in violation of the Fourteenth Amendment to the Constitution.

This court has had frequent occasion to comment upon the effect of this Amendment in respect to laws of the

States for the levy and collection of taxes. A summary procedure has been sustained where the person taxed has been allowed opportunity to be heard in opposition to the enforcement of taxes and penalties against him. In *McMillen* v. *Anderson*, 95 U. S. 37, 41, this court said:

"The mode of assessing taxes in the States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done."

See in this connection *Leigh* v. *Green*, 193 U. S. 79; *Ballard* v. *Hunter*, 204 U. S. 241, and cases therein cited.

Summary proceedings adapted to the circumstances and permitting the taxpayer to appear and be heard at some stage of the proceedings have been held to satisfy the requirements of due process of law. *Security Trust & Safety Vault Co.* v. *Lexington*, 203 U. S. 323.

The State of West Virginia, by its constitution, in 1872 inaugurated a system of forfeiture of lands for nonpayment of taxes in some respects analogous to the one under consideration now. The West Virginia system was before this court in *King* v. *Mullins*, 171 U. S. 404. In that case due process of law, in connection with the taxing system of the State, was given full consideration; and the constitution of West Virginia, when read in connection with the statutes of the State, was held to afford due process of law. The constitution of the State of 1872, by article 13, § 6, made it the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon and pay the same; and when, for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more should not have been charged on such books with the state tax on said land, then by operation of the constitution the land was forfeited and the title vested in the

State. The statute of the State provided for proceedings by the commissioner of the school fund to subject forfeited lands to sale, in which proceeding the owner was permitted to intervene by petition and obtain a redemption of his land from the forfeiture claimed by the State; and after a full discussion of the subject and the bearings of the Fourteenth Amendment of the Constitution upon the statute, Mr. Justice Harlan, who delivered the opinion of the court, said (p. 436):

"For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and causing himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper Circuit Court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the constitution of the State."

In the present case the statute does not undertake to forfeit the lands for the failure to register them and pay the taxes upon them for the years stated, without a judicial proceeding by which the owner of the title may have the taxes assessed and upon payment thereof the forfeiture avoided; and the forfeiture is declared only after a judicial proceeding instituted by the Commonwealth's attorney, in which there is opportunity for a hearing, and after which the forfeiture may be declared.

The case of *King* v. *Mullins*, *supra*, was followed and approved in this court in *King* v. *West Virginia*, 216 U. S. 92, and in *Fay* v. *Crozer*, 217 U. S. 455.

It is however insisted that although a hearing before forfeiture is provided the proceedings are so arbitrary and oppressive as to deprive the owner of due process of law, notwithstanding there is opportunity to appear and contest the forfeiture.

As bearing upon this alleged lack of due process in this statute it is contended that it cuts down the period of limitation in which actions may be brought by the holder of the title to recover against adverse claimants, and this because of the short time given in which to take proceedings against such claimants. The argument is that as § 6 of article III transfers the forfeited title to occupying claimants in actual adverse possession for five years next preceding the judgment of forfeiture, and as the statute of limitations for the recovery of real property in Kentucky is fifteen years, there was still ten years in which to have sued an occupying claimant of five years' standing, but because of the action required to prevent forfeiture under article III, which it is contended under the Kentucky constitution did not take effect until ninety days after the adjournment of the session at which it was passed, there was visited upon the owner the necessity of terminating the adverse possession by an action brought within six and one-half months. But we do not perceive in this indirect effect upon the statute of limitations any deprivation of due process of law. The state statute limiting actions between individuals cannot operate to affect the right of the State to require the registration of the lands withheld from taxation, or prevent acts for the summary registration or forfeiture of such lands, wherein, as in the case at bar, an opportunity, not unreasonable in character, is given for compliance with the laws after the same go into effect, and the forfeiture is had upon a proceeding in which the owner of the title is summoned and heard.

A time not unreasonably short for the beginning of actions may be fixed by the legislature, having in view par-

ticular conditions without violating the due process clause. *Terry* v. *Anderson*, 95 U. S. 628.

Much is said of the purpose of this law not being that of legitimate taxation, but intended to and in its operation having the practical effect of transferring the title of the owners to others. This argument is based upon the provision of the statute which makes the title, when forfeited to the State, inure to the benefit of occupants in possession who have paid the taxes as provided in the act. This feature of the law, in substance, is in the West Virginia constitution, and was referred to in the opinion in *King* v. *Mullins*, 171 U. S. *supra*.

It is not a valid objection to a law of this character that the title forfeited to the State as the result of proper proceedings and due notice to the owner of the title who is in default for the payment of taxes, may be transferred to others occupying and paying taxes upon the lands and not in default. That the similar feature of the West Virginia constitution did not invalidate the law where opportunity was given for a hearing was held in *King* v. *West Virginia*, 216 U. S. *supra*, to have been concluded by *King* v. *Mullins*, *supra*, and the same doctrine was applied in *Fay* v. *Crozer*, 217 U. S. 455. This view may have the effect of subjecting the owner of the title which is forfeited to proceedings which divest his title, notwithstanding another claimant may have paid taxes upon a separate title in the same land; but this consideration does not affect the validity of the law. The State may, so far as the Federal Constitution is concerned, tax each claimant of title upon the same premises and may, by a proper procedure, divest the owner of one in default.

Much comment is made upon the statement in the opinion of the learned Chief Justice of Kentucky, who spoke for the court in No. 47, as to the purpose of the State to incidentally "outlaw" the titles claimed under the old Virginia grants for the benefit of occupying claimants, but as

was held in *King* v. *Mullins*, and the subsequent cases in this court following that case, this effect of a valid law of the State having also for its object the subjection of the lands to taxation, does not invalidate the law.

Nor do we find valid objection to the constitutionality of the law in the contention that the lands not transferred may be sold without adequate description.

This contention seems to have been made in case No. 22 by objections to the petition for failing to disclose what parts, if any, of the land were held by occupants who had paid taxes for five years preceding, and by objection to the judgment as erroneous because it did not segregate the parts to which the forfeited title would inure.

No mention appears to have been made of the Federal Constitution in this connection until petition for a rehearing, when it was objected that the statute in providing for the sale of the forfeited title furnished no means of identification or description of the land to be sold, nor for such an ascertainment of the holdings of occupying claimants as would enable a purchaser to know what was being offered for sale, and it was urged that a judicial sale in pursuance of such a proceeding would be no less than a sacrifice of the defendant's property, and that such an order would violate the due process of law secured by the Constitution.

In the opinion upon the petition for a rehearing the Court of Appeals announced that it found nothing in the statute which deprived the owner of due process of law within the meaning of the Fourteenth Amendment, the court having thus considered the Federal question, the objection is open here.

In the original opinion concerning this objection the court said:

"So far as disclosed by the record, there is no part of the tract held by occupants. But the court judicially knows, and it was admitted in argument, that practically, if not

quite, all the land described in the petition is adversely held by occupants under claim or color of title. The record shows only that the appellant is the owner or claimant of the title to the tract of land, which is specifically described, by metes and bounds, courses and distances, and that appellant has failed to comply with the provisions of the article with respect to the listing of it for taxes and the payment of taxes thereon. The petition contains all the allegations necessary to show that the appellant was delinquent, and its title subject to forfeiture, and the demurrer thereto was, therefore, properly overruled. Nor is the judgment erroneous on that ground. Certainly the title to the tract of land described in the petition, and which is adjudged to be subject to forfeiture and sale, can be sold by the same description, the purchaser taking that which, under the article, passes at the sale. The doctrine of *caveat emptor* applies in this, as in other proceedings. And the purchaser, and not the occupant, as argued by counsel for appellant, would be required to show, in actions to recover under his purchase, that the land claimed by him was not of the excluded class. The rule is universal that where one seeks to recover under a grant or deed which does not convey all the land within the boundary described, he must show that the land sought to be recovered is within the boundary and without the exclusions. *Hall* v. *Martin*, 89 Kentucky, 9.

"The act provides that the deed shall transfer to the purchaser the title and claim: 'So forfeited and transferred to, and vested in, the Commonwealth, as remains in it after the operation of section six of this article, and shall so recite.'

"The article, taken as a whole, clearly shows that such was the legislative intent. It is not necessary for the petition to describe more than the tract of land the title to which is sought to be forfeited.

"After the judgment of forfeiture becomes final, the

main purpose to be conserved is the interest of the Commonwealth, and circumstances might arise or be shown to exist that would authorize different modes of executing it. We have no hesitancy in holding that it is not necessary for the judgment to ascertain and describe the parts of the tract held by occupants. If, at the hearing, it should be made manifest that the title as to certain parts only of the tract would pass to the purchaser under a sale, the statute would be complied with by a sale of the title covering those parts alone. In any event, it is the duty of the court to prescribe what parts thereof shall be sold, if less than the whole is to be sold. Therefore, the judgment appealed from, in so far as it authorizes the commissioner to sell the tract as a whole or in parcels, to suit the purchaser, is erroneous."

As we construe this part of the opinion, it means that it was not necessary in the petition for forfeiture to point out and describe the parts of the tract held by occupants. But from what is said in the latter part of the paragraph just quoted we think that it is apparent that the defendant might show what parts of the land were subject to sale, if less than the whole was to be sold. That is, while in the absence of a showing in this matter, a sale in gross would be ordered, it was nevertheless open for the defendant to show that only a part of the tract, in view of other provisions of the statute, would be subject to sale. With the opportunity to be thus heard, and have a definite ascertainment of the parts to be sold, we think the statute, as construed by the Court of Appeals of Kentucky, does not deprive the defendant of due process of law in this respect.

It is alleged that there was an offer to pay the taxes properly assessable against these lands, notwithstanding which they were declared forfeited; but an inspection of the record shows that such offer was in effect an offer of compromise, not justified by the statute and not in accord with its terms.

The denial of the prayer of the petition involved in case No. 47, because the same did not contain a description of the land sufficient to identify it, which was the basis of the decision of the Kentucky Court of Appeals, presents no Federal question. Whether that petition contained an adequate description was a question for the State to determine in the construction of its own statute. There is nothing to show that the ruling made upon that subject was so arbitrary and baseless as to amount to a deprivation of due process of law.

It is next contended that the statute denies the equal protection of the laws within the meaning of the Fourteenth Amendment, because it does not apply equally upon all the lands in the State. The fact that in its application it can only meet conditions such as are embraced within the law in a part of the counties of the State does not render it obnoxious to the Fourteenth Amendment. *Florida R. R. Co.* v. *Reynolds*, 183 U. S. 471.

This court has frequently held that the State may classify the subjects of taxation, so long as all persons similarly situated are treated alike. *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245. This law applies with equal force to all who are in a condition to come within its terms.

The fact that the plaintiff in error did not acquire the land until after the delinquencies had occurred cannot prevent the operation of the law against it. In such cases the doctrine of innocent purchasers does not apply. *Citizens' Natl. Bank* v. *Kentucky*, 217 U. S. 443.

Another ground of objection under the Federal Constitution is insisted upon in the alleged violation of the Virginia Compact of 1789, embodied in the constitution of Kentucky, and held by this court to be a binding contract between the States. By the seventh section of that compact it is provided:

"SEC. 7. Third, that all private rights and interests of lands within the said district [Kentucky] derived from the

laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State and shall be determined by the laws now existing in this State."

Section 8 provides that a neglect of cultivation or improvement of any land within either the proposed State or the Commonwealth of Virginia belonging to non-resident citizens of the other, shall not subject such non-residents to forfeiture or other penalty within the term of six years after the admission of the said State (Kentucky) into the Federal Union.

Section 9 provides that no grant of land or land warrant to be issued by the proposed State shall interfere with any warrant theretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or before the first day of September, 1791.

This compact has been the subject of frequent consideration in the courts of Kentucky and more than once in this court.

In the case of *Green* v. *Biddle*, 8 Wheat. 1, the effect of this compact upon certain laws of the State of Kentucky was considered and determined. The case was twice argued, on the first hearing the opinion being given by Mr. Justice Story, and upon rehearing the opinion was given by Mr. Justice Washington. In that case it was held that the seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia as they were under the then existing laws of that State, and that laws of the State of Kentucky which undertook to prevent the owner of the land from a recovery thereof, without certain payments to the tenant in possession, impaired the obligation of the contract and were, therefore, null and void.

Under the Kentucky statutes the owner could not recover his property without paying for improvements made by the occupying claimant and making allowances in con-

nection therewith, which it was held had the effect of depriving the true owner of the property vested in him under the laws of Virginia at the time the compact became operative in 1789. "He [the owner] is no more bound," said Mr. Justice Story, "by the laws of Virginia to pay for improvements, which he has not authorized, which he may not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property, according to the rights and interests secured to him by those laws. It is no answer that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so changed the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

These conclusions were adhered to upon a rehearing and reaffirmed in the opinion of Mr. Justice Washington.

The Virginia compact came again before this court in the case of *Hawkins* v. *Barney's Lessee*, 5 Pet. 457. In that case the validity of a law of Kentucky which undertook to limit the right of bringing suits for the recovery of lands to seven years, instead of twenty, as was the case under the laws of Virginia at the time the compact was made, was sustained. The case of *Green* v. *Biddle* was reviewed, and it was said that, "looking through the course of legislation in Virginia, there was found no principle or precedent to support such laws, the court was induced to pass upon them as laws calculated in effect to annihilate the rights secured by the compact, while they avoided an avowed collision with its literal meaning. But in all their reasoning on the subject they will be found to acknowledge that whatever course of legislation could be sanctioned by the principles and practice of Virginia would be regarded as an unaffected compliance with the compact."

And Mr. Justice Johnson, who spoke for the court in that case, said:

"It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted, it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign State governed by the laws of another sovereign; of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State. Or a motley multiform administration of laws, under which A would be subject to one class of laws, because holding under a Virginia grant; while B, his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government."

And the learned judge referred to the language of the eighth article of the compact, recognizing the power of Kentucky to pass similar laws to those which existed in Virginia, after the period of six years; referring to the laws of Virginia, where one who had received a grant of land had failed, at first in three and afterwards in five years, to seat and improve it, and was held to have abandoned it as lapsed and forfeited land, and any one might take out a grant for it.

We think the effect of these decisions is to declare that while the Virginia compact prevents the cutting down of the titles secured under the State of Virginia prior to its date, so as to take away substantial rights incident to the title, as was the case in *Green* v. *Biddle*, *supra*, it did not mean to prevent the State, upon notice and hearing, from requiring the registration of land titles for taxation, or, in

default thereof, from forfeiting such titles to the State. These laws do not have the effect of taking away legitimate rights secured by the old grants, but enable the new sovereign to enforce against such lands, as well as others, the taxing laws of the State. It was of course recognized that the land would pass under the dominion of a new State, which would require revenues for its support, and while the title obtained from the State of Virginia was protected, it was not intended that it should be immune from constitutional laws having the effect to subject such lands to the taxing power of the new sovereignty and to require their owners, by all proper methods, to contribute their share to the public burdens of the State.

As we have said, many considerations are urged against the policy and justice of this statute, and other objections are made which depend solely upon the laws of the State and their interpretation by the courts of the State. We are unable to find that rights secured by the Federal Constitution were denied by the judgments of the Court of Appeals of Kentucky.

The judgments in each and all of the cases are therefore

Affirmed.

SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY *v.* WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 49. Submitted November 29, 1910.—Decided January 3, 1911.

No one can take advantage of the forfeiture provided for non-performance of a condition subsequent in a land grant *in præsenti*, except the Government, *Schulenberg* v. *Harriman*, 21 Wall. 44; nor can there be any forfeiture on the part of the United States without appropriate judicial proceeding equivalent to office found or legislative assertion of ownership.

Although the grant of right of way involved in this action made by the act of June 4, 1898, c. 377, 30 Stat. 430, provided for grading and completion of a specified number of miles of track, failure to do so did not operate as a forfeiture without action by the Government or render the grant null or void leaving the land open for settlement or location by another railroad.

Whether a granted right of way to a railroad under act of Congress has been abandoned by the grantee or whether the grantee is estopped to make claim thereunder, are not Federal questions and the decision of the state court is not reviewable here.

49 Washington, 280, affirmed.

THE facts, which involve the right of a grantee of lands under the act of June 4, 1898, 30 Stat. 430, are stated in the opinion.

Mr. W. T. Beck, with whom *Mr. W. C. Keegin* was on the brief, for plaintiff in error:

Defendants in error never acquired any vested interest in the right of way. The location of such right of way made and approved under the act of June 4, 1898, was rendered void for failure to commence grading or other

work on such location within six months after the filing of the maps showing such location, as required by § 3 of the act. Congress intended that before the grant should attach, maps showing location must be filed, but such location was to be of no effect without commencement of work. The doing of such things by the grantee was essential to divest the Government of title, and failure made the grant void *ipso facto*. Any other construction is to read a meaning into the statute contrary to its plain language.

The term forfeited implies the extinguishment of a vested grant or interest, or a right thereto.

The fact that words of grant are found in the act of June 4, 1898, does not make the case other than one of statutory construction. Although a statute may contain the elements of a compact between the Government and an individual, nevertheless it should be construed according to the rules for construction of statutes and not according to those for construction of contracts. Black, Interpretation of Laws, p. 315; *Schulenberg* v. *Harriman*, 21 Wall. 44; 5 Thompson on Corp., § 6588.

A strict construction in favor of the Government is demanded by public policy. Sutherland, Stat. Const., § 378; Black, Interpretation, p. 315; *Rice* v. *Minn. & N. W. R. R. Co.*, 1 Black, 358; *Railroad Co.* v. *Litchfield*, 23 How. 66. Acts containing such or other language importing a grant *in præsenti*, have been construed not to be grants *in præsenti*, and *vice versa* acts without any terms of conveyance at all have been construed to be grants *in præsenti*. See *New York Indians* v. *United States*, 170 U. S. 1; *Heydenfelt* v. *Daney G. Mining Co.*, 93 U. S. 634; *United States* v. *Choctaw, A. & G. R. R. Co.*, 3 Oklahoma, 404, 490; *New York R. R. Co.* v. *Boston, Hartford & Erie Ry. Co.*, 36 Connecticut, 196; 5 Thompson, § 6586. The decision of the court below is not supported by *Railroad Co.* v. *Alling*, 99 U. S. 463; *United States* v. *D. & R. G.*

R. R. Co., 150 U. S. 1; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 176.

Without conceding the right of way in question was ever acquired, if acquired, it was abandoned long prior to the deed from the grantee to defendant in error. The facts show non-user and an abandonment. Defendants in error are estopped from claiming this right of way. *Roanoke Inv. Co.* v. *Kansas City R. R. Co.*, 17 S. W. Rep. 1000; *Jones* v. *Van Bochove*, 61 N. W. Rep. 342; *Blakely* v. *Chicago, K. & N. R. R. Co.*, 64 N. W. Rep. 972. An abandonment is more readily presumed where the easement is granted for a public benefit, than where held for private use, and when such right has been abandoned the State may grant it to another. *Henderson* v. *Cent. Pass. Ry. Co.*, 21 Fed. Rep. 358.

Whether the grant be one in fee or an easement merely, it is subject to the condition that it be appropriated and used for the purpose designed. *Denver & R. G. R. R. Co.* v. *Alling*, 99 U. S. 463; *Railroad Co.* v. *Baldwin*, 103 U. S. 426. The defendant in error is bound by the abandonment of its predecessor. *Westcott* v. *New York & N. E. R. R. Co.*, 25 N. E. Rep. 840.

Justice favors the position of plaintiff in error. *White's Bank* v. *Nichols*, 64 N. Y. 74.

Mr. Thomas R. Benton, with whom *Mr. Wm. R. Begg* was on the brief, for defendant in error:

When the line of the proposed railway was definitely located, and a map thereof filed with and approved by the Secretary of the Interior, the title to the lands granted vested in the grantee as of the date of the granting act. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Railroad Co.* v. *Baldwin*, 103 U. S. 426; *Noble* v. *Logging R. R. Co.*, 147 U. S. 165, 176; *New York Indians* v. *United States*, 170 U. S. 1, 17. See also *Leavenworth &c. R. R. Co.* v. *United States*, 92 U. S. 733; *Railroad Co.* v. *Alling*, 99 U. S. 463, 474;

St. Paul & Pacific R. R. Co. v. *Northern Pacific R. R. Co.*, 139 U. S. 1; *Railroad Co.* v. *Jones*, 177 U. S. 125.

The conditions that when a map showing any portion of said company's located line is filed, the company shall commence grading said located line and complete portions within specified periods are conditions subsequent, of which no one can take advantage but the United States, and until the United States has asserted its right to enforce a forfeiture for the breach of these conditions, either by legislation declaring a forfeiture, or by judicial proceedings authorized by law, the title remains unimpaired in the grantee. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Van Wyck* v. *Knevals*, 106 U. S. 360; *St. Louis &c. Ry. Co.* v. *McGee*, 115 U. S. 469; *Bybee* v. *Oregon R. R. Co.*, 139 U. S. 663; *Utah N. & C. R. R. Co.* v. *Utah & C. Ry. Co.*, 110 Fed. Rep. 879.

Mr. Justice Day delivered the opinion of the court.

In this case the Spokane and British Columbia Railway Company, plaintiff in error, began an action in the Superior Court of the State of Washington for Ferry County to enjoin the Washington and Great Northern Railway Company, the Washington Improvement and Development Company and others from interfering with the use of a certain right of way for railway purposes through the Colville Indian Reservation in the State of Washington, which, it was alleged, belonged to the plaintiff. The plaintiff had judgment in its favor in the Superior Court. Upon proceedings in error the judgment was reversed and a judgment entered in favor of the present defendants in error, defendants below. 49 Washington, 280. To that judgment a writ of error was sued out from this court.

The case presents a conflict between the right of way of the Spokane and British Columbia Railway Company

and a right of way theretofore granted by the United States to the Washington Improvement and Development Company, grantor of the Washington and Great Northern Railway Company. The case is stated in the Supreme Court of Washington as follows:

"By an act of Congress approved June 4, 1898, there was granted to the appellant Washington Improvement and Development Company, and to its assigns, a right of way for its railway, telegraph and telephone lines through the Colville Indian Reservation, beginning on the Columbia River near the mouth of the Sans Poil River, running thence northerly through said reservation toward the international line. There was also granted grounds adjacent for the purposes of stations, other buildings and side tracks, and switch tracks. The act provided for the filing of maps showing the route when determined upon, said maps of definite location to be approved by the Secretary of the Interior. These maps were subsequently filed, and were approved by the Honorable Secretary prior to November 27, 1899. Before the commencement of this action the Washington Improvement and Development Company transferred all of its rights, privileges and immunities acquired under this act of Congress to the appellant Washington and Great Northern Railway Company. Since the filing and approval of the maps of definite location as aforesaid this respondent [plaintiff in error here], acting under authority of the act of Congress of March 3, 1875, and the act of Congress of March 2, 1899, located a route for its railway over practically the same line indicated by the maps filed by the Washington Improvement and Development Company, as aforesaid, and filed its maps with the Secretary of the Interior, who approved the same on October 17, 1905. The act of June 4, 1898, under which appellants [defendants in error here] claim, contained the following provision:

"'Provided, That when a map showing any portion of said railway company's located line is filed herein, as provided for, said company shall commence grading said located line within six months thereafter or such location shall be void, and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before the construction of any such section shall be begun.'

"Section 5 of the statute reads as follows:

"That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this act.'

"Neither the Washington Improvement and Development Company nor its successor, the Washington and Great Northern Railway Company, commenced grading within six months after the approval of its maps of definite location, nor did it construct twenty-five miles of railroad, nor any, within two years after the passage of the act. For these reasons the respondent claims that appellant's location of the strip indicated by its map became void and forfeited, and that respondent had a right to go upon the same strip of land and survey and locate its line of railway; that having surveyed and marked out its proposed line of railway upon substantially the same strip of ground after the expiration of two years, and its said maps of location having been approved by the Secretary of the Interior, respondent claims that its location thereupon is legal, and that appellants have no rights whatever in the premises, and should be enjoined from in any manner interfering (which appellants were doing) with the respondent's use and occupancy thereof."

From this statement it is apparent that the case turns upon the rights of the defendants in error, the Washington and Great Northern Railway Company, in the right of way, as the successor of the Washington Improvement and Development Company, in view of the facts just stated.

The grant to the Washington Improvement and Development Company, to it and its assigns, by the act of Congress of June 4, 1898 (c. 377, 30 Stat. 430), was of the right of way for its railway, telegraph and telephone lines in and through the Colville Indian Reservation in the State of Washington, and its language is:

"That there is hereby granted to the Washington Improvement and Development Company, a corporation organized and existing under the laws of the State of Washington, and to its assigns, a right of way for its railway, telegraph and telephone lines through the Colville Indian Reservation in the State of Washington."

A description of the right of way is inserted, and in § 3 of the act it is provided that maps of the route of its located lines through the reservation shall be filed in the office of the Secretary of the Interior, and after the filing of the maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company; the act then cites the proviso already quoted from the opinion of the Supreme Court of Washington, requiring the company to commence grading the located lines within six months "or such location shall be void."

Section 4 authorized the company to enter upon the reservation for the purpose of surveying and locating the line.

Section 5 provided that the right therein granted should be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of the act.

As found by the Supreme Court of Washington, the grading was not begun within the six months provided, nor was twenty-five miles of said railroad constructed through the reservation within two years after the passage of the act, as provided in § 5.

Subsequently the maps of location of the plaintiff in error were approved by the Secretary of the Interior, and the contention is on its behalf that the rights of the defendant in error, as successor of the original grantee, had terminated because of the failure to keep the conditions of the granting act. On the part of the defendant in error it is contended that inasmuch as the grant was *in præsenti*, and there has been no subsequent act of Congress or direct proceeding in behalf of the United States to forfeit the title of the grantee, its rights are unimpaired and superior in the conflicting right of way to those of the plaintiff in error.

The Supreme Court of Washington, reviewing the decisions in this court, was of opinion that the rights granted in the act of June 4, 1898, had not been forfeited and inured to the benefit of the Washington and Great Northern Railway Company as successor of the Washington Improvement and Development Company.

This court has had frequent occasion to consider acts of this character, and a brief review of its decisions will, we think, establish the rule to be applied. The leading case is *Schulenberg* v. *Harriman*, 21 Wall. 44. In that case there was an act of Congress making a grant of lands conditioned that all lands remaining unsold after ten years should revert to the United States. It was there held that notwithstanding this condition, no one could take advantage of its non-performance except the grantor or his heirs, or the successors of the grantor, if the grant proceeded from an artificial person, and that unless such persons asserted the right to forfeiture, the title remained unimpaired in the grantee; and it was further held that if the grant be a public one, the right to forfeiture must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership for the breach of the condition. This doctrine was approved

in *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Van Wyck* v. *Knevals*, 106 U. S. 360, and *St. Louis &c. Ry. Co.* v. *McGee*, 115 U. S. 469.

In *New York Indians* v. *United States*, 170 U. S. 1, this court, after referring to *Schulenberg* v. *Harriman*, 21 Wall. 44, said:

"It has always been held that these were grants *in præsenti*, although the lands could not be identified until the map of definite location of the road was filed, when the title which was previously imperfect acquired precision and became attached to the land. The doctrine of this case has been affirmed so many times that the question is no longer open to argument here."

In *Bybee* v. *Oregon &c. Railroad Co.*, 139 U. S. 663, the grant provided that not only the lands should revert to the United States for failure to perform the conditions, but the grant itself should be null and void for noncompliance with the conditions. It was nevertheless held that the conditions were subsequent, and the title could not be forfeited except upon proper proceedings by the Government, judicial in their character, or an act of Congress competent for that purpose.

Applying the principles of those cases to the grant in question, we find that in its terms the granting clause is clear and distinct and conveys an estate *in præsenti*. There is nothing in the conditions inconsistent with the vesting of the title, or requiring things to be done before the title can be vested. The company is required to commence grading its located line within six months and the grant is to be forfeited, unless at least twenty-five miles shall be constructed within two years after the passage of the act. These things may be done after the vesting of the title, and do not necessarily precede the vesting of the estate.

Reading this grant in the light of the former adjudications of this court, we think it must be held that it was

the intention of Congress that the grantee should perform these conditions after acquiring title and taking possession, and therefore that the conditions were subsequent. This being true, there could be no forfeiture on the part of the United States without some appropriate judicial or legislative action, which it is not claimed was taken in this case. We think the Supreme Court of the State of Washington was right in its construction of the grant under the circumstances shown.

The contention that the grant was abandoned by the grantee, or that the circumstances show estoppel to make claim under it, do not present questions reviewable here. The state court having, in our view, properly decided the Federal question made, upon which this court alone could take jurisdiction, its judgment must be

Affirmed.

FORE RIVER SHIPBUILDING COMPANY *v.* HAGG.

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

No. 75. Submitted December 16, 1910.—Decided January 3, 1911.

This court takes notice of, and inquires as to, its own jurisdiction, whether the question is raised by counsel or not. *Mansfield &c. Ry. Co.* v. *Swan*, 111 U. S. 379.

Section 5 of the Court of Appeals Act of March 3, 1891, c. 577, 26 Stat. 826, gives a direct review of the judgment of the Circuit Court as to its jurisdiction, not upon general grounds of law or procedure but of the jurisdiction of the court as a Federal court. *Louisville Trust Co.* v. *Knott*, 191 U. S. 275; *Bache* v. *Hunt*, 193 U. S. 523.

Where jurisdiction by diversity of citizenship exists, the question of whether the Circuit Court has jurisdiction to enforce the decree of another sovereignty is a question of general law and not a question peculiar to the jurisdiction of the Federal court as such, and a direct appeal will not lie to this court from the judgment of the Circuit Court.

THE facts, which involve the jurisdiction of this court of a direct appeal under § 5 of the Circuit Court of Appeals Act of 1891, are stated in the opinion.

Mr. John Lowell and *Mr. James A. Lowell* for plaintiff in error.

Mr. Asa P. French and *Mr. James S. Allen, Jr.*, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon a question involving the jurisdiction of the Circuit Court of the United States for the District of Massachusetts to entertain the action. It was begun in the Circuit Court by Selma T. Hagg, a citizen of Sweden, against the Fore River Shipbuilding Company, a corporation of the Commonwealth of Massachusetts. The object of the suit was to recover damages under the Employers' Liability Act of Massachusetts (Revised Laws, chap. 106, § 73), and was for the death, without conscious suffering, of her husband, Charles A. Hagg, an employé of the defendant company, resulting from an injury received in the defendant's forge shop in Quincy, Massachusetts. The action resulted in a verdict and judgment for the plaintiff below. The defendant below moved the court to dismiss the action on the ground that it was without jurisdiction, for the reason that the Massachusetts statute was of a penal character, and therefore an action upon it could be maintained only in the courts of Massachusetts. The case comes here upon certificate of the judge of the Circuit Court, and the question stated is, "whether or not the statute under which the plaintiff's action was brought was of such a penal character that the Circuit Court did not have jurisdiction of said action."

In behalf of the defendant company, now plaintiff in error, it is contended that a penal action of this character

can be brought only in the courts of Massachusetts, and it is insisted that such is the rule applicable to cases of this character as between separate and distinct sovereignties. It is argued that the act under which the suit was brought is a penal statute, and it is insisted that the wrong done is primarily an offense against the public, and the relief sought not of the class of actions remedial in their nature, wherein recovery is given in the form of compensation to the widow or children of the deceased, which actions have been sustained in the courts of States other than those enacting the statute.

The question presented, therefore is, whether owing to the character of the Massachusetts act, the courts of another sovereignty will enforce its provisions, or whether the sole remedy is under the laws of the Commonwealth enacting the statute.

This court takes notice of its own jurisdiction, and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it. *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379–382.

In that case Mr. Justice Matthews, who spoke for the court, said:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

We shall then inquire, Has this court jurisdiction to entertain this attempt at a direct review of the Circuit Court's judgment certified here upon the question of jurisdiction? By the Court of Appeals Act of March 3, 1891 (c. 517, 26 Stat. 826), a writ of error may be taken directly from a Circuit Court to this court in certain cases, among which is "any case in which the jurisdiction of

the court is in issue;" and it is further provided: "In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." The question then is, Does this case involve a question of jurisdiction reviewable in the manner sought in this case by writ of error to the Circuit Court?

The court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but of the jurisdiction of the court as a Federal court.

A leading case on this subject, and one frequently cited with approval since its decision, is *Louisville Trust Company* v. *Knott*, 191 U. S. 225. In that case a state court had taken jurisdiction of an action in equity in which a receiver was asked for and none had been appointed at the time when another suit was begun in the Circuit Court of the United States and a receiver appointed therein. Thereafter the state court which had first taken jurisdiction appointed a receiver, and upon its direction that receiver intervened in the Federal court and asked to have the property turned over to him. The Circuit Court of the United States maintained its own jurisdiction, and refused to give the property to the state receiver. The case came to this court upon certificate of a question involving the jurisdiction of the Circuit Court of the United States. This court dismissed the writ of error for want of jurisdiction, holding that the question presented was one of the equity jurisdiction of one court as against the like jurisdiction in another court, and did not present a distinctive question as to the jurisdiction of the Federal court as such. The former cases were reviewed, and Mr. Justice Harlan, who spoke for the court, said:

"The question of jurisdiction which the statute permits

to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

See also in this connection *Bache* v. *Hunt*, 193 U. S. 523, in which the same principle is announced.

Applying the rule thus settled to the case under consideration, there was jurisdiction in the Circuit Court of the United States for the District of Massachusetts under the judiciary act, as the plaintiff was a citizen of Sweden and the defendant shipbuilding company a corporation of Massachusetts. Thus having jurisdiction, it was at liberty to decide all questions properly before it, including the one whether, under the applicable principles of law, a court of another sovereignty would enforce a cause of action based upon the Massachusetts statute. But the determination of that question did not involve the jurisdiction of the Circuit Court as a Federal court. It was a question to be decided upon the application of the same principles as would apply had the action been brought in a court of another State or nation. Whether other sovereignties would enforce penal actions of the character alleged to arise under the Massachusetts statute was not a question peculiar to the Federal jurisdiction of the court. It was general in its nature and to be determined upon principles controlling in other courts as well as those of Federal creation.

Without enlarging the discussion, and applying principles thoroughly settled in this court, we are of opinion that a direct writ of error will not lie from the determination of the Circuit Court of the United States to exercise its jurisdiction in the present case. The writ of error is therefore dismissed for want of jurisdiction.

Dismissed.

UNITED STATES *v.* GRIZZARD.

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

No. 66. Argued December 6, 1910.—Decided January 3, 1911.

The compensation to be awarded under the Fifth Amendment for an actual physical taking of a part of a distinct tract of land includes not only the market value of the part appropriated, but the damage to the remainder resulting from such taking, embracing injury due to the use to which the part appropriated is to be devoted.

In this case *held* that such damage to the unappropriated portion of the tract included that caused by cutting off access therefrom to the public road by flooding the land actually taken.

In determining the total amount of damages for land appropriated and for damages to remainder, the trial court may divide the total award and specify the amounts for each element of damage, and it is not error if the total award represents the difference between the value of the entire tract before the taking and that of the remainder after the taking. A less sum would not be the just compensation which the Fifth Amendment prescribes.

THE facts are stated in the opinion.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. Assistant Attorney Cox* was on the brief, for the United States:

The closing of public highways, such as streets, roadways and alleys, when done under and pursuant to authority conferred by a valid act, and where there has been no want of reasonable care or skill in the execution of the power, does not constitute a taking of private property within the meaning of the Constitution. This is especially true where ingress and egress to and from land has been closed in but one direction. At most, the damages arising therefrom have been held to be consequen-

tial and not actionable. *United States* v. *Welch*, 217 U. S. 333, does not apply. See Lewis on Eminent Domain (3d ed.), § 202; *Keasy* v. *Louisville*, 4 Dana, 154; *Louisville & Frankfort R. R. Co.* v. *Brown*, 17 B. Mon. (Ky.) 763; *Wolfe* v. *C. L. R. R. Co.*, 15 B. Mon. (Ky.) 404; Cooley, Const. Lim. (6th ed.), pp. 473, 666; Dillon, Mun. Corps., § 987; Sedgwick, Stat. Const. (2d ed.), pp. 456 *et seq.*

Defendants in error must show something more than damage to bring suit within the jurisdiction of the court under the act of March 3, 1887. They cannot be content with alleging and proving mere damages arising out of the commission of a tort, but must show that there has been such a taking of private property for public use as is inhibited by the Fifth Amendment to the Constitution. Neither can they, by any evasion in pleading, create an action *ex contractu* out of one purely sounding in tort. 149 U. S. 593; 188 U. S. 400.

It has not been alleged, nor can it be presumed as a matter of law, that defendants possessed any individual property right in a public road of Madison County. Whatever rights that county and the State of Kentucky may have in this thoroughfare need not here be discussed, because they are not parties to this proceeding.

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

Mr. Justice Lurton delivered the opinion of the court.

Action by the owners of a farm for a taking of a part thereof by the United States for public purposes. Judgment for the plaintiff below.

The farm of the defendants in error lies upon Tates Creek, a tributary of the Kentucky River. For the purpose of improving the navigation of that stream the Gov-

ernment has erected a series of locks and dams. As a consequence the waters of Tates Creek are backed up to such an extent as to flood or submerge a strip of the Grizzard farm, permanently destroying its use for agricultural purposes. The court below, a jury being waived, found that seven and a half acres of land had been actually taken. He then added:

"3. That in addition there is taken an easement of access from plaintiffs' land by way of the county road to the Tates Creek pike.

"4. That the whole land was worth $3,000 before said taking, and what was left after the taking was worth $1,500.

"5. I divide the damage by reason of the taking between the land taken and the easement of access taken equally, *i. e.*, I allow $750 for the land taken, and a like sum of $750 for the easement of access taken.

"I therefore conclude as a matter of law that plaintiffs are entitled to a judgment for $1,500."

The errors assigned relate only to so much of the judgment as allows damages for the "easement of access," referred to in the findings above set out. That there was a taking by flooding permanently the seven and a half acres, valued at $750 by the court below, is not contested. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 323.

The contention is that the "easement of access" destroyed, and therefore, taken, was not a private right of way constituting property such as that for which compensation was allowed in *United States* v. *Welch*, but was a public county road; and reference has been made to the well-known class of cases touching an injury to land not taken by the construction of a railroad along and upon an abutting public road, or a change of grade to the dam-

age of adjacent property, and like indirect injuries to the use of property adjacent but of which no part was taken from the owner. *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Sharp* v. *United States*, 191 U. S. 341.

But here there has been an actual taking by permanently flooding of a part of the farm of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owners' single tract and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case.

That the petition laid stress upon the flooding of the highway which crossed the flooded land, and sought to recover for a deterioration of an easement in the public road, is not fatal. The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole by flooding—a manner of appropriating which has made the village market, church and school so inconvenient of access as to add some three miles of travel by an unimproved and roundabout country road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted. Thus in *Sharp* v. *United States*, 191 U. S. 341, 353, damage resulting to adjacent but distinct parcels was denied because there had been no actual appropriation of any part of such separate parcel, but the principle was conceded as to injury, from the character of the

use of that taken, to that untaken of the same tract. Upon this distinction the court said:

"Upon the facts which we have detailed we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract."

To the same effect see Cooley's Constitutional Limitations, pp. 565–566.

There is nothing in *United States* v. *Welch*, 217 U. S. 333, cited above, which conflicts with the conclusion we have reached, but, upon the contrary, the trend of the opinion is toward the decision we announce.

The constitutional limitation upon the power of eminent domain possessed by the United States is that "private property shall not be taken for public use without just compensation." The "just compensation" thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiffs' farm has depreciated the usefulness and value of the remainder the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into ac-

count both the benefits which accrue and the depreciation which results to the remainder in its use and value. Thus in *Bauman* v. *Ross*, 167 U. S. 548, 574, it is said:

"Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened."

In *Sharp* v. *United States*, 191 U. S. 341, 354, and *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 320, 323, as well as in *United States* v. *Welch*, 217 U. S. 333, the principle is recognized as settled law.

Both the petition and the finding show that access to the public road has been cut off by the intervention of flooded land actually taken.

That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was fifteen hundred dollars, when the value of the entire place before the taking was three thousand dollars. A judgment for a less sum will not be that "just compensation" to which the defendants are entitled. The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the re-

maining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.

Judgment affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* RIVERSIDE MILLS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 215. Argued October 19, 20, 1910.—Decided January 3, 1911.

A provision in a bill of lading issued by the initial carrier, that it should not be liable for loss or damage not occurring on its portion of the route, is not a contract of exemption from its own liability as a carrier, but a provision of non-assumption of the liabilities of others and at common law relieves it of such liabilities.

The general rule adopted by this court is that, in the absence of legislation, a carrier, unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier; it may, however, contract to carry beyond its line, and if it does so its common-law carrier liability extends over the entire route.

It was not only the legal elements of the situation, but also the fact that the business prosperity of the country largely depends on through rates and routes of transportation, that induced Congress to enact such regulations in regard to the duties and liabilities of interstate carriers as would relieve shippers whose goods were damaged from the burden of proving where the loss occurred.

There is no absolute freedom of contract. The Government may deny liberty of contract by regulating or forbidding every contract reasonably calculated to injuriously affect public interests.

The United States is a Government of limited and delegated powers but in respect to the powers delegated, including that to regulate commerce between the States, the power is absolute except as limited by other provisions of the Constitution.

Congress has power to prohibit a carrier engaged in interstate commerce from limiting by contract its liability beyond its own line,

and the Carmack amendment of January 29, 1906, c. 3591, 34 Stat. 584, 595, to § 20 of the Interstate Commerce Act, making such carriers liable for loss or damage to merchandise received for interstate transportation beyond their own lines, notwithstanding any contract of exemption in the bill of lading, is a valid exercise of such power and is not in conflict with the due process provision of the Fifth Amendment.

Quære, and not decided, whether a carrier can be compelled to accept goods for transportation beyond its own lines or be required to make a through or joint rate over independent lines.

Under the Carmack amendment to the Interstate Commerce Act, the initial carrier is, as principal, liable not only for its own negligence, but that of any agency which it may use, although as between themselves the carrier actually causing the loss may be primarily liable.

Section 8 of the act to regulate commerce of February 4, 1887, c. 104, 24 Stat. 379, 382, does not authorize the taxing of an attorney's fee in an action to recover damages for loss to goods which does not result from a violation of the act.

168 Fed. Rep. 987 and 990, affirmed.

THIS was an action to recover the value of goods received by the Atlantic Coast Line Railroad at a point on its line in the State of Georgia for transportation to points in other States. The agreed statement of facts showed that the goods were safely delivered by the Atlantic Coast Line Railroad to connecting carriers, and were lost while in the care of such carriers, and the question is whether the initial carrier is liable for such loss.

The stipulated facts showed that the goods were tendered to the Atlantic Coast Line Railroad and through bills of lading demanded therefor, which were duly issued, as averred, on the dates named in the petition. That the goods so received were forwarded over the lines of the receiving road and in due course delivered to a connecting carrier engaged in interstate shipment for continuance of the transportation. It was also stipulated "that the Riverside Mill made constant and frequent shipments over the Atlantic Coast Line, and had a blank form of receipt, like the attached, marked 'A,' which the

Riverside Mill filled out, showing what goods it had loaded into cars and the name of the consignee; said receipt containing a stipulation that the shipment is 'per conditions of the company's bill of lading,' and that the Atlantic Coast Line Railroad Company, on said receipts prepared by the Riverside Mill, issued, for each of the shipments hereinbefore referred to, bills of lading on forms like that attached, marked exhibit 'B.' "

Upon the reverse side of the bill of lading were certain conditions, one of which was that "No carrier shall be liable for loss or damage not occurring on its portion of the route." The tenth clause thereof was in these words:

"This bill of lading is signed for the different carriers who may engage in the transportation, severally but not jointly, each of which is to be bound by and have the benefits of the provisions thereof, and in accepting this bill of lading the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether printed or written."

The court below, upon this state of facts, instructed a verdict for the plaintiff, upon which there was judgment for the amount of the verdict, and, upon motion of the plaintiff, an attorney's fee of $100 was ordered to be taxed as part of the costs in the case. Thereupon error was assigned, and this writ of error sued out by the railroad company.

Mr. J. R. Lamar, for plaintiff in error in this case and *Mr. C. H, Moorman,* with whom *Mr. B. D. Warfield* and *Mr. Henry L. Stone* were on the brief, for plaintiff in error in No. 286:[1]

The cases below hold that the statute is a great convenience to the shipper; is declaratory of the common law; that the initial carrier at common law is liable beyond its

[1] See *post,* p. 209.

line, and can be prohibited from limiting an existing liability beyond its line; that amendment becomes a part of the contract, and as the goods are voluntarily accepted for interstate shipment, they are therefore subject to interstate regulations of Congress; that contracts of exemption are rendered ineffectual by this statute, and that Congress has the same power to regulate commerce as it has to regulate the relation of master and servant; that it is an incident of the right to make through and joint rates. *Smeltzer Case*, 158 S. W. Rep. 649; *L. & N. R. R. Co.* v. *Scott*, 118 S. W. Rep. 992; *Pittsburg Ry. Co.* v. *Mitchell*, 91 N. E. Rep. 735; *Galveston* v. *Piper*, 115 S. W. Rep. 108; *St. Louis* v. *Grayson*, 115 S. W. Rep. 933; *Greenwald* v. *Weir*, 115 N. Y. Supp. 311.

Plaintiff in error, however, claims that the act deprives both the initial carrier and the shipper of the right to make a just and reasonable contract which it could do at common law. 1 Hutchinson on Carriers, 3d ed., 153, 233, 405; *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 424; *Michigan Central* v. *Myrick*, 107 U. S. 102. This is contrary to the Fifth Amendment, *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161, 174, as is also the provision that the initial carrier "shall issue a bill of lading" and "shall be liable to the holder of the bill of lading for any damage caused by any connecting carrier. *Attorney General* v. *Old Colony R. R. Co.*, 22 L. R. A. 112; *Norfolk R. R. Co.* v. *Stuart Co.*, 63 S. E. Rep. 415; *McCann* v. *Eddy* (Mo.), 27 S. W. Rep. 541; Cooley's Const. Lim., 7th ed., 150; *Lindsey Co.* v. *Mullen*, 176 U. S. 155, 143; *Rodgers* v. *Camp*, 44 Connecticut, 297; *Colon* v. *Lisk*, 47 N. E. Rep. (N. Y.) 333; *Ohio &c. R. R. Co.* v. *Lacey*, 78 Illinois, 55; *Knoxville R. R. Co.* v. *McMillan*, 65 L. R. A. 296; *Woodward* v. *Vermont Central R. R. Co.*, 62 N. E. Rep. 1051; 180 Massachusetts, 599; 217 U. S. 196, 205; *Dirkin* v. *Kingston Coal Co.*, 171 Pa. St. 199, 203; *S. C.*, 50 Am. St. Rep.

805; *Williams* v. *Thaylor Co.*, 40 L. R. A. 812 (W. Va.); *Missouri R. R. Co.* v. *Nebraska*, 164 U. S. 403; *Same* v. *Same*, 217 U. S. 196.

Giving the initial carrier its day in court does not save the statute, as no provision for hearing will support a statute that takes the property of A to pay the debt of B. *Chicago &c. R. R. Co.* v. *Chicago*, 166 U. S. 234; *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 695; *Taylor* v. *Porter*, 4 Hill (N. Y.), 140.

The act does not even give the connecting carrier its day in court. It is bound by the judgment without notice, and if it had notice, the connecting carrier is not estopped from showing that it was free from negligence. *Robins* v. *Chicago*, 2 Black, 418; *City of Boston* v. *Worthington*, 10 Gray, 496; *Lincoln* v. *First Nat. Bank*, 60 L. R. A. 924.

The act would make a connecting carrier in Canada liable on shipment from New York to Detroit, though manifestly the Canadian company is not subject to the provisions of the Hepburn bill.

Even if the judgment against the initial carrier does bind the connecting carrier, that could not satisfy the requirement of the Constitution, for a subsequent and contingent right to an action at law against corporations or individuals of undefined responsibility is not the compensation which the Constitution requires. *Bloodgood* v. *Mohawk*, 31 Am. Dec. 368; *Haverhill* v. *Commissioners*, 103 Massachusetts, 120; *Stockyard Co.* v. *L. & N. R. R. Co.*, 192 U. S. 568; *Cherokee Nation* v. *Sou. Pac. R. R. Co.*, 135 U. S. 661.

The statute is not a valid exercise of the power to regulate commerce. Citizens have the right to engage in interstate commerce. *Crutcher* v. *Kentucky*, 141 U. S. 57. They are not obliged to yield to an unconstitutional statute as condition precedent to so doing. Nor can Congress treat the right as a privilege not to be availed of except

upon such conditions it may prescribe, if the conditions are otherwise beyond the power of Congress. *Employers' Liability Case*, 207 U. S. 502; *Adair Case*, 208 U. S. 180. The grant to the National Government under the commerce clause is subject to the limitations of the Fifth Amendment. *Monongahela Bridge Co.* v. *United States*, 148 U. S. 345.

The power to regulate commerce includes the power to facilitate and expedite transportation of goods, but does not authorize the prohibition of the reasonable and just contracts under which commerce has been developed, and which do not, and are not intended to, impede commerce. *Railroad Co.* v. *Richmond*, 19 Wall. 589, 590; *Central Ry. Co.* v. *Murphy*, 196 U. S. 204, 205; *Lottery Case*, 188 U. S. 362.

The statute contains provisions which are not valid regulations of interstate commerce. The initial carrier cannot be made liable on the theory that Congress has power to make through and joint rates. For the making of through and joint rates is essentially contractual. *Star Co.* v. *Atchison R. R. Co.*, 14 I. C. C. 354; *Kentucky Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 630; and the courts have never decided to what extent the carrier can be required to make through and joint rates. *Sou. Pac. R. R. Co.* v. *I. C. C.*, 200 U. S. 553; *Atchison Ry. Co.* v. *Denver &c. Ry. Co.*, 110 U. S. 680; *Cole* v. *Central*, 86 Georgia, 255; *Burlington Ry. Co.* v. *Dey*, 82 Iowa, 312; *S. C.*, 31 Am. St. Rep. 490, 499; *Jacobson* v. *Wisconsin*, 70 Am. St. Rep. 364; 179 U. S. 292; *Central Stockyards* v. *L. & N. R. R. Co.*, 192 U. S. 571; *Chicago &c. Ry. Co.* v. *Osborne*, 52 Fed. Rep. 915; *Int. Com. Com.* v. *Stickney*, 215 U. S. 98, 106; *Penn Ref. Co.* v. *Western &c. R. R. Co.*, 208 U. S. 208, 222.

Limited liability acts of Congress, whether passed in pursuance of the admiralty jurisdiction or the commerce clause, or both, were primarily intended to prevent the making of unreasonable stipulations in bills of lading

(*The Delaware*, 161 U. S. 472), and at most only related to the liability of owners for their own negligence, and did not make them or the vessel liable for injuries occasioned by the negligence of another vessel by which the goods might be forwarded.

The initial carrier is not liable on the ground stated in the *Smeltzer Case*, 158 Fed. Rep. 661, that the act became a part of the contract, for if the act is void, it imposes no duties, and is as though it had never been passed. *Norton* v. *Shelby County*, 118 U. S. 426; *Cleveland* v. *Clemmons*, 59 L. R. A. 775; *People ex rel. Rodgers* v. *Koler*, 166 N. Y. 1; *S. C.*, 52 L. R. A. 814.

Nor has the company voluntarily made itself liable. *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 697.

The contract under which the goods were received is an entirety. Part of it cannot be laid hold of to acquire interstate jurisdiction, and the balance ignored, whereby interstate relation is stipulated to cease in law, when it ceases in fact by delivery to the next carrier. *McCarn* v. *International Co.*, 19 S. W. Rep. 549; *Hartley* v. *St. Louis Co.*, 89 N. W. Rep. 88; *Railroad Co.* v. *Richmond*, 19 Wall. 589; *Michigan Central R. R. Co.* v. *Myrick*, 107 U. S. 110.

The statute imposes mandatory requirements instead of permissive provisions at common law, and the Missouri statute in part copied by the Carmack amendment was sustained because the provisions were not mandatory. *Missouri Ry. Co.* v. *McCann*, 174 U. S. 580.

The provision as to attorney's fees under § 8, also takes property without due process of law. *Gulf &c. R. R. Co.* v. *Ellis*, 165 U. S. 150, 160.

Mr. John Maynard Harlan and *Mr. Lewis W. McCandless*, by leave of the court, filed a brief attacking the constitutionality of certain portions of § 20 of the act to regulate commerce.

Mr. R. J. Southall, with whom *Mr. Charles Akerman* and *Mr. Alexander Akerman* were on the brief, for defendant in error, submitted:

The mischief sought to be remedied by the statute was the trouble, delay, and expense to the shipper in collecting claims for loss or damage by the carriers. *Cent. of Ga. Ry. Co.* v. *Murphey*, 196 U. S. 194.

The constitution gives Congress full power to regulate interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat. 196; *Howard* v. *Ill. Cent. R. R. Co.*, 207 U. S. 463; *Smeltzer* v. *St. Louis & S. F. R. R. Co.*, 158 Fed. Rep. 649; *Lottery Case*, 188 U. S. 321.

Section 20 of the Hepburn bill (Carmack amendment) was only intended to compel the carriers to return to the common-law rule which made the initial carriers liable, in the absence of contract limiting the carrier to liability for loss occurring on its own line, and to prohibit such contracts as being contrary to the declared public policy of the United States. *A., T. & S. F. R. R. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S. 688; *Southern Pacific Co.* v. *Crenshaw*, 5 Ga. App. 675; *S. C.*, 63 S. E. Rep. 865; *Smeltzer* v. *St. Louis & S. F. R. R. Co.*, 158 Fed. Rep. 649.

The liberty of contract guaranteed by the Constitution is subject to such reasonable restraints as may be imposed by Congress for the public good and general welfare. *Adair* v. *United States*, 208 U. S. 161; *United States* v. *Traffic Association*, 171 U. S. 571; *United States* v. *Trans-Missouri Assn.*, 166 U. S. 290; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375.

Railroad companies are subject to legislative control for the protection of the public. *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556; *Nashville, C. & St. L. R. R. Co.* v. *Alabama*, 128 U. S. 96; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174; *Minneapolis & St. L. R. R. Co.* v. *Beck-*

with, 129 U. S. 26; *Dent* v. *West Virginia*, 129 U. S. 114; *Charlotte, C. & S. R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Minneapolis & St. L. R. R. Co.* v. *Emmons*, 149 U. S. 364.

Congress may fix a new rule of civil liability in matters of interstate commerce. Act of March 2, 1893, 27 Stat. 531; *Johnson* v. *Sou. Pac. Co.*, 196 U. S. 1.

As to the power of Congress to regulate the liability of carriers and others engaged in interstate commerce for injury to person or property, see *Sherlock* v. *Alling*, 93 U. S. 99; *Missouri R. R. Co.* v. *Mackey*, 127 U. S. 205; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368; *Chicago, M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 133; *Martin* v. *Pittsburg & L. E. R. R. Co.*, 203 U. S. 284.

It is for Congress to determine what public policy requires with respect to common carriers engaged in interstate commerce. *United States* v. *Joint Traffic Assn.*, 171 U. S. 569, 571; *Missouri R. R. Co.* v. *Mackey*, 127 U. S. 205.

The allowance of attorneys' fees was proper. *Seaboard Air Line* v. *Seegers*, 207 U. S. 73; *Montague & Co.* v. *Lowry*, 193 U. S. 38.

Mr. Wm. S. Kenyon, Assistant to the Attorney General, with whom *The Attorney General* was on the brief, by leave of the court for the United States, as *amicus curiæ* in support of the constitutionality of § 20 of the act of June, 1906.

After making the above statement, MR. JUSTICE LURTON delivered the opinion of the court.

The goods of the defendants in error were lost by a connecting carrier to whom they had been safely delivered. Though received for a point beyond its own line and for a point on the line of a succeeding carrier, there was no agreement for their safe carriage beyond the line of the plaintiff in error, but, upon the contrary, an express

agreement that the initial carrier should not be liable for "a loss or damage not occurring on its own portion of the route." Such a provision is not a contract for exemption from a carrier's liability as such, but a provision making plain that it did not assume the obligation of a carrier beyond its own line, and that each succeeding carrier in the route was but the agent of the shipper for a continuance of the transportation. It is therefore obvious that at the common law an initial carrier under such a state of facts would not be liable for a loss through the fault of a connecting carrier to whom it had, in due course, safely delivered the goods for further transportation. *Railroad* v. *Pratt*, 22 Wall. 123; *Myrick* v. *Railroad*, 107 U. S. 102; *Southern Pac. Ry.* v. *Interstate Commerce Commission*, 200 U. S. 536, 554. Liability is confessedly dependent upon the provision of the act of Congress regulating commerce between the States known as the Carmack amendment of January 29, 1906, c. 3591, § 7, 34 Stat. at Large, 584, 595. The twentieth section of the act of February 4, 1887, c. 104, 24 Stat. at Large, 379, as changed by the Carmack amendment, reads as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The power of Congress to enact this legislation has been denied, first, because it is said to deprive the carrier and the shipper of their common-law power to make a just and reasonable contract in respect to goods to be carried to points beyond the line of the interstate carrier; and, second, that in casting liability upon the initial carrier for loss or damage upon the line of a connecting carrier the former is deprived of its property without due process of law.

The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce and "receiving property for transportation from a point in one State to a point in another State" as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents.

Independently of the Carmack amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry safely over its own lines only and then deliver to the next carrier, who would then become the agent of the shipper. In the first case the receiving carrier's liability, as carrier, extends over the whole route, for, on obvious grounds, the principal is liable for the acts of its agent. In the other case its carrier liability ends at its own terminal, and its further liability is merely that of a forwarder. Having this power to make the one or the

other contract, the only question which has occasioned a conflict in the decided cases was whether it, in the particular case, made the one or the other.

The general doctrine accepted by this court, in the absence of legislation, is, that a carrier, unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier. That such an initial carrier might contract to carry over the whole route was never doubted. It is equally indisputable that if it does so contract, its common-law carrier liability will extend over the entire route. *Railway* v. *McCarthy*, 96 U. S. 258, 266; *Railroad* v. *Pratt*, 22 Wall. 123; *Railroad* v. *American Trading Co.*, 195 U. S. 439; *Muschamp* v. *Lancaster Railway Co.*, 8 M. & W. 421.

The English cases beginning with *Muschamp* v. *Lancaster Railway Company*, 8 M. & W. 421, decided in 1841, down to *Bristol &c. Railway* v. *Collins*, 7 H. L. Cases, 194, have consistently held that the mere receipt of property for transportation to a point beyond the line of the receiving carrier, without any qualifying agreement, justified an inference of an agreement for through transportation and an assumption of full carrier liability by the primary carrier. The ruling is grounded upon considerations of public policy and public convenience, and classes the receipt of goods so designated for a point beyond the carrier line as a holding out to the public that the carrier has made its own arrangements for the continuance by a connecting carrier of the transportation after the goods leave its own line. There are American cases which take the same view of the question of evidence thus presented. Some of them are *Railroad* v. *Campbell*, 7 Heisk. (Tenn.) 257; *Railroad* v. *Mt. Vernon Co.*, 84 Alabama, 175; *Railroad* v. *Hasselkus*, 91 Georgia, 384; *Beard* v. *Railroad*, 79 Iowa, 531; *Kyle* v. *Railroad*, 10 Rich. (S. C.) 382; *Railroad* v. *Wilcox*, 84 Illinois, 240; *Railroad* v. *Rogers & Hartsell*, 6 Heisk. (Tenn.) 143.

Upon the other hand, many American courts have repudiated the English rule which holds the carrier to a contract for transportation over the whole route, in the absence of a contract clearly otherwise, and have adopted the rule that unless the carrier specifically agrees to carry over the whole route its responsibility, as a carrier, ends with its own line, and that for the continuance of the shipment its liability is only that of a forwarder. The conflict has, therefore, been one as to the evidence from which a contract for through carriage to a place beyond the line of the receiving carrier might be inferred.

In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress by the act here involved has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout. But this uncertainty of the nature and extent of the liability of a carrier receiving goods destined to a point beyond its own line was not all which might well induce the interposition of the regulating power of Congress. Nothing has perhaps contributed more to the wealth and prosperity of the country than the almost universal practice of transportation companies to coöperate in making through routes and joint rates. Through this method a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice has its origin in the mutual interests of such companies and in the necessities of an expanding commerce.

In the leading case of *Muschamp* v. *Lancaster Railway Company,* cited above, Lord Abinger defended the inference of a contract for through carriage from the mere

receipt of a package destined to a point beyond the line of the receiving carrier upon the known practice in his day of such carriers. Upon this subject, in speaking of connecting lines of railway, he said: "These railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last."

The tenth clause of the conditions annexed to this bill of lading, and shown elsewhere, affords a fair illustration of the customary methods of connecting carriers to cooperate for their mutual benefit in carrying on transportation begun by one which must be continued by other lines over which the thing to be transported must go. The receiving carrier makes the rate and the route, and as the agent of every such connecting carrier executes a contract which is to bind each of them, "severally, but not jointly," one of the terms of the agreement being that each carrier shall be liable only for loss or damage occurring on its own line. Through this well known and necessary practice of connecting carriers there has come about, without unity of ownership or physical operation, a singleness of charge and a continuity of transportation greatly to the advantage of the carrier and beneficial to the great and growing commerce of the country.

Along with this singleness of rate and continuity of carriage there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier for the purpose of carriage would become the agent of the primary carrier. The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package

must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the connecting carriers who in turn had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate. Thus when this Carmack amendment was reported by a conference committee, Judge William Richardson, a Congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said:

"One of the great complaints of the railroads has been —and, I think, a reasonable, just and fair complaint— that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, respon-

sible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons for inducing us to do that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the coöperation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference." (Cong. Rec. Pt. 10, p. 9580.)

It must be conceded that the effect of the act in respect of carriers receiving packages in one State for a point in another and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line. This it is said is a denial of the liberty of contract secured by the Fifth Amendment to the Constitution. To support this counsel cite such cases as *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Lochner* v. *New York*, 198 U. S. 45, and *Adair* v. *United States*, 208 U. S. 161.

This power to regulate is the right to prescribe the rules under which such commerce may be conducted. "It is," said Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 197, "a power vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It is a power which extends to the regulation of the appliances and machinery and agencies by which such commerce is conducted. Thus in *Johnson* v. *Southern Pac. Ry.*, 196 U. S. 1, an act prescribing safety ap-

pliances was upheld. And in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, it was held that the equipment of an interstate railway, including cars used for the transportation of its own fuel, was subject to the regulation of Congress. In *Interstate Commerce Commission* v. *C. & A. Ry. Co.*, 215 U. S. 479, it was held to extend to the distribution of coal cars to the shipper, so as to prevent discrimination. In *The Employers' Liability Cases*, 207 U. S. 463, 495, power to pass an act which regulated the relation of master and servant, so as to impose on the carrier, while engaged in interstate commerce, liability for the negligence of a fellow-servant, for which at common law there was no liability, and depriving such carrier of the common-law defense of contributory negligence save by way of reduction of damages, was upheld. In *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, and *Northern Securities Co.* v. *United States*, 193 U. S. 197, it was held that this power of regulation extended to and embraced contracts in restraint of trade between the States.

It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself.

Having the express power to make rules for the con-

duct of commerce among the States, the range of Congressional discretion as to the regulation best adapted to remedy a practice found inefficient or hurtful, is a wide one. If the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided, the question of power is foreclosed. "The test of power," said Mr. Justice White, speaking for this court in the *Employers' Liability Cases*, cited above, "is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce."

That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic

balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.

But, it is said, that any security resulting from a voluntary agreement constituting a through route and rate is destroyed if the receiving carrier is not at liberty to select his own agencies for a continuance of the transportation beyond his own line. This is an objection which has no application to the present case. This action was for loss and damage arising from several distinct shipments to different places beyond the line of the plaintiff in error who was the initial or receiving carrier. The presumption from the absence of anything to the contrary in the record is that the routing was over connecting lines with whom the plaintiff in error had theretofore made its own arrangements and rate. This record presents no question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. We, therefore, refrain from any consideration of the large question thus suggested. The shipments involved in the present case were voluntarily received by an initial carrier who undertook to escape carrier's liability beyond its own line by a provision limiting liability to loss upon its own line. This was forbidden by the Carmack amendment and any stipulation and condition in the

special receipt which contravenes the rule in question is invalid.

Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one State to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence. The conditions which justified this extension of carrier liability we have already adverted to. The rule of the common law which treated a common carrier as an insurer grew out of a situation which required that kind of security for the protection of the public. To quote the quaint but expressive words of Lord Holt, in *Coggs* v. *Bernard*, 2 Ld. Raymond, 909, when defending and appying the doctrine of absolute liability against loss not due to the act of God or the public enemy, "this rule," said he, "is a politick establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons that they may be safe in their ways of dealing."

If it is to be assumed that the ultimate power exerted by Congress is that of compelling coöperation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since without merging identity of separate lines or operation it stops with the requirement of oneness of charge, continuity of transportation and primary liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route. That there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation. If the

power existed and the regulation is adapted to the purpose in view, the public advantage justifies the discretion exercised and upholds the legislation as within the limit of the grant conferred upon Congress. Touching the range of legislative discretion of the States in respect to occupations or trades which are affected by a public use, this court, in *Gundling* v. *Chicago*, 177 U. S. 183, 188, said:

"Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend, beyond the power of the State to pass, and they form no subject for Federal interference. As stated in *Crowley* v. *Christensen*, 137 U. S. 86, 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.' "

But it is said that the act violates the Fifth Amendment by taking the property of the initial carrier to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss. But this contention results from a surface reading of the act and misses the true basis upon which it rests. The liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents.

In substance Congress has said to such carriers, "If you receive articles for transportation from a point in one State to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents and not as agents of the shipper." It is, therefore, not the case of making one pay the debt of another. The receiving

carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable.

In *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, 78, legislation by the State of Georgia imposing a penalty on common carriers for failure to adjust damage claims within forty days was held to neither deny due process nor the equal protection of the law. Speaking by Mr. Justice Brewer, the court said of the reasonableness of the requirement and classification, that "the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments within the State forty days cannot be said to be an unreasonably short length of time."

The conclusion we reach in respect to the validity of the amendment has the support of some well-considered cases. Among them we cite: *Smeltzer* v. *Railroad*, 158 Fed. Rep. 649; *Railroad* v. *Mitchell*, 91 N. E. Rep. 735; *Railroad* v. *Scott*, 118 S. W. Rep. 992.

The judgment included an attorney's fee taxed as part of the costs. The authority for this is supposed to be found in the eighth section of the act to regulate commerce of February 4, 1887, chap. 104, § 8 (24 Stat. at Large, p. 379, 382). The section reads as follows:

"That in case any common carrier subject to the pro-

visions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs of the case."

But that section applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery "of damages sustained in consequence of any such violation of this act," etc. The cause of action in the present case is not for damages resulting from "any violation of the provisions of this act." True, the plaintiff in error attempted by contract to stipulate for a limitation of liability to a loss on its own line, and in this action has defensively denied liability for a loss not occurring on its own line. But the cause of action was the loss of the plaintiff's property which had been entrusted to it as a common carrier, and that loss is in no way traceable to the violation of any provision of the act to regulate commerce. Having sustained no damage which was a consequence of the violation of the act, the section has no application to this case.

The judgment was erroneous to this extent, and the provision for an attorney's fee is stricken out, and the judgment thus modified is

Affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* SCOTT.

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

No. 286. Argued October 19, 20, 1910.—Decided January 3, 1911.

Decided on authority of *Atlantic Coast Line R. R. Co.* v. *Riverside Mills, ante,* p. 186.

THE facts are stated in the opinion.

Mr. Joseph R. Lamar for plaintiff in error in No. 215 [1] and *Mr. C. H. Moorman,* with whom *Mr. Benjamin D. Warfield* and *Mr. Henry L. Stone* were on the brief, for plaintiff in error in this case.

Mr. Wm. S. Kenyon, Assistant to the Attorney General, with whom *The Attorney General* was on the brief, by leave of the court for the United States, as *amicus curiæ* in support of the constitutionality of § 20 of the act of June, 1906.

There was no appearance for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This case was heard with No. 215, *Atlantic Coast Line Railroad Co.* v. *Riverside Mills,* just decided. Like that case it presents only the question of the constitutionality of the Carmack amendment of the act to regulate commerce.

The facts are not substantially different, and the judgment of the Court of Appeals of the Commonwealth of Kentucky is affirmed upon the authority of that case.

Affirmed.

[1] See *ante,* p. 186.

MATTER OF GREGORY, PETITIONER.

PETITION FOR WRIT OF HABEAS CORPUS.

No. 17, Original. Argued December 5, 1910.—Decided January 3, 1911.

Habeas corpus cannot be made to perform the functions of a writ of error, and this court is concerned only with the questions of whether the information is sufficient, or whether the committing court properly applied the law if that court had jurisdiction to try the issues and render the judgment. *Harlan* v. *McGourin*, 218 U. S. 442.

The provisions and prohibitions of § 1176 of the Revised Statutes relating to the District of Columbia are not limited to transactions previously licensed by the act of August 23, 1871, but expressly include gift enterprises conducted in any manner, whether defined in said act or otherwise.

Section 1177 of the Revised Statutes relating to the District of Columbia punishes a recognized category of offenses within the power of Congress to punish, and is not controlled or rendered invalid by a definition of the prohibited crime in an earlier statute which has been repealed.

Where the statute defining the crime is valid, it is within the range of judicial consideration to determine whether the acts of the accused are within the definition, and if the court has jurisdiction its judgment cannot be reviewed on *habeas corpus*.

The police court of the District of Columbia has jurisdiction to try persons charged on information of violating § 1177 of the Revised Statutes relating to the District of Columbia prohibiting engaging in gift enterprises, and the judgment of that court determining that the acts of accused fell within the definition of gift enterprise is not reviewable on *habeas corpus* proceedings.

THE facts, which involve the constitutionality and construction of §§ 1176, 1177 of the Revised Statutes relating to the District of Columbia prohibiting and punishing gift-enterprises, and the validity of a conviction thereunder, are stated in the opinion.

Mr. John Hall Jones and *Mr. W. Benton Crisp* for petitioner:

Section 1177 of the Revised Statutes relating to the District of Columbia does not define gift-enterprises. Such definition is found in the laws of the District of Columbia, 1871–73, Part II, 96, and see *Re Lansburgh*, 11 App. D. C. 512, and opinion in *District* v. *Kraft*, referred to in petition in this case.

The answer filed herein bases the jurisdiction of the Police Court upon the act of 1873. The information merely charges petitioner with engaging in the business of a gift-enterprise, which comes within the definition of the act of 1871, and charges a perfectly innocent business transaction involving neither moral turpitude, nor any element of chance.

The court has original jurisdiction to issue the writ of *habeas corpus* in this case. *Ex parte Bollman & Swartwout*, 4 Cr. 75; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, 100 U. S. 371.

The prohibition contained in this statute is in violation of the Fifth Amendment to the Constitution of the United States, in that it deprives petitioner of liberty and property without due process of law, and the courts below were, therefore, without jurisdiction to try and sentence petitioner. *Lochner* v. *New York*, 198 U. S. 47, 53; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *McLean* v. *Arkansas*, 211 U. S. 539, 547; *O'Keefe* v. *Somerville*, 190 Massachusetts, 110; *Young* v. *Commonwealth*, 101 Virginia, 853; *People* v. *Gillson*, 109 N. Y. 389; *People* v. *Zimmerman*, 102 App. Div. 103; *State* v. *Hyman*, 98 Maryland, 596, 613; *Toledo R. R. Co.* v. *Jacksonville*, 67 Illinois, 37, 40; *State* v. *Loomis*, 115 Missouri, 307, 313; *Ex parte Drexel & Holland*, 147 California, 763, 767; *State* v. *Dalton*, 22 R. I. 77, 80.

The act does not affect the public health, safety and morals.

In the following cases the petitioner's business has been held to be legal: *Humes* v. *Little Rock*, 138 Fed. Rep. 929; *Hawaii* v. *Gunst*, 18 Hawaii, 196; *Sperry & Hutchinson Co.* v. *Weber*, 161 Fed. Rep. (Ill.) 219; *Sperry & Hutchinson Co.* v. *Temple*, 137 Fed. Rep. (Mass.) 992; *Ex parte Hutchinson*, 137 Fed. Rep. (Oregon) 950; *Sperry & Hutchinson Co.* v. *Brady*, 134 Fed. Rep. (Penna.) 691; *Same* v. *Mechanics' Cloth Co.*, 135 Fed. Rep. (R. I.) 833; *Same* v. *Same*, 128 Fed. Rep. (R. I.) 800; *Ex parte Hutchinson*, 137 Fed. Rep. (Wash.) 949; *State* v. *Shugart*, 138 Alabama, 86; *Montgomery* v. *Kelly*, 142 Alabama, 552; *Ex parte McKenna*, 126 California, 429; *Ex parte Drexel & Holland*, 147 California, 763; *Denver* v. *Frueauff*, 39 Colorado, 20; *Hewin* v. *Atlanta*, 121 Georgia, 731; *O'Keefe* v. *Somerville*, 190 Massachusetts, 110; *Commonwealth* v. *Emerson*, 165 Massachusetts, 149; *Commonwealth* v. *Sisson*, 178 Massachusetts, 578; *Sperry & Hutchinson Co.* v. *Temple*, 137 Fed. Rep. 992; *Long* v. *Maryland*, 74 Maryland, 565; *Attorney General* v. *S. & H. Co.*, 126 N. W. Rep. (Minn.) 120; *State* v. *Ramseyer*, 73 N. H. 31; *People* v. *Gillson*, 109 N. Y. 389; *People* v. *Dycker*, 72 App. Div. 308; *People* v. *Zimmerman*, 102 App. Div. 103; *Winston* v. *Beeson*, 135 N. C. 271; *Commonwealth* v. *Moorhead*, 7 Penn. Co. Ct. Rep. 513; *State* v. *Dalton*, 22 R. I. 77; *State* v. *Dodge*, 76 Vermont, 197; *Young* v. *Commonwealth*, 101 Virginia, 853.

Mr. Edward H. Thomas and *Mr. William Henry White*, with whom *Mr. Francis H. Stephens* was on the brief, for respondent.

Mr. Justice Hughes delivered the opinion of the court.

This is a petition for a writ of *habeas corpus*. By information filed in the Police Court of the District of Columbia, the petitioner was charged with engaging "in

the business of a gift-enterprise" in violation of § 1177 of the Revised Statutes relating to the District of Columbia. Thereupon an agreed statement of facts was filed, by which it appeared that the petitioner, as the managing officer of The Sperry & Hutchinson Company, was conducting, within the District, its business of issuing and redeeming so-called "trading stamps" in the particular manner set forth. It was stipulated that the statement should be considered as a part of the information, and the petitioner made a motion to quash. This motion was sustained and the petitioner was discharged. On writ of error, the Court of Appeals of the District of Columbia reversed the judgment of the Police Court and ordered the cause to be remanded for further proceedings in conformity with its opinion. Application was made to this court for a writ of certiorari, which was refused. 218 U. S. 673. The petitioner was then arraigned in the Police Court, pleaded not guilty, and waived trial by jury; and the case was submitted to the court upon the agreed statement. Judgment of guilty was entered and the petitioner was sentenced to pay a fine. He then obtained leave of this court to file the present petition.

The only question before us is whether the Police Court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127 U. S. 731; *Gonzales* v. *Cunningham*, 164 U. S. 612; *In re Eckart*, 166 U. S. 481; *Storti* v. *Massachusetts*, 183 U. S. 138; *Dimmick* v. *Tompkins*, 194 U. S. 540; *Hyde* v. *Shine*, 199 U. S.

62, 83; *Whitney* v. *Dick*, 202 U. S. 132, 136; *Kaizo* v. *Henry*, 211 U. S. 146, 148. This rule has recently been applied in a case where it was contended in a *habeas corpus* proceeding that the record should be examined to determine whether there was any testimony to support the accusation. And this court, affirming the judgment which discharged the writ, said by Mr. Justice Day: "The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions." *Harlan* v. *McGourin*, 218 U. S. 442.

We come then to the grounds upon which the jurisdiction of the Police Court is assailed. It is urged that the prohibition contained in the statute under which the information was brought is unconstitutional, in that it violates the Fifth Amendment of the Constitution of the United States by depriving the petitioner of liberty and property without due process of law. The information rested on § 1177 of the Revised Statutes relating to the District of Columbia, which makes it a crime "in any manner" to engage "in any gift-enterprise business" in the District. If this section be read alone no basis appears for the argument of invalidity. It cannot be said that the words "gift-enterprise business" are so uncertain as to make the prohibition nugatory, or that they necessarily include conduct which lies outside the range of legislative interference in the exercise of the police power. While these words are general, they may be regarded as embracing a class of transactions which the legislature is competent to condemn. Thus a "gift-

enterprise" has been defined to be "a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme." Bouvier's Law Dictionary (Rawle's Rev.), p. 884; Black's Law Dictionary, p. 539; Anderson's Law Dictionary, p. 488. See also *Lohman* v. *State*, 81 Indiana, 15, 17; *Winston* v. *Beeson*, 135 N. C. 271, 279; *Randle* v. *State*, 42 Texas, 580.

But it is said that § 1177 must be read in connection with § 1176, which in turn has reference to the act of the Legislative Assembly of the District of Columbia approved August 23, 1871. The argument in substance is that these statutes furnish a controlling definition of the words "gift-enterprise business" as used in § 1177, and that if this be so, the section must be held unconstitutional.

The act passed in 1871 by the Legislative Assembly of the District of Columbia, to which reference is made, was entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia." It provided as follows:

"The proprietors of gift enterprises shall pay one thousand dollars annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with the promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution, of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise: *Provided*, That no such proprietor, in consequence of being thus taxed, shall be exempt from paying any other taxes imposed by law, and the license herein

required shall be in addition thereto." Laws of the District of Columbia, 1871–72, Part II, pp. 96, 97.

Congress, by act of February 17, 1873, c. 148, 17 Stat. 464, disapproved and repealed this legislation and enacted the prohibitions which later were incorporated in §§ 1176 and 1177 of the Revised Statutes relating to the District of Columbia, as follows:

"SEC. 1176. So much of the act of the legislative assembly of the District of Columbia entitled 'An act imposing a license on trades, business and professions, practiced or carried on in the District of Columbia,' approved August twenty-third, eighteen hundred and seventy-one, as authorizes gift-enterprises therein, and licenses to be issued therefor, is disapproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise.

"SEC. 1177. Every person who shall in any manner engage in any gift-enterprise business in the District shall, on conviction thereof in the police court, on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars, or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."

It will be observed that while § 1176 refers to the District act of 1871, and to "gift enterprises" as therein described, it does not treat that description as exclusive. It assumes that there are other gift enterprises than those defined in the act of 1871. It denounces the former not less than the latter. It does not limit its provisions to the transactions which previously had been licensed under the act of 1871, but expressly includes gift enterprises conducted "*in any manner as defined in said act or otherwise.*"

The purpose of the provision of § 1176 was to disapprove and repeal the former authorization, but not to es-

tablish an exclusive definition based upon it. The language of § 1176 conclusively negatives such an intention. It follows that § 1177 is not controlled by the definition to be found in the act of 1871. Even if it were assumed that the condemnation contained in § 1176 of the transactions particularly described in the act of 1871 was too sweeping, and that Congress went beyond its power in giving the prohibition so wide a scope, this would not affect the provision of § 1177, relating, as we have seen, to a recognized category of offenses for which it was within the power of Congress to prescribe punishment. Whether it be read alone or in the light of its context, § 1177 cannot be adjudged invalid. And it is upon this section that the information in question was based.

We have then a statute with valid operation. This being established there can be no question that it conferred upon the Police Court, by its express terms, jurisdiction of the offense, and that court tried and convicted the petitioner.

But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, unless it be meant that no colorable question was presented; that on the agreed statement of facts and viewing the statute as prohibiting transactions involving the element of chance, there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated.

Such a contention is without merit. It is by no means manifest that the scheme or enterprise in which the petitioner was engaged lay outside the range of judicial consideration under the statute. On the contrary, the agreed statement of facts presented questions requiring the exercise of judicial judgment, and the case falls within the well-established rule. Given a valid enactment, the

question (assuming it to be one demanding judicial examination) whether a particular case falls within the prohibition is for the determination of the court to which has been confided jurisdiction over the class of offenses to which the statute relates.

As said by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, on p. 203: "The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it." And in *Ex parte Parks*, 93 U. S. 18, on page 20, the court said: "Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question."

In hearing this application, this court does not sit to review the correctness of the conclusion of the Police Court as to the violation of the statute by the petitioner, or of the decision of the Court of Appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction the application for a writ of *habeas corpus* must be denied.

Rule discharged and petition dismissed.

BAILEY *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 300. Argued October 20, 21, 1910.—Decided January 3, 1911.

Prima facie evidence is sufficient to outweigh the presumption of innocence, and, if not met by opposing evidence, to support a verdict. *Kelly* v. *Jackson*, 6 Pet. 632.

The validity of a statute that authorizes a jury to convict on *prima facie* evidence must be judged by the fact that the jury may convict even if it is not made the duty of the jury to do so.

Although a state statute in terms be to punish fraud, if its natural and inevitable purpose is to punish for crime for failing to perform contracts of labor, thus compelling such performance, it violates the Thirteenth Amendment and is unconstitutional.

A constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment; and a State cannot compel involuntary servitude in carrying out contracts of personal service by creating a presumption that the person committing the breach is guilty of intent to defraud merely because he fails to perform the contract.

While States may, without denying due process of law, enact that proof of one fact shall be *prima facie* evidence of the main fact in issue, the inference must not be purely arbitrary; there must be rational relation between the two facts, and the accused must have proper opportunity to submit all the facts bearing on the issue.

While its immediate concern was African slavery, the Thirteenth Amendment was a charter of universal civil freedom for all persons of whatever race, color, or estate, under the flag.

The words "involuntary servitude" have a larger meaning than slavery, and the Thirteenth Amendment prohibited all control by coercion of the personal service of one man for the benefit of another.

While the Thirteenth Amendment is self-executing, Congress has power to secure its complete enforcement by appropriate legislation and the peonage act of March 2, 1867, and §§ 1990 and 5526, Rev. Stat., are valid exercises of this authority. *Clyatt* v. *United States*, 197 U. S. 207.

A peon is one who is compelled to work for his creditor until his debt

is paid, and the fact that he contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the peonage acts.

The Federal anti-peonage acts are necessarily violated by any state legislation which seeks to compel service or labor by making it a crime to fail or refuse to perform it.

Although this court may not impute to a State an actual motive to oppress by a statute which that State enacts, it must consider the natural operation of such statute and strike it down if it becomes an instrument of coercion forbidden by the Federal Constitution.

Section 4730 of the Code of Alabama as amended in 1907, in so far as it makes the refusal or failure to perform labor contracted for without refunding the money or paying for property received *prima facie* evidence of the commission of the crime defined by such section, and when read in connection with the rule of evidence of that State, that the accused cannot testify in regard to uncommunicated motives, is unconstitutional as in conflict with the Thirteenth Amendment and of the legislation authorized by it and enacted by Congress.

Quære, and not necessary now to decide, whether such section is, under the Fourteenth Amendment, an unconstitutional deprivation of property without due process of law or denial of equal protection of the laws.

161 Alabama, 78, reversed.

THE facts, which involve the constitutionality of § 4730 of the Code of Alabama as construed by the courts of that State and the validity of a conviction thereunder, are stated in the opinion.

Mr. Fred S. Ball, Mr. Edward S. Watts and *Mr. Daniel W. Troy* for plaintiff in error, submitted.

Mr. Assistant Attorney General Harr, with whom *The Attorney General* was on the brief, by leave of the court, on behalf of the United States as *amicus curiæ:*

The judgment, and the statute upon which it is based, conflict with the Thirteenth Amendment and §§ 1990, 5526, Rev. Stat. See *Clyatt* v. *United States*, 197 U. S.

207, 216, which settled the question, left in doubt by *Robertson* v. *Baldwin*, 165 U. S. 275, 280. A state penal statute will be construed by this court as though a rule of evidence announced by the highest court of the State as being applicable thereto was incorporated therein. Freund, Police Power, § 448.

The act, as amended, is the result of efforts to enforce labor contracts. See act of March 1, 1901, declared unconstitutional by the Supreme Court of Alabama, *Toney* v. *The State*, 141 Alabama, 120; and by the Federal court, *Peonage Cases*, 123 Fed. Rep. 671, 691.

That act failing, resort was had to the statute here in question. But first the statute, found ineffective under *Ex parte Riley*, 94 Alabama, 82, upon the subject of intent, was amended by adding the *prima facie* clause. *Bailey* v. *The State*, 158 Alabama, 18, 24.

The statute was further amended by the act of August 15, 1907 (Gen. Act, Ala., 1907, p. 636), so as to cover expressly tenants of land, and by changing the penalty so as to make it peculiarly applicable to contracts with agricultural laborers. For history of this legislation and the position of the Supreme Court of Alabama in regard thereto, see *Bailey* v. *State*, 158 Alabama, 18, 22; *Banks* v. *State*, 124 Georgia, 15; *State* v. *Thomas*, 144 Alabama, 77; *Vann's Case*, 150 Alabama, 66.

Even if the legislature can punish fraudulent practices in obtaining property by false pretenses under contract for the performance of an act or service, such object is clearly distinguishable from one punishing a mere breach of contract. *Freeman* v. *United States*, 217 U. S. 539. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 268.

In Florida and Mississippi, similar statutes have been declared void under the Thirteenth Amendment by United States judges in charges to grand juries; and see

also a similar holding in North Carolina. So also as to the Louisiana act of July 5, 1892, *State* v. *Murray*, 116 Louisiana, 655, though it is manifest that it punishes a mere breach of contract. See records in this court this term in *Harlan* and *Gallagher* v. *McGourin*, 218 U. S. 442.

In construing the Alabama statute the court will bear in mind that the legislature would naturally seek to accomplish by indirection what it could not do directly. But § 1990, Rev. Stat. specifically covers such a case. *Freeman* v. *United States*, 217 U. S. 539, distinguished.

A breach of a contract for personal service upon which advances have been received cannot be made *prima facie* evidence of a fraudulent intent in entering into the contract. *Ex parte Riley*, 94 Alabama, 82; *State* v. *Williams*, 63 S. E. Rep. 949; *Ex parte Hollman*, 79 S. E. Rep. 9; *Vankirk* v. *Staats*, 24 N. J. L. 121; *Adams* v. *New York*, 192 U. S. 585; *Commonwealth* v. *Williams*, 6 Gray (Mass.), 1. *State* v. *Kingsley*, 108 Missouri, 135, holds that it is necessary to establish fraudulent intent before the *prima facie* rule in this statute becomes operative, and see *State* v. *Yardley*, 95 Tennessee, 546, to same effect, that where the only thing shown was a refusal to pay, the fraudulent intent must be proved before the *prima facie* rule could become operative. In this case mere breach of contract is made evidence of the fraudulent intent.

The *prima facie* rule established by the Alabama statute, as shown by this case, is unyielding. The inference under that statute of an intent to defraud from a mere breach of the contract is as absolute when the breach occurs eleven months thereafter as when it occurs one day after the making of the contract.

The judgment in this case, and the statute of Alabama upon which it is founded, are in violation of the Fourteenth Amendment. They deny the defendant the equal protection of the laws. The statute hits especially, as was intended, negro laborers on farms and plantations. Every

reported case under the statute is that of a farm laborer. The maximum penalty fixed by the statute, $300, also makes it peculiarly applicable to this class of laborers. See *Ex parte Drayton*, 153 Fed. Rep. 986, holding unconstitutional on those grounds a similar statute of South Carolina.

Even if the Alabama statute, as originally enacted, was not to be regarded as class legislation, the subsequent amendments render it so, and the actual enforcement of the statute against a single class of laborers alone, denies equal protection. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 151.

Even if the employers of such labor have much to complain of, it does not relieve the statute of the taint of unconstitutionality. See Judge Jones' charge to grand jury in the *Peonage Cases*, 123 Fed. Rep. 691.

Although the legislature may provide that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact, the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. *People* v. *Cannon*, 139 N. Y. 32, 43; *State* v. *Beswick*, 13 R. I. 211.

A law which practically shuts out the evidence of a party, thus denying him the opportunity for a trial, substantially deprives him of due process of law. *Commissioners* v. *Merchant*, 103 N. Y. 143, 148; *Commonwealth* v. *Rubin*, 165 Massachusetts, 453; *Kelly* v. *Jackson*, 6 Pet. 622, 631; Greenleaf on Evidence, § 33; *Vankirk* v. *Staats*, 24 N. J. L. 121; *Steinhardt* v. *Beir*, 60 N. Y. Super. Ct. Rep. 489; *Mooney* v. *LaFollette*, 21 N. Y. App. Div. 510; *McCormick* v. *Joseph*, 77 Alabama, 236, 240; *Coffin* v. *United States*, 156 U. S. 432, 453; *State* v. *Thomas*, 144 Alabama, 77, and see *Twining* v. *New Jersey*, 211 U. S. 78, 101, as to the guaranties of due process of law.

Mr. Alexander M. Garber, Attorney General of the State of Alabama, and *Thomas W. Martin* for defendant in error:

The statute was designed to punish a certain class of frauds not then punished by any statute.

The original and amended statute has been frequently construed by the Supreme Court of Alabama and the court has consistently held that the purpose of the statute was to punish fraudulent practices and not the mere failure to pay a debt.

The offense is but a species of the common-law crime of cheating by false pretenses, and if in fact the statute does define and punish a crime, there can be no question here of its validity. See for history of the legislation, *Riley* v. *State*, 94 Alabama, 82; *Toney* v. *State*, 141 Alabama, 120; *Peonage Cases*, 123 Fed. Rep. 671, 690, and *Ex parte Drayton*, 153 Fed. Rep. 986, considering a statute of South Carolina.

For decisions involving similar legislation, see *Lamar* v. *State*, 120 Georgia, 312; *State* v. *Williams* (N. C.), 63 S. E. Rep. 949; *Ex parte Hollman*, 79 S. C. 9; *S. C.*, 21 L. R. A. (N. S.) 242. No case can be found from any jurisdiction in which a statute similar to the one under consideration has been held to be invalid.

Unless the original statute is held invalid, there can be no condition of peonage incident to a conviction thereunder. The rule of evidence does not, of itself, or as an amendment to the original statute, make a condition of peonage.

The statute at present is wholly different from the law held invalid in *Toney* v. *State*, 141 Alabama, 120, and in the *Peonage Cases*, 123 Fed. Rep. 671. See *Bailey* v. *State*, 158 Alabama, 18; *State* v. *Vann*, 150 Alabama, 66.

The statute was meant to prevent employés from making fraudulent contracts and to prevent them from obtaining money by promising service. *McIntosh* v. *State*,

117 Alabama, 127. The essential ingredient of the offense is fraud in entering into the contract of employment. If invalid so are all statutes aimed at the obtaining of goods of another by false pretenses. The victim in all such cases has a civil right of action against the party who thus obtains his money. But this fact does not deprive the State of its inherent right to punish the criminal act involved in that transaction.

The Alabama Supreme Court has held that the basal fact is fraud and that the statute does not violate the provision of the state constitution against imprisonment for debt. This construction of the state constitution is conclusive on this court. *Yick Wo* v. *Hopkins*, 118 U. S. 360; *Noble* v. *Mitchell*, 164 U. S. 367. The only question left for determination is whether the statute as thus construed violates the Thirteenth Amendment or the peonage statute. *Mo. Co.* v. *McCann*, 174 U. S. 575; *Am. Steel & Wire Co.* v. *Speed*, 192 U. S. 523. This court cannot hold the law to be violative either of that Amendment, or of the peonage statute except on the theory that it imprisons for a debt. As to what is peonage, see *Clyatt* v. *United States*, 197 U. S. 207; see also *Freeman* v. *United States*, 217 U. S. 539.

The provision of the present statute which provides for a fine in double the damage suffered by the injured party, half to go to the county and the other half to such party, is valid. *Freeman* v. *United States, supra; Re Ebenhack*, 17 Kansas, 615; *Maryland* v. *Nicholson*, 67 Maryland, 1; *State* v. *Yardley*, 95 Tennessee, 546.

The act does not violate the Fourteenth Amendment in that it applies only to persons who enter into contracts for the performance of an act or service or for the rent of land; that it does not bear equally upon the employé and the employer, and that it is applied only against laborers and the colored race. It applies to every person who with a fraudulent purpose enters into a written

contract to perform an act or service for another, and thereby obtains money. *Clark* v. *Kansas City*, 176 U. S. 144.

The legislature may establish a *prima facie* rule of evidence in criminal cases. *Li Sing* v. *United States*, 180 U. S. 485; *Adams* v. *New York*, 192 U. S. 585; *Ah How* v. *United States*, 193 U. S. 65; *Fong* v. *United States*, 149 U. S. 697, 719; *Commonwealth* v. *Williams*, 6 Gray (Mass.), 1; *State* v. *Beach*, 147 Indiana, 74; *State* v. *Buck*, 120 Missouri, 479; *State* v. *Kingsley*, 108 Missouri, 135; *Meadowcraft* v. *People*, 163 Illinois, 56; *Barker* v. *State*, 54 Wisconsin, 368; *Robertson* v. *People*, 20 Colorado, 279; *Voght* v. *State*, 124 Indiana, 358; *People* v. *Cannon*, 139 N. Y. 32; *Commissioners* v. *Merchant*, 105 N. Y. 148; *Re Milecke*, 100 Pac. Rep. 743.

The validity of this provision has been upheld by the Supreme Court of Alabama in *Bailey* v. *State*, 158 Alabama, 18; *State* v. *Vann*, 150 Alabama, 66; *State* v. *Thomas*, 144 Alabama, 77.

The fact that Bailey could not testify to his uncommunicated motive or intention does not prove that he was unable to prove his innocence. If a rule of evidence which excludes the defendant from testifying as to his motives has the effect of making the rule of evidence prescribed by the statute a conclusive rule, it is due to the particular facts and not to the statute itself.

A *prima facie* rule of evidence in a criminal case does not overcome the presumption of innocence or change the burden of proof or require the jury to convict, unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt. 24 Cyc. 192.

The presumption of innocence does not attend a defendant throughout the whole trial but only until sufficient evidence is introduced to overcome the proof which the law has created. *Coffin* v. *United States*, 156 U. S. 453; *Martin* v. *State*, 104 Alabama, 78; *Wilson* v. *United*

States, 162 U. S. 613; *Considine* v. *United States*, 112 Fed. Rep. 342; *Newson* v. *State*, 107 Alabama, 133, 139.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of the State of Alabama, affirming a judgment of conviction in the Montgomery City Court. The statute, upon which the conviction was based, is assailed as in violation of the Fourteenth Amendment of the Constitution of the United States upon the ground that it deprived the plaintiff in error of his liberty without due process of law and denied him the equal protection of the laws, and also of the Thirteenth Amendment and of the act of Congress providing for the enforcement of that Amendment, in that the effect of the statute is to enforce involuntary servitude by compelling personal service in liquidation of a debt.

The statute in question is § 4730 of the Code of Alabama of 1896, as amended in 1903 and 1907. The section of the Code as it stood before the amendments provided that any person who with intent to injure or defraud his employer entered into a written contract for service and thereby obtained from his employer money or other personal property, and with like intent and without just cause, and without refunding the money or paying for the property refused to perform the service, should be punished as if he had stolen it. In 1903 (Gen. Acts, Ala., 1903, p. 345) the section was amended so as to make the refusal or failure to perform the service, or to refund the money or pay for the property, without just cause, *prima facie* evidence of the intent to injure or defraud. This amendment was enlarged by that of 1907. Gen. Acts, Ala., 1907, p. 636. The section, thus amended, reads as follows:

"Any person, who with intent to injure or defraud his

employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured; and any person, who with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service or to cultivate such land, or refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure his employer or landlord or defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed."

There is also a rule of evidence enforced by the courts of Alabama which must be regarded as having the same effect as if read into the statute itself, that the accused, for the purpose of rebutting the statutory presumption, shall not be allowed to testify "as to his uncommunicated motives, purpose or intention." *Bailey* v. *The State*, 161 Alabama, 77, 78.

Bailey, the plaintiff in error, was committed for detention on the charge of obtaining fifteen dollars under a

contract in writing with intent to injure or defraud his employer. He sued out a writ of *habeas corpus* challenging the validity of the statute. His discharge was refused and the Supreme Court of the State affirmed the order, holding the statute to be constitutional. 158 Alabama, 18. On writ of error from this court it was held that the case was brought here prematurely, and the questions now presented were expressly reserved. *Bailey* v. *Alabama*, 211 U. S. 452.

Having failed to obtain his release on *habeas corpus*, Bailey was indicted on the following charge:

"The Grand Jury of said County charge, that before the finding of this indictment Alonzo Bailey with intent to injure or defraud his employer The Riverside Company, a corporation, entered into a written contract to perform labor or services for The Riverside Company, a corporation and obtained thereby the sum of Fifteen Dollars from the said The Riverside Company, and afterwards with like intent, and without just cause, failed or refused to perform such labor or services or to refund such money against the peace and dignity of the State of Alabama."

Motion to quash and a demurrer to the indictment were overruled. Upon the trial the following facts appeared: On December 26, 1907, Bailey entered into a written contract with the Riverside Company, which provided:

"That I Lonzo Bailey for and in consideration of the sum of Fifteen Dollars in money, this day in hand paid to me by said The Riverside Co., the receipt whereof, I do hereby acknowledge, I, the said Lonzo Bailey do hereby consent, contract and agree to work and labor for the said Riverside Co. as a farm hand on their Scotts Bend Place in Montgomery County, Alabama, from the 30 day of Dec. 1907, to the 30 day of Dec. 1908, at and for the sum of 12.00 per month.

"And the said Lonzo Bailey agrees to render respectful and faithful service to the said The Riverside Co. and to perform diligently and actively all work pertaining to such employment, in accordance with the instructions of the said The Riverside Co., or ag't.

"And the said The Riverside Co. in consideration of the agreement above mentioned of the said Lonzo Bailey hereby employs the said Lonzo Bailey as such farm hand for the time above set out, and agrees to pay the said Lonzo Bailey the sum of $10.75 per month."

The manager of the employing company testified that at the time of entering into this contract there were present only the witness and Bailey and that the latter then obtained from the company the sum of fifteen dollars; that Bailey worked under the contract throughout the month of January and for three or four days in February, 1908, and then, "without just cause and without refunding the money, ceased to work for said Riverside Company, and has not since that time performed any service for said Company in accordance with or under said contract, and has refused and failed to perform any further service thereunder, and has, without just cause, refused and failed to refund said fifteen dollars." He also testified, in response to a question from the attorney for the defendant and against the objection of the State, that Bailey was a negro. No other evidence was introduced.

The court, after defining the crime in the language of the statute, charged the jury, in accordance with its terms, as follows:

"And the refusal of any person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer, or to defraud him."

Bailey excepted to these instructions, and requested the court to instruct the jury that the statute, and the

provision creating the presumption, were invalid, and further that "the refusal or failure of the defendant to perform the service alleged in the indictment, or to refund the money obtained from the Riverside Co. under the contract between it and the defendant, without cause, does not of itself make out a prima facie case of the defendant's intent to injure or defraud said Riverside Company."

The court refused these instructions and Bailey took exception.

The jury found the accused guilty, fixed the damages sustained by the injured party at fifteen dollars, and assessed a fine of thirty dollars. Thereupon Bailey was sentenced by the court to pay the fine of thirty dollars and the costs, and in default thereof to hard labor "for twenty days in lieu of said fine and one hundred and sixteen days on account of said costs."

On appeal to the Supreme Court of the State the constitutionality of the statute was again upheld and the judgment affirmed. 161 Alabama, 75.

We at once dismiss from consideration the fact that the plaintiff in error is a black man. While the action of a State through its officers charged with the administration of a law, fair in appearance, may be of such a character as to constitute a denial of the equal protection of the laws (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 373), such a conclusion is here neither required nor justified. The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. Opportunities for coercion and oppression, in varying circumstances, exist in all parts of the Union, and the citizens of all the States are interested in the maintenance of the constitutional guarantees, the consideration of which is here involved.

Prior to the amendment of the year 1903, enlarged in 1907, the statute did not make the mere breach of the contract, under which the employé had obtained from his employer money which was not refunded or property which was not paid for, a crime. The essential ingredient of the offense was the intent of the accused to injure or defraud. To justify conviction, it was necessary that this intent should be established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.

This was the construction which the Supreme Court of Alabama placed upon the statute, as it then stood, in *Ex parte Riley*, 94 Alabama, 82. In that case the court said (pp. 83, 84):

"The ingredients of this statutory offense are: (1) a contract in writing by the accused for the performance of any act or service; (2) an intent on the part of the accused, when he entered into the contract, to injure or defraud his employer; (3) the obtaining by the accused of money or other personal property from such employer by means of such contract entered into with such intent; and (4) the refusal by the accused, with like intent, and without just cause, and without refunding such money, or paying for such property, to perform such act or service. This statute by no means provides that a person who has entered into a written contract for the performance of services, under which he has obtained money or other personal property, is punishable as if he had stolen such money or other personal property, upon his refusal to perform the contract, without refunding the money or paying for the property. A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform

was with like intent and without just cause. That there was an intent to injure or defraud the employer, both when the contract was entered into and when the accused refused performance, are facts which must be shown by the evidence. As the intent is the design, purpose, resolve or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. *Carlisle* v. *The State*, 76 Alabama, 75; *Mack* v. *The State*, 63 Alabama, 136. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations or suspicions as to intentions which were not disclosed by any visible or tangible act, expression or circumstance.—*Green* v. *The State*, 68 Alabama, 539." See also *Dorsey* v. *The State*, 111 Alabama, 40; *McIntosh* v. *The State*, 117 Alabama, 128.

We pass then to the consideration of the amendment, through the operation of which under the charge of the trial court this conviction was obtained. No longer was it necessary for the prosecution to comply with the rule of the *Riley case* (*supra*) in order to establish the intent to injure or defraud which, as the court said, constituted the gist of the offense. It was "the difficulty in proving the intent, made patent by that decision" which "suggested the amendment of 1903." *Bailey* v. *The State*, 158 Alabama, p. 25. By this amendment it was provided, in substance, that the refusal or failure to perform the service contracted for, or to refund the money obtained, without just cause, should be *prima facie* evidence of the intent to injure or defraud.

But the refusal or failure to perform the service, without just cause, constitutes the breach of the contract. The justice of the grounds of refusal or failure must, of course, be determined by the contractual obligation as-

sumed. Whatever the reason for leaving the service, if, judged by the terms of the contract, it is insufficient in law, it is not "just cause." The money received and repayable, nothing more being shown, constitutes a mere debt. The asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the *prima facie* case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction.

It is no answer to say that the jury must find, and here found, that a fraudulent intent existed. The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding. Had it not been for this statutory presumption, supplied by the amendment, no one would be heard to say that Bailey could have been convicted.

Prima facie evidence is sufficient evidence to outweigh the presumption of innocence and if not met by opposing evidence to support a verdict of guilty. "It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." *Kelly* v. *Jackson*, 6 Pet. 632.

We are not impressed with the argument that the Supreme Court of Alabama has construed the amendment to mean that the jury is not controlled by the presumption, if unrebutted, and still may find the accused not guilty. That court, in its opinion, said: "Again, it must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the con-

trary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence." 161 Alabama, 78.

But the controlling construction of the statute is the affirmance of this judgment of conviction. It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such a case, the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept is as a basis for their verdict. And it is in this light that the validity of the statute must be determined.

It is urged that the time and circumstances of the departure from service may be such as to raise not only an inference, but a strong inference, of fraudulent intent. There was no need to create a statutory presumption and it was not created for such a case. Where circumstances are shown permitting a fair inference of fraudulent purpose, the case falls within the rule of *Ex parte Riley* (*supra*) which governed prosecutions under the statute before the amendment was made. The "difficulty," which admittedly the amendment was intended to surmount, did not exist where natural inferences sufficed. Plainly the object of the statute was to hit cases which were destitute of such inferences, and to provide that the mere breach of the contract and the mere failure to pay the debt might do duty in their absence.

While in considering the natural operation and effect of the statute, as amended, we are not limited to the particular facts of the case at the bar, they present an illuminating illustration. We may briefly restate them. Bailey made a contract to work for a year at $12 a month. He

received $15 and he was to work this out, being entitled monthly only to $10.75 of his wages. No one was present when he made the contract but himself and the manager of the employing company. There is not a particle of evidence of any circumstance indicating that he made the contract or received the money with any intent to injure or defraud his employer. On the contrary, he actually worked for upwards of a month. His motive in leaving does not appear, the only showing being that it was without legal excuse and that he did not repay the money received. For this he is sentenced to a fine of $30 and to imprisonment at hard labor in default of the payment of the fine and costs for 136 days. Was not the case the same in effect as if the statute had made it a criminal act to leave the service without just cause and without liquidating the debt? To say that he has been found guilty of an intent to injure or defraud his employer, and not merely for breaking his contract and not paying his debt, is a distinction without a difference to Bailey.

Consider the situation of the accused under this statutory presumption. If at the outset nothing took place but the making of the contract and the receipt of the money, he could show nothing else. If there was no legal justification for his leaving his employment, he could show none. If he had not paid the debt there was nothing to be said as to that. The law of the State did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances affirmatively showing good faith, he was helpless. He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon evidence only of breach of contract and failure to pay.

It is said that we may assume that a fair jury would convict only where the circumstances sufficiently indicated a fraudulent intent. Why should this be assumed

in the face of the statute and upon this record? In the present case the jury did convict, although there is an absence of evidence sufficient to establish fraud under the familiar rule that fraud will not be presumed, and the obvious explanation of the verdict is that the trial court in accordance with the statute charged the jury that refusal to perform the service, or to repay the money, without just cause, constituted *prima facie* evidence of the commission of the offense which the statute defined. That is, the jury were told in effect that the evidence, under the statutory rule, was sufficient, and hence they treated it as such. There is no basis for an assumption that the jury would have acted differently if Bailey had worked for three months, or six months, or nine months, if in fact his debt had not been paid. The normal assumption is that the jury will follow the statute and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes.

It may further be observed that under the statute there is no punishment for the alleged fraud if the service is performed or the money refunded. If the service is rendered in liquidation of the debt there is no punishment, and if it is not rendered and the money is not refunded that fact alone is sufficient for conviction. By a statute passed by the legislature of Alabama in 1901 it was made a misdemeanor for any person, who had made a written contract to labor for or serve another for any given time, to leave the service before the expiration of the contract and without the consent of the employer, and to make a second contract of similar nature with another person without giving the second employer notice of the existence of the first contract. This was held unconstitutional upon the ground that it interfered with freedom of contract. *Toney* v. *The State*, 141 Alabama, 120. But, judging it by its necessary operation and obvious effect, the fundamental purpose plainly was to compel, under the sanction

of the criminal law, the enforcement of the contract for personal service, and the same purpose, tested by like criteria, breathes despite its different phraseology through the amendments of 1903 and 1907 of the statute here in question.

We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 749. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. *Adams* v. *New York*, 192 U. S. 585; *Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed*, decided December 19, 1910, *ante*, p. 35.

The latest expression upon this point is found in the case last cited, where the court, by Mr. Justice Lurton, said: "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact

presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

In this class of cases where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to proscribe.

In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the Thirteenth Amendment of the Constitution of the United States and the act of Congress passed for its enforcement.

The Thirteenth Amendment provides:

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

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

Pursuant to the authority thus conferred, Congress passed the act of March 2, 1867, c. 187, 14 Stat. 546, the provisions of which are now found in §§ 1990 and 5526 of the Revised Statutes, as follows:

"SEC. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"SEC. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the

Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.

The words involuntary servitude have a "larger meaning than slavery." "It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used." *Slaughter House Cases*, 16 Wall. p. 69. The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude.

While the Amendment was self-executing, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation. As was said in the *Civil Rights cases:* "By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." 109 U. S. 20.

The act of March 2, 1867 (Rev. Stat., §§ 1990, 5526, *supra*), was a valid exercise of this express authority. *Clyatt* v. *United States*, 197 U. S. 207. It declared that all laws of any State, by virtue of which any attempt should be made "to establish, maintain, or enforce, directly or

indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," should be null and void.

Peonage is a term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid. And in this explicit and comprehensive enactment, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced.

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor. This has been so clearly stated by this court in the case of *Clyatt, supra*, that discussion is unnecessary. The court there said:

"The constitutionality and scope of sections 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in *Jaremillo* v. *Romero*, 1 N. Mex.

190, 194: 'One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their masters' service.' Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, *Robertson* v. *Baldwin*, 165 U. S. 275, or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt." 197 U. S. pp. 215, 216.

The act of Congress, nullifying all state laws by which it should be attempted to enforce the "service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The Thirteenth

Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

If the statute in this case had authorized the employing company to seize the debtor and hold him to the service until he paid the fifteen dollars, or had furnished the equivalent in labor, its invalidity would not be questioned. It would be equally clear that the State could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt. But the State could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force. "In contemplation of the law the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station." *Ex parte Hollman* (S. Car.), 60 S. E. Rep. 24.

What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson* v. *Mayor*, 92 U. S. p. 268), and it is apparent that it furnishes a convenient instrument for the coer-

cion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud but merely upon evidence of failure to work out their debts. The act of Congress deprives of effect all legislative measures of any State through which directly or indirectly the prohibited thing, to wit, compulsory service to secure the payment of a debt may be established or maintained; and we conclude that § 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received, *prima facie* evidence of the commission of the crime which the section defines, is in conflict with the Thirteenth Amendment and the legislation authorized by that Amendment, and is therefore invalid.

In this view it is unnecessary to consider the contentions which have been made under the Fourteenth Amendment. As the case was given to the jury under instructions which authorized a verdict in accordance with the statutory presumption, and the opposing instructions requested by the accused were refused, the judgment must be reversed.

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

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE LURTON, dissenting.

WE all agree that this case is to be considered and decided in the same way as if it arose in Idaho or New York.

Neither public document nor evidence discloses a law which by its administration is made something different from what it appears on its face, and therefore the fact that in Alabama it mainly concerns the blacks does not matter. *Yick Wo* v. *Hopkins*, 118 U. S. 356, does not apply. I shall begin then by assuming for the moment what I think is not true and shall try to show not to be true, that this statute punishes the mere refusal to labor according to contract as a crime, and shall inquire whether there would be anything contrary to the Thirteenth Amendment or the statute if it did, supposing it to have been enacted in the State of New York. I cannot believe it. The Thirteenth Amendment does not outlaw contracts for labor. That would be at least as great a misfortune for the laborer as for the man that employed him. For it certainly would affect the terms of the bargain unfavorably for the laboring man if it were understood that the employer could do nothing in case the laborer saw fit to break his word. But any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine. If the mere imposition of such consequences as tend to make a man keep to his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment ending in fine. Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave.

But if a fine may be imposed, imprisonment may be

imposed in case of a failure to pay it. Nor does it matter if labor is added to the imprisonment. Imprisonment with hard labor is not stricken from the statute books. On the contrary, involuntary servitude as a punishment for crime is excepted from the prohibition of the Thirteenth Amendment in so many words. Also the power of the States to make breach of contract a crime is not done away with by the abolition of slavery. But if breach of contract may be made a crime at all, it may be made a crime with all the consequences usually attached to crime. There is produced a sort of illusion if a contract to labor ends in compulsory labor in a prison. But compulsory work for no private master in a jail is not peonage. If work in a jail is not condemned in itself, without regard to what the conduct is it punishes, it may be made a consequence of any conduct that the State has power to punish at all. I do not blink the fact that the liability to imprisonment may work as a motive when a fine without it would not, and that it may induce the laborer to keep on when he would like to leave. But it does not strike me as an objection to a law that it is effective. If the contract is one that ought not to be made, prohibit it. But if it is a perfectly fair and proper contract, I can see no reason why the State should not throw its weight on the side of performance. There is no relation between its doing so in the manner supposed and allowing a private master to use private force upon a laborer who wishes to leave.

But all that I have said so far goes beyond the needs of the case as I understand it. I think it a mistake to say that this statute attaches its punishment to the mere breach of a contract to labor. It does nor purport to do so; what it purports to punish is fraudulently obtaining money by a false pretense of an intent to keep the written contract in consideration of which the money is advanced. (It is not necessary to cite cases to show that such an in-

tent may be the subject of a material false representation.) But the import of the statute is supposed to be changed by the provision that a refusal to perform, coupled with a failure to return the money advanced, shall be *prima facie* evidence of fraudulent intent. I agree that if the statute created a conclusive presumption it might be held to make a disguised change in the substantive law. *Keller* v. *United States*, 213 U. S. 138, 150. But it only makes the conduct *prima facie* evidence, a very different matter. Is it not evidence that a man had a fraudulent intent if he receives an advance upon a contract over night and leaves in the morning? I should have thought that it very plainly was. Of course the statute is in general terms and applies to a departure at any time without excuse or repayment, but that does no harm except on a tacit assumption that this law is not administered as it would be in New York, and that juries will act with prejudice against the laboring man. For *prima facie* evidence is only evidence, and as such may be held by the jury insufficient to make out guilt. 161 Alabama, 78. This was decided by the Supreme Court of Alabama in this case, and we should be bound by their construction of the statute, even if we thought it wrong. But I venture to add that I think it entirely right. *State* v. *Intoxicating Liquors*, 80 Maine, 57. This being so, I take it that a fair jury would acquit, if the only evidence were a departure after eleven months' work, and if it received no color from some special well-known course of events. But the matter well may be left to a jury, because their experience as men of the world may teach them that in certain conditions it is so common for laborers to remain during a part of the season, receiving advances, and then to depart at the period of need in the hope of greater wages at a neighboring plantation, that when a laborer follows that course there is a fair inference of fact that he intended it from the beginning. The Alabama stat-

ute, as construed by the state court and as we must take it, merely says, as a court might say, that the prosecution may go to the jury. This means and means only that the court cannot say, from its knowledge of the ordinary course of events, that the jury could not be justified by its knowledge in drawing the inference from the facts proved. In my opinion the statute embodies little if anything more than what I should have told the jury was the law without it. The right of the State to regulate laws of evidence is admitted, and the statute does not go much beyond the common law. *Commonwealth* v. *Rubin*, 165 Massachusetts, 453.

I do not see how the result that I have reached thus far is affected by the rule laid down by the court, but not contained in the statute, that the prisoner cannot testify to his uncommunicated intentions, and therefore, it is assumed, would not be permitted to offer a naked denial of an intent to defraud. If there is an excuse for breaking the contract it will be found in external circumstances, and can be proved. So the sum of the wrong supposed to be inflicted is that the intent to go off without repaying may be put further back than it would be otherwise. But if there is a wrong it lies in leaving the evidence to the jury, a wrong that is not affected by the letting in or keeping out an item of evidence on the other side. I have stated why I think it was not a wrong.

To sum up, I think that obtaining money by fraud may be made a crime as well as murder or theft; that a false representation, expressed or implied, at the time of making a contract of labor that one intends to perform it and thereby obtaining an advance, may be declared a case of fraudulently obtaining money as well as any other; that if made a crime it may be punished like any other crime, and that an unjustified departure from the promised service without repayment may be declared a sufficient case to go to the jury for their judgment; all without in any

way infringing the Thirteenth Amendment or the statutes of the United States.

MR. JUSTICE LURTON concurs in this dissent.

UNITED STATES *v.* CHAMBERLIN.

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

No. 77. Argued December 16, 1910.—Decided January 3, 1911.

An action lies by the United States to recover the amount of a stamp tax upon execution of a conveyance, payable under the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 470, and the penalties provided in such act for non-compliance therewith are not exclusive of collection of the amount by suit.

A tax may or may not be a debt under a particular statute according to the sense in which the word is found to be used. But whether the Government may recover a personal judgment for a tax depends upon the existence of the duty to pay for the enforcement of which another remedy has not been made exclusive.

Whether an action for debt is maintainable depends not upon who is plaintiff, or how the obligation was incurred, but the action lies wherever there is due a sum either certain or readily reduced to certainty. *Stockwell* v. *United States*, 13 Wall. 542.

Nothing in the nature of a stamp tax negatives *per se*, either the personal obligation to purchase and affix the stamps or the collection of the amount by action; nor do provisions for penalties necessarily exclude personal liability.

Penalties may be provided to induce payment of the tax, and not as a substitute for such payment, and it will not be presumed that Congress intends by penalizing delinquency to deprive the Government of suitable means of enforcing the collection of revenue.

THIS case comes here on certiorari. The action was brought by the United States, in the District Court of

the United States for the District of Colorado, against the executors of the estate of Winfield Scott Stratton, deceased, to recover the amount of stamp taxes claimed to be payable under the War Revenue Act of June 13, 1898.

The plaintiff alleged that in May, 1899, Stratton had conveyed to a corporation known as Stratton's Independence, Limited, certain lands in the State of Colorado by deed reciting a consideration of $4,850,000; that internal revenue stamps of the value of $4,850 were affixed to the deed, whereas the actual consideration of the conveyance and the value of the lands was $9,733,000, and by reason thereof there became due and payable to the United States from Stratton a revenue tax amounting to $9,733, of which the sum of $4,883 remained unpaid, internal revenue stamps therefor not having been attached to the deed or canceled; that the Collector of Internal Revenue of the United States for the District of Colorado had reported the facts to the Commissioner of Internal Revenue, who had determined that the sum of $9,733 should have been paid, and demand for payment having been made and refused the said Commissioner had directed suit to be instituted.

The District Court sustained a general demurrer to the complaint and its judgment was affirmed by the Circuit Court of Appeals.

The applicable provisions of the War Revenue Act of June 13, 1898, chapter 448, (30 Stat., pp. 448–470; R. S. Supp., Vol. 2, pp. 779–804), are set forth in the margin, together with the amendment to § 13 made by the act of March 2, 1901, chapter 806, 31 Stat. 941.[1]

---

[1] "SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment, or paper upon which such instruments, mat-

Mr. Assistant Attorney General Denison, with whom *Mr. Barton Corneau*, Special Assistant to the Attorney General, was on the brief, for the United States:

The War Revenue Act of 1898 created a personal obli-

---

ters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule. . . .

"SEC. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court.

"SEC. 13. That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this Act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court; and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect: *Provided*, That hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of issuing, selling, or transferring the said bonds, debentures, or certificates of stock or of indebtedness . . . and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, or, if said instrument be lost, to a copy thereof, he or they shall appear before the collector of internal revenue of the proper district, who shall, upon the payment of the price of the proper stamp required by law, and of a penalty of ten dollars, and, where the whole amount of the tax denoted by the stamp required shall exceed the sum of fifty

gation to pay these taxes, which obligation is enforcible by this action at least in the absence of a provision to the contrary in the War Revenue Act itself. 3 Black. Com. 160.

A court of the United States is bound to enforce per-

---

dollars, on payment also of interest, at the rate of six per centum, on said tax from the day on which such stamp ought to have been affixed, affix the proper stamp to such bond, debenture, certificate of stock or of indebtedness or copy, and note upon the margin thereof the date of his so doing, and the fact that such penalty has been paid; and the same shall thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued: *And provided further*, That where it shall appear to said collector, upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped, at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any willful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then and in such case, if such instrument, or, if the original be lost, a copy thereof, duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within twelve calendar months after the making or issuing thereof, be brought to the said collector of internal revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid and to cause such instrument to be duly stamped. And when the original instrument, or a certified or duly proven copy thereof, as aforesaid, duly stamped so as to entitle the same to be recorded, shall be presented to the clerk, register, recorder, or other officer having charge of the original record, it shall be lawful for such officer, upon the payment of the fee legally chargeable for the recording thereof, to make a new record thereof, or to note upon the original record the fact that the error or omission in the stamping of said original instrument has been corrected pursuant to law; and the original instrument or such certified copy, or the record thereof, may be used in all courts and places in the same manner and with like effect as if the instrument had been originally stamped: *And provided further*, That in all cases where the party has not affixed the stamp required by law upon any such instrument issued, registered, sold, or transferred at a time when and at a place where no collection district was established, it shall be lawful for him or them, or any party having an interest therein, to affix the proper stamp thereto, or, if

formance of this plain, direct mandate of the law thus addressed to this defendant. *Meredith* v. *United States*, 13 Pet. 486, 493; *United States* v. *Lyman*, 1 Mason, 482.

This personal obligation to pay created by the act imposing the tax, whether the tax be of one or another sort, is enforcible by any appropriate civil action, even though the taxing statute does not contain a specific grant of authority to proceed in that way. *United States* v. *Hathaway*, 3 Mason, 324; *Dollar Savings Bank* v. *United States*,

---

the original be lost, to a copy thereof. But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid."

The foregoing section (Sec. 13) was amended by the Act of March 2, 1901, chapter 806 (31 Stat. 941), by striking out the words "Schedule A of" in the fourth line of the section as above quoted, and also by inserting in the first proviso after the words "bonds, debentures, or certificates of stock or of indebtedness," the words "or any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this Act."

"SEC. 14. That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law. . . .

"SEC. 15. That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry, or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used in evidence.

"SEC. 25. That the Commissioner of Internal Revenue shall cause to be prepared for the payment of the taxes prescribed in this Act suitable stamps denoting the tax on the document, article, or thing to which the same may be affixed, and he is authorized to prescribe such method for the cancellation of said stamps, as substitute for or in addition to the method provided in this Act, as he may deem expedient. The Commissioner of Internal Revenue, with the approval

19 Wall. 227; *Stockwell* v. *United States*, 13 Wall. 531; *Chaffee* v. *United States*, 18 Wall. 516; *King* v. *United States*, 99 U. S. 229; *United States* v. *Erie Railway Co.*, 106 U. S. 327; *S. C.*, 107 U. S. 1; *United States* v. *Reading R. R. Co.*, 123 U. S. 113; *United States* v. *Snyder*, 149 U. S. 210; *United States* v. *George*, 6 Blatch. 406, 416; *United States* v. *Phelps*, 17 Blatch. 312; *United States* v. *Pacific Railroad Co.*, 4 Dill. 66; *United States* v. *Hathaway*, 3 Mas. 324; *United States* v. *Cobb*, 11 Fed. Rep. 76;

---

of the Secretary of the Treasury, is authorized to procure any of the stamps provided for in this Act by contract whenever such stamps cannot be speedily prepared by the Bureau of Engraving and Printing; but this authority shall expire on the first day of July, eighteen hundred and ninety-nine. That the adhesive stamps used in the payment of the tax levied in Schedules A and B of this Act shall be furnished for sale by the several collectors of internal-revenue, who shall sell and deliver them at their face value to all persons applying for the same, except officers or employees of the internal-revenue service: *Provided*, That such collectors may sell and deliver such stamps in quantities of not less than one hundred dollars of face value, with a discount of one per centum, except as otherwise provided in this Act. And he may, with the approval of the Secretary of the Treasury, make all needful rules and regulations for the proper enforcement of this Act.

SCHEDULE A.

Stamp Taxes.

* * * * * * * *

"Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents.

* * * * * * * *

"SEC. 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this Act."

United States v. *Boyd*, 24 Fed. Rep. 670; *United States* v. *National Fiber Board Co.*, 133 Fed. Rep. 597; *United States* v. *Mexican Int. Ry. Co.*, 154 Fed. Rep. 519; *United States* v. *Hazard*, Fed. Cas. No. 15,337; *United States* v. *Dodge*, Deady, 124; *United States* v. *Tilden*, 9 Ben. 368; *United States* v. *Washington Mills*, 2 Cliff. 601. See also 2 Dillon, Mun. Corp., § 815.

For English cases applying the principle, all being informations in debt in the Court of Exchequer for duties and other imports and penalties due the Crown, see *Attorney General* v. *Sewers*, Bunb. 225 (1726); *Attorney General* v. *Hatton*, Bunb. 262 (1728); *Attorney General* v. *Weeks*, Bunb. 223 (1726); *Attorney General* v. *Tooke*, Hardr. 334 (1675); *Attorney General* v. ———, 2 Anst. R. 558 (35 Geo. III); *Attorney General* v. *Stranyforth*, Bunb. 97 (1721); *Sir William Waller* v. *Travers*, Hardr. 301 (1674); *Attorney General* v. *Chitty*, Parker, 37 (1744); *Rex* v. *Malland*, Str. 828; and see Comyn's Digest, Title "Debt," A, 9.

The right of the Government to sue to enforce its civil rights has been recognized as not dependent upon specific act of Congress. *Dugan* v. *United States*, 3 Wheat. 172; *United States* v. *Bank*, 15 Pet. 377; but see for express authority, § 3213, Rev. Stat.

The War Revenue Act did not, either expressly or by implication, forbid the collection by this action of these delinquent stamp taxes due under it. The punitive provisions of the act are not in any sense remedies to make the Government whole for its loss of revenue. These penalties, even if remedies at all, were imposed not for failure to pay the tax but for failure to affix the stamps.

It was not the intention of Congress, in making the punitive provisions under this particular act, to renounce the right to collect the tax; or to offer to the person taxed an alternative choice of penalty or tax. The rule of construction as to exclusive remedies is not applied as against

the Government. The Government is not to be limited to one remedy merely because it was the only one given by the statute creating a right. *Meredith* v. *United States, supra; Dollar Savings Bank* v. *United States, supra; Blacklock* v. *United States*, 208 U. S. 75; *United States* v. *Stevenson*, 215 U. S. 190.

Instead of forbidding resort to the method of collecting the delinquent taxes invoked in this suit, the act, by § 31, explicitly authorizes it. See Endlich on Inter. of Stat., § 396. As to the effect of the repealing act of 1902, 32 Stat. 97, see *Hertz* v. *Woodman*, 218 U. S. 205. It was doubtless assumed that all citizens had dutifully paid their taxes when due; but if not, then the Government's right to collect them was sufficiently preserved by § 13, Rev. Stat.

Mr. D. P. Strickler, with whom *Mr. P. H. Holme* was on the brief, for defendants in error:

That part of the act of June 13, 1898, requiring stamps on deeds does not create a liability authorizing an action of debt against one failing to comply with its requirements. *Lane County* v. *Oregon*, 7 Wall. 71; *Meriwether* v. *Garrett*, 102 U. S. 472; *Crabtree* v. *Madden*, 54 Fed. Rep. 426; *Fleshman* v. *McClain*, 105 Fed. Rep. 610; *McClain* v. *Fleshman*, 106 Fed. Rep. 880; *United States* v. *Chamberlin*, 156 Fed. Rep. 881.

The remedies and penalties prescribed by said part of said act for a violation thereof are exclusive. Cases *supra*, and *United States* v. *Truck's Admr.*, 27 Fed. Rep. 541; *S. C.*, 28 Fed. Rep. 846; *Craft* v. *Schafer*, 153 Fed. Rep. 175; *Thompson* v. *Allen County*, 115 U. S. 550; *Barkley* v. *Levee Comrs.*, 93 U. S. 258; *Heine* v. *Board of Comrs.*, 19 Wall. 655.

Section 31 of said act does not apply. Even if it be conceded it does apply, no statute giving the right asserted is available.

The repeal of the requirements of the act that deeds should be stamped, did not abate the penalty prescribed for a violation thereof. The Government is no more remediless since the repeal than it was before. *Sackett* v. *McCaffrey*, 131 Fed. Rep. 219.

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

The question presented is whether an action lies by the United States to recover the amount of a stamp tax payable under the War Revenue Act of 1898 upon the execution of a conveyance.

If the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action must be regarded as well brought.

At common law, customs duties were recoverable by the Crown by an information in debt or an exchequer information in the nature of a bill in equity for discovery and account. These informations rested upon the general principle "that in the given case the common law or the statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the importation; and that, therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown." *United States* v. *Lyman*, 1 Mason, p. 499. See also Comyn's Digest (Title "Debt," A, 9); Bunbury's Reports, *pp. 97, 223, 225, 262.

Applying this principle it was held in the *Lyman case, supra,* and in *Meredith* v. *United States*, 13 Pet. 486, that the Government was entitled to maintain an action to recover duties upon imports as a personal indebtedness of the importers. The duty to pay was there derived from the language of the act of April 27, 1816, c. 107 (3 Stat., p. 310), that "there shall be levied, collected and paid" the several duties mentioned, and in accordance with an

established rule of interpretation the charge of the duty on the goods was taken to mean a personal charge against the owner. In the case last cited the court by Mr. Justice Story said (p. 493):

"The first question is, whether Smith and Buchanan were ever personally indebted for these duties; or, in other words, whether the importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties due thereon; or the remedy of the United States is exclusively confined to the lien on the goods, and the security of the bond given for the duties. It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer (and the consignee for this purpose is treated as the owner and importer), independently of any lien on the goods, and any bond given for the duties. The language of the duty act of the 27th of April, 1816, ch. 107, under which the present importations were made, declares that 'there shall be levied, collected, and paid' the several duties prescribed by the act on goods imported into the United States. And this is a common formulary in other acts laying duties. Now, in the exposition of statutes laying duties, it has been a common rule of interpretation derived from the principles of the common law, that where the duty is charged on the goods, the meaning is that it is a personal charge on the owner by reason of the goods. So it was held in *Attorney General* v. ———, 2 Anst. R. 558, where a duty was laid on wash in a still; and it was said by the court that where duties are charged on any articles in a revenue act, the word 'charged' means that the owner shall be debited with the sum; and that this rule prevailed even when the article was actually lost or destroyed before it became available to the owner. Nor is there anything

new in this doctrine; for it has long been held that in all such cases an action of debt lies in favor of the government against the importer, for the duties, whenever by accident, mistake, or fraud, no duties, or short duties have been paid."

A similar rule has been applied in the case of internal revenue taxes. *United States* v. *Washington Mills,* by Clifford, J., 2 Cliff. 601, 607; *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Pacific Railroad,* by Miller and Dillon, JJ., 4 Dill. 66; *United States* v. *Tilden,* by Blatchford, J., 9 Ben. 368.

In *Dollar Savings Bank* v. *United States, supra,* an action of debt was sustained to recover the amount of the internal revenue tax imposed by the act of July 13, 1866, c. 184, 14 Stat. 138, on the undistributed gains carried to the surplus fund of the bank. It was objected that the act provided a special remedy for the assessment and collection of the tax and that no other could be used. But the court, finding no prohibition of the remedy by action, held the argument untenable, saying (pp. 238–240):

"It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other States, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies.

"But it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the Internal Revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due

to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the government. They may be obligatory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the State. It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.

"It must, then, be concluded that the government is not prohibited by anything contained in the act of 1866 from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason." See also *United States* v. *Stevenson*, 215 U. S. p. 197.

The statute, in the *Savings Bank case*, contained a provision (now in § 3213, Rev. Stat.) which expressly authorized the bringing of an action. But the court also found a sufficient basis for its judgment in the general power of the Government to collect by suit taxes that are due, where the statute imposing the tax does not deny that remedy.

This point was presented, considered and decided in the determination of the cause and the decision is none the less authoritative because there was another ground for the ultimate conclusion. *Railroad Co.* v. *Schutte*, 103 U. S. p. 143; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. p. 166.

Neither *Lane County* v. *Oregon*, 7 Wall. 71, nor *Meriwether* v. *Garrett*, 102 U. S. 472, relied upon by the defendants, involved the question. In the former case it was held that the acts of Congress of 1862 and 1863, making United States notes a legal tender for debts, had no reference to taxes imposed by state authority. The Legal Tender Acts expressly provided that the notes should be receivable for national taxes and the context forbade the conclusion that Congress intended to include state taxes under the term "debts," and there was hence no conflict with the statute of Oregon which required the taxes due the State to be collected in coin.

In *Meriwether* v. *Garrett*, *supra*, it was held that taxes levied before the repeal of the charter of a municipality, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, could not be collected through the instrumentality of a court of chancery at the instance of the city's creditors. Such taxes could be collected only under authority from the legislature.

A tax may or may not be a "debt" under a particular statute, according to the sense in which the word is found to be used. But whether the Government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive. Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was

incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty. *Stockwell* v. *United States*, 13 Wall. p. 542.

Here the tax was a stamp tax, but the language as clearly imports the obligation to pay as did that of the statute before the court in the *Meredith case, supra.* Section 6 of the War Revenue Act of 1898 provided that there should be "levied, collected and paid" in respect of the instruments mentioned "by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money" set forth in the schedule which followed. There is nothing in the nature of a stamp tax which *per se* negatives either the personal obligation, otherwise to be derived from the words imposing the tax, or its collection by action. The stamp is to be affixed to the instrument "to denote said tax." Sections 7, 13, 14. Section 25 provided that the Commissioner of Internal Revenue should cause to be prepared "for the payment of the taxes prescribed in this Act suitable stamps denoting the tax on the document, article, or thing to which the same may be affixed." The stamp is the evidence, and its purchase the convenient means, of payment. When a statute says that a person shall *pay* a given tax it obviously imposes upon that person the duty to pay, and this may be enforced through the ordinary means adapted to the recovery of a definite sum due, unless that course is clearly prohibited.

The objection was made in the *Savings Bank case, supra*, that the tax had not been assessed. The court held, however, that no other assessment than that made by the statute was necessary in order to determine the extent of the bank's liability. Following this rule, Judge Blatchford said in *United States* v. *Tilden*, 9 Ben. p. 386, where the action was brought to recover unpaid taxes on income: "The extent of the liability of the individual for

income tax is defined by the statute, equally with the extent of the liability of the bank for the tax on undistributed earnings. In each case it is necessary, in an action of debt for the tax, to resort to sources of information outside of the statute, to ascertain the amount on which the per centum of tax fixed by the statute is to be calculated. . . . The difference between the two cases, in that respect, if there be any, will be, in every case, one of degree merely, not of principle. The statute in imposing the per centum of tax on the income of the individual, makes a charge on him of a sum which is certain for the purposes of an action of debt, because it can be made certain through the action of a judicial tribunal, by following the rules laid down in the statute. That is the principle of the decision in the case of the bank, and it controls the present case." See also *King* v. *United States*, 99 U. S. p. 233; *United States* v. *Erie Railway Co.*, 107 U. S. p. 2; *United States* v. *Philadelphia & Reading Railroad Co.*, 123 U. S. p. 114; and *United States* v. *Snyder*, 149 U. S. p. 215. The statute now before us fixes a tax of a specified amount, according to the consideration or value of the lands conveyed.

It is insisted, however, that the provision for penalties excludes the idea of a personal liability. Thus it is made a misdemeanor to sign or issue one of the described instruments to which a stamp has not been affixed, punishable under § 7 by a fine of not more than one hundred dollars, and not exceeding two hundred dollars under § 10 in the case of a bill or note. And under § 13, where there is intent to evade the law, the offense is punished "by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court." The unstamped instrument is made inadmissible in evidence (§§ 7, 14), is not allowed to be recorded (§ 15), and by the provision of § 13 is to "be deemed invalid and of no effect."

But these penalties were provided in order to induce the payment of the tax, and not as a substitute for payment. It cannot be supposed that Congress intended, by penalizing delinquency, to deprive the Government of any suitable means of enforcing the collection of revenue. In large transactions, as in the case at bar, the fine which could be imposed would be much less than the tax, and no reason is suggested why the Government should forego the collection of that which, under the statute, is its due. Punishment by imprisonment, under § 13, is imposed only where it can be shown that there was an "intent to evade the provisions" of the act, and while this remedy is appropriate in such a case, and is for the obvious purpose of discouraging evasion, it is without application where, for any other reason, the tax has not been paid and thereby the Government has lost its revenue. The provision invalidating the instrument is likewise punitive. The object was not primarily to deprive instruments of effect, but to insure the discharge of the obligation to pay; and that obligation would still be undischarged, even though, by reason of the non-payment, the instrument was deemed invalid.

It is insisted, however, that there is no provision for the removal of the ban from the instrument in case the tax were collected by suit and that this shows the intention to bar the latter remedy; for it is said that the purpose could not be to destroy the effect of the instrument and at the same time to compel the payment of the tax.

This argument proceeds upon a misconception of the statute. The provision under which unstamped instruments are made invalid is found in § 13, which also provides a method of validation on making the prescribed payment. The portion of this section which imposes the penalty is of comprehensive scope and must be deemed to include a conveyance of land, as well as the other instruments within the purview of the statute. While the

language of the first proviso, in its original form, specifically referred to "bonds, debentures, or certificates of stock or of indebtedness," this was broadened by the amendment made by the act of March 2, 1901, chapter 806, 31 Stat. 941, so as to embrace "any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this Act." This amendment, in extending an existing opportunity so as expressly to include all instruments mentioned in the schedule, must be construed to refer not only to instruments subsequently executed but to those as well which had been previously made or issued. No different construction is required by the language of the statute, the obvious policy of which was both to supply a measure of relief from the punitive provision and at the same time to encourage the payment of the tax. The provisos of the section as amended are as follows:

"*Provided*, That hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of issuing, selling, or transferring the said bonds, debentures, or certificates of stock or of indebtedness, or any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this Act, and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, or, if said instrument be lost, to a copy thereof, he or they shall appear before the collector of internal revenue of the proper district, who shall, upon the payment of the price of the proper stamp required by law, and of a penalty of ten dollars, and, where the whole amount of the tax denoted by the stamp required shall exceed the sum of fifty dollars, on payment also of interest, at the rate of six per centum, on said tax from the day on which such stamp ought to have been affixed, affix the proper stamp to such bond, debenture, certificate of stock or of indebtedness or copy, or instru-

ment, document or paper of any kind or description whatsoever mentioned in Schedule A of this Act, and note upon the margin thereof the date of his so doing, and the fact that such penalty has been paid; and the same shall thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued: *And provided further*, That where it shall appear to said collector, upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped, at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any willful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then and in such case, if such instrument, or, if the original be lost, a copy thereof, duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within twelve calendar months after the making or issuing thereof, be brought to the said collector of internal revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid and to cause such instrument to be duly stamped. And when the original instrument, or a certified or duly proven copy thereof, as aforesaid, duly stamped so as to entitle the same to be recorded, shall be presented to the clerk, register, recorder, or other officer having charge of the original record, it shall be lawful for such officer, upon the payment of the fee legally chargeable for the recording thereof, to make a new record thereof, or to note upon the original record the fact that the error or omission in the stamping of said original instrument has been corrected pursuant to law; and the original instrument or such certified copy, or the record thereof, may be used in all courts and places in the same manner and with like effect as if the instrument had been originally

stamped: *And provided further*, That in all cases where the party has not affixed the stamp required by law upon any such instrument issued, registered, sold, or transferred at a time when and at a place where no collection district was established, it shall be lawful for him or them, or any party having an interest therein, to affix the proper stamp thereto, or, if the original be lost, to a copy thereof. But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid."

Neither the punitive provision, nor the means thus afforded to escape it through a voluntary payment, indicate an intention to deprive the Government of the right to compel payment by action. The party may pay the tax in the first instance or he may subsequently make payment as the statute provides and thus render the instrument effective. If he is unwilling or fails to avail himself of this opportunity, why should he be heard to insist that because the instrument is made invalid he should escape payment of what is due the Government? In the face of the express requirement of the statute that he shall pay the tax there is no basis for the contention that from the provisions affecting the validity of the instrument should be implied an intent to prohibit the enforcement of the tax by suit.

Further, as the obvious purpose is to validate the instrument in case the prescribed payment is made, the satisfaction of a judgment for the recovery of the tax must be deemed the equivalent of the payment of the price of the stamps under the provisos above quoted. Section 3216 of the Revised Statutes provides: "All judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to collectors as internal taxes are required to be paid." If the case is not one within the second proviso permitting the remission

of the penalty, the additional payment of ten dollars will be required to meet the conditions of the first proviso. But so far as the tax is concerned, the person liable therefor, on satisfying the judgment, will have the same right to have the instrument stamped by the collector as though he had paid the taxes to the officer without suit. Such a case would present no administrative difficulty in accomplishing the intent of the statute.

We have examined the other statutory provisions to which our attention has been called in support of the defense, and we find none of controlling significance, or which taken separately or together detract from the force of the provision imposing the obligation to pay the tax and deprive the Government of the remedy here sought.

We are also of opinion that the statute itself provides that payment may be enforced by action. Section 31 makes "all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed," applicable to the act. Within "administrative" provisions must be included those which relate to the collection of the taxes imposed. For the administration of the statute may well be taken to embrace all appropriate measures for its enforcement, and there is no substantial reason for assigning to the phrase which is used in the section quoted a narrower interpretation. It therefore comprehends the authority conferred by § 3213 of the Revised Statutes in the following words:

"And taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action."

This provision authorizing suit, with the sanction of the Commissioner of Internal Revenue (Rev. Stat., § 3214),

was originally enacted in 1866 (act of July 13, 1866, c. 184; 14 Stat., p. 111) as an amendment of the Internal Revenue act of June 30, 1864, chapter 173 (13 Stat. 239), and included within its scope the stamp taxes then in force. It must be deemed applicable also to the taxes imposed by the act of 1898.

Upon these grounds we conclude that the United States was entitled to maintain this action and that the demurrer should have been overruled. The judgment is therefore

Reversed.

HOUSE *v.* MAYES, MARSHAL OF JACKSON COUNTY, MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 597. Argued December 13, 14, 1910.—Decided January 9, 1911.

The following fundamental principles are not open to dispute:

The Government created by the Federal Constitution is one of enumerated powers, and cannot by any of its agencies exercise an authority not granted by that instrument either expressly or by necessary implication.

A power may be implied when necessary to give effect to a power expressly granted.

While the Constitution of the United States and the laws enacted in pursuance thereof, together with treaties made under the authority of the United States, constitute the supreme law of the land, a State may exercise all such governmental authority as is consistent with its own, and not in conflict with the Federal, Constitution.

The police power of the State, never having been surrendered by it to the Federal Government, is not granted by or derived from, but exists independently of, the Federal Constitution.

One of the powers never surrendered by, and therefore remaining with, the State is to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, safety and health, as well as to promote the public convenience and the common good.

It is within the power of the State to devise the means to be employed to the above ends provided they do not go beyond the necessities of the case, have some real and substantial relation to the object to be accomplished, and do not conflict with the Constitution of the United States.

A State may enact a regulation as to sale and delivery of a commodity by actual weight and prohibit arbitrary deductions under rules of associations, without depriving the members of such associations of their liberty of contract or of their property without due process of law.

The State may, without violating the due process clause of the Fourteenth Amendment, regulate the conduct of boards of trade or exchanges which have close and constant relations with the general public, by such means as are not arbitrary or unreasonable. Such regulations are not interferences with liberty of contract beyond the police power of the State to protect the public and promote the general welfare.

The statute of Missouri of June 8, 1909, to prevent fraud in the purchase and sale of grain and other commodities and which prohibits arbitrary deductions from actual weight or measure thereof under custom or rules of boards of trade, is a valid exercise of the police power of the State and is not unconstitutional as a deprivation of property, interference with liberty of contract, or denial of equal protection of the law.

227 Missouri, 617, affirmed.

THE facts, which involve the constitutionality of an act of the State of Missouri to prevent fraud in the purchase and sale of grain and other commodities, are stated in the opinion.

Mr. Frank Hagerman, with whom *Mr. Kimbrough Stone* was on the brief, for plaintiff in error:

The act denies to plaintiff in error the right to contract. Under the Fourteenth Amendment, freedom of contract is guaranteed. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Holden* v. *Hardy*, 169 U. S. 366, 390; *Lochner* v. *New York*, 198 U. S. 45, 53; *Adair* v. *United States*, 208 U. S. 161, 172.

While freedom of contract must yield to the police

power of the State, there is a limit to the exercise of that power. In the end the court must decide the question. *Mugler* v. *Kansas City*, 123 U. S. 623, 661; *State* v. *Tie Co.*, 181 Missouri, 536, 559; *State* v. *Cantwell*, 179 Missouri, 245, 263; *State* v. *Loomis*, 115 Missouri, 307, 316. There must be some reasonable grounds for the legislative interference, or it cannot be justified. *Bonnett* v. *Vallier*, 136 Wisconsin, 193, 203; *State* v. *Redmon*, 134 Wisconsin, 89, 110; *Harding* v. *People*, 160 Illinois, 459.

On the ground of unreasonable interference with the liberty of contract, the courts have condemned legislative acts prescribing maximum hours of labor, *Lochner* v. *New York*, 198 U. S. 45; making unlawful contracts of employment forbidding membership in labor unions, *State* v. *Julow*, 129 Missouri, 163; *People* v. *Marcys*, 189 N. Y. 257; *Gillespie* v. *People*, 188 Illinois, 176; *Coffeyville B. & T. Co.* v. *Perry*, 69 Kansas, 297; *State* v. *Bateman*, 7 Ohio N. P. 487; *Zillmer* v. *Kreutzberg*, 114 Wisconsin, 530; *Goldfield Mines Co.* v. *Miners' Union*, 159 Fed. Rep. 500; requiring stipulations in contracts for public work that none but union labor be employed, *Atlanta* v. *Stein*, 111 Georgia, 789; *Marshall Co.* v. *Nashville*, 109 Tennessee, 495; *Adams* v. *Brennan*, 177 Illinois, 194; *Holden* v. *Alton*, 179 Illinois, 318; *Fiske* v. *People*, 188 Illinois, 206; *Furniture Co.* v. *Toole*, 26 Montana, 22; *Lewis* v. *Board of Education*, 139 Michigan, 306; *Rodgers* v. *Coler*, 166 N. Y. 1, 59; making it criminal to discharge an employé because he is a member of a labor organization, *Adair* v. *United States*, 208 U. S. 161; requiring contractors to pay certain minimum wages, *Street* v. *Electrical Supply Co.*, 160 Indiana, 338; *State* v. *Norton*, 5 Ohio N. P. 183; regulating the time of payment of wages in defiance of contract, *Leep* v. *Railway Co.*, 58 Arkansas, 407; *Braceville Coal Co.* v. *People*, 147 Illinois, 66; *Railway Co.* v. *Wilson* (Tex.), 19 S. W. Rep. 910; *Republic I. & S. Co.* v. *State*, 160 Indiana, 379; *Commonwealth* v.

Isenburg, 4 Pa. Dist. R. 579; *Bauer* v. *Reynolds*, 3 Pa. Dist. R. 502; prohibiting payment of laborers otherwise than in money, *State* v. *Loomis*, 115 Missouri, 307; *State* v. *Goodwill*, 33 W. Va. 179; *Godcharles* v. *Wigeman*, 113 Pa. St. 431; *State* v. *Hann*, 61 Kansas, 146; *Jordan* v. *State*, 51 Tex. Crim. 531; *Avent Coal Co.* v. *Commonwealth*, 96 Kentucky, 218; prohibiting mine owners from dealing in supplies, provisions, etc., *Froer* v. *People*, 141 Illinois, 171; forbidding sale of supplies to employés at greater price than to others, *State* v. *Fire Creek Co.*, 33 W. Va. 118; forbidding deduction of wages because of defective work, *Commonwealth* v. *Perry*, 155 Massachusetts, 117; or for any reason except for actual cash advanced, *Kellyville Coal Co.* v. *Harrier*, 207 Illinois, 624; requiring employers to give discharged employés written reasons for discharge, *Wallace* v. *Railway Co.*, 94 Georgia, 732; *New York Ry. Co.* v. *Schaffer*, 65 Oh. St. 414; requiring a day's labor to consist of eight hours, *Low* v. *Rees Printing Co.*, 41 Nebraska, 127; requiring sleeping car companies, upon request of occupant of lower berth, to raise upper berth if not occupied, *State* v. *Redmon*, 134 Wisconsin, 89, 110; requiring all contractors for erection of buildings to give bond for benefit of material men, *Montague & Co.* v. *Furness*, 145 California, 205; forbidding cigar making in tenement houses, *In re Jacobs*, 98 N. Y. 98; regulating weight of loaves of bread, *Buffalo* v. *Collins Baking Co.*, 39 App. Div. (N. Y.) 432; giving state board power to refuse or grant nurseryman's license as it might think applicant financially responsible or not, *Hawley* v. *Nelson* (S. D.), 115 N. W. Rep. 93; requiring certain bonds to be secured by surety companies as sureties, *McKell* v. *Robins*, 71 Ohio, 273; prohibiting location of laundry without consent of certain property owners, *Ex parte Sing Lee*, 96 California, 354; *Laundry Ordinance Case*, 13 Fed. Rep. 229; or unless permitted by board of supervisors, *Yick Wo* v. *Hopkins*, 118 U. S. 373; requiring production of cer-

tificate showing payment of all taxes due before recording conveyance of real estate, *Baldwin* v. *Moore*, 7 Washington, 173; forbidding sale of groceries and provisions in same store where dry goods, clothing or drugs are sold, *Chicago* v. *Nitcher*, 183 Illinois, 104; making gift of premium stamps with purchase a crime, *Appel* v. *Zimmermann*, 102 App. Div. (N. Y.) 103; *Madden* v. *Dycker*, 72 App. Div. (N. Y.) 308; prohibiting selling of any article upon inducement of a premium, *People* v. *Gillison*, 109 N. Y. 397; requiring mine owners to provide scales for weighing coal and to make the weight of coal the basis of wages, *Millett* v. *People*, 117 Illinois, 294; *In re House Bill No. 203*, 21 Colorado, 27; requiring payment for coal mined to be based on coal before screened, *Ramsey* v. *People*, 142 Illinois, 380; *Re Preston*, 63 Oh. St. 428; *Whitebreast Fuel Co.* v. *People*, 175 Illinois, 51; making it criminal to offer real estate for sale without written authority, *Fisher Co.* v. *Woods*, 187 N. Y. 90; putting onerous restrictions upon keeping of private asylums for insane, *Ex parte Whitwell*, 98 California, 73.

The Board of Trade was a voluntary association of great service to the public and the alleged rule was but a reasonable provision in a written contract between plaintiff in error and others. *Tompkins* v. *Saffrey*, L. R. 3 App. Cas. 213, 228; *Moffatt* v. *Kansas City Board of Trade*, 111 S. W. Rep. 894, 900; *Hopkins* v. *United States*, 171 U. S. 578, 597; *Nicol* v. *Ames*, 173 U. S. 509; *Greer* v. *Stoller*, 77 Fed. Rep. 1; The Law and Customs of the Stock Exchange by Melsheimer and Gardner (3d Ed., London, 1891), 98; *Clark* v. *Foss*, 7 Biss. 547, 555; Bisbee and Simon's Exchanges, Preface VI.

The fact that a membership fee is charged, makes no difference as to the rights of the parties. The association owns no property, there is a mere membership, the fee being paid as an aid to carry the expense of the organization. The very definition of an exchange excludes the

idea of having property interests. *White* v. *Brownell*, 2 Daly, 329; *Leech* v. *Harris*, 2 Brewst. (Pa.) 571, 575; *In re Haebler*, 149 N. Y. 414, 428; *American Com. Co.* v. *Chicago Live Stock Exchange*, 143 Illinois, 210, 226; 23 Am. & Eng. Ency. of Law, 749; *Seymour* v. *Bridge*, 14 Q. B. Div. 460, 465; *Belton* v. *Hatch*, 109 N. Y. 593, 596; *Commercial Telegraph Co.* v. *Smith*, 47 Hun, 494, 505; *Board of Trade* v. *Nelson*, 162 Illinois, 431, 438; *People* v. *New York Commercial Association*, 18 Abb. Pr. 271, 279; *Vaughn* v. *Herndon*, 91 Tennessee, 64; *Evans* v. *Chamber of Commerce*, 86 Minnesota, 448; *People* v. *Chicago Board of Trade*, 80 Illinois, 134; *Metropolitan Grain Exchange* v. *Board of Trade*, 15 Fed. Rep. 847.

There is a vast difference between the rights of a member of a voluntary, unincorporated institution and those of a shareholder of a corporation. 1 Thompson on Corporations, § 846; Bacon on Benefit Societies, § 89; Niblack on Benefit Societies, §§ 22, 30, 73; *Kehenbeck* v. *Logeman*, 10 Daly (N. Y.), 447.

Mr. Elliott W. Major, Attorney General of the State of Missouri, with whom *Mr. John M. Atkinson* was on the brief, for defendant in error:

The legislature has the right to enact laws preventing and abolishing self-imposed rules of boards of trade which have been adopted as to weights and measures; such legislation is within the police power of the State. The State can abolish any custom or usage among merchants or others as to what shall constitute the unit of weight. *Pittsburg Coal Co.* v. *Louisiana*, 156 U. S. 590.

The statute is leveled at rule 18, adopted by the Board of Trade, whereby it arbitrarily deducts from every car of grain one hundred pounds of its weight.

The deduction of the one hundred pounds, as made by the rule, is a fraud or trespass upon the rights of others. It is the duty of the State to prevent same, because the

action to recover is not adequate on account of the frequency and multiplicity of the acts.

The law is in the interest of fair dealing and common honesty. It prevents the taking of the property of the citizen by arbitrary rule without that "due process of law" about which plaintiff in error has said so much. *House* v. *Mayes*, 227 Missouri, 641; *McLean* v. *Arkansas*, 211 U. S. 550; Tiedeman, Police Power, § 89.

The public has such an interest in and is so affected by the dealing of boards of trade, that the legislature can control same.

Making the deduction of any amount from the actual weight of certain commodities by reason of any custom or rule of a board of trade a misdemeanor, as provided in the Missouri statute, is a valid exercise of the police power of the State.

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as those to promote public health, morals or safety; it is not confined to the expression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the State. 30 Am. & Eng. Ency. Law (2d Ed.), 451; *People* v. *Wagner*, 86 Michigan, 599; *State* v. *Wilson*, 61 Kansas, 32; *Pittsburg Coal Co.* v. *Louisiana*, 156 U. S. 590; *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391; Cooley on Const. Lim. (6th Ed.), 744; *Green* v. *Moffitt*, 22 Missouri, 529; *Evans* v. *Myers*, 25 Pa. St. 114; *Noble* v. *Durrell*, 3 T. R. 271; *St. Cross* v. *Howard*, 6 T. R. 338; *Mayes* v. *Jennings*, 4 Humph. (Tenn.) 102; *Harris* v. *Rutledge*, 19 Iowa, 388; Tiedeman's Police Power, § 89; 1 Bishop's New Criminal Law, § 234; *McLean* v. *Arkansas*, 211 U. S. 546, 550; *Williams* v. *Arkansas*, 217 U. S. 79; *New York* v. *Miln*, 11 Pet. 105; *Thurlow* v. *Massachusetts*, 5 How. 628; *Holden* v. *Hardy*, 169 U. S. 380; *Bacon* v. *Walker*, 204

U. S. 317; *Welch* v. *Swasey*, 214 U. S. 105; *C., B. & Q. Ry. Co.* v. *Drainage Com.*, 200 U. S. 592; *Gundling* v. *Chicago*, 177 U. S. 183; *Jacobson* v. *Massachusetts*, 197 U. S. 11.

The State, under its police power, has the right to prevent fraud generally, in any transaction, and especially in weights and measures of the commodities of life. Freund, Police Power; Tiedeman, Police Power, § 260.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error was proceeded against by information filed in the Criminal Court of Jackson County, Missouri, under a statute of Missouri, which was passed June 8, 1909, and is entitled "An act to prevent fraud in the purchase and sale of grain and other commodities." The statute reads: "§ 1. Every sale of grain, seed, hay or coal shall be made on the basis of *the actual weight thereof*, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so *by reason of any custom or rule of a Board of Trade or any pretense whatsoever*, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense. § 2. No agent or broker selling any grain, seed, hay or coal shall have authority, under claim or right to do so *by reason of any custom or rule of Board of Trade*, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void." Mo. Sess. Acts, 1909, p. 519; Mo. Rev. Stat., §§ 11969, 11970.

The information charged that the accused, on the first day of September, 1909, at the County of Jackson, State of Missouri, purchased from one James Anderson a carload of wheat, by weight, and unlawfully took and de-

ducted from the actual weight one hundred pounds, pretending and claiming the right to make such deduction, and to have and keep the said one hundred pounds so deducted free of charge and cost to him, under and by virtue of a rule and custom of the Board of Trade of Kansas City, Missouri.

Having been arrested on a capias and being held in custody by the defendant as Marshal, the accused presented to the Criminal Court an application for a writ of *habeas corpus*—claiming that he was deprived of his liberty in violation of the Fourteenth Amendment of the Constitution of the United States. The application was denied, but it was subsequently granted by the Supreme Court of the State. The latter court upon final hearing also denied the application, and ordered that the petitioner be remanded to the custody of the Marshal. The case is now here for review, upon assignments of error which question the constitutional validity of the statute under the Fourteenth Amendment.

The case was heard upon an agreed statement of facts, the parties reserving all questions as to the relevancy of any particular fact therein stated. As the case is of some importance it will be appropriate to set forth the above statement in full, as follows: "Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties: There are competitive grain markets at Galveston, Texas; Chicago, Illinois; Omaha, Nebraska; Atchison and Wichita, Kansas, and St. Louis, St. Joseph and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market course of grain. That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place

where such persons can meet and, under rules of safety and convenience, transact such business. Its objects are: 'To maintain a Board of Trade, to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.' Its members are governed by rules and regulations, enacted by the members, and which form part of the written contract of association between them. This organization provides for the exclusive use of its members a trading floor, where grain is bought and sold only under and according to said rules. Three of said rules are: '§ 16. The weight Supervising Committee shall have supervision, through the Weight Department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this Board, and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employé of any elevator, mill, warehouse, transfer or team tracks, or by any person or persons under agreement with the same; or the buying or receiving of any such sweepings or cleanings by any member of this Association is prohibited. § 17. Violations of any of the provisions of section 16 of this article shall subject the members so violating to a fine of $50.00 for the first offense, to a fine of $100.00 for the second offense, to expulsion and forfeiture of membership for the third offense. § 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred lbs. per car shall be

made to the buyer, to cover loss on account of dirt and other foreign matter.' That said Board of Trade maintains a bureau of weights, which strictly enforces rule 16. That rules 16 and 17 were enacted to secure to the seller full weight of the entire contents of the car and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain, which was unloaded at Kansas City. Before grain is sold it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience had shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt, and the one hundred pound quantity was taken as a fair average. The members of said Board of Trade buy and sell sometimes as commission men for outsiders and sometimes for their own account, and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for some one else. The buying and selling of grain on the floor of said Board of Trade is as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of all such contracts of sale there is a rule of said Board of Trade forbidding the disclosure of outside principals and holding the member in all cases as the principal. There are also rules making a membership responsible for the faithful performance of such contracts. That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept. That

the method of making the reduction is to weigh the loaded car; then after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of the carload of grain, the deduction of one hundred pounds being also noted on that slip and settlement made for this balance. That is, the weight of the entire contents of the car is shown, and also the one hundred pounds' deduction on the face of the account sales given the seller. That upon the first day of September, 1909, your petitioner [House] bought upon the trading floor of said Board of Trade, and from a member thereof, a carload of wheat on Kansas City unloading weights. In accordance with the above method and under said rule 18, he deducted one hundred pounds and made settlement for the balance. The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right, and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had been said between the member selling and his principal as to the allowance of the one hundred pounds. Both your petitioner and the seller understood at the time of sale that it was made subject to this rule."

An extended discussion of the general question of constitutional law raised by the assignments of error is rendered unnecessary by former decisions of this court. There are certain fundamental principles which those cases recognize and which are not open to dispute. In our opinion, they sustain the power of the State to enact the statute in question. Briefly stated, those principles are: That the Government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary

to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the Supreme Law of the Land, a State of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own constitution or the Constitution of the United States. The cases which sanction these principles are numerous, are well known to the profession, and need not be here cited.

Applying these principles to the present case we cannot say that the statute in question is in conflict with the Constitution of the United States. The Supreme Court of Missouri well observed that the object of the statute was to prevent the enforcement of a rule of a board of trade, under the ordinary operation of which unfair and fraudulent practices occur, or would most probably occur, in the sale of grain and the other commodities named. That court said:

"The provision of the act which petitioner is charged

with having violated is that part thereof which prohibits any purchaser of grain from deducting any amount from the actual weight under a claim of right to do so by reason of any custom or rule of the Board of Trade and it is the rule of the Kansas City Board of Trade at which this act is really aimed. The petitioner claims that this act is unconstitutional because it prohibits him from deducting an arbitrary amount, to wit, one hundred pounds from each and every car of grain, irrespective of the fact whether or not it actually contains any dirt or foreign substance. While conceding in the agreed statement of facts that there is no method of accurately determining the percentage of such foreign matter and dirt he assumes that there will be an average of one hundred pounds to each car. He admits that in grading wheat, dirt and foreign matter are taken into account in determining the value of the grain, but the Kansas City Board of Trade have arbitrarily added to this and deducted one hundred pounds from every car, so that if A shipped a car of grain to Kansas City to a member of the Board of Trade, which was entirely free from dirt or foreign matter, under this rule one hundred pounds would be deducted and he loses the value of this one hundred pounds and receives no compensation therefor, but is told that he must submit to this because some other shipper may ship a carload of grain containing two hundred pounds of dirt or foreign matter, thus the grain of A which contains no dirt is taken without compensation and the man who shipped a carload of grain with two hundred pounds of dirt suffers a deduction of only one hundred pounds. . . . 1 *Bishop's New Crim. Laws*, 234. It prohibits merely the taking of one man's property by another without compensation. It imposes no unjust burden upon the purchaser but simply inhibits his deduction from the wheat he purchases, a part thereof which he would take without paying the seller therefor by virtue, not of any

agreement with the seller, but by virtue of a rule made by an association of which he is a member."

Again, the Supreme Court of the State says: "Petitioner insists that by prohibiting him from making the deduction of one hundred pounds his property is taken without due process of law. We agree with the Attorney General that he has reversed the conditions. To strike down this act will be to permit him to continue to take the shipper's property without due process of law, and without any compensation therefor. Without further elaboration, we are of the opinion that this act is a valid one and it is wisely aimed to prevent unjust and unfair practice and to repeal and nullify a rule of the Board of Trade which is unjust and unfair and contrary to good morals and fair dealings, and the act offends against no provision of the Constitution."

Reference has been made to the fact that the Board of Trade of Kansas City is a voluntary association of individuals who perform great service to the public, and that its purpose is to enforce, as between its members, a high standard of business dealings. Let all this be granted, and yet it must be held that the Board, in the management of its affairs, has such close and constant relations to the general public, that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the State necessary or needful to protect the people against unfair practices that may likely occur from time to time. Such regulations do not, in any true sense, interfere with that "liberty of contract" which the individual members of the Board of Trade are undoubtedly entitled, under the Constitution to enjoy, without unnecessary interference from government; for, the liberty of contract which that instrument protects against invasion by the State is subject to such regulations of the character just stated, as the State may establish for the protection of the public

and the promotion of the general welfare. If such state regulations are not unreasonable, that is, not simply arbitrary nor beyond the necessities of the case, they are not forbidden by the Constitution of the United States. We so adjudge on both principle and authority.

The judgment of the Supreme Court of Missouri is

Affirmed.

MR. JUSTICE MCKENNA concurring.

THE CHIEF JUSTICE and myself concur in the judgment solely on the ground that it is competent for the State of Missouri to provide that, in the absence of an express contract to which the owner of the articles sold on the Board is a party, the rule of the Kansas City Board of Trade shall not prevail.

BRODNAX *v.* STATE OF MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 598. Argued December 14, 1910.—Decided January 9, 1911.

In this case, as the statute shows on its face that the subject regulated needed to be regulated for the protection of the public against fraudulent practices to its injury, this court is not prepared to declare that the State has acted beyond its power or the necessities of the case.

While it is the duty of the Federal courts to protect Federal rights from infringement, they should not strike down a police regulation of a State that does not clearly violate the Federal Constitution; they cannot overthrow police legislation because they consider it unwise or inexpedient. *House* v. *Mayes*, *ante*, p. 270.

Although the due process clause of the Fourteenth Amendment secures liberty of contract, it does not confer liberty to disregard lawful police regulations of the State established by the State for all within its jurisdiction.

A classification of persons keeping places where stocks, bonds and such commodities as grain, petroleum and cotton are dealt in for future and not actual delivery, is a reasonable one and not a denial of equal protection of the laws.

The fact that commodities in course of transportation in interstate commerce are dealt in at certain places does not render a state police statute regulating sales, and imposing stamp tax on records of transactions thereat, which is otherwise valid, an unconstitutional regulation of interstate commerce. *Hatch* v. *Reardon*, 204 U. S. 502.

It is not a violation of the due process, or equal protection, clause of the Fourteenth Amendment, or an unconstitutional regulation of interstate commerce, for a State to prohibit the keeping of a place where purchases or sales are made of stocks, bonds, petroleum, grain, cotton, etc., on margins or otherwise, not paid for or delivered at the time, without record of sale and stamp tax, by a statute applicable to all persons keeping such places, and so held as to the Missouri statute to that effect of March 8, 1907.

THE facts, which involve the constitutionality of a statute of Missouri prohibiting the keeping of places for dealing in stocks, bonds and commodities for future delivery except under certain conditions, are stated in the opinion.

Mr. Frank Hagerman, with whom *Mr. Kimbrough Stone* was on the brief, for plaintiff in error:

The act is not limited to all sales of any particular commodity, but are those of particular things, *i. e.*, corporate bonds and stocks, petroleum, cotton, grain and provisions.

No provision is made for the collection of the tax from any person or property. For its enforcement, reliance must be placed solely upon the coercion flowing from the criminality involved in a violation of its terms.

As against the keeper, as each plaintiff in error was, this act must, if at all, be sustained as a police regulation, and as such it is void because interfering with the liberty of contract and because it is discriminatory.

The Fourteenth Amendment secures to everyone the right to carry on a business and to make all contracts

needful for the purpose. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Holden* v. *Hardy*, 169 U. S. 366, 390; *Lochner* v. *New York*, 198 U. S. 45, 53; *Adair* v. *United States*, 208 U. S. 161, 172. This right to contract is of no value if there be no power to extend credit, or if one to buy or sell must have immediate delivery.

The police power of the State cannot be exercised unreasonably nor in an arbitrary manner, and whether it has been or not is a question solely for the courts. Cases *supra*.

The act considered as a police regulation is discriminatory. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Godard*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *State* v. *Loomis*, 115 Missouri, 307, 314; *State* v. *Julow*, 192 Missouri, 163, 177; *State* v. *Walsh*, 136 Missouri, 400, 405; *State* v. *Mikisek*, 225 Missouri, 561, 577.

It singles out certain articles, the sale of which at certain places is lawful and not harmful, but absolutely necessary, and attempts to classify those who there sell on credit or for future delivery, as distinguished from those who sell the same articles for the same prices for cash and make present delivery. No case has ever gone to the extent of sustaining such classification for any purpose whatever. Such classification is arbitrary, artificial and fanciful, and does not rest upon a distinction differentiating the particular persons to be affected. Gray on Limitation of Taxing Power, § 1435; *Southern Ry. Co.* v. *Greene*, 216 U. S. 406, 417; *People* v. *Mensching*, 187 N. Y. 8; *Barbier* v. *Connolly*, 113 U. S. 27; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 37; *Tiernan* v. *Rinker*, 102 U. S. 123; *Webber* v. *Virginia*, 103 U. S. 344; *Walling* v. *Michigan*, 116 U. S. 446; *State* v. *Gorbroski*, 111 Iowa, 496; *O'Keefe* v. *Summerville*, 190 Massachusetts, 110.

See also where laws have been held to be discriminatory when they impose a tax only upon foreign unnaturalized laborers, *Juniata Limestone Co.* v. *Fagley*, 187 Pa. St. 193; *Fraser* v. *Conway*, 6 Pa. Dist. R. 555; on peddlers, except those "persons who have served in the Union army or navy," *State* v. *Garbroski*, 111 Iowa, 496; on taxable inhabitants who had not paid a previous assessment, *State* v. *Township*, 36 N. J. L. 66; on peddlers and transient merchants but not upon permanent merchants doing the same kind of business, *State ex rel.* v. *Parr*, 109 Minnesota, 147; *State* v. *Wagener*, 69 Minnesota, 206; upon peddlers in the State other than those of a particular county, *Commonwealth* v. *Snyder*, 182 Pa. St. 630; requiring a license from each individual plumber, but providing that the license of one member of a firm or manager of a corporation should be sufficient, *State* v. *Benzenburg*, 101 Wisconsin, 172; *State* v. *Gardner*, 58 Ohio St. 599; providing that a license fee for a place upon one street of a city shall be higher than when it is upon another, *Harrodsburg* v. *Renfro* (Ky.), 58 S. W. Rep. 695. And see *Lassen Co.* v. *Cone*, 72 California, 387.

The act is unconstitutional as regulating interstate commerce.

This court will look through forms to the substance of things and if in substance there is any interference, state legislation so interfering must fall, no matter how general its form and even though interstate transactions are not specifically mentioned. *West. Un. Tel. Co.* v. *Coleman*, 216 U. S. 1; *Galveston, H. & T. R. Co.* v. *Texas*, 210 U. S. 217; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *International Book Co.* v. *Pigg*, 217 U. S. 91.

If the act be treated as an occupation or license tax, or one for facilities used for such sale, it is still in substance a tribute laid upon property engaged in interstate commerce. *Bivin* v. *Maryland*, 12 Wheat. 419; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Lyng* v.

Michigan, 135 U. S. 161; *Asher* v. *Texas*, 128 U. S. 129; *Brennan* v. *Titusville*, 153 U. S. 289; *Stockard* v. *Morgan*, 185 U. S. 27; *Atlantic & P. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 163; *Kehrer* v. *Stewart*, 197 U. S. 60, 65.

Mr. Elliott W. Major, Attorney General of the State of Missouri, with whom *Mr. John M. Atkinson* was on the brief, for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an indictment in the Criminal Court of Jackson County, Missouri, against the defendants in error Brodnax and Essex. It is based on a statute of Missouri, approved March 8th, 1907, (Mo. Sess. Acts, 1907, pp. 392-393; Mo. Rev. Stat., 1909, §§ 10228, 10229 and 10230), which declares it to be "unlawful for any corporation, association, copartnership or person to keep, or cause to be kept, in this State, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser and the time of delivery in a book kept for that purpose; and at the time the seller shall deliver to the purchaser a written or printed memorandum of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents, which the seller shall purchase of the State Auditor, and have on hand before making such sale; and it shall be the duty of the State Auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application and

payment for said stamps, to immediately furnish the same to the applicants applying therefor: Provided, further, and it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for. § 2. The fund arising from the sale of the stamps provided for in section one of this act shall, in the hands of the State Auditor, constitute a road fund; and it shall be the duty of the said Auditor to distribute said fund, annually, to the counties in the State and the city of St. Louis, in the same proportion and in like manner as the State school funds are now distributed by him. § 3. Any person, whether acting individually or as a member, or as an officer, agent or employé of any corporation, association or copartnership, who shall be guilty of violating any of the provisions of section one, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, nor to exceed one year."

The indictment charges that the defendants, being officers and agents of the Board of Trade of Kansas City, Missouri, did, at a time specified, willfully and unlawfully keep and cause to be kept a *place* commonly called the trading floor of the Board of Trade of Kansas City, wherein was permitted the buying and selling of grain, provisions and other commodities, on margins and otherwise, and where at the time of such sales, so permitted the grain, provisions and other commodities so sold, were not actually paid for and delivered, and at such time and place the sellers, or any of them, of the grain, provisions and other commodities, so sold on margins and otherwise, did not then and there cause to be made a complete record of the commodities sold and the time of delivery in a book kept for that purpose, and at said time and place neither the sellers, nor any of them, delivered to the purchasers

a written or printed memoranda of said sales, on which they, the sellers, or any of them, had placed or caused to be placed a stamp of the value of twenty-five cents, which they had purchased of the State Auditor and had on hand before making such sales; contrary to the statutes, etc.

The defendants demurred to the indictment on the ground, among others, that the statute was in violation of the Fourteenth Amendment, as well as of the commerce provision of the Constitution of the United States. The demurrer was overruled and the defendants excepted. A jury was waived, and the case was tried by the court.

Before the introduction of evidence the defendants objected to any proof, resting their objection upon these grounds: 1. That the statute was discriminatory, abridged the privileges and immunities of citizens of the United States, deprived defendants of their property without due process of law, and denied to them the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States. 2. That it was an unwarranted attempt to regulate interstate commerce.

The objection was also made that the statute was in violation of certain alleged provisions of the Constitution of Missouri. But with the latter ground we have, for obvious reasons, no concern on this writ of error from the state court. The above objections to the evidence were overruled, the defendants duly excepting.

For the purpose of the case, and subject to such objections as might be thereafter stated, facts were admitted which brought the case within the provisions of the statute and the averments of the indictment.

The defendant objected to these facts as incompetent and inconsistent with the Constitutions both of the United States and of Missouri. The objections were overruled and the defendant excepted. To the above statement

of admitted facts this was added: "A substantial part of the sales aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce." The State objected to the facts just stated as incompetent and irrelevant. The objection was overruled, and the State excepted.

The result of the trial was a judgment that the defendants were guilty, and they were fined each $50. Motions for a new trial and for the arrest of judgment having been severally denied, the case was taken by appeal to the Supreme Court of Missouri, where the judgment of the trial court was affirmed.

The assignments of error present the same questions of constitutional law that were raised by the defendants' demurrer and objections to evidence.

The words of the statute show that the keeping of a *place* where corporate stocks and bonds, as well as grains, provisions and other commodities were bought and sold, but not paid for at the time, without a complete record of the transaction (including a minute of the time of delivery) in a book kept for that purpose, and without the purchaser receiving a printed or written memorandum of the sale, needed to be regulated, so as to protect the public against unfair or fraudulent practices that might result to the injury or inconvenience of the general public. We are not prepared to hold that the State in this matter has exceeded the bounds of reason, or has legislated beyond the necessities of the case, or has arbitrarily interfered with the course of ordinary business among its people. While it is the duty of the Federal courts, if their jurisdiction be lawfully invoked, to see to it that the constitutional rights of the citizen are not infringed by the State, or by its authorized agents, they should not strike down an enactment or regulation adopted by the State under its police power, unless it be clear that the declara-

tion of public policy contained in the statute is plainly in violation of the Federal Constitution. Much may be done by a State under its police power which many may regard as an unwise exertion of governmental authority. But the Federal courts have no power to overthrow such local legislation, simply because they do not approve it or because they deem it unwise or inexpedient. What we have said in *House* v. *Mayes*, *ante*, p. 270, as to the nature and extent of the police power of the State, is applicable to this case, and need not be here repeated.

Suffice it, on this point to adjudge, as we now do, that the Federal Constitution does not prevent the enforcement by the State of the provision making it unlawful to keep or cause to be kept in the State an office, store, or *place*, where things are omitted to be done which the statute requires to be done at the time bonds and stocks and commodities are sold and bought *in such place*. The defendants were indicted and found guilty of keeping and causing to be kept such a *place* as the statute forbade to be kept or caused to be kept. We do not perceive that any right secured by the Fourteenth Amendment is or has been thereby violated. We could not adjudge otherwise without declaring that the statute was so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions. We are unwilling to so adjudge. Much was said at bar about the "liberty of contract." In a large sense every person has that liberty. It is secured by the provision in the Federal Constitution, forbidding a State to deprive any person of liberty or property without due process of law. But the Federal Constitution does not confer a liberty to disregard regulations as to the conduct of business which the State lawfully establishes for all within its jurisdiction.

It is contended that the statute is in violation of the Fourteenth Amendment, in that the classification of sub-

jects within the limits of the authorities levying the stamp tax is not a true classification. Construing the statute the state court said: "In our opinion, this law clearly embraces every class, whether it be corporation, association, either voluntary or otherwise, partnership or person which furnishes a *place* for dealing in sales of stocks, bonds, etc., upon margins or otherwise, where the same is not at the time actually paid for and delivered, and embraces all classes who may deal in such places so furnished. It is clear that the character of business which is treated of by the statute is fully recognized as a separate and distinct business from all other classes. That the statute embraces every class, whether it be corporation, association, partnership or person who may furnish a place or who may deal in transactions in such places, there can be, in our opinion, no sort of doubt; therefore we conclude that so far as the class of persons to whom this law is made applicable, whether natural or artificial, this statute embraces the entire class and is not subject to the objection that it singles out a part of a legal class upon which the license or stamp tax is imposed and exempts others of the same class. Manifestly the selection of the business calling and the class pursuing such calling were proper and appropriately selected by the legislature of this State in dealing with that subject." Of course, we take the statute as a local law to mean what the court says it means. Nor is there any force in the objection that the classification, as shown by the statute, is arbitrary and unreasonable. The same methods and means are applied equally to all of the same class. *Kentucky R. R. Tax Cases*, 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Barbier* v. *Connolly*, 113 U. S. 27, 32.

Again, it is said that the statute, by its necessary operation, is a regulation of interstate commerce. Not so. It might suffice, in the present case, to say, that under

the facts admitted there is no reason whatever to invoke the commerce clause of the Federal Constitution. All that the defendant offered to show in this connection was that a substantial part of the sales referred to were of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce. With this state of facts and *no more before it* the Supreme Court of the State said: "The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the *places* as well as those who deal in the transaction *in such places*. In other words, in sales of property in the manner and *at the places pointed out* by the statute it is required, where a sale is made in the manner contemplated by that statute that the seller shall make a memorandum of such sale and place upon such memorandum a twenty-five cent stamp. We repeat that transactions of this character have no influence whatever upon commerce between different States, and, as was in substance said by the Supreme Court of the United States [*Hatch* v. *Reardon*, 204 U. S. 152], sales of this character do not contemplate or have anything to do with the transportation of property from one State to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them, happen to be a resident of another State, in no way, legally or practically, affects the transaction and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce, and should not be held invalid for that reason." We add that the indictment deals with the *place* where sales, such as the statute describes, are made. The offense is complete under the statute, by the keeping of such a place, and that occurs before any question of in-

terstate commerce could arise, so far as this record discloses.

We do not perceive that any error of law was committed by the state court, and its judgment is

Affirmed.

REAVES *v.* AINSWORTH, MAJOR GENERAL.

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

No. 14. Argued December 2, 5, 1910.—Decided January 9, 1911.

Under the act of October 1, 1890, c. 1241, 26 Stat. 562, regulating examinations and promotions in the army, the board of examiners may make a provisional order giving the officer a reasonable period for reëxamination and such an order is not final but provisional, and does not deprive the board of jurisdiction to subsequently determine the fitness of officer for duty.

What is due process of law depends upon circumstances. To those in the military or naval service of the United States military law is due process; and the decision of a military tribunal acting within scope of its lawful powers cannot be reviewed or set aside by the courts.

The purpose of the act of October 1, 1890, is to secure efficiency and the only relief from error or injustice in the order of the board is by review of the President. The courts have no power of review.

Courts are not the only instrumentalities of government; they cannot command or regulate the army, and the welfare and safety of the country, through the efficiency of officers of the army, is greater than the value of his commission, or the right of promotion of any officer of the army.

There is a difference between the regular army of the Nation and the militia of a State when not in service of the Nation, and more rigid rules and a higher state of discipline are required in the former than in the latter.

28 App. D. C. 157, affirmed.

THE facts, which involve the validity of an order hon-

orably discharging an officer of the United States Army under the act of October 1, 1890, are stated in the opinion.

Mr. Alexander S. Bacon for plaintiff in error.

Mr. Assistant Attorney General Harr for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error filed a petition in the Supreme Court of the District of Columbia for a writ of certiorari to review the proceedings of a board of examination convened under the authority of the act of Congress of October 1, 1890, entitled "An Act to provide for the examination of certain officers of the Army and to regulate promotions therein," (c. 1241, 26 Stat. 562), and to annul an order made by the President discharging plaintiff in error from the army.

The basis of the petition is that by a prior decision of the board he became entitled, by virtue of the act of Congress, to be retired with three-quarters pay for life.

A writ was issued, directed to General Frederick C. Ainsworth, Military Secretary.

He appeared and moved to quash the writ. The motion was granted and the petition dismissed. The order, however, was subsequently vacated, and, by leave of the court, the petition was amended by making William H. Taft, Secretary of War, one of the respondents.

An amended writ was issued, which the respondents moved to supersede upon the following grounds: the writ was granted improvidently, and upon an *ex parte* application; its allowance would be unjust and contrary to public policy; the petition does not set up any right of property, title or interest in the alleged office; Congress has intrusted to the board of examination the decision of

matters properly arising before it and the court has no jurisdiction by certiorari to examine the proceedings of the board; the allowance of the writ would embarrass the operations of the military service of the United States and the proper administration of the manifold duties of the War Department, hindering the enforcement of its discipline and regulations and the discharge of the legally ordained functions of that branch of the government; the record sought to be reviewed shows that the petitioner (plaintiff in error) "is not entitled to the issuance of the writ, as it appears by a duly certified and true extract from said record." The record was filed with the motion and will be given hereafter.

The motion to supersede was granted, the order reciting "it appearing to the court, without considering the question of discretion, that the writ of certiorari" had been "improperly granted." The petition was dismissed at the cost of the petitioner, which ruling was affirmed by the Court of Appeals.

The Court of Appeals expressed the opinion that the board of examination was military in character and having had jurisdiction of the subject-matter and of the person the courts were without jurisdiction to review its decision.

By § 3 of the act of October 1, 1890, the President is authorized to prescribe a system of examination for all officers below the rank of major, to determine their fitness for promotion, and it is provided "that if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed said examination, shall receive the promotion: *And provided*, That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should

fail for any other reason he shall be suspended from promotion for one year, when he shall be re-examined, and in case of failure of such re-examination he shall be honorably discharged with one year's pay from the army; . . . and no act shall be so construed as to limit or restrict the retirement of officers as herein provided for."

This statute constitutes the law of the case. The material facts are these: Plaintiff in error was a second lieutenant of artillery on sick leave at Fort Hamilton on account of neurasthenia, resulting from overwork in the Philippine Islands. On August 16, 1904, he was ordered for promotion before a board of examination, constituted of five members, two of whom were surgeons. The surgeons found him physically fit for duty, but he was, on their recommendation, allowed to return to Fort Hamilton. On October 5, 1904, while still on sick leave, he was again ordered to Fort Monroe before the same board and forced to take a mental examination. He broke down completely and was found deficient. On May 22, 1905, he was again ordered before the board for reëxamination, and appeared before it on the twenty-third. On the twenty-fourth the board made the following order, which was referred to above in connection with the motion to supersede the writ:

"The board is of opinion that 2d Lieut. Winslow H. Reaves, Art'l Corps, is physically incapacitated for service at the present time, but that there is a reasonable hope of his recovery. Lieut. Reaves' present condition is such that it is not possible for him to proceed with the mental examination, without serious interference with his future recovery.

"His disability is due to severe cerebral and cardio-vascular neurasthenia, contracted in line of duty."

Subsequently he was ordered to appear before the same examining board convened by special order of the President, but changed as to a majority of its members. The

board convened at Fort Monroe August 21, 1905, and he appeared before it pursuant to orders. He was found physically fit for duty. He failed, however, in his mental examination, and, we may assume, although it is not directly averred, that in consequence of the report of the board the President made the order above set out, honorably discharging the plaintiff in error from the service of the United States. This order he attacks and urges that of the twenty-fourth of May as the foundation of his rights and contentions. He maintains that the surgeons having reported as therein set out, and their report having been confirmed by a full board of five officers and forwarded to the Secretary of War, it, under the expressed wording of the statute of October 1, 1890, had the finality of an acquittal of a court martial, "and that, by the operation of the statute," plaintiff in error "was thereupon retired and entitled to retired pay during life, instead of being dismissed from the service with one year's pay," and that, as such right became absolute by the report of the surgeons and the action of the board thereon, the subsequent proceedings of the board were without jurisdiction and void, and that they and the President's order deprived him of his property without due process of law.

Plaintiff in error misunderstands the order of May 24. It is not a final order but a provisional one. It was an indulgence to the afflicted officer, giving him a chance for recovery and promotion and assignment to the active list of his profession. And we have no doubt of the power of the board to make it and reserve jurisdiction for further proceedings.

It is next contended that even if the board had jurisdiction its proceedings subsequent to the order of May 24, 1905, were arbitrary and illegal, and that the relief prayed does not involve the "question of interference with the discretion of the board; it is a question of the jurisdic-

tion of the board and of the fact that discretion, if exercised, was abused." On this contention the averments of the petition have a more pertinent bearing than on the first contention. The petition described with much detail and quite vividly his disability. He alleges that for the last two years he has been suffering from an extremely acute case of cerebral neurasthenia, or nervous exhaustion, for which he has been almost continuously under the care of physicians, some of whom are the most famous in the world as specialists for nervous diseases. And, further, that he is to-day in as bad a condition as at any time during the last two years and is wholly unable to exercise mental effort; his memory is at times a blank, and it is, and for two years has been, utterly impossible for him "to study, read or think consecutively, except for a few moments at a time, and 'his' sleep has not averaged more than about two and one-half hours per day." This was his condition, it is alleged, when he was ordered before the first board. The allegations are supported by an affidavit of Dr. Weir Mitchell and Dr. John K. Mitchell. The affidavit, which was submitted to the first board, illustrated his condition and its effects in various ways and declared that from the experience and knowledge obtained from actual attendance upon him he was not "competent to undergo a mental examination or to do any military duty."

This condition is further set forth in the petition, and the affidavit which accompanied it, with circumstances of emphasis, and there is an intimation that the final action of the board was contrived. The details we may omit. The important facts which are alleged and which, as it is contended, give character to the action of the board as illegal and arbitrary are the following: The board had before it papers from the War Department and his counsel made a series of motions for permission to examine them and to inspect the other evidence, which included

documents of all kinds, reports of surgeons and the report of the surgeons made to the board May 23, 1905.

A motion was also made to strike out the report of the surgeons, on the ground that the report of the examining board of May 24, 1905, was final, and plaintiff in error's retirement was mandatory under said report and the act of Congress of October 1, 1890.

The motions were all denied except the request to produce witnesses. At the request of the board he presented the names of about thirty witnesses who were physicians and had had him under observation for different periods of time, and all of whom could swear to facts, exact symptoms of his malady, and besides could give expert evidence as to his condition while under observation. The names of the witnesses and the facts were given. It was offered to be shown that the reports of the surgeon who had charge of a hospital at Fort McPherson, Georgia, to which plaintiff had been sent, that he was competent to do duty, were not based on facts or the reports of the attendants, "but were prepared negligently, ignorantly, wickedly and corruptly." And an offer was made to produce the attendants with their official reports.

The board refused to call in witnesses, on the ground that the doctors named had already filed certificates, and that the laymen were not expert witnesses. Plaintiff in error was not allowed to call witnesses, nor to inspect exhibits presented to the board, nor to cross-examine the surgeons on their report. All testimony, documentary or otherwise, was taken in secret.

The board went into executive session and formally reported plaintiff in error to be without physical disqualification and competent to take the examination and to do the duty of a first lieutenant of artillery. He was thereupon ordered to take such examination, and attempted to take the same, until prevented by spells of weeping and other marked symptoms of neurasthenia.

Thereupon the post surgeon made a certificate as to his condition and put him on the sick report, and on the following day the surgeons of the board were sent to Fort Monroe and superseded the post surgeon, and plaintiff in error was forced to go through "the farcical form of an examination under the personal supervision of the board surgeons, turning in practically blank examination papers, petitioner's mind being almost a blank."

The prayer is for a writ of certiorari to bring up all of the proceedings which we have detailed, that they may be reviewed and that the following order discharging him from the army be annulled. The order is annexed to the petition as an exhibit and is as follows:

"4. By direction of the President, 2d Lieutenant Wilson Hart Reaves, Artillery Corps, is honorably discharged from the services of the United States, under the provision of the Act of Congress approved October 1, 1890, to take effect September 14, 1905 (1052959, M. S. O.).

"By order of the Acting Secretary of War.

"J. C. BATES,

"*Major General, Acting Chief of Staff.*

"Official: F. C. AINSWORTH,

"*The Military Secretary.*"

And it is further prayed that petitioner be put upon the retired list under the act of October 1, 1890, and the findings of the board of May 24, 1905, and that the proceedings of the board and of the Acting Secretary of War subsequent to that date be found to be void and without effect. And such further relief is prayed as may be just.

The petition is verified and is accompanied by an affidavit of plaintiff in error's counsel, corroborating with some detail its statements of the mental and physical condition of plaintiff in error.

It will be seen that the report of the board of May 24,

1905, is made by the petition, and urged in the argument, as the foundation of the rights of plaintiff in error. It is argued that his commission in the army constituted property of which to be retired from the army, with pay for life, was a valuable attribute, and of which he could not be deprived without due process of law. Such process, he urges, "consists of two independent parts, both of which must be lawful; one, the proceeding before the board of examination and its report, which conforms in all respects to a 'decision' by a judge, which is the foundation of a judgment; second, the confirmation of that report by the President." These being filed, it is further argued all subsequent proceedings affecting them, if without jurisdictional support, as it is contended they are, are void and may be declared so, and plaintiff in error's right to be promoted and put upon the retired list adjudged. But the contention and argument are without foundation, as we have seen, and the case presented by the petition does not exist. It is not necessary therefore to review the able argument of counsel. It is based entirely on the unsound assumption which we have pointed out. Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts. *Johnson* v. *Sayre*, 158 U. S. 109. See also *Mullan* v. *United States*, 212 U. S. 516.

It is contended, however, that the board of examination did not observe the procedure required by law, and that they are bound, as retiring boards are bound under § 1248 of the Revised Statutes, "to inquire into and determine the facts touching the nature and occasion of the disability of an officer, . . . and shall have such powers of a court-martial and of a court of inquiry, as may be necessary for that purpose."

But the act of October 1, 1890, has a different purpose from the retirement of an officer from service. Its purpose is to secure efficiency in those who are to be active in service, and physical capacity, of course, is as necessary as mental capacity, but no fixed procedure is provided by the statute to ascertain either, but by very comprehensive words power is conferred upon the President to "prescribe a system of examination of all officers of the army, to be conducted at special times anterior to the acquiring of the right of promotion as may be best for the interests of the service." This power is exercised through special orders creating examining boards which define their membership and duties. For officers of artillery the board shall consist of five members, two of whom shall be medical officers, and a recorder, all of whom take an oath to act and report impartially. The medical officers are required to make the necessary physical examination of all officers, reporting their opinion to the board by which "all questions relating to the physical condition of an officer shall be determined." The orders directed that "if anything should arise during the examination regarding the introduction of evidence, the inquiry shall proceed upon written interrogatories as far as possible, the board determining to whom questions shall be forwarded." If it becomes necessary to take oral testimony the fact must be reported to the War Department for the necessary orders in regard to witnesses summoned from a distance.

The record, where an officer is found physically disqualified, must be authenticated by all members of the board and the recorder. If the disability be the result of an incident of the service, and the proceedings of the board be approved by the President, the officer "shall be regarded as physically unfit for promotion within the meaning of section 3 of the act of October 1, 1890, and shall be retired with the rank to which his seniority en-

titles him whenever a vacancy occurs that otherwise would result in his promotion on the active list."

If it be disputable whether these provisions guarantee to an officer "the safeguards of a trial in court," it is certain that the decision is not final with the board but must be reported with the proceedings to the President, and may be approved or disapproved by him. This is the only relief from the errors or the injustice that may be done by the board which is provided. The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. And this was the motive of the act of October 1, 1890, and naturally its accomplishment was intrusted to the President. He executed the trust by constituting examining boards, defining their duty and reserving to himself the ultimate review of their proceedings and decision. This is the protection which the act of Congress gives to the rights conferred by it. If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

It is, however, contended that *People ex rel. Smith* v. *Hoffman*, 166 N. Y. 462, sustains the right of review. The case does not support the contention. The decision was based on the statutes of the State, which made, it was

decided, the military board, whose action was reviewed, a judicial tribunal, and its decision subject to be reviewed by certiorari. And, replying to the argument against the existence of the power of the courts to review the determination of a military tribunal and the cases from the Federal courts, adduced to support the argument, the court said, "there is a wide difference between the regular army of the Nation and the militia of a State when not in the service of the Nation," and that "more rigid rules and a higher state of discipline are required in the one case than in the other."

Judgment affirmed.

GERMAN ALLIANCE INSURANCE COMPANY *v.* HALE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

No. 56. Argued and submitted November 29, 1910.—Decided January 16, 1911.

The business of fire insurance is of an extensive and peculiar character, concerning a large number of people; and it is within the police power of the State to adopt such regulations as will protect the public against the evils arising from combinations of those engaged in such business, and to substitute competition for monopoly; and regulations which have a real substantial relation to that end and are not essentially arbitrary do not deprive the insurance companies of their property without due process of law.

All corporations, associations and individuals, within its jurisdiction, are subject to such regulations in respect of their relative rights and duties as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good; and the State may also prescribe, within such limits, the particular means of enforcing such regulations.

Although the means devised by the state legislature for the enforcement of its police regulations may not be the best that can be devised, this court cannot declare them illegal if the enactment is within the power of the State.

A State is not bound to go to the full extent of its power in legislating against an evil from which it seeks to protect the public.

A statute which applies equally to all of the same class and under like conditions does not deny equal protection of the law.

A statute that applies to all insurance companies which unite with others in fixing rates to be charged by each constituent member of the combination does not deny equal protection of the law to the companies so uniting. The classification is neither unreasonable nor arbitrary, but has a reasonable and just relation to the evil which the legislation seeks to prevent.

Where defendant takes no exception to action of the trial court in sustaining demurrer to one of his pleas, but goes to trial on the merits, introduces evidence on other issues, and does not offer evidence on those raised by that plea, this court may fairly assume that he waived or abandoned it on the trial even if he has assigned as error the action of the court in sustaining the demurrer.

Sections 2619, 2620 of the Code of Alabama, 1896, as amended, §§ 4954, 4955, Code 1907, imposing on all insurance companies who are connected with a tariff association a liability to be recovered by the insured of twenty-five per cent in excess of the amount of the policy, are not unconstitutional under the Fourteenth Amendment as depriving such companies of their property without due process of law or denying them the equal protection of the laws.

THE facts, which involve the constitutionality of certain provisions of the Code of Alabama, are stated in the opinion.

Mr. Alex. C. King and *Mr. H. Pillans* for plaintiff in error:

The statute of Alabama (Code of 1896, § 2619), attacked as unconstitutional, is not a condition to the doing of business in the State imposed on foreign corporations; neither is it a penalty put upon one class of litigants; neither is it a part of the costs of one class of cases. It is a discrimination imposed upon a part of the class, to-wit,

fire underwriters, and not upon others, who may have the same contract, the same defenses, who may have charged the same premium and may be in the same relation to the insured. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 153; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 100, 108; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

While classification is allowed, it must not be arbitrary; it must be reasonable with relation to the subject-matter, and such reasonableness is a judicial question. The division is not based on any difference of contract with the plaintiff-claimant. It is not even based on a state of facts necessarily prevailing when the insurance contract was made. The contracts of each insurer may be identical in every respect. Even the membership in a tariff association may have occurred after the policies were all delivered to the assured.

It is a law providing one rule for construction of a private contract in one case, where the same contract between other insurance companies and the insured is differently construed.

The excess liability under the statute is not a penalty, and adjudged as such for making an illegal combination. The insurer may be ever so flagrant in making a combination as to rates affecting the very risk incurred, and the proof may be conclusive as to this. It may defend successfully alone on a breach of covenant not affecting the happening of the loss, the extent of damage done, or the good faith of the plaintiff. If successful on this defense, the verdict is for the defendant, without damages of any kind.

The decisions of the Supreme Court of Alabama on this statute, *Continental Ins. Co.* v. *Parks*, 142 Alabama, 650; *Firemen's Fund Ins. Co.* v. *Hellner*, 49 So. Rep. 297, overlook the true question involved in the claim made that it is void under the Fourteenth Amendment.

These decisions are in conflict with previous decisions

of the Supreme Court of Alabama, the principles of which declare this statute invalid both under the constitution of Alabama and the Fourteenth Amendment. See *South & North R. Co.* v. *Morris*, 65 Alabama, 193; *Louisville & Nashville R. Co.* v. *Baldwin*, 85 Alabama, 627; *Randolph* v. *Builders' & P. S. Co.*, 106 Alabama, 501.

This statute also discriminates against the insurance companies falling within its terms, as against the rest of the community, in that it penalizes them and vitiates clauses of their contracts for making any agreement fixing prices, while no such penalty or consequence is visited on any other litigant. *Wabash &c. R. R. Co.* v. *Illinois*, 118 U. S. 557.

The court below erred in sustaining the demurrers to the plea setting up a breach of the iron safe clause of said policy. *Scottish Un. & Nat'l Ins. Co.* v. *Stubbs*, 98 Georgia, 754, 761; *Georgia Home Ins. Co.* v. *Allen*, 128 Alabama, 451.

The Alabama statute is an unconstitutional interference with the liberty of contract. This intrusion into a contract of yesterday, which was lawful yesterday which can be made, merely because of some act of one of the parties, disconnected with the contract and with the other, to-day, is unlawful. Such legislation has no reasonable tendency to aid in the legitimate accomplishment of any purpose under the police power.

The right to make contracts in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. *McLean* v. *State of Arkansas*, 211 U. S. 539, 547; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45; *L. & N. R. R. Co.* v. *Baldwin*, 85 Alabama, 619, 629.

This law is invalid in so far as it seeks to alter a contract valid at the time it was entered into, because of the supposed misbehavior of one of the parties in his subsequent relations to the State; it undertakes to deprive one

contracting party of his property in behalf of the other contracting party and thus arbitrarily to enrich the latter at the expense of the former.

Mr. Thomas M. Stevens for defendant in error:

The Supreme Court of Alabama has upheld the validity of the statute involved in this case, in *Continental Ins. Co.* v. *Parkes*, 142 Alabama, 650; *Firemen's Fund Ins. Co.* v. *Hellner*, 49 So. Rep. 297; *Ætna Ins. Co.* v. *Kennedy*, 50 So. Rep. 73.

The statute does not discriminate between different insurance companies—the only distinction is that which exists between the innocent and the guilty. The statute does not discriminate between those who violate its terms. The penalties imposed by the statute are not directly or indirectly aimed at an impairment of the insurer's right to defend, but they are intended as a punishment for a violation of the laws of the State. The statute does not impair the obligation of contracts, as its operation is limited to those contracts made after its adoption. *Denny* v. *Burnett*, 128 U. S. 489; *Edwards* v. *Kearzey*, 96 U. S. 595; *McLean* v. *Arkansas*, 211 U. S. 546, 547; *Gundling* v. *Chicago*, 177 U. S. 183.

The purpose of the regulation being laudable and proper, it is not so utterly unreasonable and extravagant in its nature as to be condemned upon that ground. The contention that the effect of imposing the penalty is to take one person's property and bestow it upon another is manifestly unsound.

The selection of those who may recover the statutory penalty is based upon a reasonable classification well within the legislative discretion. *L. & N. R. R.* v. *Baldwin*, 85 Alabama, 619.

The purpose of the law is, not to reimburse the insured, but to punish the insurer for violating the law against combinations and there can be no reason for distinguish-

ing between contracts of insurance made before, and those made after, the entering into the prohibited combination.

The punishment is not so severe and far-reaching as to be classed as unreasonable and arbitrary. To so hold, the court must decide that the punishment goes so far beyond what is necessary as to shock the conscience, and there is nothing in the character, nature or extent of the punishment imposed by the statute which can authorize this court to set aside and hold for naught the legislative will and judgment expressed in and by the enactment of the said statute.

The well-established rule that contracts of insurance are to be construed most strictly against the insurer, is here applicable and relevant.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in one of the courts of Alabama by the defendant in error, Hale, on a policy of fire insurance issued by the German Alliance Insurance Company, a New York corporation.

The policy covered "lumber and square timber while stacked on the banks of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, said lot of lumber and timber containing 300,000 feet," etc.

Upon the petition of the defendant, the case was removed into the Circuit Court of the United States for the Southern District of Alabama, where a verdict was returned for $5,198.93 in favor of the plaintiff. For that amount judgment was rendered against the company. The Circuit Court suggested that the verdict was excessive, and that the motion for new trial would be granted, unless the plaintiff reduced the verdict to $4,112. The required reduction was made and the new trial denied. *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 647.

The principal question presented by the assignments of

error arises out of certain provisions of the Code of Alabama, as follows:

"SECTION 2619. Every contract or policy of insurance hereafter made or issued shall be construed to mean that in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover twenty-five per cent of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding. Provided, at the time of the making of such contract or policy of insurance, or subsequently before the time of trial, the insurer belonged to, or was a member of, or in any way connected with, any tariff association or such like thing by whatever name called, or who had made any agreement or had any understanding with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any kind or class of insurance risk; and, provided further, no stipulation or agreement in such contract or policy of insurance to arbitrate loss or damage nor to give notice or make proofs of loss or damage shall in any such case be binding on the assured or beneficiary, but right of action accrues immediately upon loss or damage.

"SECTION 2620. If it is shown to the reasonable satisfaction of the jury by a preponderance of the weight of the testimony that such insurer at the time of the making of such agreement or policy of insurance or subsequently before the time of trial belonged to, or was a member of, or in any way connected with any tariff association or such like thing by whatever name called, either in or out of this State, or had made any agreement or had any understanding either in or out of this State with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any risk of

insurance on any person or property or on any kind or class of insurance risk, they must, if they find for the assured or beneficiary, in addition to his actual damages, assess and add twenty-five per cent of the amount of such actual loss, and judgment shall be rendered accordingly, whether claimed in the complaint or not." Alabama Code, 1896, §§ 2619, 2620; *Ib.*, 1907, §§ 4954, 4955.

At the time of the contract of insurance the defendant corporation was connected with a tariff association which prescribed the rates of premium to be charged by its constituent members. The verdict and judgment against the company gave effect to that clause of the statute providing that under every contract or policy of insurance, thereafter made or issued by any such association, the assured or beneficiary may, in addition to the actual loss or damage suffered, recover 25 per cent of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding.

The assignments of error present a question of practice which is supposed to be raised by those provisions of the policy which contained a covenant and warranty in these words:

"1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. 2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause and during the continuance of this policy. 3d. The assured will keep such books and inventory, and

also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon. And defendant avers that the assured wholly disregarded the terms, stipulations and conditions of said policy in the following respects, to wit: 1st. He did not keep a set of books as therein provided; 2d. He did not keep said books securely locked in a fireproof safe at night, and at other times as therein provided; 3d. He failed to produce said books for the inspection of the defendant after said alleged loss, wherefore said policy became and was null and void. And the defendant says by reason of the failure and refusal of said plaintiff to comply with the said covenant and warranty in the said particulars the said plaintiff is not entitled to recover in this action, nor to have and maintain this action against the defendant."

The principal question arising on this writ of error is whether the above sections of the Alabama Code are consistent with the Constitution of the United States. The contention is that the provision allowing the insured or beneficiary in a named contingency to recover, in addition to the actual loss or damage suffered by him, twenty-five per cent of the amount of loss or damage so suffered—any stipulation in the contract of insurance to the contrary notwithstanding—deprives the company of its property without due process of law, and also denies to it the equal protection of the laws; thus, it is contended, violating the Fourteenth Amendment of the Constitution of the United States.

In our opinion the statute is not liable to objection on constitutional grounds. The State—as we may infer from the words of the statute alone—regarded the fixing of insurance rates by self-constituted tariff associations or com-

binations as an evil against which the public should be guarded by such legislation as the State was competent to enact. This question was before the Supreme Court of Alabama, and the statute was there assailed as violating both the state and Federal constitutions. That court held that the object of the legislature of Alabama was to prevent monopoly and to encourage competition in the matter of insurance rates, and that the statute was a legitimate exercise to that end of the police power of the State, not inconsistent with either the state or Federal constitution. *Continental Ins. Co.* v. *Parkes*, 142 Alabama, 650, 658, 659. The same view of the statute was taken by the state court in subsequent cases. *Firemen's Fund Ins. Co.* v. *Hellner*, 49 So. Rep. 297; *Ætna Ins. Co.* v. *Kennedy*, 50 So. Rep. 73. We concur entirely in the opinion expressed by the state court that the statute does not infringe the Federal Constitution, nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411. Regulations, having a real, substantial relation to that end, and which are not essentially arbitrary, cannot properly be characterized as a deprivation of property without due process of law. They are enacted

under the power with which the States have never parted, of caring for the common good within the limits of constitutional authority. Insurance companies, indeed, all corporations, associations and individuals, within the jurisdiction of a State, are subject to such regulations, in respect of their relative rights and duties, as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27, 31; *Lake Shore &c.* v. *Ohio*, 173 U. S. 285, 297; *House* v. *Mayes*, *ante*, p. 270.

Much stress is placed by the insurance company on that clause of the statute allowing the insured to recover, in addition to the actual loss or damage suffered, twenty-five per cent of the amount of such loss or damage, if the company, before or at the time of trial belonged to or was connected with a tariff association that fixed rates. We do not think that this provision is in excess of the power of the State. As a means to effect the object of the statute—the discouragement of monopoly or combination and the encouragement of competition in the matter of insurance rates—the State adopted the regulations here in question. It was for the State, keeping within the limits of its constitutional powers, to say what particular means it would prescribe for the protection of the public in such matters. The court certainly cannot say that the means here adopted are not, in any real or substantial sense, germane to the end sought to be attained by the statute. Those means may not be the best that could have been devised, but the court cannot, for any such reason, declare them illegal or beyond the power of the State to establish. So far as the Federal Constitution is concerned, the State could forbid, under penalty, combinations to be formed within its limits, by persons, associations or corporations engaged in the business of insurance, for the purpose of fixing rates. But it is not bound to go to that extent in its

legislation. It may, in its discretion, go only so far as to impose upon associations or corporations acting together in fixing rates, a liability to pay to the insured, as part of the recovery, a certain per cent beyond the actual loss or damage suffered, if, before or at the time of suit on the contract of insurance, it is made to appear that the company or corporation sued is part of or connected with a tariff rate association. Such a provision manifestly tends to discourage monopoly or combination and to encourage competition in a business in the conduct of which the general public is largely interested.

Equally without basis on which to rest is the contention that the statute violates the clause of the Fourteenth Amendment, forbidding a State to "deny to any person within its jurisdiction the equal protection of the laws." We will assume, for the purposes of this case, that this company is within the jurisdiction of the Federal court so as to entitle it to claim the benefit of that provision of the Fourteenth Amendment. *Blake* v. *McClung*, 172 U. S. 239, 260. We are yet clearly of the opinion that the statute does not, within the meaning of the Constitution, deny the insurance company the equal protection of the laws. The statute applies only to associations or corporations that unite in fixing the rates of insurance to be charged by each constituent member of the combination. Looking at the evil to be remedied, that was such a classification as the State could legally make. It is neither unreasonable nor arbitrary within the rule that a classification must rest upon some difference indicating "a reasonable and just relation to the act in respect of which the classification is proposed." The legislature naturally directed its enactment against insurance companies or corporations which before or at the time of trial were found to be members of an insurance tariff association that fixed rates. No principle of classification required it to include insurance associations that were free to act, in

the matter of rates, upon the merits of each application for insurance, unaffected by any agreement or arrangement with other companies. All insurance companies, persons, or corporations engaged in the business of insurance as agent or otherwise with associations, persons or corporations which acted together in fixing rates are placed by the statute upon an equality in every respect, and, therefore, it cannot rightfully be contended that the plaintiff in error is denied the equal protection of the laws. Whatever "liberty of contract" they had must have been exercised in subordination to any valid regulations the State prescribed for the conduct of their business. Statutes that apply equally to all of the same class and under like conditions cannot he held to deny the equal protection of the laws; for, as this court has adjudged, "the equal protection of the laws is a pledge of the protection of equal laws" to all under like circumstances. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 367; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703.

One of the assignments of error for this court, the ninth, is that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea numbered two, in which reference was made to the above provisions, alleged to be embodied in the policy and which make it the duty of the assured at stated times to take an inventory of stock on hand and keep a set of books to be securely locked in a fireproof safe at night. To that plea the plaintiff demurred upon these separate grounds: 1. It did not appear that the plaintiff was bound by the provision of the policy referred to in the plea. 2. The property insured was of such a character that the policy set up in the plea was not applicable thereto. 3. It did not appear that the property insured was of such a character that the provision of the policy, as set up in the plea, was applicable thereto. 4. It was not made to appear by the plea that there was any purchase, sales and shipment or other business transacted from the time the

policy was issued until the time of the loss which affected or related to the property insured. The demurrer was sustained, but no exception appears to have been taken to this action of the court. The defendant did not stand upon his plea, and went to trial upon the merits of the case, without objection, and introduced evidence upon other issues in the case, but at the trial no evidence was offered or introduced on either side relating to the matters set out in the second plea. Under these circumstances, we are not required to consider the questions raised by that plea. On this record we may fairly assume that the defendant, at the trial, waived or abandoned the issues raised by the plea. *Garrard* v. *Lessee of Reynolds*, 4 How. 123, 126; *Weed* v. *Crane*, 154 U. S. 570. Restricting this decision to the points herein before discussed the judgment must be affirmed.

Judgment affirmed.

WILLIAM W. BIERCE, LIMITED, *v.* WATERHOUSE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 508. Argued December 12, 1910.—Decided January 16, 1911.

This court disapproves of the practice, followed by an intermediate appellate court in this case, of reversing a judgment on one of a number of assigned errors without passing on the others; it is likely to involve duplicate appeals.

Increasing the *ad damnum* of a suit in replevin to an amount within the penalty of the bond by amendments to make the declaration conform to the evidence as to value is not, under the laws or practice of Hawaii, illegal, nor does it have the effect of discharging the sureties.

The surety on a bond given in course of a judicial proceeding is represented in that proceeding by his principal, and becomes responsible, to the amount of the penalty, for amendments allowed by the court that do not introduce new causes of action.

A plaintiff suing in replevin is not estopped from showing that he

mistakenly undervalued the property sought to be recovered; and one becoming surety for performance of a judgment of the court in a pending suit is bound by the judgment against his principal to the limit of his obligation.

In the absence of fraud and collusion the question of value of property taken under replevin as found in the replevin suit cannot be relitigated in a suit against the sureties on the redelivery bond.

The effect of a petition for rehearing, if duly filed and entertained by the court, is to prevent the judgment from becoming final and reviewable until disposed of, and when disposed of, an appeal from the judgment is regulated by the statutes then in force, even if enacted after the original decision; and so held as to an appeal from the Supreme Court of Hawaii under the act of March 3, 1905.

Litigants and their sureties are subject to the power of the sovereign to extend the right of review and appeal pending litigation, and no fundamental rights are denied or contractual rights of the parties affected by the exercise of that power.

A redelivery bond is executed subject to such possible changes in the procedure as do not affect the contract, and under the law of Hawaii, as amended during the pendency of this litigation, the action against the sureties was properly brought.

In this case, as the evidence of tender of delivery was not unequivocal, the question of whether the property was actually restored was for the jury, and the charge being full and fair, there was no error.

18 Hawaii, 398, reversed.

THIS was an action for breach of the condition of a redelivery or return bond executed by the defendant to a certain replevin suit instituted in a Circuit Court for the Territory of Hawaii. The bond was in these words:

"Circuit Court, Third Circuit, Territory of Hawaii.

$1.00 stamp.

William W. Bierce, Limited, a Corporation, Plaintiff,

v.

Clinton J. Hutchins, Trustee.

Replevin.

Return Bond.

"Know all men by these presents:

"That we, Clinton J. Hutchins, trustee, as principal, and Henry Waterhouse and Arthur B. Wood, as sureties,

are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns, in the sum of thirty thousand (30,000) dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors herein and administrators, jointly and severally, firmly by these presents.

"The condition of the foregoing obligation is as follows:

"That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii a replevin suit against Clinton J. Hutchins, trustee, to recover from him certain property specifically set forth in the bill of complaint filed in said suit, and of the value of $15,000, as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the high sheriff of the Territory of Hawaii, or his deputies, and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said high sheriff and his deputies:

"Now, therefore, if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may for any cause be recovered against the defendant, then this obligation to be null and void; otherwise to be and remain in full force and effect.

"In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Signed) Clinton J. Hutchins, *Trustee.*
(Signed) Henry Waterhouse, *Surety.*
(Signed) Arthur B. Wood, *Surety.*

The foregoing bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

(Signed) A. M. Brown,
High Sheriff."

The replevin suit referred to was instituted July 20, 1903, by a corporation styled William W. Bierce, Limited, against Clinton J. Hutchins, trustee, and was for the recovery of certain railway material which had been conditionally sold to the Kona Sugar Company, another corporation. The property of the latter company, including this material, was acquired at a receiver's sale by Hutchins, trustee, with notice that the title had been retained by the Bierce Company, and that the property had not been paid for. The plaintiff's affidavit (Rev. Laws Hawaii, § 2102) stated the value of the material which it was sought to reclaim at $15,000, and a bond in double that sum was duly executed with the usual conditions of such replevin bonds. The defendant Hutchins thereupon, in order to retain possession of the material claimed, executed a redelivery or return bond under § 2112, Rev. Laws Hawaii, being the bond upon which the present action is based.

The replevin suit resulted, on March 19, 1904, in a judgment for the plaintiff and against the defendant Hutchins, trustee, for the return of the property and damages for its detention, or in default of return, that the defendants pay the value of the property, which was adjudged to be $22,000.

Inasmuch as the defense by the surety in the action upon the return bond referred to grows in part out of matters which were litigated in the replevin suit, we must state somewhat fully the proceedings in that action. That case, upon a bill of exceptions, was taken to the Supreme Court of Hawaii. Certain of the exceptions taken by the defendant Hutchins were sustained in a judgment rendered January 28, 1905, one of which was that the trial court had erred in not rendering judgment for the defendant *non obstante veredicto*. See *Bierce* v. *Hutchins*, 16 Hawaii, 418. A motion for a rehearing was disposed of in that court April 29, 1905 (see 16 Hawaii, 717). On May 6,

1905, a judgment was entered reversing the judgment of the Circuit Court, and remanding the case, with direction to render a judgment for defendant *non obstante veredicto.* Thereupon an appeal to this court was allowed, where the judgment of the Hawaiian Supreme Court was reversed, for the reasons appearing in the opinion reported in 205 U. S. 340, and the case remanded to that court. Thereupon the Supreme Court of Hawaii held that the defendant Hutchins was then entitled to have a hearing upon other exceptions not passed upon at the first hearing. These were therefore heard and overruled. 18 Hawaii, 374. An appeal from that judgment was taken to this court, and dismissed, as not from a final judgment. 211 U. S. 429.

Pending the review proceedings above referred to the plaintiff, upon cause shown, obtained a rule on the defendant Hutchins to give a new redelivery bond. Failing in this an execution issued to recover the property which the defendant had been directed to return, and for the damage for detention and costs. These damages, amounting to $1,050, and the taxed costs were paid and may be dropped from consideration. The sheriff returned that he was unable to obtain possession of the materials for which the action had been instituted, and therefore, returned the execution unsatisfied.

Pending the review proceedings already stated this action was begun against the obligors and the executors of Henry Waterhouse, one of the sureties upon the return bond given by Hutchins as stated. Wood, the other surety, was sued but was not found. Hutchins, for reasons immaterial, was dropped out. Upon the issue joined there was a verdict and judgment against the executors of Waterhouse for $22,000, the value of the property which the obligor had failed to return as required by the judgment in the replevin suit, that being the value adjudged in that action, together with interest and costs of former

actions not paid, the whole aggregating $28,156.74, for which there was judgment.

A bill of exceptions was taken from this judgment to the Supreme Court of Hawaii, which court, passing over the great majority of exceptions without ruling, sustained one which assigned error in the overruling of the motion of the defendant below for judgment *non obstante veredicto.*

The case having been remanded for judgment pursuant to the opinion and mandate, there was a judgment, notwithstanding the verdict for the defendant. This in turn was affirmed by the Supreme Court of the Territory, and the present writ is sued out to review that judgment.

Mr. Frederic D. McKenney, with whom *Mr. Henry W. Prouty* was on the brief, for plaintiff in error:

The lower court erred in ruling that the sureties were discharged by the amendments of the complaint in the replevin suit, increasing the alleged value of the property from $15,000 to $22,000. The amendments were properly made during the course of the trial by leave of court, in order to make the pleadings correspond with the proofs, and the *ad damnum* as increased was within the penalty of the bond. No new cause of action was introduced by the amendments, and the liability of the sureties was not thereby increased. Section 1145, Session Laws Hawaii, 1903, 366; Revised Laws Hawaii, 1905, § 1738; *Wood* v. *Denny,* 7 Gray, 540; *National Bank* v. *Jones,* 151 Massachusetts, 454; *Jamieson* v. *Capron,* 95 Pa. St. 15; *Hare* v. *Marsh,* 61 Wisconsin, 435; *Evers* v. *Sager,* 28 Michigan, 48, 52; *Merrick* v. *Greely,* 10 Missouri, 106; *Hanna* v. *International Petroleum Co.,* 23 Ohio St. 622; *New Haven Bank* v. *Miles,* 5 Connecticut, 587; *Carr* v. *Sterling,* 114 N. Y. 558; *Shepard* v. *Pebbles,* 38 Wisconsin, 373, 378; Cobbey on Replevin, § 1331; *Bradford* v. *Frederick,* 101 Pa. St. 445. To the same effect, see *Hocker* v. *Wood's Ex'r,* 33

Pa. St. 466; *Tracy* v. *Maloney*, 105 Massachusetts, 90; *Cutter* v. *Evans*, 115 Massachusetts, 27; *Knight* v. *Dorr*, 19 Pick. 48, 51; *Smith* v. *Mosby*, 98 Indiana, 445; *Schott* v. *Youree*, 142 Illinois, 233, 243; *Kennedy* v. *Brown*, 21 Kansas, 171; *Council* v. *Averett*, 90 N. Car. 168.

The condition of the bond was that the property should be delivered to said plaintiff if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause, be recovered against the defendant. *Mason* v. *Richards*, 12 Iowa, 74; *Richardson* v. *Bank*, 57 Ohio St. 299, 308, 315. See also *Christiansen* v. *Mendham*, 61 N. Y. 326; *Waldrop* v. *Wolff*, 114 Georgia, 610, 620.

The case at bar is clearly distinguishable from an action on a replevin bond following a judgment of dismissal of the replevin suit for want of prosecution where there is no trial on the merits. See *Smith* v. *Mosby*, 98 Indiana, 445, 448; *Bridgeport Ins. Co.* v. *Wilson*, 34 N. Y. 275, 280; *Irwin* v. *Backus*, 25 California, 214; *Braiden* v. *Mercer*, 44 Ohio St. 339; *Heard* v. *Lodge*, 20 Pick. 53, 58; 2 Brandt on Surety, 3d ed., § 563.

A verdict in claim and delivery is conclusive against the sureties of the defendant in replevin. *Parish* v. *Smith*, 66 So. Car. 424; *Waldrop* v. *Wolff*, 114 Georgia, 610, 620; *Stovall* v. *Banks*, 10 Wall. 583; *Richardson* v. *Bank*, 57 Ohio St. 299; *Hiriat* v. *Ballon*, 9 Pet. 156; *Washington Ice Co.* v. *Webster*, 125 U. S. 426.

The refusal or failure of the territorial Supreme Court to pass upon the remaining grounds was equivalent to the denial or rejection thereof by that court, and in the absence of exception to such denial or rejection by the party aggrieved, should stand as the final disposition thereof, not open to review by this court.

Parties to contracts have no vested right to insist that legislatures, during the pendency of said contract or the continuance of rights and liabilities thereunder shall re-

frain from adding to or taking from statutory remedies theretofore provided for the enforcement of or defense against such rights and liabilities, if adequate remedy for such enforcement or the making of defense thereto, shall remain. *Brown* v. *New Jersey*, 175 U. S. 172; *Bronson* v. *Kinzie*, 1 How. 311.

Whether the suit on the return bond was brought against the executors prematurely, is solely one of local practice and procedure which the Supreme Court of the Territory, in so far as this case is concerned, has approved. Such matters of local practice and procedure in territorial courts are not open for review here.

The statute of limitations commences to run as against a right of action for breach of the conditions of a replevin or delivery bond from the date of the judgment for a return of the property, which in this case was March 19, 1904 (Rec. 34); Cobbey on Replevin (2d ed.), §§ 1209, 1311, 1313, 1314 *et seq; Hagan* v. *Lucas*, 10 Pet. 40; *Lovejoy* v. *Bright*, 8 Blackf. 206; *Evans* v. *King*, 7 Missouri, 411; *Lockwood* v. *Perry*, 9 Met. 444; *Burkle* v. *Luce*, 1 Comstock (N. Y.), 163; *McRea* v. *McLean*, 3 Port. (Ala.) 138; *Delay* v. *Yost*, 59 Kansas, 496.

Mr. David L. Withington, with whom *Mr. William R. Castle*, *Mr. A. W. Greenwell* and *Mr. Alfred L. Castle* were on the brief, for defendants in error:

The sureties were discharged by the amendments increasing the valuation of the property and the recovery of judgment for the increased amount.

The foundation of the ancillary proceeding in which the bond was given was an affidavit in which the plaintiff fixes the actual value, and the contract was entered into with reference to the value so fixed. *Anderson* v. *Hapler*, 34 Illinois, 436; *S. C.*, 85 Am. Dec. 318; *Bardwell* v. *Stubbert*, 17 Nebraska, 485; *S. C.*, 23 N. W. Rep. 344; *Ah Leong* v. *Kee You*, 8 How. 416, 418; *Achi* v. *Alapai*, 9 Hawaii, 591,

592; *Smith* v. *Fisher*, 13 R. I. 624; *Simpson* v. *Wilcox*, 18 R. I. 40.

This is a statutory bond, into which all existing provisions of law enter, including that under which the plaintiff fixes the actual value on which the bond is conditioned. The sureties can rely upon this statutory provision, and in order to be bound to an increased value, or by subsequent legislation, the intent of the surety to be bound must appear on the face of the bond. *Sweeny* v. *Lomme*, 22 Wall. 208; *Douglass* v. *Douglass*, 21 Wall. 98; *Lee* v. *Hastings*, 13 Nebraska, 508.

The laws in force at the time and place of executing a contract, which affect the right of the parties thereto, enter into the contract and form a part of it, without any express stipulation to that effect. *Bronson* v. *Kinzie*, 1 How. 311; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *West River Bridge* v. *Dix*, 6 How. 792; *Walker* v. *Whitehead*, 16 Wall. 314; *Barnitz* v. *Beverly*, 163 U. S. 118, 127.

In order to bind the sureties, the bond itself must show an intent to be bound by subsequent legislation as a part of the bond itself. *Miller* v. *Stewart*, 9 Wheat. 680; *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Powell*, 14 Wall. 493; *Mix* v. *Vail*, 86 Illinois, 40; *Berwick* v. *Oswald*, 3 El. & Bl. 653, 678.

The defendants' contract is to be strictly construed, and doubts are resolved in favor of the surety. *Smith* v. *United States*, 2 Wall. 219; *United States* v. *Price*, 9 How. 84, 91; *Crane* v. *Buckley*, 203 U. S. 441, 447; *United States* v. *Hough*, 103 U. S. 72; *Magee* v. *Life Ins. Co.*, 92 U. S. 93; *Prairie State Nat. Bank* v. *United States*, 164 U. S. 227; *United States* v. *Boecker*, 19 Wall. 652; *Stull* v. *Hance*, 62 Illinois, 52, 55; *Supt. Pub. Works* v. *Richardson*, 18 Hawaii, 523, 525.

The surety has a right to stand upon the exact terms of his contract. The actual value fixed by the affidavit was an exact term of his contract, made so by statute. A varia-

tion from this term is fatal to his liability. *Reese* v. *United States*, 9 Wall. 13; *Bierce* v. *Waterhouse*, 19 Hawaii, 398, 405; *Cross* v. *Allen*, 141 U. S. 528; *United States F. & G. Co.* v. *United States*, 191 U. S. 416; *Miller* v. *Stewart ubi supra; Leggett* v. *Humphreys*, 21 How. 66, 76; *Bauer* v. *Cabanne*, 105 Missouri, 110, 118, 119; *The State* v. *Medary*, 17 Ohio St. 554, 565.

A variation between the affidavit and the writ discharges the bail bond. *Robeson* v. *Thompson*, 9 N. J. L. 97. The plaintiff is estopped by its affidavit, on the faith of which the surety contracted. 1 Greenleaf on Evidence, 16th ed., §§ 22, 27, 122; *Parker* v. *Simonds*, 8 Met. 205, 212; *Kafer* v. *Harlow*, 5 Allen, 348; *Leighton* v. *Brown*, 98 Massachusetts, 515; *Huggeford* v. *Ford*, 11 Pick. 222, 223; *Swift* v. *Barnes*, 16 Pick. 194; *Iron Works* v. *Snow Plow Co.*, 48 Fed. Rep. 652; *Smith* v. *Packard*, 98 Fed. Rep. 793, 800; *Weyerhauser* v. *Foster*, 60 Minnesota, 223, 224; *S. C.*, 61 N. W. Rep. 1129; *Wiseman et al.* v. *Lynn*, 39 Indiana, 250, 259; *Trimble* v. *The State*, 4 Blackf. 435, 437; *Capital Lumbering Co.* v. *Learned*, 36 Oregon, 544, 548; *S. C.*, 59 Pac. Rep. 454; *Butts* v. *Woods*, 14 N. Mex. 187; 16 Pac. Rep. 617, 618; Wells on Replevin, §§ 251, 252, 453, 569, 660; *Tuck* v. *Moses*, 58 Maine, 461, 477.

The better rule is that any increase in the pecuniary obligation, without assent, discharges the surety. *Driscoll* v. *Holt*, 170 Massachusetts, 262; *Sage* v. *Strong*, 40 Wisconsin, 575; *Tyler Mining Co.* v. *Last Chance Min. Co.*, 90 Fed. Rep. 15.

An increase even of the *ad damnum* of a writ discharges the sureties on an appeal bond. *Langley* v. *Adams*, 40 Maine, 125; *Moss* v. *Sleeper*, 58 Maine, 331; *Ruggles* v. *Berry*, 76 Maine, 262.

The construction put upon the local statute by the local court should be persuasive, if not controlling, in this court. *Bierce* v. *Waterhouse*, 19 Hawaii, 398, 408; *Kealoha* v. *Castle*, 210 U. S. 149, 153; *Kawananakoa* v. *Polyblank*,

205 U. S. 349; *Copper Queen Mining Co.* v. *Arizona*, 206 U. S. 474.

The sureties cannot be held under a subsequent amendment of the organic act granting an appeal to this court. The petition for rehearing pending in the Supreme Court would not have authorized an appeal, although acted on after March 3. *Harrison* v. *Magoon*, 205 U. S. 501.

The alleged judgment of the Supreme Court of Hawaii, entered, in effect, *ex parte*, is without authority of law. *Cotton* v. *Hawaii*, 211 U. S. 162; *Hutchins* v. *Bierce*, 211 U. S. 429; *Bierce* v. *Waterhouse*, 19 Hawaii, 594.

All the proceedings subsequent to the denial of the petition for rehearing are *coram non judice*. *Meheula* v. *Pioneer Mill Co.*, 17 Hawaii, 91; *Water Works Co.* v. *Oshkosh*, 106 Wisconsin, 83; *S. C.*, 187 U. S. 437.

If the amendment to the organic act applied, then the granting of the new right of appeal to another jurisdiction extended the liability of the surety, exposed him to the judgment of a court, with reference to which he did not contract, and imposed upon him a new pecuniary obligation, viz.: the costs of that court.

Under this rule, stay laws have been held to impair contract rights. *Aycock* v. *Martin*, 37 Georgia, 124. So repealing the right to levy a tax for the payment of bonds. *Seibert* v. *Lewis*, 122 U. S. 284; *Shapleigh* v. *San Angelo*, 167 U. S. 646. So of taxation to satisfy judgments. *Butz* v. *Muscatine*, 8 Wall. 583. Nor can the place of payment be changed. *Dillingham* v. *Hook*, 32 Kansas, 189. So of the obligation to receive coupons for taxes. *McGahey* v. *Virginia*, 135 U. S. 693. So of laws affecting judgments and executions. *Christmas* v. *Russell*, 5 Wall. 290; *Daniels* v. *Tearney*, 102 U. S. 419. A power of sale mortgage cannot be affected by changing the right of redemption or the power of sale. *Clark* v. *Reyburn*, 8 Wall. 332; *Brine* v. *Insurance Co.*, 96 U. S. 627. It is not a question of degree, or manner, or cause, but an encroachment in any respect

on its obligation dispensing with any part of its force. *Planters' Bank* v. *Sharp*, 6 How. 301; *Phinney* v. *Phinney*, 81 Maine, 450; *McCurdy* v. *Brown*, 8 Missouri, 550; *Schuster* v. *Weiss*, 114 Missouri, 158; *State* v. *Roberts*, 68 Missouri, 234; *Nofsinger* v. *Hartnett*, 84 Missouri, 549.

An injunction bond is construed with reference to the statute in force. A statute passed but not in effect does not become a part of the contract. *Mix* v. *Vail*, 86 Illinois, 40; see also *Alwood* v. *Mansfield*, 81 Illinois, 314; *Lapsley* v. *Brashears*, 4 Litt. (Ky.) 47; *Blair* v. *Williams*, 4 Litt. (Ky.) 34; *Haldeman* v. *Powers*, 103 Kentucky, 525; 45 S. W. Rep. 662; *Aeusch* v. *Demass*, 34 Michigan, 95; *Stockwell* v. *Kemp*, 4 McLean, 80; *S. C.*, 23 Fed. Cas. No. 115; *Woodson* v. *Johns* (Munf.), 18 Virginia, 230; *Jeter* v. *Langhorne*, 5 Gratt. 193; *Bailey* v. *McCormick*, 22 W. Va. 95; *Winston* v. *Reeves* (Ala.), 4 Stewart & Porter, 269.

The sureties cannot be held under the act of 1903, chapter 32, §§ 17, 18 and 19; Rev. Laws, 1905, §§ 1861, 1864, 1865, since that did not go into force until after the execution of the bond. As the act does not apply to this case, the action was prematurely brought.

The return of the property satisfied the obligation of the bond; or, if not sufficient to satisfy the bond, the offer to return, coupled with failure to accept or reject, discharged the surety. *Stevens* v. *Tuite*, 104 Massachusetts, 328, 332; *Leonard* v. *Whitney*, 109 Massachusetts, 265; *Walko* v. *Walko*, 64 Connecticut, 74; *S. C.*, 29 Atl. Rep. 243; 28 Am. & Eng. Enc. of Law, 34, 38, 40; *Dresel* v. *Jordan*, 104 Massachusetts, 407.

Mr. Justice Lurton, after making the above statement, delivered the opinion of the court.

The right to have this judgment reviewed by this court involves the review of the judgment upon which the mandate issued, and necessarily brings here the first as well as

the second bill of exceptions and transcript as one case. As it appears from the first bill of exceptions and the opinion and judgment in that case that the plaintiffs in error in that case, the defendants in error here, had taken many exceptions to the judgment against them which were not passed upon by the Supreme Court of the Territory, it must follow that if we shall find that that court erred in reversing the judgment upon the single error considered that the other exceptions and errors not considered are now open for review, inasmuch as the judgment might have been reversible for other errors not considered. The practice adopted by the Supreme Court of the Territory of passing without deciding other errors assigned upon a judgment is not approved, since it is likely to involve further review proceedings and duplicate appeals. Especially is this so in cases which are subject to the appellate jurisdiction of this court. The single ground upon which the Supreme Court of Hawaii reversed the judgment in favor of the Bierce Company and against the executors of the surety upon the return bond made by the defendants in the replevin suit was that by two amendments made to the declaration in the replevin suit the value of the property which the plaintiff sought to reclaim was increased from $15,000 to $22,000, whereby, as the court below held, the liability of the sureties was enlarged beyond their undertaking. The effect of this was held to discharge the sureties. In this we think the court erred.

The plaintiff, to make out its case, introduced in evidence, together with other matters, the pleadings, the judgment, the return of the sheriff upon the execution for a return of the property unsatisfied, and the return bond. The judgment, as before stated, was for a return of the property and costs, and $1,045 damages for detention, and, in default of a delivery of the property, that the defendant Hutchins, trustee, pay the value thereof, found to be $22,000, for which there was judgment.

The penalty of the return bond was $30,000. The damages laid in the complaint, as amended, were $28,156.74, and the judgment in the trial court upon the verdict was for the full damages claimed.

At the close of all the evidence the defendants moved the court to instruct a verdict for the defendants. This motion was based upon several grounds. The principal one was that the transcript of the record in the replevin action showed, *a*, that the plaintiff in that action had in the affidavit required by § 2102, R. L. Hawaii, executed before the issuance of the writ of replevin, stated the value of the property claimed to be $15,000; *b*, that the penalty of the replevin bond was in double this value; *c*, that the return bond recited that the value of the property claimed had been stated in the complaint in the replevin proceeding to be $15,000; *d*, that the complaint had been subsequently amended so as to state the actual value to be $20,000, and a second time amended so as to state the actual value to be $22,000; and that the legal effect of these amendments was to release and discharge the sureties.

The motion for an instructed verdict was overruled and the case submitted to the jury, who found the actual value of the property claimed to be $22,000, and for this there was an alternative judgment, as stated before.

After verdict the defendants moved a judgment *non obstante veredicto* upon like grounds. This too was denied.

On the appeal of the defendant to the Supreme Court of Hawaii the action of the trial court in allowing the amendment of the complaint so as to increase the value of the property in the manner stated was assigned as error. Upon this matter the Supreme Court said:

"The only exceptions to rulings prior to the judgment on which the defendant relied in argument are (1) to allowing the plaintiff to amend its complaint by changing the averment of the value of the property, first from $15,000 to $20,000, and then to $22,000. . . .

"The amendments were properly allowed under the statute (sec. 1738, R. L.). Before the property was delivered to the plaintiff the defendant obtained a return of it to himself upon his statutory bond in double the value of the property as originally stated by the plaintiff. It does not appear that the defendant's rights were affected by the amendment increasing the value." *Bierce* v. *Hutchins*, 18 Hawaii, 511, 522.

This brings us to the proposition as to whether a question thus once litigated and decided in the replevin suit is open for relitigation by the surety when sued upon the return bond. The surety on such a bond given in the course of a judicial proceeding is represented in that proceeding by his principal. That the court possessed the power of allowing an amendment which introduced no new cause of action is plain. The surety became such in contemplation of the possible exercise of that power. The penalty of the bond was not exceeded, and an increase in the *ad damnum* did not introduce a new cause of action. *Townsend National Bank* v. *Jones*, 151 Massachusetts, 454. By the execution of the bond the surety consented to become responsible to the amount of the penal sum therein named.

The only possible objection lay in the question as to whether the plaintiff was estopped from laying the damages in excess of the value of the property stated in the original complaint or affidavit. There are cases which hold that in the replevin action the plaintiff, having himself fixed the value of the property claimed by an affidavit, is estopped thereby from showing that it is of a less value, if he failed in his suit, though the defendant may show, if he can, that it was of a greater value. *Washington Ice Co.* v. *Webster*, 125 U. S. 426. But we are not disposed to think that a plaintiff in such a suit may not show, especially when, as here, the defendant upon a return bond was suffered to retain the possession, that he had mistakingly

undervalued the property. We have been cited to no authorities which extend the principle of estoppel to shut out such an amendment of the *ad damnum* clause of the complaint in a replevin action. However this may be, the questions were directly in issue in the replevin suit and decided against the defendant therein.

One who becomes a surety for the performance of the judgment of a court in a pending case is represented by his principal and is bound by the judgment against his principal within the limits of his obligation. *Washington Ice Co.* v. *Webster*, 125 U. S. 426, 444, 446; *Stovall* v. *Banks*, 10 Wall. 583.

The issue as to whether the value of the property redelivered to the defendants was greater than alleged in the plaintiffs' affidavit and claimed in the original complaint, as well as whether the amendment of that complaint was such as to change the cause of action, were issues made and decided against the principal in the bond upon which the sureties were bound and cannot be relitigated, in the absence of fraud and collusion, by a surety when sued upon the bond. *Townsend National Bank* v. *Jones*, 151 Massachusetts, 454, 459; *Greenlaw* v. *Logan*, 2 Lea (Tennessee), 185; *Kennedy* v. *Brown*, 21 Kansas, 171; *Hare* v. *Marsh*, 61 Wisconsin, 435; *Mason* v. *Richards*, 12 Iowa, 74.

The motion of the executors of Waterhouse in the trial court for a judgment *non obstante veredicto* was predicated upon several distinct grounds. To the action of the trial court in overruling this motion exceptions were duly taken, and this action was made the subject of distinct assignments of error upon the writ of error to the Supreme Court of Hawaii. That court, as we have already seen, considered only such of the grounds relied upon as raised the question of the effect of the increase of the plaintiff's *ad damnum* clause from $15,000 to $22,000. Concluding that the necessary legal effect of that amendment of the com-

plaint was to relieve the sureties upon the return bond, it reversed the judgment and remanded with direction to give judgment for the said executors, notwithstanding the verdict against them. See 19 Hawaii, 398.

The learned counsel for the executors have insisted that if we shall conclude that the action of the Supreme Court of Hawaii is not to be supported upon the single ground considered by it, that it is then the duty of this court to consider the grounds for the motion not passed upon, and if upon any one of them the judgment of the Supreme Court of Hawaii may be sustained, its judgment should not be disturbed. Upon this contention each of the several grounds upon which such motion was based has been covered by the briefs filed by the present defendants in error.

Among the grounds for a judgment notwithstanding the verdict, not considered, was, that the judgment of the Supreme Court of Hawaii reversing the judgment in favor of William Bierce, Limited, against Hutchins, trustee, was final as to the surety upon the return bond, and was not subject, so far at least as the surety was concerned, to be reviewed or set aside by any writ of error to this court, and that the judgment of this court, 205 U. S. 340, reversing the judgment of the Hawaiian Supreme Court, should not in anywise affect the present defendants in error as representatives of Waterhouse, one of the sureties upon the return bond. But the judgment of the Hawaiian Supreme Court was not final prior to the act of Congress referred to. It is true that the opinion of the Hawaiian Supreme Court reversing the judgment of the Hawaiian Circuit Court was filed on January 28, 1905, a date prior to the act of Congress referred to. But the record shows that thereupon a petition for rehearing was filed, and that a rehearing was denied April 29, 1905 (see *Bierce* v. *Hutchins*, 16 Hawaii, 717), and that the final judgment, which was reversed by this court, was not rendered until May 6, 1905, a date after the law referred to. The effect of the pending peti-

tion for a rehearing, if filed in due time and entertained by the court, as was the case, was to prevent the judgment from becoming final and reviewable until disposed of. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31; *In re McCall*, 145 Fed. Rep. 898. Since, therefore, there was no final judgment prior to the going into effect of the act of Congress of March 3, 1905, the pending litigation was subject to the power of Congress to allow a review after final judgment, although no such review had theretofore been admissible. No fundamental right was thereby denied, and the bond must be regarded as having been entered into subject to such change in remedy or procedure as did not change the contractual rights of the parties.

It is next claimed that this action upon the return bond was premature, because started during the pendency of the defendants' writ of error in the Supreme Court of Hawaii from the judgment in the replevin case. But that writ did not annul the judgment. The Hawaiian act of 1903, ch. 32, §§ 17, 18 and 19, Rev. Laws of Hawaii, 1905, §§ 1861, 1864 and 1865, provided for the issuance of an execution if the defendant should be ruled to give a new return bond upon an affidavit of insufficiency. This was done and the objection of the defendant overruled. An execution issued, which was duly returned unsatisfied. The contention that this act of 1903 did not go into force until after the execution of the return bond has no merit. Such a bond is always entered into subject to the possibility of changes in the law of procedure which do not change the contract. The defendant refused to give the new bond required and, under the act referred to, an execution was issued, which was returned unsatisfied. This fact authorized an immediate suit upon the return bond. There was no error in holding that the suit was not premature under the act referred to.

Another group of assignments relate to an alleged tender of redelivery of the property by Hutchins, trustee, after

the judgment requiring a return. The insistence was and is that there should have been a directed verdict for the defendant upon the evidence showing such tender and a rejection by the plaintiff. The letter in evidence making a tender was not an unequivocal tender. There was also evidence tending to show the existence of obstacles to a repossession, which it was the duty of the defendant to have removed; and also evidence of a conveyance by the defendant of record, which clouded the title. There was an absence of evidence tending to show any active exertion to restore the plaintiff's possession, and no evidence that the plaintiff was ever actually put in repossession. The question was one for the jury, who found for the plaintiff. The charge was full and fair.

There were a vast number of errors assigned. We have referred to those which were either pressed in argument or have otherwise been deemed of such importance as to require particular notice. Those not referred to have been considered, with the result that we find none of them well taken.

The conclusion we reach is that the judgment of the Supreme Court of the Territory of Hawaii, reversing the judgment of the Circuit Court and directing a judgment *non obstante veredicto*, was erroneous. The second judgment, affirming the judgment of the Circuit Court upon its mandate, is also erroneous.

The case must be remanded, with direction to set both judgments aside and affirm the judgment of the trial court in favor of the plaintiff William W. Bierce, Limited.

Reversed.

SEXTON, AS TRUSTEE IN BANKRUPTCY OF KESSLER & COMPANY, *v.* DREYFUS.

SAME *v.* LLOYD'S BANK, LTD.

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

Nos. 662, 663. Submitted January 6, 1911.—Decided January 23, 1911.

Under the Bankruptcy Act of 1898, a secured creditor selling his securities after the filing of the petition must apply the proceeds, other than interest and dividends accrued since the date of the petition, first to the liquidation of the debt with interest to the date of the petition; he cannot first apply such proceeds to interest accrued since the petition.

A secured creditor of a bankrupt can apply interest and dividends accruing on the securities after the date of the petition to interest on the debt accruing after such date.

The English rule and authorities discussed and approved.

180 Fed. Rep. 979, reversed.

THE facts, which involve the construction of certain provisions of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. Wallace Macfarlane and *Mr. George H. Gilman* for appellant:

The bankruptcy law forbids the allowance of interest on provable debts after the date of the filing of the petition. Sections 57, 57*h*, 63; and see corresponding provision, § 19, law of 1867; Collier on Bankruptcy, 7th ed., 701.

Interest accruing after petition filed is obviously not a debt existing at the time of filing, and so by the express provisions of the act is excluded from proof. See official forms Nos. 31 and 32, for proof of debt.

As long as the secured creditor stays outside the Bankruptcy Act, or as the English court puts it, "sits on his

security," and claims nothing under the bankruptcy law, he is entitled to the full proceeds of his securities, and to collect from them all the interest and principal of his debt, if he can. Section 67*d* protects him in these rights. If the proceeds are sufficient to pay both the principal and interest of his claim, nothing in the act can be invoked to restrict such a payment.

When, however, such a secured creditor comes into the bankruptcy court asking for dividends on an unsatisfied balance, his claim ceases to be a secured claim at all, and is really an unsecured claim for the diminished amount. *Coder* v. *Arts*, 152 Fed. Rep. 943 (afterwards affirmed without considering this point in this court in 213 U. S. 223).

The bankruptcy law in fixing the date of the filing of the petition as the date at which interest shall cease, seeks to treat all creditors alike. For this purpose, some date must be selected as the common due date. The present law adopts the date of filing of the petition. See *Ex parte Bennet*, 2 Atk. 527.

In cases of insolvent banks a secured creditor cannot have interest upon his claim allowed from the assets subsequent to the date of suspension. *Chemical Nat. Bank* v. *Armstrong*, 59 Fed. Rep. 378, 379; *Merrill* v. *Nat. Bank*, 173 U. S. 131, 140, 141; *White* v. *Knox*, 111 U. S. 784, 787. *Hiscock* v. *Varick Bank*, 206 U. S. 28, does not apply.

A secured creditor cannot evade the provisions of the bankruptcy law forbidding the allowance of interest, accruing subsequent to petition filed, by applying the proceeds of his security first to the payment of interest. *In re Bonacino*, 1 Manson, 59.

The long established rule of the English courts of bankruptcy forbids the application by secured creditors of the proceeds of security to interest accruing after the date of the commencement of bankruptcy proceedings, if such creditors after the liquidation of the securities claim divi-

dends on an unpaid balance. *Ex parte Wardell*, 1787; *Ex parte Hercy*, 1792, cited in Cooke's Bankruptcy Law, 4th ed., 1799, p. 181; see also 2 Montague & Ayrton, Appendix A; *Ex parte Badger*, 4 Ves. 165, decided in 1798; *Ex parte Ramsbottom*, 2 Montague & Ayrton, 80; see also *In re Savin*, Law Rep. VII, Chan. App. Cas. 760; *Quartermaine's Case*, [1892], 1 Ch. Div. 639; *In re Bonacino*, 1 Manson, 59; *Ex parte Lubbock*, 9 Jur. (N. S.) Pt. 1, 854.

The dividends or interest collected on the security subsequent to the date of the receiving order should not be applied against interest after that date notwithstanding the ruling in *In re Penfold*, 4 DeG. & Sm. 282, and *Ex parte Ramsbottom*, 2 Mont. & A. 80; see *In re Quartermaine* [1892], 1 Ch. Div. 639.

Mr. Frederic R. Coudert, for appellees in No. 662.

The cases on which appellant relies are certain English adjudications which are inconsistent, illogical, unsound and hence non-persuasive. *In re Talbott* (*King* v. *Chick*) cited in *In re Savin*, 7 Chan. App. 761.

The French law is similar to the law as laid down by the court below. See French Code Civil, § 1254; Code of Commerce, § 445, and see Credit Agricole C. Syndic Bourson, Cass. Civ. 12, July, 1876, Sirey, Lois et Arrêts (1878), p. 68, and also Société Generale C. Synd. Courtignon, Cass. Civ. 13 July, 1896, Sirey, Lois et Arrêts (1896), p. 395.

There is no reason why the British rule should prevail over the clear cut, symmetrical rule, sanctioned by the French codes and the highest French tribunal.

Mr. Rufus W. Sprague, Jr., for appellee in No. 663:

The Bankruptcy Act expressly recognizes and preserves valid liens existing at the time of the filing of the petition. *Hiscock* v. *Varick Bank*, 206 U. S. 28. Nor does it deny to a partially secured creditor, the right under its agreement to apply the proceeds of the security first to interest ac-

cruing on the debt after the filing of the petition and up to and including the time of the sale of the collateral, then to the principal and to prove for any balance remaining. Section 63 of the act; *Story* v. *Livingston*, 13 Pet. 359, 371; *Merchants' Bank* v. *Freeman*, 15 Hun, 359.

See *Coder* v. *Arts*, 213 U. S. 223; *In re Stevens*, 173 Fed. Rep. 842; *In re Haake*, 11 Fed. Cases, 134; *S. C.*, 2 Sawy. 231, to effect that if the security is sufficient to pay in full all interest accruing (subsequent to the filing of the petition in bankruptcy and up to the time of the sale of the collateral) as well as the principal of the debt, the creditor would be entitled to retain from the sale of the collateral an amount sufficient to pay all such interest as well as the entire principal and would be obligated to turn over to the trustee only such balance as might remain after such application of the proceeds from the sale of the security.

The right of a partially secured creditor to take his interest and prove for the balance due seems to have been taken for granted in *In re Peacock*, 178 Fed. Rep. 851; *McHenry* v. *La Société Francaise*, 95 U. S. 58; *In re Strachen*, Fed. Case No. 13,519; *In re Kallak*, 147 Fed. Rep. 276; *In re Scheidt Bros.*, 177 Fed. Rep. 299.

The Bankruptcy Act provides a remedy if a secured creditor unreasonably delays in the liquidation of the security held by him. *Hiscock* v. *Varick Bank*, 206 U. S. 28, 40; *In re Mertens*, 144 Fed. Rep. 818.

As to the power of the court under § 57*h* fixing the value of the security, see *In re Davison*, 179 Fed. Rep. 750; and to prevent fraudulent exercise of a power of sale of pledged property by a secured creditor see *In re Browne*, 104 Fed. Rep. 762.

The delay in selling the security in this case was with the consent of the trustee, and the English rule has no application. *Ex parte Ramsbottom*, 2 Montague & A. 79.

The English decisions have approved other exceptions to

the rule relied upon by appellant, viz.: When the assignee disputes the security interest is allowed to the claimant. *Ex parte Pollard*, 1 Mont. D. & D. 264. When there are two debts, the one provable, the other not, and the security was given to cover debts in general, the security may be applied in payment of the debts not provable. *Ex parte Kensington*, 2 M. & A. 300, 304. The income of the security earned since the bankruptcy may be set off against interest on the debt accrued for the same period. *Ex parte Penfold*, 4 De Gex & Smale, 282.

MR. JUSTICE HOLMES delivered the opinion of the court.

In both of these cases secured creditors selling their security some time after the filing of the petition in bankruptcy and finding the proceeds not enough to pay the whole amount of their claims, were allowed by the referee to apply the proceeds first to interest accrued since the filing of the petition, then to principal, and to prove for the balance. The referee certified the question whether the creditors had a right to the interest. The District Judge answered the question in the affirmative, giving the matter a very thorough and persuasive discussion, and declining to follow the English rule. *In re Kessler*, 171 Fed. Rep. 751. On appeal his decision was affirmed by a majority of the Circuit Court of Appeals. 180 Fed. Rep. 979.

The argument certainly is strong. A secured creditor could apply his security to interest first when the parties were solvent, *Story* v. *Livingston*, 13 Pet. 359, 371, and liens are not affected by the statute. Section 67*d*. The law is not intended to take away any part of the security that a creditor may have, as it would seem at first sight to do if the course adopted below were not followed. Some further countenance to that course is thought to be found in § 57*h*, which provides that the value of securities shall

be determined by converting them into money 'according to the terms of the agreement,' for it is urged that by construction the right to apply them to interest is as much part of the agreement as if it had been written in. Nevertheless it seems to us that on the whole the considerations on the other side are stronger and must prevail.

For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. *Ex parte Bennet*, 2 Atk. 527. This rule was applied to mortgages as well as to unsecured debts; *Ex parte Wardell*, 1787; *Ex parte Hercy*, 1792, 1 Cooke, Bankrupt Laws, 4th ed., 181; (1st ed., Appendix), and notwithstanding occasional doubts it has been so applied with the prevailing assent of the English judges ever since. *Ex parte Badger*, 4 Ves. 165. *Ex parte Ramsbottom*, 2 Mont. & Ayrt. 79. *Ex parte Penfold*, 4 De G. & Sm. 282. *Ex parte Lubbock*, 9 Jur. N. S. 854. *In re Savin*, L. R. 7 Ch. 760, 764. *Ex parte Bath*, 22 Ch. Div. 450, 454. *Quartermaine's Case* [1892], 1 Ch. 639. *In re Bonacino*, 1 Manson, 59. As appears from Cooke, *sup.*, the rule was laid down not because of the words of the statute but as a fundamental principle. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another State. No one doubts that interest on unsecured debts stops. See § 63 (1). *Board of County Commissioners* v. *Hurley*, 169 Fed. Rep. 92, 94.

The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well known illustration of Chief Justice Shaw's, *Parks* v. *Boston*, 15 Pick. 198, 208, the whole matter could be settled in a

day by a pie-powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain. If, under § 57 of the present act, the value of the security should be determined by agreement or arbitration the time for fixing it naturally would be the date of the petition. At that moment the creditors acquire a right *in rem* against the assets. *Chemical National Bank* v. *Armstrong*, 59 Fed. Rep. 372, 378, 379. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, 140. When there is delay in selling because of the hope of getting a higher price it is more for the advantage of the secured creditor than of any one else, as he takes the whole advance and the others only benefit by a percentage, which does not seem a good reason for allowing him to prove for interest by indirection. Whenever the creditor proves, his security may be cut short. That is the necessarily possible result of bankruptcy. The rule under discussion fixes the moment in all cases at the date which the petition is filed, but beyond the fact of being compelled to realize his security and look for a new investment there is no other invasion of the secured creditor's contract rights, and that invasion is the same in kind whatever moment may be fixed.

It is suggested that the right of a creditor having security for two claims, one provable and the other unprovable, to marshal his security against the unprovable claim, (see *Hiscock* v. *Varick Bank*, 206 U. S. 28, 37), is inconsistent with the rule applied in this case. But that right is not affected by fixing a time for winding up, and the bankruptcy law does not touch securities otherwise than in this unavoidable particular. The provision in § 57*h* for converting securities into money according to the terms of the agreement has no appreciable bearing on the question. Apart from indicating, in accordance with § 67*d*, that liens are not to be affected, it would seem rather to

be intended to secure the right of the trustees and general creditors in cases where the security may be worth more than the debt. The view that we adopt is well presented in the late Judge Lowell's work on Bankruptcy, § 419; seems to have been entertained in *Coder* v. *Arts*, 152 Fed. Rep. 943, 950, (affirmed without touching this point, 213 U. S. 223), and is somewhat sustained by analogy in the case of insolvent banks. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, 140. *White* v. *Knox*, 111 U. S. 784, 787.

Interest and dividends accrued upon some of the securities after the date of the petition. The English cases allow these to be applied to the after accruing interest upon the debt. *Ex parte Ramsbottom*, 2 Mont. & Ayrton, 79. *Ex parte Penfold*, 4 De G. & Sm. 282. *Quartermaine's Case* [1892], 1 Ch. 639. There is no more reason for allowing the bankrupt estate to profit by the delay beyond the day of settlement than there is for letting the creditors do so. Therefore to apply these subsequent dividends, &c., to subsequent interest seems just.

Decrees reversed.

MUSKRAT *v.* UNITED STATES.

BROWN AND GRITTS *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 330, 331. Argued November 30 and December 1, 2, 1910.—Decided January 23, 1911.

The rule laid down in *Heyburn's Case*, 2 Dall. 409, that neither the legislative nor the executive branch of the Government of the United States can assign to the judicial branch any duties other than those that are properly judicial, to be performed in a judicial manner, applied; and *held*, that it is beyond the power of Congress to provide for a suit of this nature to be brought in the Court of

Claims with an appeal to this court to test the constitutionality of prior acts of Congress, such a suit not being a case or controversy within the meaning of the Constitution.

From its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

Under the Constitution of the United States the exercise of judicial power is limited to cases and controversies.

A case or controversy, in order that the judicial power of the United States may be exercised thereon, implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. *Chisholm* v. *Georgia*, 2 Dall. 431.

This court has no veto power on legislation enacted by Congress; and its right to declare an act of Congress unconstitutional can only be exercised when a proper case between opposing parties is submitted for determination. *Marbury* v. *Madison*, 1 Cranch, 137.

The determination by the Court of Claims, and on appeal by this court, of the constitutional validity of an act of Congress in a suit brought by authority of a subsequent act of Congress clothing such courts with jurisdiction for the avowed purpose of settling such question with provision for payment of expenses of the suit in certain contingencies out of funds in the Treasury of the United States, is not within the appellate jurisdiction conferred by the Constitution upon this court; such a suit is not a case or controversy to which the judicial power extends, nor would such a judgment conclude private parties in actual litigation.

That part of the act of March 1, 1907, c. 2285, 34 Stat. 1015, 1028, which requires of this court action in its nature not judicial within the meaning of the Constitution, exceeds the limitation of legislative authority and is unconstitutional, and the suits brought thereunder are dismissed for want of jurisdiction.

This court cannot be required to decide cases over which it has not jurisdiction because other cases are pending involving the same point of law; to do so would require it to give opinions in the nature of advice concerning legislative action.

An act of Congress, conferring jurisdiction on the Court of Claims and on this court on appeal, testing the constitutionality of prior acts of Congress will not be sustained as to the jurisdiction of the Court of Claims alone if it cannot be also sustained as to this court.

44 Court of Claims, 137, reversed with directions to dismiss the suit.

THE facts, which involve the constitutionality and con-

struction of certain acts of Congress relating to the distribution and allotment of lands and funds of the Cherokee Indians, are stated in the opinion.

Mr. John J. Hemphill, Mr. William H. Robeson and *Mr. Daniel B. Henderson*, with whom *Mr. Frank J. Boudinot* was on the brief, for appellants.

Mr. Wade H. Ellis, Special Assistant to the Attorney General, with whom *Mr. Henry E. Colton*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. W. W. Hastings for the Cherokee Nation.

Mr. S. T. Bledsoe and *Mr. Evans Browne* submitted a brief, by leave of the court, as *amici curiæ*, on behalf of certain full blood Choctaw and Chickasaw allottees.

Mr. Justice Day delivered the opinion of the court.

These cases arise under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon this court on appeal, to determine the validity of certain acts of Congress hereinafter referred to.

Case No. 330 was brought by David Muskrat and J. Henry Dick in their own behalf and in behalf of others in a like situation to determine the constitutional validity of the act of Congress of April 26, 1906, c. 1876, 34 Stat. 137, as amended by the act of June 21, 1906, c. 3504, 34 Stat. 325 *et seq.*, and to have the same declared invalid in so far as the same undertook to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled on September 1, 1902, in accordance with the act of Congress passed July 1, 1902, c. 1375, 32 Stat. 716–720–721. The

acts subsequent to that of July 1, 1902, have the effect to increase the number of persons entitled to participate in the division of the Cherokee lands and funds, by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending for that purpose.

Case No. 331 was brought by Brown and Gritts on their own behalf and on behalf of other Cherokee citizens having a like interest in the property allotted under the act of July 1, 1902, c. 1368, 32 Stat. 710. Under this act, Brown and Gritts received allotments. The subsequent act of March 11, 1904, c. 505, 33 Stat. 65, empowered the Secretary of the Interior to grant rights of way for pipe lines over lands allotted to Indians under certain regulations. Another act, that of April 26, 1906, c. 1876, 34 Stat. 137, purported to extend to a period of twenty-five years the time within which full-blooded Indians of the Cherokee, Choctaw, Chickasaw, Creek and Seminole tribes were forbidden to alienate, sell, dispose of or encumber certain of their lands.

The object of the petition of Brown and Gritts was to have the subsequent legislation of 1904 and 1906 declared to be unconstitutional and void, and to have the lands allotted to them under the original act of July 1, 1902, adjudged to be theirs free from restraints upon the rights to sell and convey the same. From this statement it is apparent that the purpose of the proceedings instituted in the Court of Claims and now appealed to this court is to restrain the enforcement of such legislation subsequent to the act of July 1, 1902, upon the ground that the same is unconstitutional and void. The Court of Claims sustained the validity of the acts and dismissed the petitions. 44 C. Cls. 137, 283.

These proceedings were begun under the supposed authority of an act of Congress passed March 1, 1907 (a part

of the Indian appropriation bill), c. 2285, 34 Stat. 1015, 1028. As that legislation is important in this connection so much of the act as authorized the beginning of these suits is here inserted in full:

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney General, who is hereby charged with the defense of said suits.

"Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two."

This act is the authority for the maintenance of these two suits.

The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power as established by the Constitution of the United States.

Section 1 of Article III of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

It will serve to elucidate the nature and extent of the judicial power thus conferred by the Constitution to note certain instances in which this court has had occasion to examine and define the same. As early as 1792, an act of Congress, March 23, 1792, c. 11, 1 Stat. 243, was brought to the attention of this court, which undertook to provide for the settlement of claims of widows and orphans barred by the limitations theretofore established regulating claims to invalid pensions. The act was not construed by this court, but came under consideration before the then Chief Justice and another Justice of this court and the District Judge, and their conclusions are given in the margin of the report of *Hayburn's Case*, 2 Dall. 409. The act undertook to devolve upon the Circuit Court of the United States the duty of examining proofs, of determining what amount of the monthly pay would be equivalent to the disability ascertained, and to certify the same to the Secretary of War, who was to place the names of the applicants on the pension list of the United States in conformity thereto, unless he had cause to suspect imposition or mistake, in which event he might withhold the name of the applicant and report the same to Congress.

In the note to the report of the case in 2 Dall. it appeared that Chief Justice Jay, Mr. Justice Cushing and District Judge Duane unanimously agreed:

"That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit Courts, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as

it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the legislature; whereas by the Constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

A further history of the case—and of another brought under the same act but unreported—will be found in *United States* v. *Ferreira*, 13 How. 40, in which the opinion of the court was by the Chief Justice, and the note by him on page 52 was inserted by order of the court. Concluding that note it was said:

"In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

In the *Ferreira case* this court determined the effect of proceedings under an act of Congress, authorizing the District Judge of the United States for the Northern District of Florida to receive and adjudicate claims for losses for which this Government was responsible under the treaty of 1819 between the United States and Spain; decisions in favor of claimants, together with evidence given in connection therewith, to be reported to the Secretary of the Treasury, who, being satisfied that the same were just and equitable and within the treaty, was to pay the amount thereof. It was held that an award of the Dis-

trict Judge under that act was not the judgment of a court and did not afford a basis of appeal to this court.

In 1793, by direction of the President, Secretary of State Jefferson addressed to the Justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which "*do not give a cognizance of them to the tribunals of the country.*" The answer to the question was postponed until the subsequent sitting of the Supreme Court, when Chief Justice Jay and his associates answered to President Washington that in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a court of last resort, afforded strong arguments against the propriety of extrajudicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President of calling on heads of departments for opinions "seems to have been purposely, as well as expressly, united to the executive departments." Correspondence & Public Papers of John Jay, vol. 3, p. 486.

The subject underwent a complete examination in the case of *Gordon* v. *United States*, reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his last judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fullness. In that case an act of Congress was held invalid which undertook to confer jurisdiction upon the Court of Claims and thence by appeal to this court, the judgment, however, not to be paid until an appropriation had been estimated therefor

by the Secretary of the Treasury; and, as was said by the Chief Justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress. "The Supreme Court," says the Chief Justice, "does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."

Concluding his discussion of the subject, the Chief Justice said, after treating of the powers of the different branches of the Government, and laying emphasis upon the independence of the judicial power as established under our Constitution, p. 706: "These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

At the last term of the court, in the case of *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 215 U. S. 216, this court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below. In that case former cases were reviewed

by Mr. Chief Justice Fuller, who spoke for the court, and the requirement that this court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and enforced. It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. "Judicial power," says Mr. Justice Miller in his work on the Constitution, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller on the Constitution, 314.

As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies"? A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy"? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 255. Of these terms that learned Justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less compre-

hensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury* v. *Madison*, *supra*.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents

of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury* v. *Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the Chief Justice, in *Osborn* v. *Bank of United States*, 9 Wheat. 819, speaking of the third Article of the Constitution conferring judicial power:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Again, in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, Chief Justice Marshall, amplifying and reasserting the doctrine of *Marbury* v. *Madison*, recognized the limitations upon the right of this court to declare an act of Congress unconstitutional, and granting that there might be instances of its violation which could not be brought within the jurisdiction of the courts, and referring to a grant by a State of a patent of nobility as a case of that class, and conceding that the court would have no power to annul such a grant, said, p. 405:

"This may be very true; but by no means justifies the inference drawn from it. The article does not extend the

judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a *case* in law or equity' arising under the Constitution, to which the judicial power does not extend."

See also in this connection *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a

party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

Applying the principles thus long settled by the decisions of this court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the Court of Claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the Court of Claims and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the Court of Claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful char-

acter of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

Nor can it make any difference that the petitioners had brought suits in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the legislation subsequent to the act of July 1, 1902, which suits were pending when the jurisdictional act here involved was passed. The latter act must depend upon its own terms and be judged by the authority which it undertakes to confer. If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions. For

the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the Constitution under which it was created. As Congress, in passing this act as a part of the plan involved, evidently intended to provide a review of the judgment of the Court of Claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *Employers' Liability Cases*, 207 U. S. 463.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

EX PARTE HARDING, PETITIONER.

No. —. Original. Submitted December 12, 1910.—Decided February 20, 1911.

The general rule that a court, having jurisdiction over the subject-matter and the parties, is competent to decide questions arising as to its jurisdiction and that its decisions on such questions are not open to collateral attack, applied in this case; and mandamus refused to compel the Circuit Court to remand a case in which it decided that it had jurisdiction on the issues of citizenship and separable controversy.

There is nothing peculiar in an order of the Circuit Court refusing to remand which differentiates it from any other order or judgment of a Federal Court concerning its jurisdiction.

In this case the exceptional rule that mandamus will lie to the Circuit Court to correct an abuse of judicial discretion in retaining a case over which it has not jurisdiction does not apply.

It is the duty of this court to reconcile decisions and, in order to enforce the correct doctrine, to determine which rest upon the right principle and to overrule or qualify those conflicting therewith.

Conflicting decisions regarding issuing mandamus to the Circuit Court to correct its decisions in regard to jurisdiction over cases removed from the state court reviewed and harmonized.

In this case, *Ex parte Hoard*, 105 U. S. 578, and cases following it applied, as expressing the general principle involved; *Virginia* v. *Rives*, 100 U. S. 313, and cases following it distinguished, as applicable only to exceptional instances not involved in this case; *Ex parte Wisner*, 203 U. S. 449; *In re Moore*, 209 U. S. 490, and *In re Winn*, 213 U. S. 458, disapproved in part and qualified.

THE facts are stated in the opinion.

Mr. William J. Ammen for petitioner:

The original removal petition, whether considered alone or in connection with the entire record, not only failed to show a removable case, but affirmatively showed that the case was not removable under the law, on the ground of diverse citizenship. *In re Moore*, 209 U. S. 490; *Ex parte Wisner*, 203 U. S. 449; *Southern Pacific Co.* v. *Burch*, 152 Fed. Rep. 168; *Goldberg &c. Co.* v. *German Ins. Co.*, 152 Fed. Rep. 831; *Yellow Aster Co.* v. *Crane Co.*, 150 Fed. Rep. 580; *Gillespie* v. *Pocahontas &c. Co.*, 160 Fed. Rep. 742; *Blunt* v. *Southern Ry. Co.*, 155 Fed. Rep. 499; *Boston Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 640; *In re Winn*, 213 U. S. 464; *McClellan* v. *McKane*, 159 Fed. Rep. 165; *Hooe* v. *Jamieson*, 166 U. S. 395.

No separable controversy was pointed out in said original petition for removal, as required by the decisions. *Gibbs* v. *Crandall*, 120 U. S. 105, 108; *Gold Washing Co.* v. *Keyes*, 96 U. S. 199; *Newcastle* v. *Postal Co.*, 152 Fed. Rep. 572.

The claim of separable controversy between said Corn Products Company, and Harding, is so absurd upon a mere cursory reading of the bill of complaint that the Circuit Court should not have considered the same; and

relief by mandamus should not be refused on the ground that a decision of that question involved judicial discretion, although the exercise of judicial discretion on such a question might be required in a case where such question appears to be reasonably disputable.

Even if such separable controversy existed, the citizenship of the alleged parties thereto was not such as to make the case removable, under the law.

The alleged removal was void upon the further ground that the state court was not permitted to examine, and consider, and pass upon, the removal petition.

The order of the Circuit Court ordering the transcript of record of state court filed in Circuit Court, and enjoining Harding from the further prosecution of his suit in the state court, until the further order of the Circuit Court, was void.

The so-called supplement filed in the Circuit Court was unauthorized and void, and did not and could not help out the original removal petition filed in the state court.

Harding is not chargeable with laches. He has never waived his right to have said original motion to remand allowed.

The Circuit Court had no power to allow the amendment to the removal petition changing the vital averments made in said original removal petition filed in the state court. *Powers* v. *Chesapeake & O. R. R. Co.*, 169 U. S. 92, 101; *Shane* v. *Butte &c. Co.*, 150 Fed. Rep. 801; *Crehore* v. *Railway Co.*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27; *Graves* v. *Corbin*, 132 U. S. 572, 590; *Martin's Admr.* v. *Railroad Co.*, 151 U. S. 673, 691; *Carson* v. *Dunham*, 121 U. S. 421, 427; *Fife* v. *Whittell*, 102 Fed. Rep. 537; *Dalton* v. *Milwaukee Ins. Co.*, 118 Fed. Rep. 876; *Stone* v. *South Carolina*, 117 U. S. 430; *Cameron* v. *Hodges*, 127 U. S. 322; Moon on Removal of Causes, § 165; *Fitzgerald* v. *Missouri Pacific Ry. Co.*, 45 Fed. Rep. 812; *Macey Co.* v. *Macey*, 135 Fed. Rep. 725, 729, 730; *Santa*

Clara County v. *Goldy Machine Co.*, 159 Fed. Rep. 750; *Wallenburg* v. *Missouri Pacific Ry. Co.*, 159 Fed. Rep. 217; *Healy* v. *McCormick*, 157 Fed. Rep. 218; *Holton* v. *Helvitia &c. Co.*, 163 Fed. Rep. 659; *Kinney* v. *Columbia Assn. Co.*, 191 U. S. 78; *Murphy* v. *Gold Co.*, 98 Fed. Rep. 321.

The orders permitting petitioner to amend, and allowing such amendment to be filed, the said amendment so filed, and all subsequent proceedings based thereon, were wholly without power or jurisdiction of the Circuit Court, and void.

It clearly appearing that Harding will be entitled to a remand of his case after a tedious and expensive hearing on the merits, on appeal from whatever decree may be then entered, this should be duly considered by this court, as even the certainty of such ultimate remand does not constitute an adequate remedy in the premises.

Mr. Chief Justice White delivered the opinion of the court.

By a motion for leave to file a petition for mandamus, George F. Harding seeks the reversal of the action of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in taking jurisdiction over a cause as the result of a refusal to grant a request of Harding to remand the case to a state court. The facts shown on the face of the motion papers are these:

On October 19, 1907, George F. Harding, the petitioner, alleging himself to be a resident of the State of California, sued in an Illinois state court various corporations alleged to be created by and citizens of the State of New Jersey and fourteen individuals whose citizenship and residence were not given. The suit was brought by Harding as a stockholder in the Corn Products Company, one of the defendants, and the object of the suit was to annul an al-

leged unlawful merger of that company and for relief in respect of an asserted misappropriation of its assets. On November 6, 1907, the Corn Products Company applied to remove to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, on the ground that there was a separable controversy between it and Harding. By separate petitions all the other defendants united in the prayer for removal. The state court not having acted on the petition for removal, the judge of the United States court, upon the application of the Corn Products Company, ordered the transcript of record from the state court to be filed and the case to be docketed. This being done, the Corn Products Company filed what was styled an amendment and supplement to the petition for removal, stating the residence and citizenship of the individuals named as defendants in the original bill, four of them being averred to be residents of Chicago, Illinois, one of Pekin, Illinois, and the others citizens and residents of States other than Illinois.

In December, 1907, Harding moved to remand to the state court, in substance upon the ground that there was no separable controversy and that the requisite diversity of citizenship was not shown by the petition for removal, and especially directed attention to the fact that at the time of the commencement of the suit in the state court he, Harding, was not a resident of the district, and that none of the corporate defendants were such residents.

Prior to the bringing of the Harding suit a suit had been brought in an Illinois state court by the Chicago Real Estate and Trust Company, an Illinois corporation and a stockholder in the Corn Products Company, upon substantially the same grounds as those subsequently alleged in the Harding suit, against the principal corporations and individuals who were thereafter made defendants in the Harding suit. This cause had been removed by the Corn Products Company into the Circuit Court of the United

States for the Northern District of Illinois, Eastern Division, and on its removal, at the instance of the Corn Products Company the court had restrained the real estate company, its officers, agents, attorneys, etc., from further prosecuting the cause in the state court. Immediately after the bringing of the Harding suit in the state court the Corn Products Company applied to the Circuit Court, in the real estate company suit, to restrain Harding from prosecuting his suit on the ground that the bringing of the same was a violation of the previous restraining order. The court issued a temporary restraining order. Thereafter, as we have said, the Harding suit was removed on the application of the Corn Products Company to the Circuit Court of the United States, and the motion to which we have referred was made by Harding to remand. That motion to remand, however, in consequence of the restraining order, which had been made permanent, was not heard until the summer of 1909, after the restraining order above referred to had been dissolved by the Circuit Court of Appeals. 168 Fed. Rep. 658. Before the motion to remand, however, was passed upon the Circuit Court granted permission to the Corn Products Company to amend its removal petition by alleging that at the time of the commencement by Harding of his suit and continuously thereafter he was a citizen of Illinois and a resident of Chicago in that State. To this Harding objected on the ground that the court was without power to allow an amendment, and that its jurisdiction was to be tested by the averments of the original removal petition. The permitted amendment having been filed, the motion to remand was denied. Harding thereupon, reiterating his objection to the allowance of the amendment and to the jurisdiction of the court to do other than remand the cause, traversed the averment in the amended removal petition as to his Illinois citizenship and residence, and specially prayed "that there may be a speedy hearing and a decision of such issue of citizen-

ship and a remand of this cause to the state court by the order of this court, . . ." The request for hearing was granted. A large amount of evidence was introduced on such hearing, which extended over a period of more than fifteen months, and the taxable costs, it is said, "ran up into several thousands of dollars." Finally, on October 25, 1910, the issue was decided against Harding. 182 Fed. Rep. 421. The court, finding from the proof that Harding was, as alleged in the amended petition, a citizen and resident of the State of Illinois, expressly refused the prayer for removal made by Harding in his answer to the amended petition; in other words, the court reaffirmed and reiterated its previous action in refusing to remand the cause. Whether these facts give such color of right to the contention that we have jurisdiction to review the action of the trial court by the writ of mandamus as to lead us to be of opinion that further argument at bar is necessary, and therefore a rule to show cause should issue, is then the question for decision.

The doctrine that a court which has general jurisdiction over the subject-matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded (see *Dowell* v. *Applegate*, 152 U. S. 327, 337, and cases cited), and has been so recently applied (*Hine* v. *Morse*, 219 U. S. 493), that it may be taken as elementary and requiring no further reference to authority. Nor is there any substantial foundation for the contention that this elementary doctrine has no application to decisions of courts of the United States refusing to remand causes to state courts, since there is nothing peculiar in an order refusing to remand which differentiates it from any other order or judgment of a court of the United States concerning its jurisdiction. The importance of the subject which is involved in the contrary assertion, the apparent conflict between certain

decided cases dealing with the right to review by mandamus orders of Circuit Courts refusing to remand, and a long and settled line of other cases relating to the same subject, the confusion and misapprehension which must result unless the conflict is reconciled or abated, and the duty to remove obscurity, as far as it may be done, concerning the review of questions of jurisdiction, all lead us to give the subject a more extended examination than it would otherwise be entitled to receive.

In *Ex parte Hoard*, 105 U. S. 578, the court was called upon to consider whether the judgment of a Circuit Court of the United States, declining to remand a civil cause to a state court from which it had been removed, was reviewable by the extraordinary process of mandamus. In refusing to exert jurisdiction by mandamus and considering the inherent nature of the powers of a Circuit Court, it was declared that "Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded," and it was also observed that "No case can be found, however, in which a mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect." Calling attention to the fact that the act of 1875, in § 5, expressly gave an appeal to or a writ of error from this court for the review of orders of Circuit Courts remanding causes, without regard to the amount involved, the court said: "The same remedy has not been given if a cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power to review is given, the judgment of the court having jurisdiction to decide is final."

In *In re James Pollitz*, 206 U. S. 323, the facts were these: Pollitz, a citizen of the State of New York, sued in the Supreme Court of that State the Wabash Railroad Company, a consolidated corporation existing under the laws of the States of Ohio, Michigan, Illinois and Missouri, and a citizen of the State of Ohio, and various other defend-

ants, chiefly citizens and residents of the State of New York. The Wabash Company removed the cause to the Circuit Court of the United States, on the ground of a separable controversy. A motion of Pollitz to remand was denied. The controversy was decided by this court on the hearing of a rule, which was granted on the application of Pollitz for a writ of mandamus to direct the remanding of the cause. The court, after stating (p. 331) the general rule that "mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error," refused to take jurisdiction and review the action of the court below, and therefore declined to issue the writ.

Ex parte Nebraska, 209 U. S. 436, presented the following facts: In a suit against a railway company, commenced in a court of the State of Nebraska, the State, its attorney general, the railway commission and the members of the commission individually were plaintiffs. The defendant railway removed the cause to the United States court, upon the ground that the State was not a proper or necessary party to the suit, and that the controversy was wholly between citizens of different States. A motion to remand having been denied by the Circuit Court, this court issued a rule to show cause why a mandamus should not be allowed ordering the remanding of the cause. Upon the hearing on the return to this rule the court declined to take jurisdiction and review the action of the trial court. It was said that the Circuit Court had jurisdiction to pass upon the questions raised by the motion to remand, and if error was committed in the exercise of its judicial discretion "the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error." After declaring that "the applicable principles have been laid down in innumerable cases," the court cited

Ex parte Bradley, 7 Wall. 364; *Ex parte Loring*, 94 U. S. 418; *In re Rice*, 155 U. S. 396; *In re Atlantic City Railroad*, 164 U. S. 633. The case of Pollitz was also cited and reviewed.

In *Ex parte Gruetter*, 217 U. S. 586, the doctrine of *In re Pollitz* and *Ex parte Nebraska* was reaffirmed. The case was this: An action commenced by Gruetter in a state court was removed into a Circuit Court of the United States and Gruetter moved to remand. One ground of the motion was that the case was not removable because it was not an action of a civil nature, but was one to recover penalties. It was also urged that the petition and record did not show that the suit was sought to be removed to the Circuit Court of the United States for the district in which either the plaintiff or the defendant resided. On return to a rule to show cause why a mandamus should not be granted, the court declined to take jurisdiction of the case, saying (p. 588):

"There was no controversy as to there being diversity of citizenship. The defendant was a corporation of Kentucky, and plaintiff was a citizen of Tennessee. Inasmuch as we are of opinion that the Circuit Court of the United States had jurisdiction to determine the questions presented, we hold that mandamus will not lie. The final order of the Circuit Court cannot be reviewed on this writ. *In re Pollitz*, 206 U. S. 323."

It is patent from the review of the decided cases just made that the contention that the order of the court below refusing to remand the cause is susceptible of being here reviewed by the extraordinary process of a writ of mandamus, in other words, that that writ may be used to subserve the purpose of a writ of error or an appeal, is so completely foreclosed as not to be open to contention, unless it be that other cases which are relied upon as sustaining our jurisdiction to issue the writ of mandamus have either overruled the line of cases to which we have referred, or have

so qualified them as to cause them to be here inapplicable. We therefore come to consider the cases upon which petitioner relies to ascertain whether they sustain either of these views. The cases are *Ex parte Wisner*, 203 U. S. 449, *In re Moore*, 209 U. S. 490, and *In re Winn*, 213 U. S. 458. But to an elucidation of these cases it is necessary that the briefest possible recurrence be had to two leading cases which long preceded them, viz., *Virginia* v. *Rives*, 100 U. S. 313, and *Virginia* v. *Paul*, 148 U. S. 107.

In *Virginia* v. *Rives* a prosecution of persons accused of murder was removed from a state court to a Circuit Court of the United States. The latter court moreover, under a writ of *habeas corpus cum causa*, took the prisoners from the custody of the state authorities. The case in this court arose upon an application by the Commonwealth of Virginia for a rule to show cause why the prisoners should not be returned to the state court for trial. On hearing this court took jurisdiction over the cause, issued the writ of mandamus and directed the return of the accused. Speaking of the functions of the writ of mandamus, the court said (p. 323): "It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed." It is obvious from the opinion of the court and the concurring opinion that jurisdiction over the cause was taken because of the extraordinary abuse of discretion disclosed by the power attempted to be exerted, the confusion and disregard of constitutional limitations which the asserted power implied, and because under the law as it then stood no power would otherwise have existed to correct the wrongful assumption of jurisdiction by the Circuit Court.

In *Virginia* v. *Paul*, 148 U. S. 107, a person in the custody of the state authorities, charged with murder, was released under a writ of *habeas corpus* issued by a district

judge. Subsequently the Circuit Court of the United States took, by way of removal, jurisdiction over the prosecution. The Commonwealth of Virginia applied to this court for a mandamus to remand the prosecution and to restore the accused to the custody of the State authorities. The court, reaffirming the doctrine of *Virginia* v. *Rives*, pointed out that to wrongfully divest the State of its right to prosecute in its own courts for crimes committed against its authority was a gross abuse of discretion, which if not corrected by mandamus could not be done in any other form. A mandamus to remand was issued. The court, however, declined to review the order discharging on *habeas corpus*, on the ground that on the face of the application for *habeas corpus* issues had been presented which the judge had a right to decide, and if error was committed there was a remedy by appeal.

In *Ex parte Wisner*, 203 U. S. 449, mandamus was sought to compel a Circuit Court of the United States to remand a civil cause to the state court from which it had been removed and which the Circuit Court had refused to remand. The case was one where, although there was diversity of citizenship, neither of the parties resided in the particular district to which the suit had been removed. This court took jurisdiction. Reviewing the action of the court below, it was observed that the absence of residence within the district of either of the parties demonstrated the absolute want of authority of the Circuit Court over the cause, and that even if the objection was susceptible of being waived, a waiver by both parties was essential, and the record did not disclose that there had been such waiver. Considering the right to revise by mandamus the action of the Circuit Court in refusing to remand, no reference whatever was made to the existence of statutory remedies to correct the error found to have been committed, and no authority was cited, it being simply observed: "Our conclusion is that the case should have been remanded, and,

as the Circuit Court had no jurisdiction to proceed, that mandamus is the proper remedy."

In re Moore, 209 U. S. 490, was also a case of removal, where there was diversity of citizenship but neither of the parties resided in the particular district. The Circuit Court had refused to remand. Taking jurisdiction to review such action, on application for a writ of mandamus, this court held that as there was diversity of citizenship there was general jurisdiction in the Circuit Court, and that the objection that neither party resided within the district was a matter susceptible of being waived by the parties and that such waiver had taken place. The observations in *Ex parte Wisner* to the contrary were expressly disapproved. The action of the Circuit Court in refusing to remand was consequently approved. No discussion was had or authority referred to upon the question of the right to review by mandamus the action of the Circuit Court, the right to exert such authority having in effect been assumed as the result of the decision in the Wisner case.

In *In re Winn*, 213 U. S. 458, an action commenced in a state court had been removed into a Circuit Court of the United States, not upon diversity of citizenship, but upon the ground that the case stated was one arising under the laws of the United States. The Circuit Court denied a motion to remand. Upon application for mandamus this court took jurisdiction to review such action and directed that the case be remanded, upon the ground that the cause of action when rightly construed did not arise under any provision of the Constitution or under any law of the United States. Referring to some of the previous cases, and manifestly noting an apparent conflict between them, it was said that this court had declined to exert jurisdiction by mandamus in *Ex parte Nebraska* and *In re Pollitz*, because those cases but exemplified the exercise of judicial discretion by the Circuit Court as to a matter within

its jurisdiction, while the case in hand presented a question of a want of jurisdiction in the Circuit Court, clearly apparent on the face of the record, and therefore that court when it decided that the cause of action alleged arose under a law of the United States, could not possibly have exercised a discretion to decide a matter which was within its jurisdiction. *Virginia* v. *Rives* and *Virginia* v. *Paul* were approvingly cited, and it was said that in case of a refusal to remand, "although the aggrieved party may also be entitled to a writ of error or appeal," mandamus may be resorted to. On this subject it was further observed: "Mandamus, it is true, never lies where the party praying for it has another adequate remedy, . . . but where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy."

Comprehensively considering the two lines of cases, one beginning with *Ex parte Hoard*, 105 U. S. 578, and ending with *Ex parte Gruetter*, 217 U. S. 586, and the other beginning with *Virginia* v. *Rives*, 100 U. S. 313, and ending with *In re Winn*, 213 U. S. 458, it is to be conceded that they are apparently in conflict, both as to the assertion of power which one line upholds to view by mandamus the action of the United States Circuit Court in refusing to remand and the non-existence of such power which the other line of cases expounds, and also as to much of the reasoning in the opinions in some of the cases. Thus the ruling in *Ex parte Hoard*, that where in a civil case statutory remedies by error or appeal are provided for the ultimate review of errors committed by a court in determining its jurisdiction, such statutory provisions are, in their nature, exclusive, and therefore deprive of the right to resort to the remedy by mandamus, is directly in conflict with the jurisdiction which was exercised in *Ex parte Wisner*, *In re Moore* and *In re Winn*, as those cases were civil cases, and the right

to review the error, if any, committed by the Circuit Court in refusing to remand was regulated by statute. So also the statement, by way of reasoning, in the opinion in *In re Winn*, to the effect that in case of a refusal to remand "the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or appeal," is in direct conflict with the reasoning upon which the decision in *Ex parte Hoard* was based. The conflict just stated becomes more manifest when the ruling in *Virginia* v. *Paul* is considered, since in that case the court declined by mandamus to review the action of the court below in taking one accused of crime by a writ of *habeas corpus* from the custody of the state authorities, on the ground that *prima facie* there was jurisdiction to issue the writ of *habeas corpus*, and a remedy by appeal existed to review the action of the Circuit Court. Moreover, the decision in *In re Pollitz*, that there was not power to review the action of the court below in refusing to remand because the Circuit Court, in passing upon the question as to whether, on the face of the papers, a separable controversy was alleged decided a matter within its jurisdiction, and which involved the exercise of judicial discretion, cannot be harmonized with the ruling in *Ex parte Wisner* and *In re Moore*, that the action of a Circuit Court in refusing to remand could be reviewed by mandamus, because the court, in deciding whether the parties had waived the right to be sued in a particular district, had not been called upon to decide a matter within its jurisdiction involving the exercise of judicial discretion. This conflict becomes more obvious when the ruling in *In re Winn* and *Ex parte Gruetter* are contrasted, the one deciding that the action of the Circuit Court in refusing to remand because, from an analysis of the pleadings, it was found that a claim of Federal right was presented, was reviewable by mandamus, since it was plain, as a matter of law, that the court erred, and therefore its decision involved no element of judicial discretion, and

the other deciding that the denial by a Circuit Court of a motion to remand based upon the ground, among others, that on the face of the papers the suit was not removable, because it was not of a civil nature, but was for a penalty, was not reviewable by mandamus, because the decision of such a question was within the jurisdiction of the Circuit Court, and therefore involved the exercise of judicial discretion.

We must then either reconcile the cases or if this cannot be done determine which line rests upon the right principle and having so determined overrule or qualify the others and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty. Coming to the origin of the two lines of cases it is manifest that it was not conceived that there was conflict between them, since *Virginia* v. *Rives* and *Ex parte Hoard* were practically contemporaneously decided and were treated, the one as relating to an exceptional condition, that is, an effort to remove a criminal prosecution which if wrong was committed no power otherwise to redress than by mandamus existed, and the other but involved the application of the well-settled rule as to civil cases concerning which the right to review by error or appeal was generally regulated by statute. Following down the two lines of cases it is equally manifest that it was never conceived that they conflicted with each other, because some of the cases were also practically contemporaneously decided without the suggestion that one was in conflict with the other; indeed, the decisions in *In re Moore* and *Ex parte Nebraska* were announced on the same day. When the cases are closely analyzed, we think the cause of the conflict between them becomes at once apparent. As we have previously pointed out, no authority was referred to in *Ex parte Wisner* sustaining the taking in that case of

jurisdiction to review by mandamus the ruling of the Circuit Court, although in the course of the opinion the statement was made with emphasis that the face of the record disclosed an entire absence of jurisdiction in the court below. In the opinion, however, in *In re Pollitz* the Wisner case was referred to and in pointing out why it was not apposite and controlling it was observed that that case (the Wisner) presented a total absence of jurisdiction, involving no element of discretion, and *Virginia* v. *Rives* was cited, manifestly as indicating the basic authority on which the jurisdiction to review by mandamus had been exerted in the Wisner case. Again, in *In re Winn* it is to be observed that not only was *Virginia* v. *Rives* cited, but the cases of *Virginia* v. *Paul* and *Kentucky* v. *Powers*, 201 U. S. 1 (the last of which also concerned a criminal prosecution in which the doctrine of *Virginia* v. *Rives* had been applied), were also cited, evidently for the purpose of pointing out the source from whence came the doctrine of the right to review by mandamus under the facts presented. Bearing these matters in mind it plainly results that the conflict presented has arisen, not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction, or of any wrongful decision of any of the cases on the merits, but has simply been occasioned, beginning with *Ex parte Wisner*, from applying the exceptional rule announced in *Virginia* v. *Rives* to cases not governed by such exceptional rule but which fell under the general principle laid down in *Ex parte Hoard* and the line of cases which have followed it. Under these circumstances it becomes our plain duty, while not questioning the general doctrine announced in any of the cases, yet to disapprove and qualify *Ex parte Wisner*, *In re Moore* and *In re Winn* to the extent that those cases applied the exceptional rule of *Virginia* v. *Rives*, and thereby obscured the broad distinction between the general doctrine announced in *Ex parte Hoard* and the cases which have followed it and the

exception established by *Virginia* v. *Rives* and the cases which have properly applied the doctrine of that case. Our duty to take this course arises not only because of the misconception which must otherwise continue to exist, but also because it is to be observed that material portions of the act of 1875, which were made the basis of the ruling in *Ex parte Hoard*, are yet in force, and because the cogency of the considerations arising from this fact are greatly increased by the duty to give effect to the provisions of the judiciary act of 1891 concerning the review of final orders and judgments or decrees of the Circuit Courts of the United States.

As then our conclusion is that the case under consideration is not controlled by the ruling in *Ex parte Wisner* or kindred cases, but is governed by the general rule expressed in *Ex parte Hoard* and followed in *In re Pollitz* and *Ex parte Nebraska*, and, lastly, applied in *Ex parte Gruetter*, it clearly results that the application for leave is without merit, and

Leave to file is denied.

WEYERHAEUSER *v.* HOYT.

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

No. 24. Argued April 27, 28, 1910.—Restored to docket for reargument December 19, 1910.—Reargued January 19, 20, 1911.—Decided February 20, 1911.

It was the purpose of Congress, as evidenced by the original Northern Pacific Land Grant Act of July 2, 1864, c. 217, 13 Stat. 365, and the joint resolution of May 31, 1870, 16 Stat. 378, extending the indemnity limits, to confer substantial rights to the lands within the indemnity limits in lieu of those lost within place limits.

The right of the company to lieu lands lawfully embraced in selections filed with the Secretary of the Interior excluded lands to which rights of others had attached before the selection and also excluded

the right of others to appropriate lands so embraced in such selections pending action by the Secretary.

The power of the Secretary to approve selections is judicial in its nature, and implies the duty to determine as of the time of filing the selection and the doctrine of relation applies to decisions as to validity of such selections.

In this case *held*, that the company's rights to lieu lands embraced in a selection were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary and between the time of decision of the Secretary holding that the selections were unlawful and the subsequent reversal of that decision; and that the final decision related back to the date of the original selection. *Sjoli* v. *Dreschel*, 199 U. S. 564, distinguished.

General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but they are not controlling when the very point is presented in a subsequent case.

General expressions in an opinion such as those in *Sjoli* v. *Dreschel*, 199 U. S. 564, will not be made the basis for overthrowing a uniform rule of the Land Department, involving destructive effects upon property rights existing under different conditions.

The contention in this case, overruled by the Secretary, that the company was not entitled to lieu lands within indemnity limits because not on the same side of railroad as the place lands lost, held to be without merit.

Where a matter regarding selection of lieu land is wholly within the jurisdiction of the Secretary deciding it, this court will assume that the facts on which the decision rested were properly proved.

Humbird v. *Avery*, 195 U. S. 485, followed as to construction of provisions of Sundry Civil Act of July 1, 1898, c. 546, 30 Stat. 597, 620, and decision of Secretary in this case sustained; but *quære* and not decided, as to effect of such provisions on purchasers under the Timber and Stone Act.

Where the object of the bill is to charge the defendant as trustee of land included in lieu limits of a railway grant for the complainant, if it appears that a valid selection was made, proof that defendant's grantor never acquired title to the land would not establish complainant's right to it.

161 Fed. Rep. 324, reversed.

THE facts, which involve the construction of the Northern Pacific Land Grant Acts, are stated in the opinion.

Mr. Charles W. Bunn and *Mr. Frank B. Kellogg*, with whom *Mr. Stiles W. Burr* was on the brief, for appellants in No. 24 and appellees in No. 12.

Mr. Charles W. Bunn for plaintiffs in error in No. 181.

Mr. M. H. Stanford for appellees in No. 24 and appellants in No. 12.

Mr. P. B. Gorman for defendant in error in No. 181.[1]

Mr. Chief Justice White delivered the opinion of the court.

Conflicting claims to forty acres of land in the State of Minnesota is the controversy which this case involves. Both parties assert title derived from the United States, the appellants in virtue of a patent issued under a land grant made to the Northern Pacific Railroad Company and the appellees as the result of an alleged purchase under the timber and stone act. The facts are these:

The Northern Pacific Railroad Company in 1883 filed in the Land Department a list of indemnity selections which embraced the land in question. In 1893 a rearranged list was filed, differing from the previous one, in that it specified the particular tract of land lost in the place limits for which each described selection within the indemnity limits was made. The Land Department having ruled that the eastern terminus of the Northern Pacific Railroad Company was not at Ashland but at Duluth, a point west of Ashland, the selections, so far as they related to lands east of Duluth, among which was the land in con-

[1] This case was argued simultaneously with No. 12, *Campbell* v. *Weyerhaeuser*, *post*, p. 424, and *Northern Pacific Railway Company* v. *Wass*, *post*. p. 426.

troversy, were cancelled by order of the Secretary of the Interior. Following this, in December of that year, Richard B. Jones applied to purchase the land under the timber and stone act. A few months after, on February 28, 1898, the Secretary of the Interior made an order formally withdrawing from entry the selected land east of Duluth in order, as was declared, to preserve the right of the railroad company, if any, resulting from the selections previously filed, pending the decision by this court of cases involving whether the eastern terminus was at Duluth or at Ashland. About nine months after this withdrawal, in December, 1898, Jones made his final proof and paid the purchase money, one hundred dollars. The receiver of the local land office, however, recited in the receipt issued to Jones that his rights were "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described."

In 1900 (*Doherty* v. *Northern Pacific Ry. Co.*, 177 U. S. 421, 435) it was decided that the eastern terminus of the Northern Pacific Railroad was at Ashland, and therefore that the Land Department had erred in holding that such terminus was at Duluth. The Secretary of the Interior then formally reinstated the list of selections previously filed by the railroad company, the entry of Jones was cancelled, and the selections were approved and patents issued to the Northern Pacific Railway Company as entitled to all rights under the selections. The railway company conveyed the tract in controversy to Weyerhaeuser and Humbird, the present appellants.

This suit was then begun by Hoyt in a court of the State of Minnesota against Weyerhaeuser and Humbird to compel a conveyance of the land and to restrain the cutting or removal of timber during the pendency of the suit, on the ground that the title was held by the defendants in trust for complainant. The right to relief was principally based upon the contention that the purchase by Jones under the

timber and stone act was paramount to the indemnity selection previously made by the railroad company, and hence that the Land Department had fallen into an error of law in patenting the land to the company. In addition there were numerous other grounds upon which the right to relief was predicated, but we do not deem it necessary now to detail them, as we shall come to state and dispose of them after we have passed upon the contention concerning the paramount nature of the timber and stone entry. The case having been removed into a Circuit Court of the United States, upon the ground that on the face of the bill it involved the construction of acts of Congress, was in that court tried and a decree was entered dismissing the bill. The Circuit Court of Appeals, whose action is now under review, reversed the decree of the Circuit Court and remanded the cause with directions to enter a decree for the complainant granting the relief prayed. 161 Fed. Rep. 324.

The decision of the court was based upon the conclusion that the application to purchase made by Jones, although subsequent in date to the filing by the railroad company of its list of indemnity selections, was paramount to such selections, even although they had been subsequently approved by the Secretary of the Interior. This was not however the result of an interpretation originally considered of the granting act, but was exclusively caused, as shown by the opinion of the court, by what was held to be the authoritative and controlling operation of a decision of this court. *Sjoli* v. *Dreschel*, 199 U. S. 564. The soundness of this view lies at the threshold of the case, since, if it be that the rights of the parties are authoritatively concluded by the ruling in the *Sjoli case*, it will not be necessary to further consider the subject. Coming at once to analyze the ruling in the *Sjoli case* in order to fix its true import, we think it is apparent that the court below was mistaken in holding that the decision was here au-

thoritatively decisive. This is said because we see no escape from that conclusion when the issues in the *Sjoli case* are accurately ascertained and are compared with those here presented.

The Sjoli controversy, succinctly stated, thus arose: A homestead settler went in 1884 upon land within the indemnity limits of the grant to the Northern Pacific Railroad Company. He erected a dwelling-house and moved into it with his family and cultivated a portion of the land, all prior to the filing in 1885 of a list of selections by the railroad company, embracing the tract settled upon by Sjoli. Although the settler had thus prior to the filing of the list of selections entered upon and improved the land with the intention of perfecting title under the homestead laws, his application to enter, for reasons which need not be here adverted to, was not made until subsequent to the filing by the railroad company of its list of selections. Relying upon this fact, the railroad company opposed the application of Sjoli, and the proceedings which took place in the Land Department simply required the department to determine whether the railroad company, by the filing of its list of selections, could deprive the settler Sjoli of his rights, despite the fact that his settlement and improvement of the land had occurred prior to the filing by the company of its list of selections. The Land Department decided in favor of the settler, and a patent was issued to him.

The matter decided by this court in the *Sjoli case* arose from the bringing of a suit by Dreschel, as assignee of the rights of the railroad company, asserting that Sjoli held the land in trust for him as the grantee of the railway company, because the Land Department had, as a matter of law, erred in deciding that the rights of the settler Sjoli were paramount to the subsequent selection by the railroad company, since at the time of the filing of such list of selections no record evidence existed in the Land

Department of the asserted settlement by Sjoli or of his intention to avail of the benefit of the homestead laws. The action of the Land Department in maintaining the paramount right of the settler was sustained. As it is manifest from the statement we have made that the controversy in this case involves no question whatever concerning the rights of a settler initiated prior to the filing by the railroad company of its list of selections, but simply calls upon us to determine whether the Land Department erred in deciding that a filed list of selections was after approval paramount to a subsequent application to purchase, it is at once demonstrated that the question here involved is wholly different from that which was decided in the *Sjoli case*. This difference is as wide as that which would exist between a ruling that one who was prior in time was prior in right, and a directly antagonistic decision that one who was subsequent in time was yet prior in right. And the broad distinction which obtains between the matter which was involved and decided in the *Sjoli case* and the question presented on this record is made, if need be, more apparent when it is considered that in the *Sjoli case* the action of the Land Department in issuing the patent to the settler, because he was prior in time was sustained, while to hold that decision applicable here would reverse the action of the Land Department in issuing a patent to the railway company because it was prior in time. While in view of this difference between the issues involved in the *Sjoli case* and those here arising, we are constrained to the conclusion that the former case cannot be held to be here authoritatively decisive, of course the due persuasive force of the reasoning of the opinion in the *Sjoli case* if here applicable remains, and must be considered when we come, as we now do, to pass upon the controversy here arising, enlightened by the true interpretation of the granting act as elucidated by the applicable decisions of this court.

It is beyond dispute on the face of the granting act of July 2, 1864, c. 217, 13 Stat. 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat. 378, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company subject to the approval of the Secretary of the Interior that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of power of the Secretary of the Interior to approve lawful selections when made would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection, is not only theoretically apparent from the mere statement of the proposition, but has moreover in actual experience been found to be the practical result of carrying that doctrine into effect. See 25 Opin. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection when made should not include lands which at that time were subject to the rights of others. The requirement

of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the Secretary. The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in *Wisconsin Central Railroad* v. *Price*, 133 U. S. 496, 511, where it was said that the power to approve was judicial in its nature. Possessing that attribute the authority therefore involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior, was to bring into play the elementary principle of relation, repeatedly sanctioned by this court and uniformly applied by the Land Department from the beginning up to this time under similar circumstances in the practical execution of the land laws of the United States. Without attempting to cite the many cases in this court illustrating and applying the doctrine, a few only which are aptly pertinent and here decisive are referred to. *Gibson* v. *Chouteau*, 13 Wall. 92, 100; *Shepley* v. *Cowan*, 91 U. S. 330; *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, 733; *Oregon & C. R. R.* v. *United States*, 189 U. S. 103, 112; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334, and cases cited.

In *Shepley* v. *Cowan* there was conflict between a preemption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the State a large quantity of land to be selected by the governor,

the act providing that if the selection should be approved by the Secretary of the Interior patents were to issue. The court said (p. 337):

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterward issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a preëmption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

On page 338, after distinguishing *Frisbie* v. *Whitney*, 9 Wall. 187, and *Yosemite Valley Case*, 15 Wall. 77, the court said:

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase, or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

In *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, one of the questions arising for decision was which of two railroad companies was entitled to certain tracts of lieu lands situated within overlapping indemnity limits of certain grants made by an act of Congress to the Territory of Minnesota, to aid in the construction of the roads of the contesting companies. The selections were to be made by the governor, and required the approval of the Secretary of the Interior. The Winona company filed a list of selec-

tions. The St. Paul company made no selections, but nevertheless, on grounds which need not be stated, the Secretary of the Interior certified the lands to the State for the use of that company. The Winona company brought suit in the state court to have a declaration of its rights in the land, and to restrain the St. Paul company and others from receiving a patent or other evidence of title to the lands from the governor of the State. The state court decreed in favor of the Winona company, and this court affirmed its action. In the course of the opinion it was said (page 731):

"The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road."

After referring to prior decisions the conclusion was reached that, as to the lands to be selected, "priority of selection secures priority of right," and that as the Winona company alone had made selection of the lands, and that selection was lawful, the right to the land as against third parties vested in the Winona company as of the date of the filing of its lists of selections. In concluding the opinion it was said (p. 733):

"It is no answer to this to say that the Secretary of the Interior certified these lands to the State for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous de-

cision of his cannot deprive the Winona company of rights which became vested by its selection of those lands. *Johnson* v. *Towsley*, 13 Wall. 72, 80; *Gibson* v. *Chouteau*, 13 Wall. 92, 102; *Shepley* v. *Cowen*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 536."

So, also, in *Oregon & C. R. R.* v. *United States*, 189 U. S. 103, the court said (p. 112):

"Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."

The doctrine thus affirmatively established by this court as we have said has been the rule applied by the Land Department in the practical execution of land grants from the beginning. *Porter* v. *Landrum*, 31 L. D. 352; *Southern Pacific Railroad Co.*, 32 L. D. 51; *Santa Fe Pacific Railroad Co.*, 33 L. D. 161; *Eaton* v. *Northern Pacific Railway Co.*, 33 L. D. 426; *Santa Fe Pacific Railroad Co.* v. *Northern Pacific Railway Co.*, 37 L. D. 669. The well-settled rule of the Land Department on the subject was thus stated by the then Assistant Attorney General in the Department, now Mr. Justice Van Devanter as follows:

"Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings;

and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

"There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

"What effect has been given to a pending railroad indemnity selection?

"Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal, but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. *Dinwiddie* v. *Florida Railway & Navigation Co.*, 9 L. D. 74. In the circular of September 6, 1897, (6 L. D. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact, a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws."

Despite the doctrine of this court as expounded in the cases previously referred to, the unbroken practice of the Land Department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the

many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land-grant acts which would result from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is *Sjoli* v. *Dreschel*, 199 U. S. 564, to which we have previously referred, and others are cited in the margin.[1]

What we have already said as to the *Sjoli case* would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration nor even by way of *obiter* was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes: *a*, those involving the nature and character of the right, if any, to indemnity lands prior to selection; *b*, whether such lands, after the filing of a list of selections and before action by the Secretary of the Interior thereon, could be taxed by a State to the railroad company as the owner thereof; and, *c*, those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was the well-settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred to expounding the doctrine of relation were approvingly cited or expressly reaffirmed.

---

[1] *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S. 382; *Kansas Pacific R. R. Co.* v. *Atchison &c. R. R. Co.*, 112 U. S. 414; *Kansas P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639, 644; *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 511; *United States* v. *Missouri &c. Ry.*, 141 U. S. 359, 374, 375; *New Orleans Pacific Ry. Co.* v. *Parker*, 143 U. S. 42, 57; *Hewitt* v. *Schultz*, 180 U. S. 139.

The *Sjoli case*, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which when separated from its context and disassociated from the issues which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in *Cohens* v. *Virginia*, 6 Wheat. 399, so often since reiterated and expounded by this court, to the effect that "General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the *Sjoli case* of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the *Sjoli case* are not persuasive here clearly results from the demonstration which we have previously made that to apply them would be in effect to destroy the indemnity provisions of the granting act. Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the *Sjoli case* as persuasive is clear, (*a*) because to do so would result in the overthrow of the uniform rule by which the Land Department has administered land grants from the beginning, a rule continued in force after the decision in the *Sjoli case*, because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Opin. Atty. Gen. 632); (*b*) because of the destructive effect upon rights of property and the infinite confusion which would now arise from

extending, under the circumstances stated, the observations in the *Sjoli case* to the wholly different state of facts presented upon this record.

While the foregoing disposes of the main propositions which the case presents, there are additional contentions which it is necessary to pass upon. Irrespective of any question as to the paramount nature of a list of selections, it is contended on behalf of appellee, contrary to the ruling of the Secretary of the Interior: *a*, that the selection by the railroad company of the tract in controversy was void and it could not lawfully be approved; *b*, in any event that he was entitled to the land by virtue of the provisions of an act approved July 1, 1898, c. 546, 30 Stat. 620; and, *c*, the Northern Pacific Railway Company did not succeed to the rights of the Northern Pacific Railroad Company in the land, if any right thereto became vested in the latter company.

a. This contention is predicated upon the claim that the selecting company had not sustained a legal loss of the tract in lieu of which the land in controversy was selected, and that if it had sustained the loss the selection was not lawful, because the tract selected was not on the same side of the railroad as the tract lost and was not the nearest unappropriated land to it. These contentions were considered at much length by the Secretary of the Interior in the opinion, copied in the record, affirming the cancellation of the entry of Jones (34 L. D. 105) and were found not to be meritorious. The reasons advanced by the Secretary in support of his rulings upon the legal propositions involved seem to us convincing, and we therefore hold the contentions untenable. Cognate to the contentions just disposed of is a claim made in argument that the filed list of selections was void for the reason that the joint resolution of May 31, 1870, establishing the second indemnity limits, required certain facts to appear in order to entitle the railway company to the land, and that in selecting the

land those requisites were not complied with. The claim substantially embodies merely criticisms directed to the form or regularity of the selection list, and is not, in any view, of such a character as to render void the filed list. The matter being within the jurisdiction of the Secretary of the Interior, we must assume that the facts necessary to establish the right to approve the selections were shown to his satisfaction.

b. This contention asserts that complainant is entitled to the land by virtue of certain provisions relating to the Northern Pacific land grant contained in the subdivision entitled, "Surveying the Public Lands," embodied in the Sundry Civil Appropriation Act of July 1, 1898. The provisions are copied in the opinion in *Humbird* v. *Avery*, 195 U. S., beginning at page 485, and need not be here repeated. As there said, they "disclose a scheme or plan for the settlement of the disputes arising out of the conflicting rulings in the Land Department in reference to the eastern terminus of the railroad, and its action in reference to the public lands between Duluth and Ashland." It is argued that the Secretary of the Interior erroneously decided that the land could not be claimed under the act of 1898 by Jones or his grantee, because prior to January 1, 1898, Jones had done nothing more than to file his application for the land, and was consequently not a purchaser entitled to the benefits of the statute. In our opinion no error was committed by the Secretary in so deciding. Because we reach this conclusion we must not be considered as intimating any opinion whatever regarding the soundness of the contention made on behalf of the appellants, to the effect that in any event the act of 1898 can have no application to one who purchased land under the timber and stone act.

c. It is contended that the Northern Pacific Railway Company, under its charter, had no power to purchase the tract of land here in controversy, and that for various reasons the legal proceedings under which the railway com-

pany asserted it had acquired the rights of the Northern Pacific Railroad Company in the land were ineffective to produce any such result. On this record, however, it is not necessary to pass upon these contentions. As the object of the bill is to seek to charge the defendants as trustees of the land for complainant, plainly, if a valid selection was made, proof that their grantor never acquired title to the land would not establish a right to it in the complainant.

It follows that the decree of the Court of Appeals must be reversed and that of the Circuit Court affirmed.

And it is so ordered.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE DAY, dissenting.

This case is of sufficient importance to justify a full statement of the facts, as well as the grounds upon which we feel constrained to dissent from the opinion and judgment of the court.

By the final decree under review the Circuit Court of Appeals for the Eighth Circuit unanimously reversed the judgment of the Circuit Court with directions to give the plaintiff Hoyt, now appellee, the relief asked in his bill.

The general object of the suit was to have it adjudged that the present defendants, Weyerhaeuser and Humbird, now appellants, should hold the legal title to certain lands in Minnesota in trust for the plaintiff and be enjoined during the pendency of the cause, from selling, disposing of or removing, or from attempting to create any charge upon, the timber standing or lying upon the premises in question.

Many questions have been discussed by counsel. But there is one which seems to require special examination. The facts out of which that question arises may be thus stated:

The land in question is the southwest quarter of the southeast quarter of section seven, township fifty-four, of

range fourteen west, principal meridian. It contains forty acres, and is situated in St. Louis County, Minnesota. It is unfit for cultivation, is valuable chiefly for its timber, has no valuable deposit of gold, silver, cinnabar, copper or coal upon it, was at the time mentioned in the record uninhabited, and contained no mining or other improvements.

For the purpose of availing himself of the act of Congress relating to the sale of timber land in California, Oregon, Nevada, and Washington Territory, approved June 3, 1878, 20 Stat. 89, c. 151,—which act was amended August 4, 1892, and its benefits extended to all the States, 27 Stat. 348, c. 375,—one Richard B. Jones, a citizen of the United States and admittedly, in all respects, qualified under the laws of the United States to enter land, filed, December 17, 1897, with the Register and Receiver in the Land Office at Duluth a verified written duplicate statement, in due form, indicating his desire to purchase the land in dispute under the homestead laws of the United States. One of these statements was promptly transmitted by the Receiver to the General Land Office at Washington.

The Receiver, in conformity with law, at once posted in his office, for the required time, the fact of such application, describing the lands by legal subdivision and furnishing Jones a copy of such notice. That notice was duly published in the newspaper nearest to the land. On the twenty-seventh day of March, 1898, no adverse claim to the land having been filed in the Land Office, the applicant, Jones, after furnishing to the local Register satisfactory proofs of the preliminary facts required by law, *paid to the Receiver the full purchase price of the land,* together with all fees legally due to those officers. Thereupon he was permitted, December 10, 1898, to enter, and *did* enter the land, the Receiver executing and delivering to him at the time an *official receipt and certificate of purchase.* In December, 1898, all the papers and testimony in the matter

of Jones' application, including his certificate of purchase, were transmitted by the Register and Receiver to the General Land Office at Washington, *and by that office was received and filed.* On December 19, 1898, Jones and wife sold and conveyed the land to Minnie Stewart, by deed properly recorded on October 3, 1902. Stewart and wife conveyed to Hoyt, the present plaintiff, now appellee, and that deed was also duly recorded October 3, 1902.

On the second day of December, 1901—nearly *three* years *after Jones got his certificate of purchase and after he had sold the land*—the Commissioner of the General Land Office made a decision, holding for cancellation the entry made by Jones, as above stated, declaring it to be void on the ground that this land (using the words of the Commissioner) "was selected by the Northern Pacific Railroad (now Railway Company) October 17th, 1883 for the second indemnity, per list, rearranged list 15 B, in lieu of land in Section 11, T. 46, R. 16 W., in the primary limits disposed of between date of grant and definite location of the road, which selection has not since been abandoned or the basis otherwise used. The selection was cancelled, however, by letter of March 22, 1897, because the land is east of Duluth, the then [supposed] eastern terminal of the grant under departmental ruling; but said cancellation was rescinded and the selection restored by letter of May 26, 1900, under the decision of the U. S. Supreme Court, *United States* v. *Northern Pacific R. R. Co.*, 177 U. S. 435, that the grant extends to Ashland, Wisconsin. December 17, 1897, Richard B. Jones applied to purchase said tract under the Timber & Stone law, and after due publication and proof, made entry thereof December 10, 1898. Cash certificate No. 14812. Under the decision of the court, the selection of the company is a valid selection, and the claim of Jones not having been perfected prior to January 1, 1898, his claim is not within the act of July 1, 1898 (Departmental decision of May 22, 1900, *Salter* v.

Company). Said entry is therefore hereby held for cancellation for conflict with the prior valid selection of the company, subject to appeal. Notify him hereof; the company will be informed by this office."

It does not appear that Jones, or any one claiming under him, had any previous notice of this order, or that there was any trial or regular hearing of the matter in the General Land Office.

Upon appeal to the Secretary of the Interior, the above order of December 2, 1901, was affirmed, and subsequently, but not until October, 1905, a patent was issued to the Northern Pacific Railway Company. 35 L. D. 105.

When Jones entered and purchased the land, paying the Government price for it, and receiving a certificate of his purchase—*which purchase was made and which certificate was given nearly seven years before a patent was issued to the Railroad Company*—there was in the Land Office a *list* of selections alleged to have been filed by the Railroad Company on October 17, 1883. But the list did not assign each selection to specific land in the granted limits, which it was asserted had been lost by the company. That list was received at the local Land Office, and transmitted to the General Land Office. But on the eleventh of April, 1893 the Railroad Company, acting under the direction or suggestion of the Secretary of the Interior, "rearranged" its list so as to specify the particular tract lost in the primary limits. In such list the lands in dispute here were set opposite to particular lands lost in those limits. The lands mentioned in the company's list, whether we take the original or rearranged list, were, it must be remembered, within the *indemnity* limits of the grant made by Congress in 1864 in aid of the construction of the Northern Pacific Railroad. That is not disputed.

The principal assignment of error is that the entry and purchase by Jones—under whom Hoyt claims—of the lands in question were *subordinate* to the rights acquired

by the mere *filing* of the *list* of selections by the Railroad Company, followed as that was by the approval of the Secretary of the Interior and by a patent, although *such approval was not given nor*, as we have seen, *the patent issued to the Railroad Company, until many years after Jones received his certificate of purchase from the Government.*

Upon final hearing in the Circuit Court, the bill was dismissed. But upon appeal to the Circuit Court of Appeals, all the judges concurring, that judgment was reversed, and the case sent back with directions to enter a decree for the relief asked in the bill. Rec. 214; *Hoyt* v. *Weyerhaeuser*, 161 Fed. Rep. 324. The principles in the latter case were accepted and applied by the Supreme Court of Minnesota in *Northern Pacific Ry. Co.* v. *Wass*, 104 Minnesota, 411.

Section 3 of the charter of the Northern Pacific Railroad Company of July 2, 1864, provided: "And be it further enacted, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or

parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or preëmpted, or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof, under the direction of the Secretary of the Interior*, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . ."

But Congress afterwards broadened or extended the limits into which the Railroad Company, under the direction of the Secretary, might go in order to supply deficiencies in the granted limits. By the joint resolution of May 31, 1870, c. 67, 16 Stat. 378, amending the above act of 1864, "Second indemnity limits" were created. The resolution provided: "And in the event of there not being in any state or territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864 to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. . . ."

The fundamental inquiry in the case is whether Jones' entry, occupancy and purchase of the lands were subject or subordinate to the *previous filing* of the list of selections by the Railroad Company, the Secretary of the Interior not having approved such list until after such entry, occupancy, and purchase by Jones. The judgment below

proceeded upon two principal grounds: 1. That the Railroad Company did not acquire *any right or interest* in the lands selected within indemnity limits by the *mere filing* of its *list of selections*. 2. That *after* such list was filed, and while it was *unapproved* by the Secretary, the lands remained fully *open to entry and purchase* by homesteaders and preëmptors under the laws of the United States; that in the absence of the approval of the Secretary of the Interior, the *mere filing* of the lists put *no obstacle whatever* in the way of homesteaders or preëmptioners seeking to acquire public lands not already appropriated or sold under the laws of the United States; and that by an entry or purchase in conformity with the homestead or preëmption laws a right *attached* to those lands in favor of the entryman which could not be destroyed or overriden by any *subsequent* approval by the Secretary of the Interior of the original or rearranged list of selections made by the Railroad Company.

These grounds were sustained by a well-reasoned opinion delivered by Judge Sanborn on behalf of the Circuit Court of Appeals. In view of the elaborate discussion by counsel and by the majority of my brethren, it will be instructive to make a liberal extract from that opinion. After observing that lands within *indemnity* limits did not cease to be public lands open to settlement under the homestead laws, simply because of their having been embraced in a list of selections filed by the Railroad Company to supply losses within place limits, the Circuit Court of Appeals (the italics being ours) said: "The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands *did not have the effect to exclude them from occupancy under the preëmption or homestead laws*. . . . The question here is not the jurisdiction but the legality of the decision of the Land Department

and especially of the Secretary, its head, whereby he awarded this land to the Railway Company. The facts and the law warranted and required its award and sale to Jones. When he presented his application to purchase it under the Timber and Stone Act the Railway Company's selection of it was *unapproved* by the Secretary and that company was without equitable right to it. The Land Department had jurisdiction to accept the application of Jones and to sell the land to him, or to approve the selection of the company and to award the land to it. It exercised this jurisdiction, accepted the application of Jones, permitted him to enter the land, to prove up his claim to it, sold it to him, took his $100.00 in payment for it and issued to him his receiver's receipt, *and it did all this before the selection of the company was approved and before the company could acquire any right to the land.* Jones' equitable title to the tract *had then vested*, and while the jurisdiction of the Land Department continued until the patent issued, its power was neither arbitrary, unlimited nor discretionary, and its action was subject to judicial correction for error of law, fraud or clear mistake. The jurisdiction and power of disposition which the Land Department has of the lands of the United States, like the power of every other department of the government, is subject to the laws of the land, and the Land Department's violation or disregard of them is remediable in the courts. Its power 'cannot be exercised so as to deprive any person of land lawfully entered and paid for. *By such entry and payment* the purchaser secures a *vested interest in the property and a right to a patent therefor*, and can no more be deprived of it by order of the commissioner, than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way will be corrected whenever the matter is presented so that the judiciary can act upon it.' *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Germania Iron Co.* v. *James*, 89

Fed. Rep. 811, 818, 32 C. C. A. 348, 354, 355; *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 481, 107 Fed. Rep. 597, 602; *Black* v. *Jackson*, 177 U. S. 349, 357; *Orchard* v. *Alexander*, 157 U. S. 372; *Brown* v. *Hitchcock*, 173 U. S. 473, 478. . . . Finally counsel invokes the familiar rule that the decisions of officers of other departments of the government upon questions within their jurisdiction are cogent and persuasive, and should be followed by the courts unless they are clearly erroneous, and he reminds us that the Secretary of the Interior and the Commissioner of the General Land office have carefully considered the questions in this case and have decided that Jones was without legal or equitable claim to this land and that the right of the Railway Company to it was superior. But Jones *was a qualified entryman.* The attempted withdrawals and selections of the land by the Secretary prior to his approval of the company's selection *were unauthorized by law and without legal effect.* The land was open to entry and purchase *until he approved the selection. Jones entered, bought and paid for it before any such approval was made.* And the decisions of the Supreme Court which have been cited leave no doubt that the Secretary and the Commissioner fell into a plain error of law when they took the land which Jones had lawfully purchased from him or from his grantees and gave it to the Railway Company. Erroneous decisions of questions of law by the officers of the Land Department cannot be permitted to deprive the equitable owner of his vested right to lands which he has lawfully purchased from the United States. *Johnson* v. *Towsley*, 13 Wall. 72, 80; *Gibson* v. *Choteau*, 13 Wall. 92, 102; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 536; *St. Paul R. R. Co.* v. *Winona Railroad*, 112 U. S. 720, 733. The conclusion is that by his entry and purchase Jones acquired the entire beneficial ownership and the equitable right to the land in controversy and that the Railway

Company and its successors in interest obtained nothing under the patent but the naked legal title which they held in trust for him and for his successors in interest. This conclusion renders the other questions presented in this case immaterial. The decree must accordingly be reversed and the case must be remanded to the court below with directions to enter a decree for the complainant for the relief prayed in the bill, and it is so ordered."

Many cases, among which was the recent case of *Sjoli* v. *Dreschel*, 199 U. S. 564, were cited by the Circuit Court of Appeals to sustain its conclusion. Attention is specially directed to that case because it was only recently decided after full consideration. The facts in it differ, in some respects, from those in the case now before us, but the principles announced in the *Sjoli case* were clearly the result of previous cases. They directly bear upon the question now under consideration.

It appears from the report of the *Sjoli case* that he *settled* on the land there in dispute in 1884 and his original application was in 1889; whereas, the Railroad Company filed its list of selections of lands within indemnity limits to supply deficiencies in place limits in 1885, Sjoli then being in the actual occupancy of the land, and having the intention, by a formal application, to perfect his claim under the homestead laws. Dreschel claimed under the Railroad Company. Sjoli got a patent in 1901 based primarily on his prior occupancy. That was after the company filed its selections. The essential question in the case was as to the rights of the homestead settler as against the Railroad Company which had filed its list of selections of the lands after the homesteader settled on the lands with the intention to acquire them, but before he made his formal application for them. Summing up the doctrines previously established, this court declared in the *Sjoli case* that from its previous cases the following propositions were to be deduced: "That the Railroad Com-

pany will not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior, although, upon the *definite location of* its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within *primary* or place limits, not theretofore reserved, sold, granted, or otherwise disposed of, and free from preëmption or other claims or rights, become segregated from the public domain, and no rights in such *place* lands will attach in favor of a settler or occupant who becomes such after definite location; that no rights to lands within *indemnity* limits will attach in favor of the Railroad Company until *after* selections made by it *with the approval of the Secretary of the Interior; that up to the time such approval is given,* lands within *indemnity* limits, *although embraced by the company's list of selections,* are subject to be disposed of by the United States, *or to be settled upon and occupied under the preëmption and homestead laws of the United States;* and, that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected *with his approval,* to supply deficiencies within the place limits of the company's road." The words in the *Sjoli case,* "that up to the time such approval [by the Secretary] is given, lands within indemnity limits, *although embraced by the company's list of selections,* are subject to be disposed of by the United States *or to be settled upon and occupied under the homestead laws of the United States*"—were cited with approval in the very recent case of *Osborn* v. *Froyseth,* 216 U. S. 571, 578, and was really *the basis of the decision in that case.*

But the defendants insist that as Jones' occupancy of and application for the land was made while there was pending in the Land Office an unapproved *list* of selections

of lands (including the land in question), which the Railroad Company desired to appropriate in order to supply deficiencies in its primary limits, the subsequent approval by the Secretary of the company's list—although such approval did not in fact occur until 1905—overrode and annulled any right previously acquired by the homesteader Jones, although he applied, paid for and got his certificate of purchase *more than six years* prior to the *actual approval* by the Secretary of the Interior of the original or rearranged selection of these lands. We do not concur in this view. This view cannot be sustained without entirely disregarding the doctrines announced upon full consideration in many other cases, prior to the *Sjoli case*.

As counsel have made an earnest and extended argument in support of the contrary view it may be well to recall a few leading cases on the subject, and see just what has been adjudged.

In *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S. 382, the court construed the second section of the act of July 25, 1866, c. 242 (14 Stat. 239), granting to a company, for the purpose of aiding in the construction of a railroad and telegraph line, alternate odd sections of public land, for ten miles on each side, subject, however, to the condition that the Railroad Company might, *under the direction of the Secretary*, select alternate odd sections, within ten miles on each side, nearest the place limits, to supply deficiencies in lands found to have been granted, sold, reserved, occupied by homestead settlers, preëmpted or otherwise disposed of. As to lands in the *place* limits, the court said that the right of the company to the odd sections became fixed and absolute, when the road was located and the maps of such location were filed. But, said the court, speaking by Mr. Justice Swayne, "with respect to the lieu lands, as they are called, the right was a float, and attached to no specific tracts *until the selection was actually*

made in the manner described." In that case the selection made by the company was approved by local land officers and confirmed by the Secretary of the Interior, *when there was no claim upon it.* The court further said, in reference to the land actually selected under the direction of the Secretary, that "the Railroad Company had not and *could not have any claim* to it until *specially selected* as it was for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican *or other claim over it.*" In the same case, referring to the deficiency alleged to exist in the place limits, the court said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The Railroad Company had not, and could not, have any claim to it until specially selected, as it was for that purpose." This language was quoted with approval in *Osborn* v. *Froyseth*, 216 U. S. 578. So, in the present case when Jones entered and purchased there was no claim upon these lands that gave the Railroad Company any *right* or *interest* whatever in them which could be asserted in opposition to the entryman, whose rights had *attached before any approval* of the selections.

A similar question under another land grant act arose in *Kansas Pacific R. R. Co.* v. *Atchison &c. R. R. Co.*, 112 U. S. 414. The claim in that case was under an act of Congress of July 1, 1862, c. 120 (12 Stat. 489), which made a grant of lands designated by odd numbers on each side of the railroad, "which were not sold, reserved or otherwise disposed of by the United States and to which a preëmption or homestead claim had not attached at the time the land was definitely fixed." This court, speaking by Mr. Justice Field, said: "A right to select them [lands] within certain limits in the case of deficiency within the ten mile limit, was alone conferred, *not a right to any specific land or lands capable of identification by any principles of law or*

rules of measurement. Neither locality nor quantity is given, from which such lands could be ascertained."

In *Kansas P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639, 644, which involved rights under the act of July 2, 1864, (c. 317, 13 Stat. 365), granting lands to a railroad company the court, speaking by Mr. Justice Miller, said: "The reasonable purpose of the Government undoubtedly is that which it expressed, namely, while we are giving liberally to the Railroad Company, we do not give any lands we have already sold, *or to which, according to our laws,* we have permitted *a preëmption or homestead right to attach.* No right to *such* land passes by this grant. No interest in the Railroad Company attaches to *this* land or *is to be founded on this statute.*" This case was followed in *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 366; *Whitney* v. *Taylor*, 158 U. S. 85, 92–3, and *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620.

In *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 511, the court, speaking by Mr. Justice Field, in determining the effect of the mere filing of the list of selections, said: "*Until the selections were approved* there were *no selections in fact*, only preliminary proceedings taken for that purpose; and *the indemnity lands remained unaffected in their title. Until then* the lands which might be taken as indemnity were *incapable of identification; the proposed selections remained the property of the United States.* The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, *until it was executed, created no legal interest which could be enforced in the courts.*" The *mere filing of lists of* selections after the acceptance of the map of definite location of the railroad line between Duluth and Ashland *gave the company no such title as could be enforced by the courts in a suit between private parties.* It is true, the Government was under a promise to give the Railroad Company lands

in the indemnity limits to supply losses in place limits. But, as adjudged in the above cases, that promise *passed no title.* See *Humbird* v. *Avery,* 195 U. S. 480, 507, in which it was said that "no title to indemnity lands is vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established"—citing *Wisconsin Central R. R.* v. *Price, and other cases.*

In *United States* v. *Missouri &c. Railway,* 141 U. S. 359, 374–5, which case related to a railroad land grant, it was observed that certain *even*-numbered sections within the indemnity limits of the particular railroad concerned could, under the statute there in question, have been legally selected as indemnity lands, if no rights had attached to them before their selection, with the *approval of the Secretary of the Interior.* The court then proceeds: "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, *until* they are *actually* selected *and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes*"—citing, among other cases, *Sioux City &c. Railroad* v. *Chicago, Milwaukee &c. Railroad,* 117 U. S. 406, 408, in which the court, speaking by Mr. Justice Miller, said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, *and the selection made approved by the Secretary of the Interior.*"

In *New Orleans Pacific Railway Co.* v. *Parker,* 143 U. S. 42, 57, the language of the court was: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected *and approved by the Secretary of the Interior*"—citing numerous cases.

A full discussion of the rights of parties in respect of lands in indemnity limits will be found in *Hewitt* v. *Schultz*, 180 U. S. 139, which was determined after great deliberation in 1901. In that case the question arose whether it was competent for the Secretary of the Interior, after receiving from a railroad company its map of the definite location, could at once withhold or withdraw from sale or entry the odd-numbered sections within the *indemnity* limits to which the company, with the assent of the Secretary, might be permitted to resort in order to supply deficiencies in place limits. Referring to the opinions of Secretaries Lamar, Vilas and Smith, and approving their views, the court held such withdrawal to be unauthorized, indeed, *forbidden*, by the statute in respect to lands, within the *indemnity* limits, *left open by Congress for homesteaders or preëmptioners while the title remained in the United States.* The opinions of those Secretaries proceeded upon the ground taken in previous decisions of this court, that a right to select lands within indemnity limits "was alone conferred, not a right to any specific land or lands capable of identification by any principle of law or rules of measurement;" but that "the right of selection became a barren right, for, *until selection* was made the title remained in the Government, subject to its disposal at pleasure." In the opinion of Secretary Vilas, approved by this court in the *Hewitt case*, it was said: "It [the act of Congress] gave to any person entitled under the preëmption or homestead laws to take any such lands *the absolute right to acquire any proper quantity thereof, in accordance therewith;* and *this right an executive officer could not deprive the settler of.*"

In *Oregon & C. R. Co.* v. *United States*, 189 U. S. 103, the court said: "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, *no right* of the Railroad Company *attaches*, or *can* attach to specific lands within indemnity

limits *until there is a selection under the direction, or with the approval, of the Secretary.*"

Many other cases to the same effect might be cited.

It is, however, contended that the approval by the Secretary of the Interior of the selection of these lands to supply deficiencies in place limits had relation *back to the date* when the railroad *filed its original list of selections*, and had the effect to override any rights acquired by the homesteader *after* that list was filed, and *before such approval.* This view, if sustained, would practically destroy the rights given to homesteaders and preëmptioners by the acts of Congress as uniformly interpreted by this court. Even after the filing of a list of selection of lands by the beneficiary under the act of Congress, Jones was entitled, of right—prior to the actual approval by the Secretary of the proposed selections—to apply for the lands in dispute, pay for them, get a certificate of his purchase and in that way acquire them. That right *attached* to the lands *when he entered upon and applied for them under the homestead laws*, and he could not be arbitrarily prevented from paying the Government price, and obtaining a certificate of purchase, and perfecting his claim under those laws.

Now, if it be true, and all the cases so hold, that *after* the filing of a list of selections by the Railroad Company of lands within indemnity limits, such lands nevertheless remained fully open to entry, occupancy and purchase by homesteaders; if, as held in *Hewitt* v. *Schultz*, above cited, the Secretary of the Interior himself could not, immediately upon the filing of a list by the Railroad Company of selections of indemnity lands, withdraw such lands from entry or sale, and thus prevent their being entered, occupied and purchased by homesteaders, *prior* to the Secretary's *actual approval* of *such* selections; and if the *mere filing* of the list did not, in itself, in advance of any approval by the Secretary, give the land-grant beneficiary any right or claim whatever, legal or equitable, in or to any

particular lands specified in the list; then there is no basis whatever for the contention that the Secretary's approval of the selection of indemnity lands, *after* the homesteader's claim *attached* to them, can be referred back *to the day* on which the Railroad Company *filed* its list of lands within indemnity limits, sought to be taken by it—an act on his part which, *all the cases agree, did not give it any enforcible interest in particular lands.* That would be using the doctrine of relation, which is a mere fiction of law, to defeat the manifest will of Congress. To state the proposition in another way: If the lands embraced by the company's list of selections were, under the statute, fully open, *after* the filing of that list, to *entry, occupancy and sale, for the benefit of homesteaders*—and that cannot be disputed—how is it possible upon any sound principle, or consistently with the policy adopted by the Government to encourage settlements, that the right thus given to the homesteader could be annulled by any action of the Secretary occurring *after* that right accrued and *became attached* to the lands in behalf of the homesteader? A preference cannot be given in this way to the Railroad Company over the homesteader if regard be had to the purpose of Congress to keep the unappropriated public domain effectively, fully and completely open to settlers so long as the legal title remained in the United States, or until some right of the company *actually attached* to the lands settled upon. A different view cannot be sustained except upon the theory that the mere *application* of a railroad company to take particular lands to supply losses in place limits had the effect to take those lands out of the public domain and prevent their occupancy by homesteaders until it suited the Land Department—which might postpone its ruling for many years—to take up the application and pass upon it; and this, notwithstanding indemnity lands were fully open to be settled upon by homesteaders so long as the title remained in the United States.

At a very early date in the administration of the public lands this court, speaking by Mr. Justice Campbell, in *Clements* v. *Warner*, 24 How. 394, 397, said: "The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity, to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person. By the act of Sept. 4, 1841, c. 16 (5 Stat. 453), the preëmption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers." In the recent case of *Ard* v. *Brandon*, 156 U. S. 537, 542, the court, speaking by Mr. Justice Brewer (after referring to *Shepley* v. *Cowan*, 91 U. S. 330, 338), said that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. *If he does all that the statute prescribes as a condition of acquiring rights, the law protects him in those rights*, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." The court, in that case, then referred with approval to the observations above cited from *Clements* v. *Warner*, and proceeded: "There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the Government." See also *Northern Pacific R. R.* v. *Amacker*, 175 U. S. 567.

In support of the contrary view much reliance is placed

upon the general rule "that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation," Viner's Abridg. tit. Relation, 290; or, as stated by Cruise (5 Real Prop. 510, 511), that "all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." This rule may well apply where the inquiry relates to rights asserted in lands expressly granted in the *place* limits of a road; for, such grants are *in præsenti*. So, perhaps, it might be applied where the contest, under a railroad grant, is between *the Government and its grantee*, who was authorized to make selections of lands within indemnity limits to supply losses in place limits occurring before a specified time. As in *United States* v. *Anderson*, 194 U. S. 394, 399, where the court said: "But even though it be conceded, *arguendo*, that the doctrine in question would allow rights to be acquired by third parties to the injury of the applicant after the making of the selections and pending approval thereof by the Government, it does not follow that it controls the controversy here presented. This results because on this record *the rights of third parties are not involved*, since the controversy concerns only the rights of the United States to *retain as against its grantees* the proceeds recovered by it as the result of a trespass upon land after an application for the selection of such land and pending action thereon by the proper officers of the Government. Under these circumstances the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land." But clearly the rule should not be applied in a land-grant case in which the mere filing by the railroad beneficiary at the outset of a *list* of selections of indemnity lands does not affect the title of the United States, and has not, in and of itself, any such efficacy as to

become the basis of a right or interest *in the particular lands* mentioned in such list; especially when, as here, those lands, being within indemnity limits, remain open, according to all the authorities, to entry, occupancy and even purchase by homesteaders to the same extent they would have been had no list of selections ever been filed. In both a practical and legal sense the *filing* of such list was nothing more *than the expression of a desire* or *a request that the Secretary of the Interior permit the company* to *have certain indemnity lands to supply losses in the place limits.* The Secretary might unduly delay his decision, might never act on such request and thereby, for an unreasonable time, delay settlement on the public lands by those who seek homes on them, and are always dealt tenderly with by the United States. Before such request was acted on in this case rights of the homesteader intervened and became lawfully *attached* to the lands. If the homesteader acquired a *right* in these indemnity lands by entry, occupancy and purchase under the homestead laws, as he undoubtedly did, it is inconceivable that such right could, under any proper application of the doctrine of relation, be affected or overthrown by referring to an antecedent act performed by a different person, but which, *at the time it was performed, did not give any right or interest whatever in the lands,* and interposed no legal obstacle that would prevent homesteaders from entering, occupying or purchasing them. In support of the Railroad Company's position several cases are cited, to some of which we will refer.

The first of these cases, in point of time, is *Campbell* v. *Doe,* 13 How. 244. But that case has no bearing on the precise point under consideration. That was the case of a contest under an act of Congress giving school lands to townships, the selection to be made by the Secretary of the Treasury. One Hamilton made, as he supposed, a selection of certain lands under that act in conformity with regulations prescribed by the Secretary. But his

selection was made while the lands were legally reserved from sale, and he had prior notice of that fact. The land was consequently *not then open to selection*, except pursuant to the act of Congress and the regulations of the Secretary. After alluding to some minor views advanced in the case, this court said: "But in whatever light this may be viewed, we are clear that the Secretary of the Treasury had the power, under the act of Congress, to make the selection; and his decision, declaring the entry of Hamilton invalid, under the circumstances, conclusive." Referring to the argument that what was done by Hamilton was with approval of the Land Office, through whom the Secretary executed the power conferred upon him, the court said: "Yet where the Secretary has interposed and decided the matter, as in the case under consideration, his decision must be considered as the only one under the law."

The opinion in *Campbell* v. *Doe* closes with the suggestion that "under the circumstances no right became vested in him, Hamilton, by reason of his entry of the land, which could be regarded or enforced by *a court of equity*." The court did not refer, although counsel did, to the rule about the relation of time as between two acts, each of which is, in itself, efficacious to give *some substantial right* and was performed by different persons, at different times. It was adjudged in that case—and it was the only point that need have been determined—that the court could not go behind the decision of the Secretary of the Treasury, and that in no view of the case presented could the relief asked be granted by *a court of equity;* whereas, in the case now before us it must be admitted, in view of the act of Congress and the cases determining its scope and effect, that when Jones occupied and entered, as well as when he purchased the land in dispute, it *was part of the public domain*, subject to the control of the United States and *open to homesteaders and preëmptioners*, under the

laws of the United States, although there may have been at the time, on file, a list of unapproved selections by the Railroad Company.

Another case much relied on in this connection by the appellants is *Shepley* v. *Cowan*, 91 U. S. 330, 337. That case arose under the act of Congress of September 4, 1841, granting lands to certain States, including Missouri, for purposes of internal improvement, saving such as were or might be reserved from sale by any act of Congress or the proclamation of the President. The plaintiffs claimed title under a patent issued to one McPherson by the State, and purporting to be for lands *selected by the State* under the above act of 1841. The defendants claimed title under a patent issued by the United States to the heirs of one Chartrand, based on an alleged preëmption right acquired by a settlement of their ancestor. McPherson paid for the lands in dispute and got a certificate showing such fact. The selections authorized to be made were subject to the approval of the Secretary of the Treasury. That officer gave such approval. This court, referring, however, to the facts and to certain acts of Congress, held that the State *could not legally select* the lands in dispute as part of those granted by act of 1841, because they were "*legally* reserved from sale," consequently nothing could be claimed under the selection of McPherson. This view was sufficient to dispose of that case. Nevertheless, the court proceeds to consider another view which was held to be fatal to the claim made under the patent issued to McPherson. "If," the court said, "the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the State of Missouri from the time the survey was returned to the land office in St. Louis, it was equally open from that date to settlement, and consequent preëmption by settlers. The same limitation which was imposed by law upon settlement was imposed by law upon the selection of the State. In either

case the land must have been surveyed, and thus offered for sale or settlement. The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the Land Office; and the patent upon a preëmption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local Land Office. The action of the State and of the settler must, of course, in some way be brought officially to the notice of the officers of the Government having in their custody the records and other evidences of title to the property of the United States before their respective claims to priority of right can be recognized. But it was not intended by the 8th section of the Act of 1841, in authorizing the State to make selections of land, to interfere with the operation of the other provisions of that Act regulating the system of settlement and preëmption. The two modes of acquiring title to land from the United States were not in conflict with each other. *Both were to have full operation*, that one controlling in a particular case under which the first initiatory step was had. . . . But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, *as against each other*, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all *such* cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his

previous settlement in 1835 upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent State selection in 1849. His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if in point of fact the reservation had then ceased." It thus appears that the general rule determining the rights of parties under two different acts, performed at different times, was referred to and applied in a case where *each* act was of such *a substantial* character as *in itself to give a right, enforcible by law.* In the case referred to the selection by the State was wholly void, and could not be made the basis of *any* right acquired in opposition to the rights of the settler, although it was prior to the act performed by the settler. The "initiatory step" referred to in *Shepley* v. *Cowan* was necessarily a step which, *in itself,* gave *some interest* in the particular land involved. In the present case, the subsequent act of the homesteader was confessedly in accordance with law, gave him a substantial interest in the land, and was not defeated by reason of the prior act of the Railroad Company in merely filing its list of selections. We say this for the reason that such filing, according to the adjudged cases, *could not be made the basis of any right or interest in these particular lands.* Within the true meaning of the rule as to the relation of time between two acts of a substantial character, performed at different times, the initiatory step was that taken by Jones when he entered and purchased; for there was no previous step which had in or of itself any efficacy whatever to confer a right in the lands or prevent him from acquiring them.

Substantially, the same comments may be made about the case of *McCreery* v. *Haskell,* 119 U. S. 327, 330, which

is also much relied on by the appellants. The dispute in that case was about certain public lands which, from the date of the grants, were *equally* open to selection by the State and by homesteaders and preëmptioners under an act of Congress relating to land titles in California. By its selection the State could acquire by the act of Congress a right or interest in the lands; by settlement, the preëmptioner could also acquire a right in them. That being the case, this court said: "The land lying outside of this survey thus became, in the language of the act, subject to the general land laws of the United States. It was open to settlement with other public lands, and consequent preëmption by settlers, and to selection by the State on behalf of the school sections within the confirmed Mexican grant. As between the settler and the State, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. In such cases, the rule prevails that the first in time is the first in right."

In the present case the Railroad Company, as we have seen, acquired no interest whatever by merely requesting that it have certain indemnity lands to supply losses in place limits; whereas, in the California case, the prior act to which the subsequent act was referred—the selection by the State—would have given to the State a substantial interest in the lands, provided the lands had been open to selection by it at all. Proceeding on the basis that the selection was valid, the state court held that such selection was a prior substantial, effective act to which the subsequent act may be referred under the rule stated in former cases as to relation of time.

Further citation of authorities would seem to be unnecessary. In our opinion the filing by the Railroad Company of a list of lands, within indemnity limits, which it desired to obtain in order to supply deficiencies in place

limits, gave the company no interest in any particular lands, and Jones had the right under the homestead laws of the United States, *after* that list was on file, and before it was *approved by the Secretary*, to enter upon and occupy the indemnity lands so specified, with the intention to acquire them under the laws of the United States, and, by such entry and occupancy, with such intention, acquire a substantial interest or right in them which could not be affected or impaired by the subsequent approval of such list by the Secretary of the Interior; that the mere filing of the list did not and could not, in itself, be made the basis for any claim that would be inconsistent with Jones' legal rights as resulting from his entry and occupancy with the intention stated; consequently, the appellee claiming under Jones had the better right. To make the approval by the Secretary of the Interior relate back to a date when the Railroad Company confessedly did not have, and could not have acquired any, even an inchoate, interest in these lands, and thus cut off and destroy the intervening rights acquired by the homesteader before the Secretary's approval, would be to make a new and dangerous application of the doctrine of relation discussed at the bar. A subsequent act cannot properly be used to give legal effect to a prior act, as of a time when such prior act was performed, if the prior act had no efficacy whatever to confer an interest in the lands to which the two acts related. No adjudged case really holds to the contrary. These views do no injury to the Railroad Company, for if the homesteader is adjudged to have the better right, the company can, under the direction of the Secretary, go into the whole body of indemnity lands and pick out other lands to supply any loss in place limits; whereas, if the homesteader loses the land he has settled upon and occupied he will lose the benefit of his improvements, and must abandon the place he had fixed upon as his home.

One other matter should be referred to. Across the

certificate of purchase issued to Jones these words were written: "This receipt is issued under the order of the Secretary of the Interior, dated February 28th, 1898, subject to any claim the Northern Pacific Railroad Company may have to the lands herein described." Of course, the Secretary had no authority to do this, and his act had no legal efficacy. If the Railroad Company had rights superior to those acquired by Jones those rights could have been protected despite the certificate issued to Jones. If it had none, then the endorsement across the face of the certificate is to be regarded simply as a warning to Jones that he might have in the future a contest with the Railroad Company. The endorsement that Jones' purchase was subject to any claim the company "may have," neither added nor took away rights that belonged at the time to either the company or to Jones.

In our opinion the judgment of the Circuit Court of Appeals should be affirmed.

CAMPBELL *v.* WEYERHAEUSER.

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

No. 12. Argued April 27, 28, 1910.—Restored to docket for reargument December 19, 1910.—Reargued January 19, 20, 1911.—Decided February 20, 1911.

Decided on authority of *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380.

THE facts are stated in the opinion.

Mr. Charles W. Bunn and *Mr. Frank B. Kellogg*, with whom *Mr. Stiles W. Burr* was on the brief, for appellants in No. 24 and appellees in No. 12.

Mr. Charles W. Bunn for plaintiffs in error in No. 181.

Mr. M. H. Stanford, with whom *Mr. H. H. Hoyt* was on the brief, for appellees in No. 24 and appellants in No. 12.

Mr. P. B. Gorman for defendant in error in No. 181.[1]

Mr. Chief Justice White delivered the opinion of the court.

This case and the *Hoyt case*, just decided, are of the same general character, and were consolidated and tried below as one case. In this case, however, the application of Campbell to purchase the tract by him claimed was rejected by the Land Department, and Campbell was not permitted to enter the land. The land furnishing the selection basis also lay further west in Minnesota than the lost tract in the *Hoyt case*. The Court of Appeals held that Campbell acquired no equitable interest in the land by his application, and the denial thereof, and consequently he could not maintain a bill in equity to charge the title under the patent issued to the railroad company upon a selection of a tract as lieu land, and affirmed the decree of the Circuit Court dismissing the bill. As in any event the decision rendered in the *Hoyt case* is decisive of this, we hold that the bill was rightly dismissed, and the decree of the Circuit Court of Appeals is therefore

Affirmed.

Mr. Justice Harlan and Mr. Justice Day dissent for the reasons set forth in the dissenting opinion in case of *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380.

[1] This case was argued simultaneously with No. 24, *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380, and No. 181, *Northern Pacific Railway Company* v. *Wass*, *post*, p. 426.

NORTHERN PACIFIC RAILWAY COMPANY *v.* WASS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 181. Argued April 27, 28, 1910 —Restored to docket for reargument December 19, 1910.—Reargued January 19, 20, 1911.—Decided February 20, 1911.

Decided on authority of *Weyerhaeuser* v. *Hoyt, ante*, p. 380.

THE facts are stated in the opinion.

Mr. Charles W. Bunn and *Mr. Frank B. Kellogg*, with whom *Mr. Stiles W. Burr* was on the brief, for appellants in No. 24 and appellees in No. 12.

Mr. Charles W. Bunn for plaintiffs in error in No. 181.

Mr. M. H. Stanford, with whom *Mr. H. H. Hoyt* was on the brief, for appellees in No. 24 and appellants in No. 12.

Mr. P. B. Gorman for defendant in error in No. 181.[1]

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

In brief, the facts of this case are as follows: While a filed selection by the St. Paul and Northern Pacific Railway Company of land within the indemnity limits of a railroad grant was awaiting the action of the Secretary of

[1] This case was argued simultaneously with No. 24, *Weyerhaeuser* v. *Hoyt, ante*, p. 380, and No. 12, *Campbell* v. *Weyerhaeuser, ante*, p. 324.

the Interior, Fred Wass, in April, 1899, entered upon the land with the intention of making it a homestead, and continued in possession, making improvements, etc. In December following Wass presented to the Land Office an application to enter the tract under the homestead laws. The register and receiver filed his application, but on the same day rejected it and refused to receive the fees tendered, basing such refusal and rejection upon the ground that the lands filed for were embraced in the then pending selection. On appeal the action of the local Land Office was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior respectively. The selection was subsequently approved and a patent for the lands was issued by the governor of Minnesota, all rights under which became vested in the Northern Pacific Railway Company, the plaintiff in error. That company then commenced this action against Wass and his wife in a court of the State of Minnesota to recover possession of the land and damages for the detention. In the answer, among other things, affirmative relief was prayed against the railway company for the conveyance of the legal title to Wass. A demurrer to the answer was overruled upon the authority of the decision in *Sjoli* v. *Dreschel*, 199 U. S. 564, and a decree was entered in favor of Wass, granting the relief prayed by him. This decree was affirmed by the Supreme Court of Minnesota upon the authority of the *Sjoli case* as well as the decision of the Circuit Court of Appeals in *Hoyt* v. *Weyerhaeuser*, 161 Fed. Rep. 324. The opinion just announced, reviewing the action of the Circuit Court of Appeals in the *Hoyt case* and reversing the decree entered in that case, conclusively establishes that error was committed by the court below, and therefore requires a reversal.

The judgment of the Supreme Court of Minnesota is therefore reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE DAY, dissenting.

This action was instituted in the District Court of Todd County, Minnesota, by the Northern Pacific Railway Company, a Wisconsin corporation, to recover the possession and damages for the detention of the southeast quarter of section thirteen, township one hundred and twenty-nine, north of range thirty-two west, situated in the above county.

The answer of the defendant Wass states certain facts both by way of defense and as the basis for an affirmative decree against the Railway Company, declaring that the legal title to the land is held in trust for his use and benefit, and should be conveyed to him. The company demurred to the answer as not stating facts sufficient to constitute either a defense or a counterclaim. The demurrer was overruled, and the case was determined on the facts stated in the answer, as well as on those set forth in a special finding. By the decree it was adjudged that the legal title was held in trust for the defendant, and the plaintiff was ordered to convey the title to him by sufficient deed. On the authority of *Sjoli* v. *Dreschel*, 199 U. S. 564, and *Hoyt* v. *Weyerhaeuser*, 116 N. W. Rep. 937 (104 Minnesota, 411), the Supreme Court of Minnesota affirmed the decree. The case is here for review.

Upon the record before us the following facts must be taken as beyond question:

1. The lands in question were surveyed public lands of the United States within the twenty mile indemnity limits of what are known as the Northern Pacific Railroad land grants made by Congress to the Territory of Minnesota by the act of March 3d, 1857, c. 99, 11 Stat. 195, and by the act of March 3d, 1865, c. 105, 13 Stat. 526, granting lands to that State, which last act was amended March 3d, 1871, 16 Stat. 588, c. 144.

2. By an act of March 1st, 1877, the legislature of Minnesota transferred all its rights in these lands to the Western Railway Company of that State. That company subsequently assigned its rights to the St. Paul and Northern Pacific Railway Company, the predecessor in interest of the present plaintiff.

3. On the thirty-first day of December 1877, the Western Railway Company filed in the proper Land Office a list purporting to contain a selection of lands under the indemnity provisions of the grants in question; not however designating any particular lands within the primary or place limits of either grant as the basis for the selected tracts. But the lands here in question were among those embraced in the above general list of selections.

4. *Nearly twelve years after the filing of the list of selections* by the Western Railway Company, namely, on December 4th, 1889, the St. Paul and Northern Pacific Railway Company filed in the local Land Office an amended list of the selection of indemnity lands, which list included the land now in dispute. And on February 12th, 1892 it filed a rearranged list of indemnity selections, and, then, for the first time, indicated the tract alleged to have been lost in primary limits, which loss it requested to be supplied by a particular tract in indemnity limits. Up to that time the Secretary of the Interior had not acted on that request nor approved any of the selection lists filed.

5. The fact may be here stated, though it is not very important, that the lands above described are also within the indemnity limits of the Northern Pacific grant made by the act of July 2d, 1864, c. 217, 13 Stat. 365, and were included in a withdrawal of indemnity lands made by the Secretary of the Interior on December 26th, 1871. But that withdrawal was revoked by the General Land Office, September 6th, 1887, and no final or approved selection of any of the described tracts was ever made under the provisions of the Northern Pacific grant.

6. In April 1899—the Secretary of the Interior not having, even at that date, approved either the original, amended or rearranged selections of indemnity lands, as shown on the company's lists theretofore filed—Wass "entered upon and took possession of and made a settlement" on the lands in question, and *thereafter maintained such possession and use of the lands as a homestead, residing continuously upon, cultivating and using them as his only home.* He also put improvements on them of the reasonable value of $1,200. All this he did with the *bona fide* intention of entering the lands under the homestead laws. The lands in their improved state exceeded $2,500 in value. Wass was qualified in all respects to become a claimant under the homestead laws of the United States. No question was made at the hearing below either as to his qualifications as a homestead claimant or as to the sufficiency of his residence on the land or of the value of his improvements.

7. On the fourth of December 1899, Wass filed with the Register and Receiver of the local Land Office an application—which was in due and legal form, and was accompanied by proofs of his qualifications and acts as a homestead claimant—to enter the said lands under the homestead laws, and tendered to the Receiver the fees and commissions lawfully chargeable upon his application. The Register and Receiver who received and filed the application rejected it, refusing to take the fees and commissions tendered "upon the sole ground that the lands applied for were embraced in a then *pending though unapproved* indemnity selection of the St. Paul and Northern Pacific Railway." This action was approved by the Commissioner of the General Land Office on the tenth of July 1903, on the ground that defendant's application "conflicted with the prior indemnity selection of the land made by the St. Paul and Northern Pacific Railway Company." The selection here referred to was manifestly the amended or

the rearranged list of indemnity selections filed by that company on December 4, 1889. Subsequently, on January 9, 1904, the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office, "on the ground that the indemnity selection of said lands by the St. Paul and Northern Pacific Railway and its predecessor, the Western Railway Company of Minnesota, were valid and of record prior to the date of the alleged settlement and filing of homestead application" by the defendant Wass. But he made no reference to the entry and settlement of Wass on the land under the homestead laws, *prior to the approval* of the list of selections *by the Secretary of the Interior*.

8. On the sixteenth of February, 1905—*nearly six years after Wass entered and settled upon and improved these lands as his home*—the Secretary of the Interior, for the first time, approved the list of indemnity selections made by the St. Paul and Northern Pacific Railway Company.

9. On the fifteenth of March, 1905, a patent was issued by the United States to the State for the use and benefit of the Railway Company, the lands being described as indemnity lands under the above grants of March 3, 1857, March 3, 1865, and March 3, 1871.

These undisputed facts present a question of law which the court may rightfully consider and determine. The doctrine is settled that facts, authoritatively found by the Land Department in the course of its administration of the public domain, cannot be collaterally questioned. But yet when the legal title to lands has passed from the United States to one party, when in equity and good conscience, according to the facts conceded, found or established, and when, as a matter of *law*, in view of those facts, it ought to have gone to another, the former may be adjudged to hold the title in trust for the latter, true owner, and compelled to convey to him. *Stark* v. *Starrs*, 6 Wall. 402, 419; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Rob-*

bins, 96 U. S. 530; *Rector* v. *Gibbon*, 111 U. S. 291; *Bernier* v. *Bernier*, 147 U. S. 242, 247; *In re Emblen*, 161 U. S. 52; *Hedrick* v. *A., T. & S. F. R. Co.*, 167 U. S. 673.

The contention is that under the patent issued by the United States to the State for the use and benefit of the Railway Company all the original rights of the State passed to the Northern Pacific Railway Company; whereas, the defendant claims that the Land Offices and the Secretary of the Interior illegally interfered with his purpose to perfect his lawful claim originating under the homestead laws of the United States, the right to do which, he insists, belonged to him under the provisions of § 2289 and other sections of the Revised Statutes, as amended by the acts of Congress.

Upon the undisputed facts, we hold that Wass' entry and settlement upon these lands, and his application for them, with the *bona fide* intention to complete his title under the homestead laws, all occurring before the Secretary's approval of the company's list, gave him an interest and right in the particular lands in question which could not be impaired or defeated by the *subsequent* approval of the Secretary of the Interior of the list of selected lands filed by the beneficiary of the land grant, although such list was filed prior to Wass' entry, settlement and application. The pendency of the list in the Land Office was not decisive, for the reason that it had not been approved by the Secretary at the time Wass' claim was made and *attached to* the lands. The lands in question, being within indemnity limits, were open to entry, settlement and acquisition by qualified claimants under the homestead laws, after and notwithstanding the mere filing of the list of selected lands; and the rights acquired by the homesteader in the manner stated were not impaired or overridden by the Secretary's subsequent approval of such list.

For the reasons stated in the dissenting opinion in

Weyerhaeuser v. *Hoyt*, just decided, the judgment should be affirmed. We dissent from the opinion and judgment of the majority.

SOUTHERN PACIFIC COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

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

No. 527. Argued December 13, 1910.—Decided February 20, 1911.

An order of the Interstate Commerce Commission, made in consequence of assumption of powers not possessed by it, is void, and its enforcement should be restrained by the courts.

The powers of the Interstate Commerce Commission do not extend to regulating and controlling the policy of the owners of railroads in fixing rates, and it cannot substitute for a just and reasonable rate, a lower rate, either on the ground of policy or on the ground that the railroad was by its former conduct estopped from charging a reasonable rate.

Where the shippers do not complain of a new and higher rate because it is intrinsically an unreasonable one, but because, although reasonable, the railroads are estopped to advance it on account of having maintained the lower rate for a considerable period, it is beyond the power of the Commission to direct a restoration of the old rate; and so *held* in regard to the Willamette Valley lumber rates.

Where the Commission makes an order restoring a rate that shows on its face it was made on the ground that the railroad was estopped to increase it, the order will not be presumed to have been made for the purpose of establishing a reasonable rate, if it excludes a section from the benefit of the restored rate which amounts to a discrimination against that section.

Questions arising on the validity of an order of the Interstate Commerce Commission fixing a rate do not become moot merely because the period for which the rate is prescribed has expired, where an element of liability for reparation remains. See *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, *post*, p. 498.

THE facts, which involve the validity of an order of the Interstate Commerce Commission in regard to appellants' rates on lumber, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* was on the brief, for appellants.

Mr. Wade H. Ellis and *Mr. Luther M. Walter* for the Interstate Commerce Commission, appellee:

The railroads complain of the order first because the Commission was without authority to fix any rates whatever; second, because the Commission did not establish the new rates because the low rate was unreasonable or because the new rates were reasonable, but simply because the railroads had promised and long maintained a lower rate; and because the rates established by the Commission are asserted by the railroads to be unreasonably low, unremunerative, and even below the cost of service.

Congress itself may fix interstate railroad rates. *Gibbons* v. *Ogden*, 9 Wheat. 1. It is expressly asserted in many cases. *Wabash &c. R. R. Co.* v. *Illinois*, 118 U. S. 557; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Northern Securities Case*, 193 U. S. 197, 368.

Fixing of rates is a regulation of interstate commerce. *Maximum Rate Cases*, 167 U. S. 479; *C., N. O. & T. P.* v. *Int. Comm. Comm.*, 162 U. S. 184, 197; *Smyth* v. *Ames*, 169 U. S. 466; *Wabash R. R. Co.* v. *Illinois*, 118 U. S. 557.

Congress may confer upon a commission power to ascertain what rate as a maximum will be just and reasonable and prescribe and enforce that rate. *Missouri River Rate Cases*, 218 U. S. 88; *Int. Comm. Comm.* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 88; *Int. Comm. Comm.* v. *C., B. & Q. Ry. Co.*, 218 U. S. 113; *Int. Comm. Comm.* v. *Stickney*, 215 U. S. 98; *Int. Comm. Comm.* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 494.

The power thus exercised by the Commission does not constitute the usurpation of legislative or judicial functions, or unite in one body conflicting governmental authority, but consists merely in the ascertainment of facts upon which operates the general rule of Congress prescribing just and reasonable rates. *St. L. &c. Ry. Co.* v. *Taylor*, 210 U. S. 281; *Railroad Commission Cases*, 116 U. S. 307; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Field* v. *Clark*, 143 U. S. 693; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364.

Penalties imposed by the Interstate Commerce Act do not amount to a deprivation of property because, first, no penalties are sought to be recovered in this case, and, second, the penalty provision is separable from the remainder of the statute. *Commodities Clause Cases*, 213 U. S. 366, 417.

The real gist of the railroads' complaint is that the Commission heard testimony as to the circumstances under which the old rate of $3.10 had been established and maintained and, after being once increased and again restored, was finally supplanted by the new $5 rate which the shippers made the subject of their appeal for relief.

The only point pressed by appellants is that the Commission gave a wrong reason for its action, but no expressions in the opinion of the Commission can be used to defeat its order if the order is otherwise lawful. *So. Pac. Co.* v. *Int. Comm. Comm.*, 200 U. S. 536, 556, 557.

The Interstate Commerce Commission is not a court. It is not governed by technical rules of law with respect to the admission of evidence. *Int. Comm. Comm.* v. *Baird*, 194 U. S. 25, 44; § 13 of the Interstate Commerce Act as amended.

The chief function of the court, is to consider not the method by which the result was reached, but whether or not the rate prescribed is so low as to contravene the con-

stitutional provisions for the protection of property. *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Prentis* v. *Atl. Coast Line Co.*, 211 U. S. 210; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

The Commission had a right, in determining the reasonableness of rates involved, to consider the effect of the advance by the railroads from $3.10 to $5 per ton upon the transportation of lumber.

The record in this case shows conclusively that the advance in rates made by the railroads in 1907 from $3.10 to $5 per ton for the transportation of the class of lumber involved, would, if permitted to stand, simply stop such transportation altogether.

It follows that the $5 rate, being absolutely prohibitive of any traffic, amounts to a withdrawal of transportation facilities. *Atl. Coast Line R. R. Co.* v. *No. Car. Corp. Comm.*, 206 U. S. 1.

In determining what was a reasonable rate, the Commission was right in considering, as an item of evidence, the fact that the railroads had voluntarily established and long maintained a rate of $3.10 for the service. *Frye* v. *Nor. Pac. Ry. Co.*, 13 I. C. C. Rep. 501, 507, 508; *Holmes* v. *So. Ry. Co.*, 8 I. C. C. Rep. 561, 568; *Stockyards* v. *Keith*, 139 U. S. 128; *Int. Comm. Comm.* v. *Chicago &c. R. R. Co.*, 186 U. S. 320.

The Commission heard testimony on the reasonableness of the rates and did not limit the basis of its order to the past conduct of the railroads, but, independently of any so-called estoppel, expressly found the $5 rate to be unreasonable and the rates prescribed to be reasonable.

The railroads having attacked the lawfulness of the rates prescribed by the Commission, the burden was upon them to show that the rates so fixed were below the cost of service or so unreasonably low as to amount to a confiscation of property. They introduced no testimony whatever, either before the Commission or the court be-

low, which proves or tends to prove the allegation in their bill of complaint.

The real issue in this case is whether or not the rates fixed by the Commission are so low as to constitute a deprivation of property. *Land Co.* v. *National City*, 174 U. S. 739; *Willcox* v. *Gas Co.*, 212 U. S. 19.

If the rate prescribed is not for a distinct and separable service and if it appears that notwithstanding such a rate the road is enabled to earn a fair return upon all its business, the rate so prescribed will not be condemned as a deprivation of property. *Minn. & St. L. R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Atl. Coast Line R. R. Co.* v. *No. Car. Corp. Comm.*, 206 U. S. 1; *St. L. & S. F. R. R. Co.* v. *Gill*, 156 U. S. 649.

Mr. Chief Justice White delivered the opinion of the court.

Whether the court below was right in refusing to enjoin at the suit of the railway companies who are appellants the enforcement of an order of the Interstate Commerce Commission is the general subject for consideration on this record.

When that which is superfluous is put out of view, it will come to pass that every substantial controversy which the case presents will be disposed of by determining what was the character of the order made by the Commission; that is to say, what was the power which that body exerted in making the order in question. We state at once the pertinent facts.

The Willamette Valley, about 150 miles long, lies in the western part of the State of Oregon, south of the Columbia River, and through it there flows in a northerly direction the Willamette River, which empties into the Columbia River. Portland is on the Willamette River at or near where that river empties into the Columbia River. From

Cornwallis, on the Willamette River, a point about 97 miles south of Portland, that is, about that distance from where the Willamette empties into the Columbia, the Willamette is navigable, and there is navigation from Portland to the sea by means of the Willamette and the Columbia Rivers. The rails of the Oregon and California Railroad from Portland pass through the Willamette Valley, paralleling the Willamette River at various distances, and extend to the Oregon and California state line, where that road connects with the Southern Pacific Company. The latter has for a number of years operated the Oregon and California as part of its system.

In November, 1907, a complaint was filed with the Interstate Commerce Commission on behalf of the Western Oregon Lumber Manufacturers' Association and others, concerning a rate of $5 per ton, in carload lots, on "green common rough fir lath and lumber and forest products" from Willamette Valley points to San Francisco and bay points, fixed in a tariff filed by the Southern Pacific Company with the Commission and which became operative in April, 1907. It was charged that the rate complained of was unreasonable in and of itself and discriminatory. It was averred that from about 1898 there had existed a rate of $3.10 for carrying the same character of lumber between the points named; that upon the faith of this rate and the belief that it would not be changed large amounts of capital had been invested in lumber mills in the Willamette Valley; that the people in that valley were dependent upon the lumber industry, and that such industry would be destroyed and the population be detrimentally affected if the new rate of $5 per ton was continued to be charged. It was alleged that the $3.10 rate was reasonable in and of itself, and that the rate had been increased without just cause upon the theory that the lumber interest in the Willamette Valley was prosperous, and that hence the traffic could stand the increase. The

railroad companies answered, setting up the reasonableness of the $5 rate. They in effect averred that the $3.10 rate, which had previously prevailed, was unreasonably low and that it had been fixed solely for the purpose of enabling lumber from the Willamette Valley to reach a market in San Francisco and bay points, which it could not have done if a just and reasonable rate had been exacted. This condition, it was alleged, had arisen from the fact that from Portland and other points on the Columbia River and Puget Sound there was a highly developed lumber industry accessible to San Francisco and bay points by water at rates so low as to have absolutely excluded the shipping of any lumber from the Willamette Valley by rail to such points, unless a very low rate had been fixed by the railroad companies to meet the water-borne lumber traffic, and that there was no market which was commercially available for the Willamette Valley lumber other than that of San Francisco and bay points when the $3.10 rate was fixed. The complaint and the answer which we thus state are not in the record, but we have summarized their contents from a statement made concerning the same by the Interstate Commerce Commission in its answer in this suit filed in the Circuit Court.

It is certain that for a number of years the $3.10 rate was applied both to shipments of lumber not only from the Willamette Valley, but also from Portland. Several years, however, before the going into effect of the $5 rate fixed in the tariff of April, 1907, a tariff fixing that rate had been made applicable to Portland. During the hearing before the Commission the Portland lumber interests intervened and asked that if the $3.10 rate was restored to Willamette Valley it should also be restored to Portland, so as to prevent discrimination against Portland.

After a hearing the Commission in June, 1908, filed its report and made an order adverse to the railway companies, Commissioners Knapp and Harlan dissenting. 14

I. C. C. Rep. 61. It suffices to say that the order entered directed the railroad to cease from charging the $5 rate complained of from Willamette Valley points and fixed as a proper rate from certain points in the valley the sum of $3.40 a ton, and from the remaining points in the valley the sum of $3.65. Although some of the points embraced by the order were within a few miles of Portland that city was not given the benefit of the reduction, and therefore remained subject to the $5 rate.

The railroad companies, refusing to yield obedience to the order, commenced this suit in equity in the Circuit Court of the United States for the Northern District of California to have the order set aside and to enjoin its enforcement. After a demurrer was sustained, an amended bill was filed. By this bill it was averred that the rate of $5 fixed by the tariff which the Commission had set aside was a just and reasonable rate *per se*, and that the rate fixed by the Commission was so unreasonably low as to be unjust and unreasonable. This was alleged to be the case not only in view of the great increase in the cost of the operation of the road since the time when the $3.10 rate was put in force, but also because of the normally excessive cost of maintenance and operation resulting from the mountainous country which the road traversed, subjecting to an unusual expense for repairing damage done by floods and freshets, the high grades requiring the application of increased motive power, and permitting even with such power the movement of only unusually short trains, thereby causing a much greater average expense. Referring to the rate of $3.10 which had previously prevailed, the circumstances connected with its establishment were detailed. It was alleged that the rate was unreasonably low when fixed and was so fixed by the railroad solely with the object of encouraging the lumber industry in the Willamette Valley and to enable it to reach a market, a result which otherwise could not have been attained.

The averments on this subject reiterated the statements made in the answer before the Commission. It was alleged that having maintained the unreasonably low rate for the reasons stated the railroad companies had finally changed the same and fixed a just and reasonable rate for the services rendered, because of changes in the situation of the lumber interest in the Willamette Valley. Those changes it was said arose from the opening of markets for lumber from the Willamette Valley by means of new railroad routes via Portland as a gateway to the East, by means of which a large percentage of lumber produced in the Willamette Valley was moved to other markets. It was alleged that the Commission, in setting aside the increased tariff rate of $5 and fixing substantially the old rate, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered, but had proceeded upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers.

There was a demurrer to the amended bill, and the court certified the case to this court. The certificate was dismissed. 215 U. S. 226. On the receipt of the mandate the demurrer was withdrawn and a new demurrer, as also an answer to the bill, were filed. In the answer the lumber conditions in the Willamette Valley were recited, as also what were alleged to be the circumstances connected with the establishment of the $3.10 rate and the proceedings had before the Commission in the controversy referred to, were detailed. The regularity of the proceedings before the Commission was averred, and the legality and finality of the findings and conclusions of that body were asserted.

It was declared that the rates fixed from the points in the Willamette Valley, excluding Portland, were just and reasonable in and of themselves. Traversing the allegations of the complaint, it was averred that the Commission found the $5 rate to be unreasonable and unjust, admitted that it found the $3.10 rate to be a low rate, but denied that it found such rate to be unreasonably low, and denied that the $3.40 and $3.65 rates were substantially the same as the $3.10 rate.

The cause was heard upon the amended bill, the answer, the replication of the plaintiff and the evidence introduced before the Commission. The Circuit Court, as we have said, entered a decree dismissing the bill. This was done upon the theory that, as the Commission found that the rate fixed by it gave some remuneration above the cost of operation, and was not therefore confiscatory, there was no power to interfere. This appeal was then taken.

In the argument at bar the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject, and if it finds the rate complained of is in and of itself unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the courts. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute. Making these concessions, the proposition relied upon to secure reversal is that the court below should have set aside the order of the Commission because that order was in excess of the

power conferred upon the Commission, and this, it is insisted, is to be determined by substance, and not mere form. In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that both in form and in substance the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the Commission in the argument at bar does not contend that it possessed the indeed

abnormal and extraordinary power which the railroads thus say was exerted in rendering the order complained of, a power which if it obtained would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply. While it is not denied on behalf of the Commission that that body may have considered the prior rate prevailing in the Willamette Valley, the period during which it had been in force, and the effect upon the business situation in the valley of a change to a higher charge, all these things it is insisted were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one.

It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is, What was the nature and character of the order made by the Commission? That is, What, in substance, was the power which the Commission exerted in making the order?

Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests. We proceed very briefly to state the reasons which compel us to this conclusion. In the first place, when the complaint which was made to the Commission and the answer of the railroad companies to that complaint are considered they give rise to the inference that in substance

the subject complained of was not the intrinsic unreasonableness of the new rate which the railroad companies substituted for the former rate, but the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just. That such was the view entertained by the complainants when the hearing began before the Commission is too clear to require anything but statement. Thus during the opening made on behalf of the complainants by their counsel, Mr. Teal, after he had made statements concerning the origin of the $3.10 rate, the following took place:

"Commissioner COCKRELL: How much was that; $3.10 a ton?

"Mr. TEAL: $3.10 a ton; yes, 15½ cents a hundred; and I will state that we do not claim that that is not a low rate. It is a low rate. In fact, I may say that it is one of the lowest rates on lumber in the United States, and it is a rate put in, as I state, maintained for the purposes I state, and the railroad company is entitled to full credit for having done it.

"Commissioner PROUTY: Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is $5 a ton, would you claim that this Commission today ought to reduce that rate?

"Mr. TEAL: No; I don't think I would.

"Commissioner PROUTY: That is to say, you do not claim the rate is unreasonable in itself?

"Mr. TEAL: No; I do not.

"Commissioner PROUTY: You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley, and that the industry can-

not exist there in competition with other sections unless that rate is maintained in effect?

"Mr. TEAL: Yes, sir.

"Commissioner PROUTY: And therefore the railroad is obliged to maintain it in effect?

"Mr. TEAL: It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

"Commissioner PROUTY: That simply shows that it has been maintained and industries have grown up; that the railroad company has, during that period, elected to maintain it, and found it profitable, probably?

"Mr. TEAL: You have stated my position exactly. I am not here complaining about the rates being high or low, because it is a low rate."

Thereafter, as Mr. Teal concluded his opening statement, the following occurred:

"Commissioner PROUTY: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, because you say the rate is low enough, unless those men have been induced to build their mills there, and ought to be protected.

"Mr. TEAL: That is correct. I want you to understand, Mr. Commissioner,. that I do not claim the Commission has a right to compel the railroad, under ordinary circumstances, to meet water rates or any other competition."

It is true that subsequently, when counsel for the railroad companies was about to make his opening statement, Mr. Teal, after reiterating "that the $3.10 rate is a low rate," observed: "I do not say it should necessarily pay a $5 rate. That is, I do not want to be understood as saying that this rate of five dollars, in and of itself, would be reasonable." Answering the query of one of the commissioners as to whether, if the railroads had maintained in effect for the last ten years "this rate of 25 cents a hundred pounds," it would be claimed "that that was so unreasonable that the Commission ought to reduce it," Mr.

Teal answered: "Yes; I would claim that that would not be a reasonable rate to all these points." These remarks, however, can properly only be regarded as a declaration of an unwillingness to concede more than that the $3.10 rate was a low rate, and the attempt to engraft a qualification or limitation upon the prior declarations of counsel cannot be treated as having any efficacy, since no proof whatever bearing upon an issue as to the reasonableness of the $5 rate for the service to be rendered was introduced by the complainants. In fact, no attempt was even made to cross-examine Mr. Miller, the general traffic manager of the defendant, who testified on that subject. That the complainants intended to confine their evidence to the issue of whether the $3.10 rate should be maintained in order to enable the lumber mills to continue to prosper is evidenced by the following:

"Commissioner PROUTY: . . . Mr. Teal, there does not seem to be much dispute about the questions in this case. The mills have a rate to the South, and one question is to what extent they are dependent upon that rate for their continued existence. They have a rate to the East. For what reason is not that rate as valuable to them as it is to Portland and other mills, and to what extent is it necessary that this rate should be maintained to San Francisco in order to fairly continue the prosperity of these establishments?

"Mr. TEAL: That is where I intend to confine my testimony."

The order of the Commission, as we have said, applied the rate which it fixed substantially to the very doors of Portland, but did not make the reduction applicable to that city. While we shall have occasion in a moment to refer to this aspect of the order as conclusively showing on its face that the power exerted in making it was not the power to condemn an unreasonable and fix a reasonable rate, an excerpt from the examination by Mr. Cotton for

the railroad companies and Mr. Abel for the intervenors, of two witnesses—J. Poulsen for the Portland interests and Dixon for the Willamette Valley interests—will make perfectly clear how really immaterial the question of the reasonableness of the $5 rate was considered to be.

On cross-examination of Mr. Poulsen the following transpired:

"Mr. COTTON: In saying that you think Portland ought to have a lower rate, do you mean they should have a lower rate than a $3.10 rate?

"Mr. POULSEN: I mean they should have a lower rate than the inland people on account of having water competition.

"Mr. COTTON: But you do not express your opinion about the reasonableness of the rate?

"Mr. POULSEN: No, sir.

"Mr. ABEL: He was not asked that.

"Mr. COTTON: That is what I understood, but I just wanted to make it clear.

"Mr. POULSEN: No."

On the examination of Mr. Dixon the following ensued:

"Mr. COTTON: It would follow, as a matter of fact, that if the $3.10 rate, or any lower rate than the barge rate was established, that it ought to be extended all the way up to Portland; would it not?

"Mr. DIXON: Personally I have no objection to that; but I do not see that it would necessarily follow.

"Mr. COTTON: I am not considering your standpoint. I merely want your best opinion with reference to the industry in western Oregon.

"Mr. DIXON: I think, Mr. Cotton, that the arrangement in effect prior to April 18th was, from the standpoint of the lumber shippers, a fair arrangement.

"Commissioner PROUTY: How can you justify leaving Portland out of the San Francisco rate and taking you into the Eastern rate?

"Mr. DIXON: The Portland mills have so much the ad-

vantage of us in almost every other branch of the business that I do not see how it is unfair to them to give us what might appear to be a slight advantage in one particular. In other words, they have a better grade of logs, they have a better market and more markets, they have a place to dispose of their refuse, and, what counts for more than anything else and is absolutely necessary to the successful conduct of the lumber business, they can get rid of their output, while we cannot, up to date."

Although we find the record replete with statements made during the course of the hearing by counsel for both parties, and certainly by one or more of the commissioners who were present at the hearing, which we think leave no doubt as to the nature and character of the power exerted, we do not pursue the subject further, since we are of opinion that the face of the opinion and the order so additionally serve to make manifest the situation as to render it unnecessary to do more than briefly advert to those subjects. While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order

was an exertion of a power not possessed to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary. The obvious impression as to the nature and character of the power exerted given by the very face of the opinion of the Commission is shown by the syllabi to the official report of the opinion, which we copy in the margin.[1]

Finally, the express exclusion of Portland from the benefit of the reduced rate and the reasons given for the exclusion indubitably establish the character of the power exerted so as to exclude the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate. We say this because if the assumption be indulged in that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding Portland from the benefit of the reduced rate. We cannot, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its dis-

[1] 1. Where a rate has been established and maintained for a considerable period for the purpose of developing a particular industry and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property the value of which must be seriously impaired by an advance of the rate, that fact is an important consideration in passing upon the reasonableness of such advance.

2. The Southern Pacific Company established a rate of $3.10 per ton upon rough green fir lumber and lath from points in the Willamette Valley to San Francisco for the purpose of developing the lumber industry in that section, and maintained the rate in effect, with a brief interval, for six years; and on the strength of this rate that industry attained considerable proportions. In April, 1907, this rate was advanced to $5 per ton: *Held*, That the advance was unreasonable and that the rate ought not for the future to exceed $3.40 per ton.

criminatory character. And the reasons given for the exclusion of Portland from the benefit of the reduction which the order made likewise leave no room for the conclusion that the reduction was based merely upon the finding that the tariff rate which was reduced was, considering the service rendered, in and of itself unreasonable. The reasons for not applying the reduced rate to Portland were thus explained in the report of the Commission:

"The considerations which induce us to apply this lower rate to mills in the Willamette Valley do not obtain in case of Portland. These manufacturers have the benefit of the water rate, and are not, therefore, dependent at all upon the defendants for reaching the San Francisco market. The low rate was only applied to Portland for a comparatively short time, and has not been in force there for the last four years. It is of no special importance to the manufacturer at that point, and no injustice is done by withdrawing it. The distance from Portland is considerably greater than the average distance from Willamette Valley mills, and, on the whole, we think the defendants should be left to their option in meeting or declining to meet water rates at Portland. The claim of the intervenors is therefore denied."

Treating the order as having been based upon the assumed possession of the extraordinary power which it is insisted was exercised in making the order, the force of the reasoning thus advanced to sustain the order cannot be successfully gainsaid. But upon the theory that the order was made merely as the result of the exercise of the statutory power to prevent the charging of an unreasonable and unjust rate, having regard to the service rendered, the inconsequence of the reasoning stated becomes at once patent. This must be the case because Portland had been deprived by the railroads of a just and reasonable rate for a longer time than the Willamette Valley points certainly afforded no ground for concluding that Portland was not

entitled to relief, and it is equally certain that the fact that there was competition by water from Portland can in no way justify the permitting the railroads to continue to charge against traffic from Portland a high and unreasonable rate. Indeed, if the order be assumed to have been made merely as the result of the power to correct an unjust and unreasonable rate, then the reasoning by which the order, in so far as it dealt with Portland was concerned, was sustained, comes to this, that the greater the wrong the lesser the right to redress, and the greater the reason for the low and competitive rate the stronger the reason for refusing to fix such a rate.

The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* this day decided, *post,* p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy.

The decree of the Circuit Court is reversed and the case remanded to that court, with directions to enter a decree declaring the order of the Interstate Commerce Commission to be void, and otherwise granting the relief prayed in the bill.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 50. Argued November 11, 1910.—Decided February 20, 1911.

A State is under an obligation to establish necessary and reasonable regulations for the safety of all engaged in business or domiciled within its limits, and passengers on trains of interstate carriers are entitled while within a State to the same protection of valid local laws as are citizens of the State.

The States have never surrendered the power to care for the public safety; and the validity of police statutes enacted to that end which are not purely arbitrary or in conflict with a power granted to the general government cannot be questioned in Federal courts.

A state regulation that is uniform on all railroads of the class to which it is applicable is not unconstitutional as denying equal protection of the law because it does not apply to railroads less than fifty miles in length. The classification is a reasonable one.

A state statute prescribing a not unreasonable number for the crews of freight trains is not an obstruction to, or burden on, interstate commerce, but an aid thereto; and so *held* that the "full crew" act of Arkansas is not unconstitutional under the commerce clause of the Federal Constitution, Congress not having acted in regard thereto.

While Congress may in its discretion take under its charge the subject of equipment of interstate trains, until it does so the States may prescribe proper police regulations in regard thereto without violating the commerce clause of the Federal Constitution.

86 Arkansas, 412, affirmed.

THE facts, which involve the constitutionality of a law of Arkansas relating to equipment of railway trains, are stated in the opinion.

Mr. Thomas L. Buzbee and *Mr. Laurence Maxwell*, with whom *Mr. Edward S. Pierce* and *Mr. Erasmus C. Lindley* were on the brief, for plaintiff in error:

The full crew act of Arkansas is unconstitutional because it undertakes to regulate interstate commerce and is repugnant to § 8, Art. I of the Constitution of the United States. *Sherlock* v. *Alling*, 93 U. S. 102; *Hall* v. *DeCuir*, 95 U. S. 487; *Railway Co.* v. *Husen*, 95 U. S. 465; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Atl. Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328; Act of February 4, 1887; *Tex. & Pac. Ry. Co.* v. *Int. Comm. Comm.*, 162 U. S. 197; Act of March 2, 1893; *Johnson* v. *So. Pac. Ry. Co.*, 196 U. S. 1; Act of March 3, 1901; Act of March 3, 1903; Act of February 23, 1905; Joint Resolution of June 30, 1906; Act of March 4, 1907; Rep. Int. Comm. Comm., 1905, p. 78; Act of April 22, 1908; Act of June 29, 1906; *Sinnot* v. *Mobile Pilot Comm.*, 22 How. 227; *Henderson* v. *New York*, 93 U. S. 274; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238; *Bond* v. *Turck*, 95 U. S. 463; *Wisconsin* v. *Duluth*, 96 U. S. 387; *Smith* v. *Alabama*, 124 U. S. 465; *Stoutenburgh* v. *Hennick*, 129 U. S. 148; *G., C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *Int. Comm. Comm.* v. *Detroit Ry. Co.*, 167 U. S. 633; *Asbell* v. *Kansas*, 209 U. S. 251; *State* v. *C., M. & St. P. Ry. Co.*, 117 N. W. Rep. 686; *State* v. *Mo. Pac. Ry. Co.*, 111 S. W. Rep. 500.

The act, as applied to interstate commerce, is arbitrary, unreasonable and contrary to § 8, Art. I, and the due process clause of § 1, of the Fourteenth Amendment. *St. L., I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Houston & Tex. Cent.* v. *Mayes*, 201 U. S. 321; *McNeill* v. *Southern Railway Co.*, 202 U. S. 543.

The act is repugnant to the equal protection clause of the Constitution. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *A., T. & S. F. Ry. Co.* v. *Matthews*, 174 U. S. 96; *Cotting* v. *Stock Yards*

Co., 183 U. S. 79; *Connolly* v. *Sewer Pipe Co.*, 184 U. S. 540.

Mr. W. L. Terry and *Mr. Hal L. Norwood*, Attorney General of the State of Arkansas, for defendant in error:

The full crew act of Arkansas is in no just sense a regulation of interstate commerce, but is purely a police regulation, and as such is not repugnant to § 8, Art. I, of the Constitution of the United States. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Walling* v. *Michigan*, 116 U. S. 446; *Hall* v. *DeCuir*, 95 U. S. 485; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Smith* v. *Alabama*, 124 U. S. 465; *Sherlock* v. *Alling*, 93 U. S. 99; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96; *Mobile County* v. *Kimball*, 102 U. S. 691; *West. Un. Tel. Co.* v. *James*, 162 U. S. 656; *Chicago &c. R. R. Co.* v. *Solan*, 169 U. S. 133; *Gladson* v. *Minnesota*, 166 U. S. 427; *N. Y., N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 628; *Erb* v. *Morasch*, 177 U. S. 544; *L. S. & M. S. R. R. Co.* v. *Ohio*, 133 U. S. 286; *Hennington* v. *Georgia*, 163 U. S. 299; *Pierce* v. *Van Dusen*, 98 Fed. Rep. 693; *Southern Ry. Co.* v. *King*, 217 U. S. 524; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 27; *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262; *Thorp* v. *Railway Co.*, 27 Vermont, 129; *G., C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *Sinnot* v. *Commissioners*, 22 How. 227; *Wisconsin* v. *Duluth*, 96 U. S. 387; *Asbell* v. *Kansas*, 209 U. S. 251; *Reid* v. *Colorado*, 187 U. S. 137; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *Schlemmer* v. *Railway Co.*, 205 U. S. 10.

The act as applied to interstate commerce is a rightful exercise of the police power inherent in the State; is neither arbitrary, unreasonable nor contrary to § 8, Art. I, and the due process clause of § 1, of the Fourteenth Amendment to the Constitution of the United States. *Atl. Coast Line R. R. Co.* v. *No. Car. R. R. Comm.*, 206 U. S. 1; 2 Tiedman on State and Federal

Control, 987; *Norwood* v. *Baker*, 172 U. S. 269; *Wisconsin & M. P. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *L. S. & M. S. Ry. Co.* v. *Smith*, 173 U. S. 684; *St. L. & S. F. R. R. Co.* v. *Gill*, 156 U. S. 649; *Smyth* v. *Ames*, 169 U. S. 466; *Minn. & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago & G. T. R. R. Co.* v. *Wellman*, 143 U. S. 339; *Covington & Louisville Turnpike Co.* v. *Sanford*, 164 U. S. 578; Freund on Police Power, §§ 63, 549, 550; *H. & T. C. Ry. Co.* v. *Mayes*, 201 U. S. 321; Cooley, Const. Lim., 831; *License Cases*, 5 How. 579; *Louisville &c. R. R. Co.* v. *Kentucky*, 183 U. S. 518; *Austin* v. *Tennessee*, 179 U. S. 349; *Pennsylvania Ry. Co.* v. *Hughes*, 191 U. S. 477; *Railroad Co.* v. *Fuller*, 17 Wall. 460; *L. S. & M. S. Ry. Co.* v. *New York*, 165 U. S. 629; *Illinois &c. R. R. Co.* v. *Illinois*, 163 U. S. 142; *State* v. *Indiana &c. R. R. Co.*, 133 Indiana, 69; *Cooley* v. *Board of Wardens*, 12 How. 299; *The Jane Gray*, 21 How. 184; *Steamship Co.* v. *Jolliffe*, 2 Wall. 450; *Olson* v. *Smith*, 195 U. S. 332; *The William Law*, 14 Fed. Rep. 792.

The act as construed by the Supreme Court of Arkansas is not repugnant to the equal protection clause of the Constitution of the United States. *Atl. Coast Line R. R. Co.* v. *Mazursky*, 216 U. S. 122; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Armour Packing Co.* v. *Lacey*, 200 U. S. 226; *Kahrer* v. *Stewart*, 197 U. S. 60; *Pullman Co.* v. *Adams*, 189 U. S. 426; *Osborne* v. *Florida*, 164 U. S. 650; *C., B. & Q. Ry. Co.* v. *Iowa*, 94 U. S. 155; *Railway Co.* v. *May*, 194 U. S. 267; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Atchison &c. Ry. Co.* v. *Matthews*, 174 U. S. 96; *Peik* v. *Chicago &c. Ry. Co.*, 94 U. S. 164; *People* v. *Smith*, 32 L. R. A. 857; *State* v. *Gerhardt*, 33 L. R. A. 319; *Interstate Ry. Co.* v. *Massachusetts*, 207 U. S. 88; *Missouri &c. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Holden* v. *Hardy*, 169 U. S. 385; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 561; *Western Turf Assn.* v. *Greenburg*, 204 U. S. 362; *Hayes* v. *Missouri*, 120 U. S. 71; *Jones* v. *Brin*, 165

U. S. 182; *Mogoun* v. *Illinois Savings Bank*, 170 U. S. 294; *Heath* v. *Worst*, 207 U. S. 354; *Welch* v. *Swasey*, 214 U. S. 91; *McLean* v. *State*, 211 U. S. 539; *St. Louis Coal Co.* v. *Illinois*, 185 U. S. 203.

MR. JUSTICE HARLAN delivered the opinion of the court.

Two actions were instituted by the State of Arkansas in one of its courts against the Chicago, Rock Island and Pacific Railway Company, a corporation of Illinois engaged in railroad business in several States. The company, it was agreed, entered Arkansas for purposes of railroad business, complying with all the conditions of the laws of that State authorizing foreign railroad corporations to do such business within its limits.

The complaint alleged that the defendant company on a named day and in violation of the law of Arkansas operated and ran in that State a freight train of more than twenty-five cars without having equipped such train with as many as three brakemen; and that the railroad over which the train was operated was more than fifty miles in length. The State asked a judgment in each case against the railway company for $500. The company filed in each case both an answer and a general demurrer.

The suits were based on an Arkansas statute (Ark. Laws, 1907, No. 116, p. 295) prescribing the minimum number of employés to be used in the operation of freight trains and providing a penalty for violating its provisions.

The statute is in these words: "§ 1. No railroad company or officer of court owning or operating any line or lines of railroad in this State and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided. § 2. This

act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five cars, it being the purpose of this act to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train consisting of twenty-five cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, and three brakemen, but nothing in this act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this act. § 3. Any railroad company or officer of court violating any of the provisions of this act shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this act shall not apply during strikes of men in train service of lines involved." Ark. Laws, 1907, No. 116.

The railway company's answer in each case contained six paragraphs. The court sustained the demurrer to paragraphs 1, 2, 3, 4 and 6 (the defendant excepting), and thereupon, by stipulation, the two actions were consolidated for the purpose of a trial on paragraph five, which was as follows: "Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars, and could be stopped by the application of the air brakes by the engineer of said train without the intervention or assistance of the conductor or brakeman, as required by act of Congress and the order of the Interstate Commerce Commission made thereunder; that it had employed on said train a conductor and two brakemen and that the employment of another brakeman on said train was un-

necessary, because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said act, in attempting to require the defendant to employ three brakemen on said train, attempted to require the defendant to expend a large amount of money for a useless and unnecessary purpose and to deprive the defendant of its property without due process of law, and is therefore in violation of and in conflict with Section One of the Fourteenth Amendment to the Constitution of the United States."

The consolidated causes were by agreement of the parties tried by the court. The result in each case was a judgment against the railway company for $100. Upon appeal by the company to the Supreme Court of Arkansas the action of the trial court was affirmed. 86 Arkansas, 412.

In the state court the railway company assailed the act in question as being in conflict with the Fourteenth Amendment, as well as of the commerce clause, of the Constitution of the United States. But the Supreme Court of Arkansas overruled these objections, holding that the act was not to be taken as inconsistent with the Constitution of the United States. The case is here for review on the question whether the statute is in violation of the Constitution.

In our judgment, these questions are concluded by former decisions and no extended discussion of them is now required. Yet, an examination of some of the decisions will be proper in order to show the precise grounds on which this court has determined whether state enactments of a particular kind were regulations of interstate commerce or in violation of the Fourteenth Amendment.

A leading case on the general subject is *Smith* v. *Alabama*, 124 U. S. 465, 474, 482, which involved the validity under the Constitution of the United States of a statute of Alabama making it a misdemeanor for an engineer to

operate, *in that State*, a train of cars used for the transportation of persons or freight without first undergoing an examination before and obtaining a license from a board appointed by the Governor. The statute provided that before issuing a license the board should inquire into the character and habits of the applicant; that no license should be granted if he was found to be of reckless or intemperate habits; that any license granted should be forfeited if, upon notice, the engineer was found to have been intoxicated within six hours before or during the time he was engaged in running a railroad engine; and that the license should be revoked or canceled if the engineer was ascertained from any cause to be unfit or incompetent. That case related to an engineer whose ordinary run was over the Mobile and Ohio Railroad Company's road between Mobile, Alabama, and Corinth, Mississippi. He never handled the engine of any train between points wholly within Alabama. As an employé of the company he also operated an engine drawing a passenger train between St. Louis and Mobile. It was contended that the statute was repugnant to the commerce clause of the Constitution of the United States. This court referred to the decision in *Sherlock* v. *Alling*, 93 U. S. 99, 102, which involved the question whether an Indiana statute authorizing the personal representative of a deceased person whose death was caused by the wrongful act or omission of another, could be applied where the death was the result of a collision between steamboats *navigating the Ohio River*. And, speaking by Mr. Justice Matthews, it said: "Legislation, in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of

commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." The court proceeded: "In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

In *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96, 101, the question was as to the validity, so far as interstate commerce was concerned, of a statute of Alabama enacted for the protection of the travelling public against accidents caused by color-blindness and defective vision on the part of railroad employés, and which provided for an examination before a state board of any person seeking a position that involved the running or management of a railroad train. In that case the railway company operated its lines through several States and employed as a train conductor one who had not obtained a certificate of his fitness so far as color-blindness and visual powers were concerned. After referring to *Smith* v. *Alabama*, above cited, as holding that the statute of Alabama, involved in that case, was not displaced by any express

enactment of Congress in the exercise of its power over commerce, and that until so displaced it remained "as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the State, or in commerce among the States," this court, speaking by Mr. Justice Field, said: "The same observation may be made with respect to the provisions of the state law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

But the case more nearly analogous to the present one is that of *N. Y., N. H. & H. Railroad* v. *New York*, 165 U. S. 628, 631, 632–633, where the court was required to determine the validity under the Constitution of the United States of a statute of New York regulating the heating of steam passenger cars and directing guards and guard-posts to be placed on railroad bridges and trestles and the approaches thereto. The statute provided that no steam-railroad doing business in New York after a named day should heat its passenger cars on other than mixed trains by any stove or furnace kept inside of the car or suspended therefrom, except that in case of accident or other emergency such stove or furnace, with necessary fuel, could be temporarily used; that where any cars had been equipped with apparatus to heat by steam, hot water or hot air from the locomotive or from a special car the stove then in use could be retained and used when the car was standing still; and, that the statute should not apply to railroads less than fifty miles in length nor to the use of stoves of a pattern and kind to be approved by the state railroad commissioners for cooking purposes in dining cars. The New York, New Haven and Hartford Railroad Company, a Connecticut corporation, during a cer-

tain period named, ran trains of passenger cars over its route from the city of New York to Hartford and from Hartford to New York, and on through trains as well as on its road in New York other than on mixed trains, the company heated its cars by stoves and furnaces kept within the cars. An action was brought against the railway company for violation of the above statute, and there was a verdict in favor of the State for the penalties imposed. That judgment was affirmed by the Court of Appeals of New York. 142 N. Y. 646.

It was contended in that case that the New York statute was repugnant both to the commerce clause of the Constitution and to the Fourteenth Amendment. In the opinion of this court, the principle announced in *Gibbons* v. *Ogden*, 9 Wheat. 1, 211, that the mere grant to Congress of the power to regulate commerce did not of its own force and without legislation by Congress impair the authority of the States to establish reasonable regulations for the protection of the health, the lives or the safety of their people was reaffirmed and it was said: "The statute in question had for its object to protect all persons travelling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. There may be a reason to doubt the efficacy of regulations of that kind. But that was a matter for the State to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the State is competent to legislate, namely, the personal security of those who are passengers on cars used *within its limits*. Why may not regulations to that end be made applicable, within a State, to the cars of railroad companies engaged in interstate commerce as well as to the cars used wholly within such State? Persons travelling on interstate trains are as much entitled, while within the State, to the protection of that State, as those who travel on domestic trains. The

statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within the limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several States, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

It was also contended that the statute, if enforced according to its terms, would make rapid transportation difficult, if not impossible, and that to compel an interstate train to conform to its provisions would be a wholly unnecessary burden on interstate passengers. After observing that possible inconveniences could not affect the question of the power in each State to make such regulations for the safety of passengers on interstate trains as in the judgment of the State, all things considered, were reasonable, appropriate or necessary, this court said (165 U. S. 633): "Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the State covering the same ground." In reference to the contention that the statute denied the equal protection of the laws, as prescribed by the Fourteenth Amendment, the court said (p. 633): "This contention is based upon that clause of the statute declaring that it shall not apply to railroads less than fifty

miles in length. No doubt the main object of the statute was to provide for the safety of passengers traveling on what are commonly called trunk or through lines, connecting distant or populous parts of the country, and on which the perils incident to traveling are greater than on short, local lines. But, as suggested in argument, a road only fifty miles in length would seldom have a sleeping car attached to its trains; and passengers traveling on roads of that kind do not have the apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger coaches, on account of the burning of cars in case of their derailment or in case of collision. In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there had been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable."

The principles announced in the above cases require an affirmance of the judgment of the Supreme Court of Arkansas. It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power granted to the General Government or with some right secured by that instrument or unless they are purely arbitrary in their

nature. The statute here involved is not in any proper sense a regulation of interstate commerce nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce and for the protection of those engaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which evidently the state legislature had in view. It is a means employed by the State to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object. And the statute being applicable alike to all belonging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws. Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employés to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and state. In addition to the cases above cited, *Mobile Co.* v. *Kimball*, 102 U. S. 691; *G., C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *W. U. Tel. Co.* v. *James*, 162 U. S. 656; *Chicago &c. R. R. Co.* v. *Solan*, 169 U. S. 133; *W. U. Tel. Co.* v.

Kansas, 216 U. S. 27; *Reid* v. *Colorado*, 187 U. S. 137; and *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, may be consulted.

Judgment affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* MOTTLEY.

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

No. 246. Submitted January 9, 1911.—Decided February 20, 1911.

The intent of Congress is to be gathered from the words of the act according to their ordinary acceptation, and the act should be construed in the light of circumstances existing at the time it was passed. Personal hardships cannot be considered, nor can the court mold the statute to meet its views of justice in a particular case.

The court must have regard to all the words used by Congress in a statute and give effect to them as far as possible; and the introduction of a new word into a statute indicates an intent to cure a defect in, and suppress an evil not covered by, the former law.

The prohibition of the act of February 4, 1887, c. 104, § 2, 24 Stat. 379, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, against a carrier charging a different compensation from that specified in its published tariff extends to the granting of interstate transportation by carriers as compensation for injuries, services, advertising or property; the statute means that transportation shall be paid for by all alike and only in cash.

The purpose of Congress in enacting the amendatory act of June 29, 1906, was to cut up by the roots every form of discrimination in rates, not specially excepted, and the act applied to existing contracts and rendered those which were discriminatory illegal.

The court cannot on equitable grounds add an exception to the classes to which a statute clearly applies if Congress forbears to do so.

The power of Congress to regulate commerce among the States and with foreign nations is complete and unrestricted except by limitations in the Constitution itself, and extends to rendering impossible

the enforcement by suit of contracts between carriers and shippers although valid when made.

The power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but contracts of that nature are made subject to the possibility that even if valid when made Congress may by exercising its power render them invalid.

An act of Congress rendering contracts in regard to interstate commerce invalid does not infringe the constitutional liberty of the citizen to make contracts; and an act, otherwise constitutional, is not unconstitutional under the Fifth Amendment, as taking private property without compensation, because it invalidates contracts between individuals which conflict with the public policy declared in the act.

After the enactment of the act of June 29, 1906, it was unlawful for a carrier to issue interstate transportation in pursuance of a prior existing contract to do so as compensation for injuries received, and, even though valid when made, such a contract cannot now be enforced against the carrier by suit.

133 Kentucky, 652, reversed.

THE facts, which involve the construction of provisions of the Interstate Commerce Act relating to payment of fares on railways, are stated in the opinion.

Mr. Henry L. Stone for plaintiff in error:

The object of the act of June 29, 1906, was to prevent discrimination, and to place all passengers and shippers on the same level, with equal rights and privileges. While Congress may not pass an act for the purpose of impairing the obligation of specific contracts, it may in the due exercise of the powers expressly conferred upon it, incidentally do so. *Legal Tender Cases*, 12 Wall. 550; *Bullard* v. *Northern Pacific Ry. Co.*, 10 Montana, 168. See also 8 Cyc. 997; *Newport News Co.* v. *McDonald Brick Co.*, 109 Kentucky, 408; *Fitzgerald* v. *Construction Co.*, 59 N. W. Rep. 862; *Southern Wire Co.* v. *St. Louis Bridge Co.*, 38 Mo. App. 191; *Fitzgerald* v. *Grand Trunk R. R. Co.* (Vt.), 22 Atl. Rep. 76, 77. These foregoing decisions

were rendered prior to the passage of the Hepburn Bill of June 29, 1906, and, of course, apply with still greater force since that act took effect. The power of Congress to regulate commerce is paramount and is unrestrained, except by the limitations in the Constitution upon its authority. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 228; *Scranton* v. *Wheeler*, 179 U. S. 162. The only limitation prescribed by the Constitution is that the laws enacted by Congress to carry into execution this power shall be necessary and proper. That is a question wholly and exclusively within the province of Congress to determine. *Kentucky Bridge Co.* v. *L. & N. R. R. Co.*, 34 Am. & Eng. R. Cas. 630; *S. C.*, 37 Fed. Rep. 567. As to what is a vested right in the constitutional sense, see Cooley, Const. Lim., 7th ed., 509; *Bradford* v. *Jenkins*, 41 Mississippi, 328, 335. Due process of law as used in the Fifth Amendment includes not only the established mode of procedure in the courts, but also legislative acts within constitutional powers. Cooley, Const. Lim., 7th ed., 502; 3 Words and Phrases, 2228. Where no exception is made in terms, none will be made by mere implication or construction. *Rhode Island* v. *Massachusetts*, 12 Pet. 892; *Dartmouth College* v. *Woodward*, 4 Wheat. 494. For the court to go beyond that limitation is not to construe, but to legislate. See *Armour Packing Co.* v. *United States*, 209 U. S. 56; Endlich on Statutes, §§ 4–8; *Mottley* v. *L. & N. R. R. Co.*, 150 Fed. Rep. 406; *United States* v. *Dickson*, 15 Pet. 141–163; *United States* v. *Wells-Fargo Express Co.*, 161 Fed. Rep. 606.

Interstate passenger transportation must be paid for in money. Decisions of Interstate Commerce Commission relative to Railroad Passes and Free Transportation, Sen. Doc., No. 226, 60th Cong., 1st Sess., February 6, 1908, p. 18; Conference Rulings of Interstate Commerce Commission, December 28, 1909, p. 57; *C., B. & Q. Ry.*

Co. v. *United States*, 209 U. S. 90; *Un. Pac. Ry. Co.* v. *Goodridge*, 149 U. S. 690, 691; *Gulf, Colo. &c. Ry. Co.* v. *Hefley*, 158 U. S. 98; *Int. Comm. Comm.* v. *Chesapeake & Ohio Ry. Co.*, 200 U. S. 361; *Texas & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 439; *Poor Grain Co.* v. *C., B. & Q. Ry. Co.*, 12 I. C. C. Rep. 418, 469; *United States* v. *Chicago, I. & L. Ry. Co.*, 163 Fed. Rep. 114; *United States* v. *Atchison, T. & S. F. Ry. Co.*, 163 Fed. Rep. 111; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 170 Fed. Rep. 250; *State* v. *Martyn*, 117 N. W. Rep. 719; *S. C.*, 23 L. R. A. (N. S.) 217; *McNeill* v. *Durham & C. Ry. Co.*, 132 No. Car. 510.

Mr. Lewis McQuown and *Mr. Clarence U. McElroy* for defendants in error:

The act of June 29, 1906, does not cover this case and Congress did not intend it to. The sole purpose of the act in this respect was to forbid, under penalty, all carriers from giving free passes, and to forbid, under like penalty, every person not in the excepted class, from using such free passes. The only argument needed is to show that this provision does not touch the facts of this case. Section 6 of the act of 1906 does not cover this case. It was not the legislative intent to fine a carrier from $1,000 to $20,000 for issuing a ticket that had been paid for. If Congress had intended the act to embrace a case like this, it would have said so, and should have said so, and the fact that it did not say so, is evidence conclusive that it had no such purpose. The act of 1906 was never intended to reach a case like the one at bar, and this construction is not only consonant with sound principle, with common sense, and with justice, but it is believed to be fully justified by the facts. See *United States* v. *Kirby*, 7 Wall. 486. All general terms in the statutes should be limited in their application so as not to lead to injustice, oppression or unconstitutional operation, if that be possi-

ble. It will be presumed that the exceptions were intended which would avoid results of that character. *Carlisle* v. *United States*, 16 Wall. 153; *Chew Heong* v. *United States*, 112 U. S. 555; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Bate Refrigerator Co.* v. *Sulzberger*, 157 U. S. 37; *Market Co.* v. *Hoffman*, 101 U. S. 116; *Brewer's Lessee* v. *Bloucher*, 14 Pet. 78; *Auffm'ordt* v. *Rasin*, 102 U. S. 620; *Cook* v. *United States*, 138 U. S. 181.

The act of June 29, 1906, would not be constitutional if applied to a case like the one at bar and this court could not enforce such a law. Congress has vast power. It is a potent arm of the Government, but it is not omnipotent. When a private citizen has made a lawful contract, has executed that contract fully so far as his obligation is concerned, and has parted with his money or property on the faith of the inviolability of his contract, that contract cannot be confiscated, simply because Congress has power to regulate commerce between the States. *Wilkerson* v. *Leland*, 2 Pet. 657; *Osborne* v. *Nicholson*, 13 Wall. 654; *Railroad Co.* v. *Richmond*, 19 Wall. 584.

MR. JUSTICE HARLAN delivered the opinion of the court.

As the result of a collision in Kentucky of railroad trains belonging to the Louisville and Nashville Railroad Company, which operated various lines extending through that Commonwealth as well as into Tennessee and other States, the plaintiffs Mottley and wife received serious personal injuries. The collision, it is alleged, was caused by the gross carelessness and negligence of the agents and servants of the railroad company.

After the collision the plaintiffs and the company on the second of October, 1871, entered into a written agreement of which the following is a copy:

"The Louisville & Nashville Railroad Company in consideration that E. L. Mottley and wife, Annie E. Mottley,

have this day released said company from all damages or claims for damages for injuries received by them on the seventh day of September, 1871, in consequence of a collision of trains on the railroad of said company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them."

The railroad company adhered strictly to this agreement for many years, but finally refused further to perform it on the ground that the act of Congress of June 29, 1906, amendatory of the act regulating commerce, approved February 4, 1887, made its enforcement illegal. Thereupon Mottley and wife brought suit in the Circuit Court of the United States for the Western District of Kentucky to enforce the agreement and obtained a decree in their favor. 150 Fed. Rep. 406. But upon a direct appeal to this court that decree was reversed and the case was remanded with directions to dismiss the suit for want of jurisdiction. *L. & N. R. R.* v. *Mottley*, 211 U. S. 149; *Metcalfe* v. *Watertown*, 128 U. S. 586; *Tennessee* v. *Union Planters' Bank*, 152 U. S. 454, 459. The grounds upon which the Federal court was held to be without jurisdiction are not important here.

The present action was brought in the Circuit Court of Warren County, Kentucky. The relief sought was that the defendant company be required specifically to execute the above agreement by issuing passes to the plaintiffs for the year 1909 and for every year thereafter so long as the plaintiffs should each live, over all its roads in and out of Kentucky.

The railroad company resists any judgment that would compel it further to perform the agreement sued on. It bases its defense mainly on the commerce act of Congress

of June 29, 1906, which became effective August 28, 1906, 34 Stat. 838, Pt. I, Res. No. 47. By that statute Congress, among other things, provided:

"SEC. 1. . . . No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers," except to certain specified persons, the plaintiffs not being within any of the excepted classes.

"SEC. 6. . . . No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. Feb. 4, 1887, c. 104, 24 Stat. 379; June 29, 1906, 34 Stat. 584, 586, Pt. II, c. 3591.

The act of June 29, 1906, regulating commerce and enlarging the powers of the Interstate Commerce Commission, made its provisions applicable to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad . . . from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, etc.;" and in this respect it has not

been amended. It also provides that a common carrier violating the clause forbidding it after January 1, 1907, directly or indirectly to issue or to give any interstate free ticket, free pass or free transportation for passengers should pay to the United States a penalty of not less than $100 nor more than $2,000. Any person (other than those of the excepted classes) who used any such interstate free ticket, free pass or free transportation became subject to a like penalty. *Ib.* 585, § 1.

The state circuit court, giving the relief asked, by its judgment required the railroad company to issue to the plaintiffs and to each of them a pass over its lines and branches for the year 1909, and thereafter to renew such passes annually during their respective lives.

Upon appeal to the Court of Appeals of Kentucky that judgment was affirmed. *L. & N. R. R. Co.* v. *Mottley,* 133 Kentucky, 652.

It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit. That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. *Platt* v. *Union Pacific R. R. Co.,* 99 U. S. 48, 64. The court cannot mold a statute simply to meet its views of justice in a particular case. Having, in the mode indicated, ascertained the will of the legislative department, the statute as enacted must be executed, unless found to be inconsistent with the Supreme Law of the Land.

In our consideration of the case it will be assumed—indeed the parties themselves assume—that the agree-

ment of 1871 was not when made in conflict with the Constitution or laws of the United States. But we must first inquire whether such an agreement, if made after the passage of the original and amendatory commerce acts, would have been valid under those acts. If those acts forbid agreements of that character we must then inquire whether the one in suit can be now enforced simply because it was valid when made.

The act of February 4, 1887 regulating commerce declared it to be an unjust and unlawful discrimination for any carrier subject to the provisions of that act, directly or indirectly, by any special rate, rebate, drawback or other device, to charge, demand, collect or receive from any person or persons "a greater or less compensation" for any service rendered or to be rendered in the transportation of passengers or property than was charged, demanded, collected or received from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. 24 Stat. 379, c. 104, § 2. But the act of June 29, 1906 made a material addition to the words of the act of 1887; for, it expressly prohibited any carrier, unless otherwise provided, to demand, collect or receive "a greater or less *or different* compensation" for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in the tariff filed and in effect at the time. We cannot suppose that this change was without a distinct purpose on the part of Congress. The words "or different," looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them. *Market* v. *Hoffman*, 101 U. S. 112, 115. The history of the acts relating to commerce shows that Congress, when introducing into the act of 1906 the word "different," had in mind the pur-

pose of curing a defect in the law and of suppressing evil practices under it by prohibiting the carrier from charging or receiving compensation except as indicated *in its published tariff*. 11th Ann. Rep. Interstate Com. Com., 141; 19th *Ib.* 78, 15; 40 Cong. Rec. Pt. 7, p. 6608; *Ib.* 6617; *Ib.* 7428, 7434; Rept. of Confer. Com., 40 Cong. Rec. 9522; 42 Cong. Rec. Pt. 2, p. 1746.

In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation "different" *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were as well as to have the equal benefit of them. To that end the carrier was required to print, post and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier.

That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its Conference Rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or

property, for any service connected therewith, "it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules." It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. *Union Pac. Ry. Co.* v. *Goodridge*, 149 U. S. 690, 691; *Gulf, Col. &c. Ry. Co.* v. *Hefley*, 158 U. S. 98, 102; *I. C. C.* v. *Ches. & Ohio Ry. Co.*, 200 U. S. 361, 391; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439. That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property. The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs. In the first of the cases last above cited (the *Goodridge case*) the court, referring to the practice of allowing rebates, said: "So opposed is the policy of the act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices he may know precisely with what he has to compete. To hold a defense thus pleaded to be

valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported. There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and if no one else were interested in the transaction, that rule might apply here; but the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates which, in their practical application, would be rendered nugatory if this rule were given full effect." That Congress had the constitutional power to adopt such a policy and to prescribe appropriate means to give it effect, we do not doubt.

It is said, however, that as the contract of Mottley and wife with the railroad company was originally valid, it cannot be supposed that Congress intended by the act of 1906 to annul or prevent its enforcement. But the purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality, except in the cases of certain excepted classes to which Mottley and his wife did not belong and which exceptions rested upon peculiar grounds. Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should

be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions *of existing contracts*, it forbade by broad, explicit words *any* carrier to charge, demand, collect or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of passengers or property than was specified in its published schedules of rates. The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception. *Yturbide* v. *United States*, 22 How. 290, 293. The words of the act therefore must be taken to mean that a carrier, engaged in interstate commerce, cannot charge, collect or receive for transportation on its road anything but money. In *Armour Packing Company* v. *United States*, 209 U. S. 56, 81, this court said: "There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart." So, in *Adams Express Co.* v. *United States*, 212 U. S. 522, 532, 533: "But the power of Congress over interstate transportation embraces all manner of carriage of that character—whether gratuitous or otherwise—and, in the absence of express exceptions, we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property in the instances mentioned, free of charge. If it is lawful, in view of the provisions of the Interstate Commerce Act, to

issue franks of the character under consideration in this case, then this right must be founded upon some exception incorporated in the act."

It is further said that the passes contemplated by the parties were not strictly free passes; for, it is argued, the railroad company would receive a valuable consideration for each one issued by it. This view is more plausible than sound, and does not meet the difficulty. Suffice it to say, in this case, that such passes, when issued, would be illegal under the act of Congress, by reason of their not being paid for in money, according to the company's schedule of rates, but in consideration only of the release by Mottley and wife of their claim for damages on account of the collision in question.

We now come to the question whether, assuming that the agreement of 1871 was valid when made, could Congress by any statute subsequently enacted make its enforcement by suit impossible? There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the States and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211, 229; *Scranton* v. *Wheeler*, 179 U. S. 141, 162, 163; *C., B. & Q. R. R. Co.* v. *Drainage Com'rs*, 200 U. S. 561; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400; *Atlantic Coast Line &c.* v. *Riverside Mills*, 219 U. S. 186, 202.

In the *Addyston Pipe case*, this court said that, under its power to regulate commerce, Congress "may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corpora-

tions where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce."

In the *Scranton* case, where a riparian owner sought compensation from the Government because his access to navigability had been materially obstructed by a pier constructed by the Government on the submerged grounds in front of his land, this court said: "The riparian owner acquired the right of access to navigability *subject to the contingency* that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the pier in question, the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce."

In the *Union Bridge Co.* case the question was as to the constitutional authority of the Government to require the Bridge Company to make certain changes or alterations in a bridge across a navigable river of the United States, in Pennsylvania, and which bridge the company owned and constantly used. It was admitted that the bridge had been lawfully erected. But ultimately, in view of the necessities of interstate commerce, it had become an unreasonable obstruction to free, open navigation by vessels and boats then in use, and, for that reason alone, the Government, by its constituted authorities proceeding under an act of Congress, ordered the Bridge Company *at its own cost* to make certain changes and alterations in the structure. This court held that there was no taking of property for public use in the constitutional sense, and that although the bridge when erected under the authority of

Pennsylvania may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce, *as then* carried on, "it must be taken, under the cases cited and upon principle, not only that the company, when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge *subject to the possibility that Congress might, at some future time, when the public interest demanded,* exert its power by appropriate legislation to protect navigation against unreasonable obstructions."

Long before the above cases were decided it was said in *Knox* v. *Lee,* 12 Wall. 457, 550, 551, that "as in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the Sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate government authority."

These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist.

It is said that if Congress intended by the commerce act to embrace such a case as this, then the act is repugnant to the Constitution. Does the act infringe upon the constitutional liberty of the citizen to make contracts? Manifestly not. In the *Addyston Pipe* case (p. 228) above cited, the court said: "We do not assent to the

correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts," relating to interstate commerce. Again: "But it has never been, and in our opinion ought not to be, held that the word [liberty] included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce, and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, *while in the exercise of its constitutional right to regulate commerce among the States*. . . . Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

These authorities and principles condemn the proposition that the defendants in error had the constitutional right, pursuant to or because of the agreement of 1871 and during their respective lives, to accept and use free transportation for themselves, as passengers, on an interstate train, after Congress forbade, under penalty any interstate carrier to demand, collect or receive compensation for transportation, or any interstate passenger, not within the classes excepted by the act, to use transportation tickets, except upon the basis fixed by the carrier's published schedule of rates. After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established.

It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox* v. *Lee*, 12 Wall. 457, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts."

In *Fitzgerald* v. *Grand Trunk Ry. Co.*, 63 Vermont, 169, 173, which was the case of a contract for the transportation of lumber through several States, the Supreme Court of Vermont said: "Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority."

In Pomeroy on Contracts, § 280 (Specific Performance), after observing that an illegal contract cannot be made the basis of any judicial proceeding and that no action in law or equity could be maintained upon it, said: "This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether being valid when

made, the illegality has been created by a subsequent statute." Among the cases cited by the author in support of that view was *Atkinson* v. *Ritchie*, 10 East. 530, 534, in which the Chief Justice, Lord Ellenborough, delivering the opinion of the court, said: "That no contract can properly be carried into effect, which was originally made contrary to the provisions of law, or which being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt." In *Kentucky & Indiana Bridge Company* v. *Louisville & Nashville Railroad Co.*, 34 Am. & Eng. R. Cases, 630, Judge Cooley said: "But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. . . . But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable." "If one agrees," said Mr. Parsons, "to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise." Parsons on Contracts (6th Ed.), 675.

We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation

of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived.

In our opinion, the relief asked by the plaintiffs must, upon principle and authority, be denied; that the railroad company rightly refused, after the passage of the commerce act, further to comply with the agreement of 1871; and, that the decree requiring performance of its provisions, by issuing annual passes, was erroneous.

Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred is a question not before us, and we express no opinion on it.

The judgment is reversed, and the cause is remanded for such further proceedings as may be deemed proper, not inconsistent with the views herein expressed.

Reversed.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY *v.* UNITED STATES.

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

No. 74. Submitted December 16, 1910.—Decided February 20, 1911.

Louisville & Nashville Railroad Company v. *Mottley, ante,* p. 467, followed to effect that under the act of June 29, 1906, c. 3591, 34 Stat. 584, amending the act of February 4, 1887, c. 104, § 2, 24 Stat. 379, a carrier cannot accept any compensation other than cash for interstate transportation, and the delivery of such transportation in exchange for advertising is a violation of the act; and it is no defense that such a transaction is permitted by a state statute.

No state enactment can avail when the subject has been covered by an act of Congress acting within its constitutional powers. In such a case the act of Congress is paramount and the state law must give way.

THE facts, which involve the construction of provisions of the Interstate Commerce Act relating to payment of fare on railways, are stated in the opinion.

Mr. E. C. Field, with whom *Mr. H. R. Kurrie* was on the brief, for appellant:

There is no unreasonable discrimination in contracting with certain publications and refusing to do so with others.

The law recognizes the right of a carrier to discriminate between persons, the only restraint upon such discriminations being that they shall not be unreasonable. *Cincinnati &c. Ry. Co.* v. *Int. Comm. Comm.*, 162 U. S. 197; *Int. Comm. Comm.* v. *Baltimore &c. R. R. Co.*, 145 U. S. 263; *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440; *Texas & Pac. Ry. Co.* v. *Int. Comm. Comm.*, 162 U. S. 197, 220.

There is nothing in the record to show that there was any discrimination by the appellant. Appellant insists that it has the right to make this kind of a contract with publications of its own selection, provided, always, that it actually receives the money value of the transportation which it gives. Advertising is just as essential to successful operation as good train service.

Section 6 does not require the manner in which charges shall be paid to be stated in the tariffs filed by a carrier. *Int. Comm. Comm.* v. *Detroit R. R. Co.*, 167 U. S. 633; *Southern Pacific Co.* v. *Int. Comm. Comm.*, 200 U. S. 536. It has been held that the time when charges shall be paid is not required to be stated; and that the carrier may require one shipper to pay in advance, and allow another to pay at destination, and that by so doing it does not unjustly discriminate. *Little Rock &c. R. R. Co.* v. *St. Louis*

&c. R. R. Co., 63 Fed. Rep. 775; *Oregon &c. R. R. Co.* v. *Northern &c. R. R. Co.*, 51 Fed. Rep. 465, 472.

It has always been the law that charges may be paid in money value as well as in money. *Marsh* v. *Union &c.*, 9 Fed. Rep. 873; *Miami &c. Ry. Co.* v. *Port Royal &c. Ry. Co.*, 25 S. E. Rep. 153; *Gleadell* v. *Thompson &c.*, 56 N. Y. 194; *Bearse* v. *Ropes*, Fed. Cas. No. 1192; *Snow* v. *Carruth*, Fed. Cas. No. 13,144; *Bancroft* v. *Peters*, 4 Michigan, 619; *Relyea* v. *New Haven &c. Ry. Co.*, 42 Connecticut, 579; *Boggs* v. *Martin*, 13 B. Mon. 239; *Page* v. *Munroe*, 18 Fed. Cas. 10,665; *Jones* v. *Hoyt*, 25 Connecticut, 374; *Aldrich* v. *Cargo*, 117 Fed. Rep. 757; *The Success*, 7 Blatch. 551; *Woodward* v. *Int. Comm. Comm.*, 1 Biss. 403; Elliott, Railway, 2d ed., 1558; *Missouri Pac. Ry. Co.* v. *Peru &c. Ry. Co.*, 87 Pac. Rep. 80; *S. C.*, 85 Pac. Rep. 408; *Curry* v. *Kansas &c. Ry. Co.*, 48 Pac. Rep. 579; *Dempsey* v. *N. Y. Central &c. Ry. Co.*, 40 N. E. Rep. 867; *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558.

The insertion of the word "different" does not change the legal effect of § 6. Endlich, § 378; *McDonald* v. *Hovey*, 110 U. S. 619.

The construction contended for would lead to absurd consequences; even checks, drafts or other evidences of credit could not be received.

Mr. Attorney General Wickersham, with whom *Mr. Barton Corneau* was on the brief, for the United States:

Literally interpreted, § 6 of the act to regulate commerce as amended, plainly forbids the acceptance of compensation which is different either in kind or amount from that specified in the published tariffs, viz., money; and it therefore prohibits the exchange of transportation for advertising.

The word "different" in the phrase "greater or less or different compensation" means different in kind. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115; End-

lich, § 396; *United States* v. *Bowen*, 100 U. S. 508. Inter. Comm. Comm. Circular No. 2-A of September 15, 1906; *State* v. *Union Pacific R. R. Co.*, 126 N. W. Rep. 859.

Whether or not the contracts in question, or any of them, actually work discriminations or preferences contrary to §§ 2 and 3, the practice of bartering commodities for transportation, if once permitted, will invite frauds upon the law, and cannot fail ultimately to result in all sorts of discriminations and preferences. This fact not only explains the insertion of the word "different" in § 6, but furnishes a conclusive reason why this court should not depart from the literal interpretation of that section. *In re Persons Free or at Reduced Rates*, 5 I. C. C. Rep. 69; *Ex parte Koehler*, 31 Fed. Rep. 315, 321; *In re Charge to Grand Jury*, 66 Fed. Rep. 146; *Int. Comm. Comm.* v. *B. & O. R. R. Co.*, 145 U. S. 263, 282; *Denaby Colliery Co.* v. *Manchester Ry. Co.*, 11 App. Cas. 97, 120; *Wight* v. *United States*, 167 U. S. 512; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

Whether this or any other court has ever upheld a preference given to some particular patron and not open to all who are similarly situated, *Int. Comm. Comm.* v. *B. & O. R. R. Co.*, 145 U. S. 263; *Int. Comm. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *L. & N. R. R. Co.* v. *Behlmer*, 175 U. S. 648; *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440, are not in point.

If railroad companies may accept advertising in payment for transportation, then the right of the railroad to barter transportation for any sort of commodity or any kind of consideration is at once established. What abuses it would lead to no one can tell. As to the necessity for a literal interpretation of the statute by the courts, see *Union Pacific Ry. Co.* v. *Goodridge*, 149 U. S. 580, 690; *A., T. & S. F. Ry. Co.* v. *United States*, 163 Fed. Rep. 111, 113.

The undoubted purpose of § 6 was to compel carriers to

fix rates which would be uniform in their operation, *N. Y., N. H. & H. R. R. Co.* v. *Int. Comm. Comm.*, 200 U. S. 361, 391; *T. & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439, and since the statute in that respect is remedial, it is "entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

The necessity of adopting the literal interpretation of § 6 is also shown by a comparison of its language and purpose with the language and purpose of §§ 2 and 3. *American Express Co.* v. *United States*, 212 U. S. 522.

The literal interpretation of § 6 will not cause any of the inconveniences or inconsistencies suggested by appellant.

It is claimed that the publisher could hand over $500 in money for transportation which could be handed back for advertising without violating the law, and that it is absurd to forbid the parties from doing directly what they could undoubtedly do indirectly. The obvious answer is, however, such a transaction would be a mere barter of transportation for advertising, however cleverly its real nature might be concealed. The only way in which a violation of the statute could be avoided would be by *bona fide* purchase of transportation or advertising without contemporaneous agreement on the part of the seller to purchase on his part a like amount of advertising or transportation.

Section 6 undoubtedly requires the kind of compensation to be specified in the published tariffs.

Mr. Justice Harlan delivered the opinion of the court.

By the act of Congress of February 19, 1903, further regulating commerce with foreign nations and among the States, as amended by the act of June 29, 1906, it was provided that whenever the Interstate Commerce Commission had reasonable ground to believe that a common carrier was engaged in carrying passengers or freight between

given points at less than the published rates on file or was committing any discrimination forbidden by law, the facts could be set forth in a petition in equity to the proper Circuit Court of the United States, whose duty it was made summarily to inquire into the circumstances, without formal pleadings and proceedings applicable to ordinary suits in equity. If the court became satisfied upon investigation that the facts existed as alleged, it was then by proper orders to enforce the observance of the published tariffs or direct a discontinuance of the alleged discrimination, with such right of appeal as was then provided by law to the parties interested in the traffic or to the carrier. February 19, 1903, 32 Stat. 847, 848, Pt. 1, c. 708; June 29, 1906, c. 3591, 34 Stat. 584.

The present suit was brought by the United States under that statute against the Chicago, Indianapolis and Louisville Railway Company, a corporation of Indiana which operated the lines of railroad known as the Monon Route, and extending from Chicago through Indiana to Cincinnati and from Michigan City, Indiana, to Louisville, Kentucky. The railway company was engaged in the business of carrying passengers over the above lines.

The petition alleged that on the twenty-fourth day of January, 1907, the defendant made a written contract with the Frank A. Munsey Company, publisher, at New York of Munsey's Magazine, which contained, among other provisions, the following:

"Agreement between the Monon Route (Chicago, Indianapolis & Louisville Railway Company) and..... Frank A. Munsey Co.....publisher. Entered into this.....24 day of January, 1907.

"Whereas, the said publisher issues.....Munsey's Magazine.....a.....publication, published at New York City, N. Y., Chicago office 423 Marquette Building, and which has a regular circulation of..... 643,000.....each issue.

"And whereas, the said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon the following terms and conditions, which are mutually agreed upon:

"1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows:.....One page 'ad' (divided as desired).....
.....
.....
said advertisement to appear.....Favorably.....
and occupy a space of not less than.....one page.....
and to be published as desired in issues of said publication.

"2d. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following non-transferable transportation based on regular published rate:
.....Trip tickets or mileage.....
.....
To the value of.....Five hundred.....Dollars ($500.....,) for the personal use of the publisher, his employés or immediate members of his or their families, which said transportation shall be limited for use not later than December 31, 1907.

"3d. Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer or use would be a misdemeanor under the law.

"4th. It is understood and agreed that the transportation issued under this contract shall read to points on the Monon Route, and not to points on any other road. . . . Further, should said publisher or any person named on said tickets allow any other person to use same or offer to sell, sell or transfer the same, then said publisher agrees to pay the said Monon Route as a penalty the full rate of fare which would have been paid

for regular tickets. . . . This contract expires December 31, 1907, unless otherwise stipulated."

The petition also alleged that after that contract was entered into, and previous to April 3, 1907, the defendant railway company, pursuant to the above contract, transported over its railway from points in one State to points in other States the employés of the Munsey Company upon trip and mileage tickets issued for their benefit.

That such interstate transportation paid for according to the company's published rates, amounted to $145.10, while the only compensation received by it for transportation previous to May 10, 1907, was the publication in the March issue of the Munsey Magazine of one-fourth of a page advertisement of the Monon Route which the parties valued at $125;

That while the railroad company was thus transporting the Munsey employés it contemporaneously transported over its lines between the same points other persons and exacted and received in money from them, in each instance, the full amount of its published rates and fares, the conditions and circumstances of the transportation being the same in the cases of employés and others;

That in accordance with the contract in question the railway company was, at the date of this suit, still furnishing interstate transportation to the publisher of Munsey's Magazine and the members of his family and to his employés and the members of their families;

That the railway company had entered into like contracts with other publishers of magazines, newspapers and similar periodicals to the number of two hundred and fifty-one, under the terms of which latter contracts the company, at the date this suit was commenced, was furnishing interstate transportation over its lines to such persons as were from time to time designated by the publishers last above mentioned, but not receiving compensation in money in any instance when furnishing trans-

portation under those contracts for the services rendered by it; and,

That the above contracts between the railway company and the publishers of magazines and newspapers are in violation of the act of Congress regulating commerce, particularly §§ 2 and 6, and also § 3 of the above act, approved February 19, 1903,—in this, that those contracts require the furnishing of interstate transportation at rates which, in each instance, "are less than and different" from the rates contemporaneously exacted from the general public under substantially similar circumstances and conditions.

The company, in its answer, averred that the money value of the space purchased from the Munsey Company under the contract was $500 as determined and fixed by the rate to the public, and that it was to pay therefor $500 in value of passenger transportation issued and based on regularly published rates, so that the money value of the advertising space purchased and the money value of the transportation furnished was the same; and that its arrangements for advertising space with other publications were based on the "regular published rate." The answer contains this paragraph: "Defendant admits that it has entered into a large number of other contracts for advertising space by written contracts providing substantially the same as the contract with the Munsey Company as aforesaid, and that in each case, pursuant to the terms and conditions of each of said contracts, the publishers named in said contracts and in each of them sells to this defendant advertising space in the par money value at the usual market rate therefor, and that this defendant issues and pays therefor in transportation 'based on the regular published rates' in money value equal to the money value of said advertising space."

The answer further avers that all the company's corporate powers as a common carrier are derived from an

Indiana statute which prohibits the railway company from giving free tickets, free passes or free transportation, but which, in express words, authorizes the company to issue transportation in payment *for printing and advertising*. It denied that the purchase of advertising space by a common carrier constituted any part of interstate commerce or that Congress has any constitutional power to prohibit it from doing so.

It was admitted at the hearing "that said defendant had, subsequent to the filing of said petition, executed contracts similar in terms to the ones set forth in said petition, expiring December 31, 1908, for the exchange of interstate transportation for advertising, under the same conditions as those set forth in the contracts described in said petition, and that said case should be heard and determined precisely as if it were alleged in the pleading that said defendant had made said contracts expiring December 31, 1908."

The Circuit Court heard the case upon the pleadings and proofs and adjudged that the acts of the railway company, as alleged in the petition, were sustained by the evidence (as they undoubtedly were), and were in violation of the commerce act of February 4, 1887, of the act further to regulate commerce approved February 19, 1903, and of the acts amendatory thereof.

It was further adjudged, in accordance with the petition of the Government, "that the defendant, its officers and agents, and any and all persons whomsoever, acting on its behalf, be, and they are hereby, enjoined from further executing each and every one of said contracts now pending for the exchange of transportation for advertising space; and that they be, and they are hereby, enjoined from issuing transportation in exchange for advertising space pursuant to the terms of contracts providing that said transportation shall be paid for by the furnishing of advertising space in newspapers or periodi-

cals, that they be, and they are hereby, enjoined from accepting advertisements in lieu of money in payment for interstate transportation, pursuant to agreements or contracts providing that said advertising space shall be paid for by issuing transportation; and that they be, and they are hereby, enjoined from committing any of the acts with reference to the exchange of interstate transportation for advertising space as charged in said petition."

1. The decisive question in this case is whether the contract between the railway company and the Munsey Company is repugnant to the acts of Congress regulating commerce. In other words, could the company, in return for the transportation which it agreed to furnish and did furnish to the Munsey publisher over its interstate lines, and to his employés and to the immediate members of his and their families, accept as compensation for such service anything else than money, the amount to be determined by its published schedule of rates and charges? Upon the authority of *Louisville & Nashville R. R. Co.* v. *Mottley, ante*, p. 467, just decided, and according to the principles announced in the opinion in that case, the answer to the above question must be in the negative. The acceptance by the railway company of advertising, not of money in payment of the interstate transportation furnished to the publisher of the Munsey magazine, his employés and the immediate members of his and their families, was for the reasons given in the *Mottley case*, in violation of the commerce act. The facts in the present case show how easily, under any other rule, the act can be evaded and the object of Congress entirely defeated. The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be

paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money.

2. We need say but little about the Indiana statute upon which the defense is in part based. The transactions, in respect of which the Government seeks relief, being interstate in their character, the acts of Congress as to such transactions are paramount. No state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress acting within the limits of its constitutional powers. It has long been settled that when an "act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment." *Sinnot* v. *Davenport*, 22 How. 227, 243; *M., K. & T. Railway* v. *Haber*, 169 U. S. 613, 686; *Reid* v. *Colorado*, 187 U. S. 137. This results, Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1, as well from the nature of the Government as from the words of the Constitution.

Judgment affirmed.

SOUTHERN PACIFIC TERMINAL COMPANY *v.* INTERSTATE COMMERCE COMMISSION AND YOUNG.

YOUNG *v.* INTERSTATE COMMERCE COMMISSION ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

Nos. 459, 460. Argued December 9, 1910.—Decided February 20, 1911.

The case is not moot where interests of a public character are asserted by the Government under conditions that may be immediately repeated, merely because the particular order involved has expired. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308.

The rule that this court will only determine actual controversies, and will dismiss if events have transpired pending appeal which render it impossible to grant the appellant effectual relief, does not apply to an appeal involving an order of the Interstate Commerce Commission merely because that order has expired. Such orders are usually continuing and capable of repetition, and their consideration, and the determination of the right of the Government and the carriers to redress, should not be defeated on account of the shortness of their term.

The Interstate Commerce Commission has jurisdiction to regulate charges of a terminal company which is part of a railroad and steamship system and operates terminals such as those of the Southern Pacific Terminal at Galveston, Texas.

Verbal declarations cannot alter facts; and although the different parts of a system may be separate as regards their charters, each forms a link in the chain of transportation. One of the separate links in a system controlled by a holding company such as the Southern Pacific Company cannot escape regulation by the Commission, because designated as a wharfage company; its property is necessarily employed in the transportation of interstate commerce.

All shippers must be treated alike; and, under the facts in this case, an arrangement, involving the lease of a wharf at a stipulated rental, between the shipper and a corporation whose wharves and terminal facilities thereon form links in a chain of interstate transportation, amounts to an unlawful or undue preference under the Interstate Commerce Act, the Commission having found the facilities amounted

to an absolute advantage to the favored shipper, and that similar facilities could not be given to other shippers.

Where a means of interstate transportation is used to give one shipper an undue preference, the traffic comes under the jurisdiction of the Interstate Commerce Commission.

Goods actually destined for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another State or are delivered to a carrier for transportation, *Coe* v. *Errol*, 116 U. S. 577; this is the same whether the goods are shipped on through bills of lading or on an initial bill only to the terminal within the same State where they are to be delivered to a carrier for the foreign destination.

THIS is a bill in equity to enjoin an order of the Interstate Commerce Commission requiring appellants to cease and desist, on or before the first day of September, 1908 (subsequently postponed to November 15, 1908), and for a period of not less than two years thereafter, from granting and giving undue preferences and advantages to one E. H. Young, a shipper of cotton seed products at the port of Galveston, Texas, through failure to exact from him payment of wharfage charges for handling cotton seed cake and meal over the wharves, docks and piers of appellants, while at the same time exacting such charges from other shippers of cotton seed cake and meal, and from giving and allowing him or any other person whomsoever, for his exclusive use, space on the wharves of appellants at Galveston for use in the storage and handling of cotton seed cake and meal, while contemporaneously refusing and denying similar privileges to other shippers under substantially similar circumstances and conditions.

Young was not a formal party before the Interstate Commerce Commission. However, he was made a respondent in this suit, and filed an answer and cross bill. The Commission demurred to both bill and cross bill, and, the demurrer being overruled, answered.

On final hearing the case was submitted upon an agreed statement of facts, and both bills were dismissed.

The most important facts we set out below and in the opinion. We refer to the report of the Interstate Commerce Commission for further details.

The Republic of Mexico conveyed to one Menard the property upon which the wharves of the Terminal Company are situated. Menard conveyed the property to the president and directors of the Galveston City Company, who conveyed it to Collis P. Huntington for the sum of $200,000, and it is recited in the deed to him that it "is made upon the further Express Covenant and condition as follows: . . . when through and by means of such acts of Congress, act of the legislature, and ordinance and conveyance from the city of Galveston, if any, as may be required for the purpose, . . . the right has been secured to the said Collis P. Huntington, or his heirs or assigns, to construct piers, as he or they may from time to time determine, . . . then and in that event the said Collis P. Huntington, his heirs or assigns, will within six months thereof commence the construction of terminal facilities upon the property . . . for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems."

The city of Galveston, on the fourth of February, 1899, passed an ordinance which recited the conditions of Huntington's purchase to be as above stated, and that it was greatly to the interest of the city that the work contemplated by him should be performed, and that for the proper utility of the property no streets should be opened through or across it, and it was ordained that streets, avenues or alleys, if any, theretofore opened, laid out or in any manner designated upon the property be perpetually abandoned, discontinued and closed. And Huntington, his heirs and assigns, were granted the right perpetually to construct and maintain piers as he or they might from time to time determine, "and to maintain upon the property terminal facilities for the use of what are commonly

called the Southern Pacific Railroad and Steamship Systems, their successors or assigns." It was provided that if Huntington should "charge wharfage for the use of such piers and other facilities upon said property, except so far as wharf service" might be covered by the freight rate, all such wharfage should be subject to the regulation of the railroad commission of Texas. And it was recited that it was greatly for the public interest that the property "should be developed for shipping and transportation purposes, and that the shipping facilities of the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and State. . . ."

The ordinance was ratified by an act of the legislature approved May 1, 1899. The act set out the ordinance in full and relinquished to Huntington the title and claim of the State to the property upon the conditions expressed in the ordinance and, in addition to subjecting the wharfage charges to regulation by the railroad commission, required an annual report to that body. And it was provided "that the system of railroad tracks" which might be constructed by Huntington on the property should connect with the track of any railroad company which might be built to the property, at a place designated; and, further, that there should be no consolidation of the property, or the stock or franchise of any corporation which might own or control the same, with the Galveston Wharf Company or any other wharf company by which the "wharf or other terminal charges should be fixed," and that "no charter formed for the use, operation and management of the property" should be granted without containing the section providing as above.

Huntington performed the conditions expressed in the conveyance and in the ordinance and the act of the legislature.

The Southern Pacific Terminal Company is a Texas

corporation, organized in 1901 to construct and maintain wharves and docks for the accommodation of all kinds of vessels, "and to avail of, use and enjoy the properties, rights, privileges and franchises granted and described and referred to in the act of the legislature of the State of Texas of May 1, 1899, ratifying the ordinance of the city of Galveston, and to construct and maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems."

At the time of the incorporation of the Terminal Company the following were commonly referred to as the Southern Pacific Railroad and Steamship Systems: the line of steamships owned by the Southern Pacific Company, running from New York to Galveston and New Orleans, and also running from and between the latter city and Havana; Morgan's Louisiana and Texas Railroad and Steamship Company; the Louisiana Western Railroad, which leads from New Orleans to the Sabine River; the Texas and New Orleans Railroad, leading from that river to the city of Houston; the Galveston, Harrisburg and San Antonio Railway, and the railroads in which the Southern Pacific Company owns stock, extending from the connection of the latter in El Paso at the Rio Grande River to San Francisco. Each of the railways was incorporated as a separate and distinct railway and has its own officers and board of directors, but the Southern Pacific Company owns ninety-nine per cent of their stock and the same per cent of the stock of the Terminal Company. The two latter companies have the same president, and the Galveston, Harrisburg and San Antonio Railway Company and the Terminal Company have the same general manager.

Import and export traffic passing through Galveston passes over the wharves of the Terminal Company, and the only track facilities for such traffic are those owned by the

Terminal Company on its own lands. And the Galveston, Harrisburg and San Antonio Railway is the only railway having physical connection with the tracks of the Terminal Company, and it does all of the switching to and from the tracks of the Terminal Company, charging $1.75 per car. The latter company receives a trackage charge of 50 cents per car.

The Terminal Company owns no cars or locomotives and issues no bills of lading. It owns no stock in any of the railroads or corporations in which the Southern Pacific owns stock. It carries on a wharfage business and publishes a schedule of charges for such business, which, however, is not filed with the Interstate Commerce Commission, its charge being twenty cents per ton on cotton seed meal and cake passing over its docks, and is shown as wharfage charge in the tariffs of the Galveston, Harrisburg and San Antonio Railway Company and all other railways entering Galveston. Such tariffs do not show that any exception is made as to the docks occupied by E. H. Young as hereinafter shown, but as a fact the wharfage charge is not imposed by the Terminal Company on the cotton seed meal and cake handled over the dock of E. H. Young other than as the same may be included in the general lease or contract price fixed as hereinafter indicated.

The Terminal Company was a party to numerous circulars issued by the Southern Pacific Companies, known as the "Sunset Route," so termed, principally for advertising purposes. The circular of May 24, 1907, shows terminal charges (other than storage and switching). At the port of Galveston the circulars show a charge of one cent per 100 pounds on cotton seed cake and meal.

The Terminal Company has on its property two piers, known as pier "A" and pier "B," and has erected on them all facilities for handling imported and exported freight, and all freight which may come to or pass over its

wharves, and it has abundant land under water upon which to erect other piers if they should become necessary.

It charges a fixed wharfage for all freight passing over its piers to or from vessels berthed thereat. The Galveston Wharf Company affords similar public wharfage facilities at the port of Galveston, having a number of piers. If the facilities of the Galveston Wharf Company should be destroyed those of the Terminal Company would become inadequate for handling the import and export and coastwise business. Ships to and from foreign ports, and coastwise ships other than those of the Southern Pacific Company, berth at piers "A" and "B," and there receive and deliver freight, and at these piers the Terminal Company carries on its general wharfage business.

In the building of pier "B" it was necessary to dredge a slip west of it, where ships could berth, and in order that the soil, through the action of storm and wave, should not drift into the slip, a bulkhead was built. To the westward of the slip the lands of the Terminal Company were lying idle and useless, they not being needed by it, and in pursuance of negotiations with Young the company proceeded to construct a pier, known as pier "C," for the use of Young, and to erect thereon a warehouse, shed and platform for his use, the original construction and subsequent enlargement of which cost the company about $65,000. At this time the pier is 300 feet wide at its widest part and about 1,400 feet in length.

The negotiations terminated in a lease under which Young is to pay the Terminal Company a yearly rental of $15,000, payable monthly from the first day of November, 1906. And he agrees that he will route all shipments of cotton seed and cotton seed products purchased or shipped by him "over the lines of said Terminal Company and its connections, according to the instructions of said Terminal Company from time to time," and that he will insist upon and enforce such routing, except where the

enforcement will prevent him from purchasing such products or from obtaining shipments which will be ready to move immediately and for which cars cannot be procured for the routing required. It is provided, however, that Young shall not be bound by these provisions if the rates be not equal to or lower than those of other competing lines or the service be not as adequate, but notice is to be given of such lower rates and service and an option to meet them.

The business of Young is that of a merchant and manufacturer, engaged in buying, selling and converting cotton seed cake and meal for his own account. He took possession of pier "C" and the improvements erected thereon by the Terminal Company under his contract with the latter company, paying the price stipulated in the contract, and has placed thereon cake, sacking and grinding machines, representing an investment of $50,000. Young's business consists in buying cotton seed cake in the interior, shipping it to himself by carloads at pier "C," there grinding it into meal, sacking it and loading it into steamships berthed at pier "C" for export.

All cotton seed meal cake passing over piers "A" and "B" pays a wharfage of 20 cents per short ton. Young pays no wharfage or storage charge other than as the same may be included in the rental of $15,000 per year. If any exporter handles cotton seed meal or cake over pier "C" the wharfage of 20 cents per ton is paid by him to Young.

Young has certain advantages by reason of his contract with the Terminal Company, which are enumerated in the agreed statement of facts and the result of which is stated as follows: "He makes a sum equal to 30 or 40 cents per ton more than he would receive if he handled his export product under methods in existence before he established his plant on pier 'C' and adopted the method of business he follows. This 30 to 40 cents per ton is in addition to the ordinary buying and selling profit." He

at times pays more for cotton seed cake than his competitors can afford to pay, and at times he can undersell them in European markets, and since he commenced business some of the exporters who were engaged in business when he commenced have ceased exporting. A comparison of his business with that of all other exporters of cotton seed cake shows that from September 1, 1906, to September 1, 1907, he exported 105,000 tons of cotton seed cake and about the same amount of cotton seed meal; they, 50,000 tons of both products.

"Some of the cotton seed cake producers at interior mills in the State complain that Young is able to dominate the Texas market, and that his method of conducting business at Galveston enables him to command the foreign trade and may become a detriment to the cotton seed cake and meal industry, in that Young might acquire a monopoly. Others entertain a contrary opinion. They all agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired, it would be of great benefit to the cotton seed industry.

* * * * * * * *

"On the present constructed docks of the Galveston Wharf Company and the Terminal Company, with the structures as now located thereon, there is not space enough to furnish all exporters doing business at Galveston with space for erecting machinery and handling export business in the same manner as is done by Young."

This proceeding was instituted September 11, 1907, by Carl Eichenberg, an exporter of cotton seed and its products from the port of Galveston, by filing his complaint or petition before the Interstate Commerce Commission against the Southern Pacific Company and the Terminal Company, complaining that the companies, by the arrangement with Young, were violating § 3 of the act to regulate commerce, by giving him an undue and un-

reasonable preference and advantage over his competitors.

By order of the Commission the Galveston, Harrisburg and San Antonio Railway Company and other railroad companies entering Galveston were made parties defendant.

Answers were filed and full hearing was had by the Commission, which on June 24, 1908, made its report and order.

No rehearing was asked by defendant before the Interstate Commerce Commission. Young was not made a party to the proceedings before the Commission, but he appeared and testified as a witness for the Terminal Company, and his counsel was present at the hearing when the testimony was taken and engaged in the examination of witnesses. Young was also present when the case was argued and submitted.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* and *Mr. H. M. Garwood* were on the brief, for appellants:

The Interstate Commerce Commission cannot deny to a wharf company, chartered under the laws of the State of Texas, the power to lease or convey real estate which it owns in fee simple and its title to which has been sustained. See *Galveston* v. *Menard*, 23 Texas, 408; *Texas* v. *Galveston*, 38 Texas, 13; *Galveston Wharf Co.* v. *Galveston*, 63 Texas, 14; *Galveston City Co.* v. *Galveston*, 56 Texas, 486.

The supposition of the Interstate Commerce Commission that the title to the property was acquired by the ordinance of the city of Galveston and the special act of the legislature approving the same is not correct. The contract between the Terminal Company and Young is not in violation of the terms of the grant. The owner of property abutting upon a navigable stream can devote it to other purposes than that of a public wharf. *L. & N.*

R. R. Co. v. *West Coast Co.*, 198 U. S. 483; *Atchison &c. Ry. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S. 667; *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345.

Although interstate commerce may pass over a wharf, that wharf may be strictly a private wharf, and the owner does not become a common carrier subject to the jurisdiction of the Interstate Commerce Commission. The right to erect a landing on a navigable stream has its foundation in the ownership of the land, and when erected by an individual or corporation at its own expense, such landing is private property. *Leverich* v. *Mayor of Mobile*, 110 Fed. Rep. 170; *Compton* v. *Hankins*, 90 Alabama, 411; *O'Neill* v. *Annett*, 27 N. J. L. 290; *Woodruff* v *Havemeyer*, 106 N. Y. 129.

Even if the Terminal Company were a common carrier, and if the jurisdiction of the Interstate Commerce Commission were unquestioned, it nevertheless has the right to sell or convey unused portions of its property which it owns in fee simple. *Calcieu Lumber Co.* v. *Harris*, 77 Texas, 18; *A., T. & S. F. Ry. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S. 667, 682; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403.

An order of the Interstate Commerce Commission which forbids a wharf company from using, by way of lease, its property for warehouse and manufacturing purposes, effectually confiscates private rights. *Central Stock Yards Co.* v. *L. & N. Ry. Co.*, 192 U. S. 568; *United States &c.* v. *Oregon R. R. & Navigation Co.*, 159 Fed. Rep. 975.

The Southern Pacific Terminal Company is not a common carrier and is not subject to the jurisdiction of the Interstate Commerce Commission. It does not fall under cases where, for the purpose of evading laws criminal in their character, holding companies have been organized as a part of what is in reality a conspiracy to evade the law, as was the case in *Northern Securities Co.* v. *United*

States, 193 U. S. 197. By its charter it is authorized to purchase stocks and other classes of securities. The mere fact that it also owns the stock of a common carrier cannot operate to consolidate and make a corporation a wharf company and a railroad company, any more than it could turn a corporation into a banking corporation and a railway corporation, the stock of which it chanced to buy in the open market. *Pullman's Palace Car Co.* v. *Missouri Pacific Ry. Co.*, 115 U. S. 587; *Peterson* v. *C., R. I. & P. Ry. Co.*, 205 U. S. 364; *United States* v. *Del. & Hudson Co.*, 213 U. S. 366; *White* v. *Pecos L. & W. Co.*, 18 Tex. Civ. App. 634; *Exchange Bank* v. *Macon Construction Co.*, 97 Georgia, 1; *A., T. & S. F. R. R. Co.* v. *Cochran*, 43 Kansas, 225.

The ownership of the stock of the Galveston, Harrisburg and San Antonio Railway Company and the Terminal Company does not in any manner whatsoever effect an amalgamation of these companies in any legal sense. Each has its own separate corporate organization, and is absolutely independent of the other. In no case has the Interstate Commerce Commission undertaken to stretch its jurisdiction to this extent. Its own decisions are directly against such an assumption of authority. *Cattle Raisers' Assn.* v. *Ft. Worth & Denver Ry. Co.*, 7 I. C. C. Rep. 513; *Kentucky & Indiana Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 567; *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. Rep. 839.

The lease contract held to be unlawful does not, under the facts proven, constitute an unlawful or undue preference under the Interstate Commerce Act. Young by reason of prompt methods adopted for unloading his traffic, and by reason of the warehousing facilities with which he has provided himself, is able to unload the product within the ten days, and hence does not incur the penalties of demurrage charges; not, however, because of any special privilege but because he promptly unloads

his products. The record discloses no fact which would justify the conclusion that any party has been subjected to any undue or unfair advantage by reason of this lease contract. A common carrier has the right to lease or sell property which it owns in fee for the erection of warehouses, elevators, etc., and it is so universal a business method all over the United States that the court may take judicial knowledge thereof. The decision of the Interstate Commerce Commission in this case will revolutionize industrial methods in this country. *Stock Yards Co.* v. *L. & N. R. R. Co.*, 67 Fed. Rep. 35; *Ilwaco Ry. Co.* v. *Oregon Short Line & U. N. Ry. Co.*, 57 Fed. Rep. 673.

The order of the Commission transcends its jurisdiction, in that it regulates commerce purely state and intrastate, and also purely foreign commerce, neither of which is subject to its authority. *G., C. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403; *Augusta Brokerage Co.* v. *Central of Georgia Ry. Co.*, 5 Ga. App. Rep. 187; *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. Rep. 266, 279. The greater part of the traffic is confined to products which move from a point within the State of Texas to a point within the same State upon a local bill. This is intrastate and domestic traffic. When it leaves the warehouse of Young it goes without the interposition of any common carrier into the hold of a ship direct to Europe. Over this transit the Interstate Commerce Commission has no jurisdiction.

Mr. Wade H. Ellis and *Mr. Luther M. Walter* for appellee, the Interstate Commerce Commission:

The appeal should be dismissed because the Commission's order has expired and the case is now moot. *Mills* v. *Green*, 159 U. S. 651; *Pennsylvania* v. *Wheeling & Bel. Bridge Co.*, 18 How. 421; *San Mateo County* v. *Southern Pac. Co.*, 116 U. S. 138; *Little* v. *Bowers*, 134 U. S. 547; *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308;

New Orleans Flour Inspectors v. *Glover*, 160 U. S. 170; *Dinsmore* v. *Southern Exp. Co. and Georgia R. R. Comm.*, 183 U. S. 115; *Jones* v. *Montague*, 194 U. S. 147; *Richardson* v. *McChesney*, 218 U. S. 487.

On the merits this case involves three propositions: 1. Whether the Southern Pacific Terminal Company is subject to the act to regulate interstate commerce; 2. Whether the order of the Commission relating to shipments originating both within and without the State of Texas but intended for trans-shipment abroad is a regulation within the jurisdiction of the Commission, and 3. Whether the contract with Young constitutes an undue preference within the meaning of the act to regulate commerce.

The Terminal Company is subject to the act to regulate commerce because it is engaged in the business of furnishing facilities for the Southern Pacific Railroad and Steamship System and its terminal charges are included in the tariffs published by the railroads with which it connects and for which it furnishes terminals. Any fair construction of the Interstate Commerce Act would lead to the conclusion that the Terminal Company is within the terms of the act which by its express language applies to terminal facilities of every kind used or necessary in the transportation or delivery of property. If terminal facilities such as those maintained by the Southern Pacific Terminal Company are not included within the terms of the act then evasion of the provisions of the act so far as they relate to any terminal facilities is possible by every common carrier by the simple expedient of providing a separate corporation nominally to control such facilities. *Eichenberg* v. *So. Pac. Co. et al.*, 14 I. C. C. Rep. 250, 263.

Without regard to the purpose for which the Terminal Company was organized the fact remains that it was holding itself out to the public as furnishing general terminal

facilities for the railroads connecting with it. *Barrington* v. *Commercial Dock Co.*, 15 Washington, 170, 175; *Indian River Steamboat Co.* v. *East Coast Transportation Co.*, 28 Florida, 387; *Missouri Pac. Ry. Co.* v. *Flour Mills Co.*, 211 U. S. 612, 619; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 418.

L. & N. R. R. Co. v. *West Coast Naval Stores Co.*, 198 U. S. 483, is distinguishable, as there was no discrimination between shippers.

The fact that the Terminal Company confines its operations to one State does not affect the question. It is an agency in interstate commerce. *The Daniel Ball*, 10 Wall. 557; *People* v. *Miller*, 178 N. Y. 196.

Not only is the terminal company furnishing terminal facilities for the Southern Pacific System but it is itself an integral part of that system. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 326, 328.

The order of the Commission is a regulation of interstate commerce because the Commission has jurisdiction over all shipments even though part originated within the State of Texas and no advantage can be given to Young that discriminates in his favor and against interstate shippers in the same business. The situation is covered by that class of regulations which the court has described where uniformity is necessary. *Railroad Co.* v. *Fuller*, 17 Wall. 560, 568; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Missouri Pacific Ry. Co.* v. *Larrabee Mills*, 211 U. S. 611; *Int. Comm. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *United States* v. *Colo. & N. W. R. R. Co.*, 157 Fed. Rep. 321, 330.

Even though part of Young's shipments originated within the State of Texas, the business in which he engaged was interstate in character because all the shipments without exception were designed for foreign trade and actually shipped abroad. *Navigation Co.* v. *Insurance Co.*, 32 S. W. Rep. 889.

Even if a portion of Young's shipments are to be considered as not within the provisions of the Interstate Commerce Act the order is not void because the Commission is presumed to have limited its order to the power it had. *Navigation Co.* v. *Campbell*, 177 Fed. Rep. 318.

That it did not point out in detail the manner in which discriminations should be remedied does not make the order void. *N. Y. Cent. & H. R. R. R. Co.* v. *Int. Comm. Comm.*, 168 Fed. Rep. 131.

The contract with Young constitutes an undue preference within the meaning of the act. See §§ 2, 3, 6, and 15.

The act should be liberally construed so as to advance the remedy and retard the wrong. *N. Y., N. H. & H. R. R. Co.* v. *Int. Comm. Comm.*, 200 U. S. 361; *American Express Co.* v. *United States*, 212 U. S. 522, 532.

Every shipper using the terminal facilities was required to pay a certain wharfage charge according to a fixed schedule as well as storage charges. Young was granted the right to use the terminal facilities free of wharfage charges and storage charges for the lump sum of $15,000 per year, whereas if he had paid the regular charges the cost would have been $42,000 per year. Such an agreement clearly constitutes discrimination in favor of Young. Contracts between railroad companies and shippers by which for some stated consideration a less charge is made either for facilities furnished or freight carried than is made to other shippers have frequently been passed upon and held to violate statutes against undue preferences. *Hurley* v. *Big Sandy & C. R. R. Co.*, 125 S. W. Rep. 302; *C. & O. R. R. Co.* v. *Standard Lumber Co.*, 174 Fed. Rep. 107; *Hobart-Lee Tie Co.* v. *Stone*, 117 S. W. Rep. 604; *Chicago & Alton R. R. Co.* v. *United States*, 156 Fed. Rep. 558. That the Terminal Company had power to lease its property or alienate its real estate does not affect the question. The vice of the arrangement lies not in the exercise of the power to lease but in

the natural effect of the contract of lease made. *N. Y., N. H. & H. R. R. Co.* v. *Int. Comm. Comm.*, 200 U. S. 361, 397; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80; *Union Pacific R. R. Co.* v. *Goodrich*, 149 U. S. 680, 691; *Wight* v. *United States*, 167 U. S. 512, 517.

The finding of the Commission that as a matter of fact the contract with Young constituted an undue preference will not be disturbed by this court unless so arbitrary as to transcend the limits of regulation. *Int. Comm. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *Illinois Central R. R. Co.* v. *Int. Comm. Comm.*, 206 U. S. 441, 454; *C., N. O. & T. P. R. R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 184, 196; *State* v. *Adams Express Co.*, 85 N. E. Rep. 337; *Int. Comm. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170.

Mr. Justice McKenna, after stating the facts as above, delivered the opinion of the court.

It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired and that the case having thereby become moot, the appeal should be dismissed.

This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. *Jones* v. *Montague*, 194 U. S. 147, and *Richardson* v. *McChesney*, decided November 28 of this term, 218 U. S. 487. But in those cases the acts sought to be enjoined had been completely executed, and

there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 308, and *Boise City Irr. & Land Co.* v. *Clark* (C. C. App. 9th Cir.), 131 Fed. Rep. 415.

In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

In *United States* v. *Trans-Missouri Freight Ass'n, supra*, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: "The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself, for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendant should be enjoined for the future. . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before

judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by the judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case." Referring to the agreement as one claimed by the Government as illegal, it was further said (p. 310): "That question the Government has the right to bring before the court and obtain its judgment thereon." The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached, and that the Government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy or terminate its questions.

In *Boise City Irr. & Land Co.* v. *Clark, supra*, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: "But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."

The motion to dismiss is denied.

Four errors are assigned in the action of the Circuit

Court in dismissing the bill of complaint. (1) The Interstate Commerce Commission had no jurisdiction over the Terminal Company, it not being a common carrier, and therefore not subject to the act to regulate commerce. (2) The Commission had no power or authority to declare the lease to Young illegal. (3) The lease does not constitute an unlawful or undue preference or advantage within the meaning of the act to regulate commerce. (4) The Commission by its order assumed to control intrastate and foreign commerce, not subject to the act to regulate commerce.

Two facts are prominent in the case, that the piers of the Terminal Company are facilities of import and export traffic at the port of Galveston and that the arrangement of the Terminal Company with Young has enabled him to largely and rapidly increase his business until his exports of cotton seed products are more than twice those of all other competitors, that he derives therefrom 30 to 40 cents per ton over the ordinary buying and selling profit, and that some who were his competitors have ceased to export. A direct advantage to Young is manifest. A direct detriment to other exporters is equally manifest.

The situation challenges attention. Appellants find in it nothing but the natural and legal result of the sagacity which could see an opportunity for profit and the enterprise which could avail of it. It was the simple matter on the part of Young, it is contended, of bringing his business to the ship's side and cutting out intervening expenses. And it is said that the Terminal Company had an equally lawful inducement. It had an idle property, it is contended, over which it had absolute control and which it turned to use and profit by the arrangement with Young. And this, it is insisted, was a simple exercise of ownership. If the elements of the controversy are correctly stated, the justification may be considered as made out.

Appellants make much of their title and, assuming it to be absolute, assert the right to an unrestrained use of the property. But the assertion overlooks or underestimates the condition expressed in the deed to Huntington, that from his estate to the Terminal Company, in the ordinance of the city of Galveston, and in the act of the legislature of the State of Texas. The condition expressed in all of them was that terminal facilities should be constructed upon the property for the use of the Southern Pacific Railroad and Steamship Systems. The act of the legislature declared that the property "should be developed for shipping and transportation purposes, and that the shipping facilities at the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and of the State." And wharfage charges, except so far as they should be covered by the freight rates, should be subject to regulation by the railroad commission of the State.

It is clear, therefore, that it was the purpose of the ordinance and of the act confirming it to secure shipping facilities for the city, open to public use, and necessarily so, for the property was to be the terminal of a railroad and steamship system. It may be, as it is contended, that there was no necessity for the ordinance, "except for the purpose of a valid relinquishment of the municipal right, often asserted by it, of opening streets through the bay front property and constructing wharves thereon." The relinquishment was treated as valuable and Huntington pledged the property to a public use as a consideration for it. And, as we have said, such use was also a condition expressed in the act of the legislature. It was not discharged by the expenditure of $150,000 and the erection of wharves by Huntington, as seems to be the contention.

The case has no likeness whatever to *Louisville &c. R. R. Co.* v. *West Coast Co.*, 198 U. S. 483. In the latter case there was no discrimination against the West Coast Com-

pany by the railroad company or a preference given to any person. The West Coast Company had the same privilege of using the wharves of the railroad company as other shippers were given. It asserted other privileges. It asserted the privilege of using the wharf for the purpose of transferring goods into vessels which it might arrange to take them; in other words, not into the vessels of the railroad company or into those with which it had traffic agreements. And we said, through Mr. Justice Peckham, "In brief, the fact seems to be that the only complaint of the plaintiff (West Coast Company) is that the defendant (the railroad company) will not permit competing vessels to make use of its wharf for the purpose of such competition."

It is true that there was a contention that the wharf was a public one, but the contention was based only on the fact that the wharf was built at the foot of a public street by authority from the city of Pensacola and the State of Florida. That fact alone was not considered sufficient to support the contention. And it was said, "The city or State authorities in granting the right to erect such facilities might, of course, have attached such conditions as they thought wise, but in their absence neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with defendant." It is true it was said that the railroad company never became a common carrier as to the wharf, in the sense that it was bound to accord to the public or to the West Coast Company the right to use it upon payment of compensation. But it was added that the railroad company would be bound to carry the West Coast Company's goods on the rails which led to the wharf, for the same purpose and upon the same terms that it did for others, viz., in order that it might itself, or through others it had contracted with, forward

the goods beyond its own line. And it was further said that the West Coast Company demanded more than this; it demanded that the railroad company should carry its goods in order that it might itself forward them by vessels of its own selection, and that the railroad company should surrender possession of enough of its wharf to enable the other company to do so.

Nor is *Weems Steamboat Company* v. *People's Company*, 214 U. S. 344, applicable to the pending controversy. The contest there was between two independent lines of steamboats, the one claiming a right to use the wharves of the other, on the ground that the wharves had been dedicated to the public. The fact was found adversely to the contention, and the claim of right to the use of the wharves denied. A review of the reasoning of the court is unnecessary. There is great difference between competing carriers claiming the right to use the facilities of one another and the patrons of the same carrier contending for equality of treatment. In stating this we assume that the wharves in the pending case are the instruments of a common carrier. This is, however, denied, and it is asserted that the Terminal Company is purely a wharfage company, and "has no power under its charter to act as a common carrier." The contention is based on a partial view of the conditions. The Terminal Company was incorporated to execute the purposes expressed in the act of the legislature of the State of Texas, that is, to construct terminal facilities for the Southern Pacific Railroad and Steamship Systems, and to accommodate the export and import traffic at Galveston; and, necessarily, as instrumentalities of such traffic, wharves and piers are as essential as steamships and railroads, and are, in fact, as they were intended to be by the charter of their authorization, parts of a system. The only track facilities for movement of cars to or from the ships, from or to the tracks of the Southern Pacific Railways, are on the Termi-

nal Company's lands, and are owned by it. To these tracks the Galveston, Harrisburg and San Antonio Railway switches cars for other railroads, charging $1.75 per car, and the Terminal Company receives a trackage charge of 50 cents per car. It is true that the Terminal Company does a wharfage business and publishes a schedule of its charges, which, while not filed with the Interstate Commerce Commission, shows a charge of 20 cents a ton on cotton seed cake and meal, and this appears as a wharfage charge in the tariffs of the Galveston, Harrisburg and San Antonio Railway Company and other railways entering the city of Galveston. And, besides, the Terminal Company was a party to numerous circulars issued by the Southern Pacific Railway Company, and that effective May 23, 1905, was filed with the Interstate Commerce Commission. These circulars gave terminal charges at the port of Galveston. The charge on cotton seed meal and cake was given at 1 cent per 100 pounds. Shipments on through bills of lading include in the freight rate the wharfage charge.

Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies. As said by the Interstate Commerce Commission, "the Terminal Company was organized to furnish terminal

facilities for the system at the port of Galveston," and it is further said that "through shipments on the railroad lines from and to points in different States of the Union pass and repass over the docks of the Terminal Company. It forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation." And this unity of the railroad's lines and the terminal facilities is recognized in the lease to Young. By it he agrees to route all of his shipments over "the lines of the Terminal Company and its connections, according to the instructions of said Terminal Company from time to time." And provision is made against the possibility of other lines bidding for the traffic by lower rates. In such event he must give notice to the Terminal Company and give it "the option of meeting such proposed rates," and if the company "elects to do so," then he "shall not divert such shipments, but shall abide by the provisions" of his agreement. And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, "a corporation such as this Terminal Company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. . . . The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

The reasoning of the Commission is justified by the

statute. It includes in the term "railroad" "all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property."

The property of the Terminal Company is "necessary in the transportation or delivery" of the interstate and foreign freight transported by the lines of the Southern Pacific system. It is the only terminal for freight moving over the lines of such system, the rails of one of those lines, the Galveston, Harrisburg and San Antonio Railway Company, connecting with tracks upon the docks of the Terminal Company. That the latter collects a trackage charge from the former and it a switching charge from the Terminal Company are, to quote the Commission, "but incidents of the separate corporations."

In opposition to these views appellants urge the legal individuality of the different railroads and the Terminal Company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and

made single by it. In all transactions it is treated as single. In the ordinance of the city of Galveston, in the act of 1899, of the legislature of the State, and in public circulars and in the lease of Young, it is the system which is dealt with and not its separate links. And, we have seen, the terminal facilities which the Terminal Company was authorized to maintain were for the system, not for the corporate elements considered separately.

It is next contended that the lease to Young under the facts proven does not constitute an unlawful or undue preference under the Interstate Commerce Act.

To a certain extent we have considered this contention. An absolute advantage to Young cannot be denied. A facility that has enabled him to acquire practically all the export of cotton seed products must have something in it of advantage which other shippers do not receive, and it would seem to proclaim a power working for his benefit which is not working for others. And yet it is urged that there is a contrariety of opinion about it among cotton seed cake producers and as to whether Young is able to dominate the Texas market and to command the foreign trade. The facts, we think, put the matter beyond conjecture or opinion and demonstrate the potency of his situation. That it is a preference, however, is denied; and it is urged that by the agreed statement of facts all cotton seed cake producers "agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired" by Young, "it would be of great benefit to the cotton seed industry." But it is also agreed that neither the Galveston Wharf Company nor the Terminal Company has space enough to afford facilities to "all exporters doing business at Galveston" such as Young. And the Commission found that as a practical matter other shippers could not be given the same facilities on the same conditions as those granted to him, nor could such fa-

cilities be secured on the bay front. It was further found that the Terminal Company had indicated that it is not willing to accord shippers generally such facilities, and that the situation of its docks with respect to space is such that it cannot do so even if it were willing. It may be contended that the patrons of a railroad are not obliged to seek or compete for extraordinary facilities in its terminals. But, be that as it may, all shippers must be treated alike.

Appellants bring forward the same argument to support the contention under consideration which they advance to support their first contention, to wit, the right, as owner of the property, to make a lease of its "unused property," subject only to the limitation that there shall be no interference "with the use of the adjacent navigable waters." It would seem that, if the argument have any force at all, it would extend the rights of ownership to used as well as unused property and be exercised in any form of preference, even to the exclusion of some shippers from the wharves. However, as appellants do not press the argument so far we need not dwell upon it and will only add that the terminal facilities contemplated by the ordinance of the city of Galveston and the act of the legislature of Texas confirming it were public terminal facilities, not those which might be granted or withheld in preferences or discriminations.

The last contention advanced is that "the order of the Commission transcends its jurisdiction, in that it regulates commerce purely State and intrastate, and also purely foreign commerce, neither of which is subject to its authority."

In support of this contention it is insisted that the evidence shows the following facts: The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and way bills, showing

the point of origin in those States and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships' bills of lading made to his order.

This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is "a final point of concentration and manufacture, the cotton seed cake being there manufactured into meal and sacked for export." But this does not distinguish between the meal and the cake, nor between the meal that is purchased at points outside of Texas and directly exported, from that so purchased and manufactured on the wharves of the Terminal Company. Nor does it take account of the fact that the wharves were intended for shipping facilities, a means of transition from land carriage to water carriage. It is manifest, as we have said, that to make the wharves manufacturing or concentrating points for one shipper and not for all is to give that shipper a preference. And, being a preference, the traffic necessarily comes under the jurisdiction of the Interstate Commerce Commission. In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the trans-shipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise

would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol*, 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transportation to another State, or delivered to a carrier for transportation." In *G., C. & S. F. Ry. Co.* v. *State of Texas*, 204 U. S. 403, the facts are different and the case is not apposite.

Decree affirmed.

MERRIMACK RIVER SAVINGS BANK *v.* CITY OF CLAY CENTER.

IN RE PROCEEDINGS FOR CONTEMPT.

No. 604. Argued January 26, 1911.—Decided February 20, 1911.

The force and effect of a decree dismissing a bill and discharging an injunction is neither suspended nor annulled as a mere consequence of an appeal to this court, even if supersedeas is allowed; but the Circuit Court has power to continue an injunction during such an appeal by virtue of its inherent equity power. Equity Rule 93.

While the Circuit Court has not only the power to continue an injunction in order to preserve the *status quo* pending an appeal but to take cognizance of violations of such injunction, it does not follow

that violating the injunction is not a contempt also of the appellate jurisdiction of this court and that question is not now decided.

Irrespective of an actual injunction order, the willful destruction or removal beyond the reach of this court of the subject-matter of litigation pending an appeal to this court is a contempt of the appellate jurisdiction of this court; and this is so even though it may also be a violation of the injunction below.

An appeal to this court must be regarded as pending and undisposed of until the mandate issues, even though a decision may have been announced. Defendants under order to show cause why they should not be punished for contempt for having, after decision in their favor but before mandate, destroyed the subject-matter of the litigation, are adjudged in technical contempt; but having under oath denied any intent of contempt and satisfied the court of their good faith, the vindication of the court is satisfied by discharging the rule on payment of costs.

THE facts, which involve questions of contempt for violation of injunction after decision of this court and before issuing of the mandate, are stated in the opinion.

Mr. F. L. Williams, with whom *Mr. D. R. Hite* and *Mr. C. C. Coleman*, were on the brief, for petitioner:

This court is possessed of the power to so deal with the property as to make its final decision and judgment effectual. This court and not the Circuit Court is the tribunal clothed with authority to maintain the status of the parties existing at the time an appeal is taken and thereby rendering it possible for its judgment and mandate to become effectual. *Penn. R. R. Co.* v. *National Docks Co.*, 54 N. J. Eq. 647, 654; *Evers* v. *Watson*, 156 U. S. 527; citing *McCormick* v. *Sullivant*, 10 Wheat. 192; *Ex parte Watkins*, 3 Pet. 193; *Kennedy* v. *Bank*, 8 How. 586; *Des Moines Co.* v. *Homestead Co.*, 123 U. S. 552, and *Dowell* v. *Applegate*, 152 U. S. 327.

The Circuit Court having passed upon the question before it and a right of appeal being given from its decision, neither the Circuit Court nor the parties had any right

to determine any question concerning this matter until the judgment and mandate of this court had been taken.

This court is not without jurisdiction to punish respondents for a violation of the injunctional order because such jurisdiction is in the Circuit Court which issued the order. *State* v. *Bridge Co.*, 16 W. Va. 864; *Gates* v. *McDaniel*, 4 Stew. & P. (Ala.) 69, distinguished, and see cases collated, 9 Cyc. 32; *People* v. *Horan*, 34 Colorado, 304, 338; *Wilkinson* v. *Dunkley-Williams Co.*, 141 Michigan, 409; *Bridge Co.* v. *Krieger*, 91 Kentucky, 625; *Lytle* v. *Railroad Co.*, 90 S. W. Rep. (Tex.) 316; *State* v. *Campbell*, 25 Mo. App. 640; *San Antonio St. Ry. Co.* v. *State*, 38 S. W. Rep. (Tex). 54, 59; *State* v. *Johnson*, 13 Florida, 33

Even if the case is one which the court in which it is pending eventually determines that there is want of jurisdiction, the injunctional orders of the court are not therefore void. *Williamson's Case*, 26 Pa. St. 9, 21; *Ex parte Wimberly*, 27 Mississippi, 437, 444; *Franklin Union No. 4* v. *People* (Ill.), 110 Am. St. Rep. 255.

As defining "subject-matter" for the purpose of determining jurisdiction, see *Union Depot Ry. Co.* v. *Southern Ry. Co.*, 100 Missouri, 61; *Dowdy* v. *Wamble*, 110 Missouri, 284; *Egan* v. *Wolever*, 127 Indiana, 306.

This court has the power and authority to maintain the status of the property pending the litigation, even though jurisdiction may eventually be denied. *United States* v. *Shipp*, 203 U. S. 563, 573.

It is contempt of the court in which an action is pending for a litigant to destroy, remove, or conceal the subject of the litigation, or do any other act in respect to the subject of the litigation, which may render nugatory the decision of the court. *In re Debs*, 158 U. S. 564, 598; *Wartman* v. *Wartman*, 29 Fed. Cases, 303, 306; *Richard* v. *Van Meter*, 20 Fed. Cas. 682, No. 11,763; *Morse* v. *District Court*, 29 Montana, 230; *Ex parte Kellogg*, 64 California,

343; *Cottier* v. *People*, 61 Ill. App. 17, 30; *Brooklyn School* v. *Kearney*, 21 How. Prac. 74; *In re Reese*, 47 C. C. A. 87, 90; *Garrigan* v. *United States*, 89 C. C. A. 494; *State* v. *Pittsburg*, 80 Kansas, 710, 712.

A disclaimer or denial of an intention to be in contempt of court or to violate the court's orders, does not purge the accused parties of the contempt. *Wartman* v. *Wartman*, 29 Fed. Cases, 303, No. 17,210; *Cartwright's Case*, 114 Massachusetts, 230; *Sturoc's Case*, 48 N. H. 428; *People* v. *Wilson*, 64 Illinois, 194; *Hughes* v. *The People*, 5 Colorado, 436, 453; *Plate Co.* v. *Schimmel*, 59 Michigan, 524; *Dodge* v. *State*, 39 N. E. Rep. (Ind.) 745; 7 Am. & Eng. Ency. of Law, 76; *State* v. *Simmons*, 1 Arkansas, 265; *Watson* v. *Citizens' Bank*, 5 S. Car. 159, 182; North Carolina cases distinguished; see Rapalje on Contempt, § 121.

The right of a citizen to the protection of property from destruction by violence should be, and is, zealously guarded by the courts. The power of this court to punish for contempt is not limited or restricted by statutory provisions. Thomas on Constructive Contempt, and cases cited on p. 211.

The merits of the original action in respect to whether the mortgage held by the appellant is in fact a lien upon the property destroyed is not examinable in this proceeding. *Rodgers* v. *Pitt* (C. C.), 89 Fed. Rep. 424, 428, 429; 1 Beach on Injunctions, par. 250; 2 High on Injunctions, § 1427; *Carroll* v. *Campbell*, 25 Mo. App. 639; 10 Amer. & Eng. Enc. of Pl. & Pr., p. 1105; *United States* v. *Agler* (C. C.), 62 Fed. Rep. 824; *Blake* v. *Nesbet*, 144 Fed. Rep. 279, 284.

Mr. F. B. Dawes, with whom *Mr. R. C. Miller* was on the brief, for respondents:

This court has no power or authority to punish parties for a violation of an order issued by the court from which the appeal was taken even though the court below had

jurisdiction to issue such order. See 36 La. Ann. 942; *Barthet* v. *Judge*, 37 La. Ann. 852; *Gates* v. *McDaniel*, 3 Porter (Ala.), 356; *Gates* v. *McDaniell.*, 4 Stew. & P. (Ala.) 69; *Matthews* v. *Chase*, 41 Indiana, 358; *Telephone Co.* v. *Commissioners*, 10 N. E. Rep. 922; *S. C.*, 12 N. E. Rep. 136; *Dewey* v. *Superior Court*, 22 Pac. Rep. (Cal.) 333; *Balkum* v. *Harper*, 50 Alabama, 372; *Slaughter House Cases*, 10 Wall. 273; *Hovey* v. *McDonald*, 109 U. S. 150; and *Leonard* v. *Land Co.*, 115 U. S. 465; *State* v. *Dillon*, 8 S. W. Rep. (Mo.) 781; *Bettman* v. *Harness*, 26 S. E. Rep. (W. Va.) 270; *Champion Min. Co.* v. *Eureka Min. Co.*, 13 Pac. Rep. (Utah) 174; see *In re Whitmore*, 35 Pac. Rep. 524; *Sixth Avenue R. R. Co.* v. *Gilbert, E. R. R. Co.* 71 N. Y. 430; *Fitzsimmons* v. *Board of Canvassers*, 77 N. W. Rep. (Mich.) 632; *Lindsay* v. *District Court*, 75 Iowa, 509; *State* v. *Ritz*, 60 W. Va. 395; *Barnes* v. *Chicago Typographical Union*, 232 Illinois, 402; *State* v. *Davis*, 51 N. W. Rep. (N. D.) 942; 2 High on Injunctions, 4th ed., §§ 1431, 1698*a*, 1699; Beach on Injunctions, § 283; 1 Joyce on Injunctions, § 277; *Green Bay Canal Co.* v. *Norrie*, 118 Fed. Rep. 923. See *Voorhees* v. *Albright*, 28 Fed. Cas. 1274; *Kirk* v. *Milwaukee Dust Collector Co.*, 20 Fed. Rep. 501.

No order of any kind or character has ever been entered or made by this court, save and except an order made on October 24, 1910, dismissing the appeal for want of jurisdiction. This must mean that, according to the unbroken line of authorities, jurisdiction remains in the court below to punish for any infraction or violation of the orders of that court, and it follows as a necessary consequence that these parties cannot be found guilty of contempt of this court. The sole power to punish for contempt by a Federal court will be found in § 725 of the Judiciary Act. All proceedings in contempt in Federal courts are criminal in their nature and governed largely by the rules of criminal law and criminal procedure. See *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 124 Fed. Rep.

736; *Kirk* v. *Milwaukee Dust Co.*, 26 Fed. Rep. 501; *United States* v. *Berry*, 24 Fed. Rep. 780; *In re Ellerbe*, 13 Fed. Rep. 530; *D. & N. O. Ry. Co.* v. *A., T. & S. F. Railway Co.*, 16 Fed. Rep. 853; *Worden* v. *Searles*, 187 U. S. 516.

Even if it was within the power of this court to punish parties for disobeying an order granted by the court below, fines for the benefit of parties could not be inflicted at this time because if the case is ever heard on its merits it may turn out to be that the plaintiff in the case had no right to have its poles and wires upon the streets of the city. Punishment of a civil nature for the benefit of the parties cannot be inflicted until after the merits of the case have been passed upon. If such a penalty should be adjudged prior to the hearing on the merits on which the court should find the parties had a right to do the acts complained of and the other parties had no rights, the judgment punishing for the benefits of the parties would necessarily have to be set aside. *Besette* v. *Conkey*, 194 U. S. 196–638; *N. J. Patent Co.* v. *Martin*, 166 Fed. Rep. 1010.

Mr. Justice Lurton delivered the opinion of the court.

The Merrimack River Savings Bank filed a bill in equity in the Circuit Court of the United States for the District of Kansas claiming to be a creditor of the light and power company by bonds secured by mortgage upon its plant, property and franchises, against the city of Clay Center, the Clay Center Light and Power Company and certain individuals, officials of said city. The bill averred that the Clay Center Light and Power Company was a corporation owning and conducting a light and power plant at Clay Center under a perpetual franchise, authorizing it to place and maintain a line of poles and wires upon the streets of that city; that the city, claiming that its franchise had expired, had, through its coun-

cil, of which the individual defendants were members, required said company to remove its poles and wires from the public streets, and that the officials named as defendants were threatening to cut down its poles and destroy its wires thereon, and thus destroy all possibility of operating its plant, to the irreparable ruin of the security to which the complainant must look for the payment of its bonds. A temporary injunction was issued to prevent the destruction of the lines of poles and wires as threatened. A demurrer to the bill for want of jurisdiction in the Circuit Court as a court of the United States was sustained and the bill dismissed. An appeal to this court was allowed and the injunction continued pending the appeal. Upon a hearing in this court the appeal was dismissed without opinion.

The present petition alleges that after this court had made an order dismissing said appeal, but before any mandate had issued or could issue under the rules of this court, and pending the right of petitioners to file an application for a rehearing, since filed and now pending, certain of the defendants to said appeal, namely, George W. Hanna, O. L. Slade, W. D. Vincent, S. D. Tripp, and G. P. Randall, had, by force and violence, cut down many of the poles and destroyed much of the cable and wires stretched thereon, and had put the light and power company out of business and disabled it so that it could not exercise its franchise or carry on its operations. It is averred that the said defendants did thus destroy the subject-matter of the suit, knowing that this appeal was pending and that this court had not lost control over the controversy, and that no mandate had issued and could not issue under the rules. The petition concludes by praying that the individual defendants named be cited and required to appear before this court and "show cause, if any they have, why they should not be proceeded against as for contempt of this court." Such a

rule was made, and the defendants have appeared and made defense.

The respondents have moved to discharge the rule, because the petition fails to show that they have in any way violated any injunction, rule, order or mandate of this court. This is bottomed, first, upon the claim that the injunction which was continued pending the appeal to this court is the injunction of the Circuit Court, and that any violation is cognizable only in the Circuit Court, and second, upon the claim that if that be so, that the petition fails to show any facts which constitute a contempt of this court.

The plain purpose of the order continuing the injunction pending this appeal was to preserve the subject-matter of the litigation until the rights of the complainant could be heard and decided. It is well settled that the force and effect of a decree dismissing a bill and discharging an injunction is neither suspended nor annulled as a mere consequence of an appeal to this court, even if a supersedeas is allowed. *Slaughter-House Cases*, 10 Wall. 273, 297; *Hovey* v. *McDonald*, 109 U. S. 150, 161; *Leonard* v. *Ozark Land Co.*, 115 U. S. 465; *Knox County* v. *Harshman*, 132 U. S. 14. That the Circuit Court, to the end that the *status quo* might be preserved pending such appeal, had the power to continue an injunction in force by virtue of its inherent equity power is not doubtful. In *Hovey* v. *McDonald*, cited above, Mr. Justice Bradley for the court, referring to what had been said in the *Slaughter-House Cases* as to the effect of an appeal, said:

"It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury

may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or non-exercise is not an appealable matter. In recognition of this power and for the purpose of facilitating its proper exercise in certain cases, on appeals from the Circuit Courts, this court, by an additional rule of practice in equity, adopted in October term, 1878, declared that '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.' Rule 93."

Obviously this may include a continuance of an injunction which would be otherwise vacated.

Plainly the effect of continuing the injunction operated to continue in the Circuit Court such jurisdiction over the subject-matter of the litigation and of the parties as to enable it to preserve the *status quo* pending the appeal, including power to take cognizance of a violation of its injunction.

It does not necessarily follow that disobedience of such an injunction, intended only to preserve the *status quo* pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since irrespective of any such injunction actually issued the willful removal beyond the reach of the court of the subject-matter of the litigation or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a con-

tempt of the appellate jurisdiction of this court. That such conduct may be a violation of the injunction below affords no reason why it is not also a contempt of this court. Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent. See *United States* v. *Shipp*, 203 U. S. 563; *Richard* v. *Van Meter*, 3 Cranch C. C. 214; *S. C.*, 20 Fed. Cases, 682; *Wartman* v. *Wartman*, Taney C. C. Decisions, 362; *S. C.*, 29 Fed. Cases, 303; *State ex rel. Morse* v. *District Court*, 29 Montana, 230; *Ex parte Kellogg*, 64 California, 343, 344; *The State* v. *Pittsburg*, 80 Kansas, 710, 712.

In *Wartman* v. *Wartman*, cited above, a case heard by Chief Justice Taney on the circuit, the question was whether a defendant who had parted with an alleged trust fund in his custody pending an application for an order requiring him to pay the money into court was thereby in contempt. His act was held to be in contempt of the authority of the court, as a final decree would be idle and nugatory if pending the litigation he should be held at liberty to put the fund beyond the reach of the process of the court.

The defendants have severally answered and have denied under oath that they meant any contempt of this court. They say that when they were advised that the decree of the court dismissing the bill of complaint had been affirmed and an order of affirmance entered, that they honestly believed the case to be finally concluded, and that there was no reason why the order of the city council requiring the removal of the lines of poles and wires should not be carried out. This is an excuse, but does not acquit them of a technical contempt, since the appeal must be regarded as pending and undisposed of until a mandate issues. In view, however, of the good faith of the defendants, it is enough for the

vindication of the court under the circumstances of this case that

The rule be discharged upon the payment of the costs of the proceeding.

ROUGHTON *v.* KNIGHT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 711. Submitted January 6, 1911.—Decided February 20, 1911.

As the Forest Reserve provision of the Sundry Civil Act of June 4, 1897, c. 2, 30 Stat. 36, did not prescribe the method which those entitled to avail of its provision should pursue, it was competent for the Secretary of the Interior to adopt the rules and regulations, which this court has already held to be reasonable and valid, and entitled to respect and obedience. *Cosmos Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301.

One not following the rules and regulations adopted by the Land Department for exchange of lands under the Forest Reserve Act and not accompanying his relinquishment deed with a proper selection in lieu of the land relinquished, and whose relinquishment was returned to him by the Department, did not become entitled to a selection and exchange after the repeal of the act.

Where one attempting to avail of the statutory provision to exchange under the Forest Reserve Act of 1897 failed to comply with the rules and regulations of the Land Department, and his relinquishment deed was returned to him, no contract was created with the Government which saved him any rights under the repealing act of March 3, 1905, c. 1495, 33 Stat. 1264.

103 Pac. Rep. 844, affirmed.

THE facts, which involve rights of a patentee under the forest law acts of June 4, 1897, and March 3, 1905, are stated in the opinion.

Mr. E. D. F. Brady, Mr. W. P. Fennell, Mr. E. O. Miller and *Mr. W. H. Morrissey* for plaintiff in error:

Title passed to the United States upon the recording

of the deed of relinquishment. *Moses Land Co.*, 34 L. D. 458, holding that title did not pass to the United States by the recording of the deed and delivery of the same to the local land officers, does not reach the gist of the question. While the mere recording of a deed does not operate as a delivery and pass title, where the vendee assents in advance to the transaction the recording does operate as a delivery and to pass title. Devlin on Deeds, §§ 262, 269, 287, 291.

When Congress enacted, in the Forest Reserve Act, that owners of lands might relinquish the same to the United States and select other lands in lieu thereof, it plainly intended an acceptance of every title so relinquished. See Regulations, June 30, 1897, Rule 16, and circular of May 9, 1899.

This regulation was mandatory. It required the full investiture of title in the United States before a selection could be made. The regulation was undoubtedly within the competency of the Land Department. As completely as a private owner could assent, the United States assented in advance to the delivery to it of title in every case, and when the relinquisher recorded his conveyance he did so because he had no alternative. Where a conveyance is recorded at the express requirement of the grantee, it is idle to speak of lack of delivery; a contract was created. 9 Am. & Eng. Ency., 2d ed.; *Cosmos Exploration Co.* v. *Gray Eagle Co.*, 190 U. S. 301, distinguished; and see *Hyde's Case*, 28 L. D. 284.

A ruling that no contract was created by the relinquishment violates the settled laws of real property. A contract of exchange is construed exactly as are contracts of sale, and when one accepts an offer by doing what the offerer makes a prior condition, the minds of the parties meet.

A promise to convey a certain number of acres out of a large tract, the location and method of the ascertainment

being pointed out, will be specifically enforced, as that which might otherwise be uncertain is made certain by the act of selecting. *Lingeman* v. *Shirk*, 42 N. E. Rep. (Ind.) 34, 35; *Carpenter* v. *Lockhard*, 1 Indiana, 434; *Baldwin* v. *Kerlin*, 46 Indiana, 426; *Cheney* v. *Cook*, 7 Wisconsin, 413; *Washburne* v. *Fletcher*, 42 Wisconsin, 152; *Roehl* v. *Hammexer*, 114 Indiana, 311, 315; *Colerick* v. *Hooper*, 3 Indiana, 316; *Williamson* v. *Johnstone*, 20 Kentucky, 253; *Owing's Exrs.* v. *Morgan*, 7 Leigh (Va.), 548; *Ernshwiller* v. *Tyner*, 54 Ohio St. 214.

As to when the right of selection must be exercised, the act under review is silent. In land grant cases, whenever the railroad company has shown a loss the Land Department has permitted a lieu selection, no matter how long a time after the loss. *Gulf Island R. R. Co.* v. *United States*, 22 L. D. 560.

The two parties to the contract are the relinquisher and the United States, not the relinquisher and the land officials. Their rejection of a selection does not conclude the question that title did not pass, because, after their jurisdiction ceases, the courts will announce as a matter of law whether title will pass. *Kern Oil Co.* v. *Clarke*, 30 L. D. 561; Bishop on Contracts, 2d Enlarged Ed., § 330; Page on Contracts, § 48; *Pennoyer* v. *McConnaughey*, 43 Fed. Rep. 196; *Olive Land Co.* v. *Olmstead*, 103 Fed. Rep. 573; *Farnum* v. *Clarke*, 84 Pac. Rep. 168.

Inasmuch as the relinquisher's right to make a lieu selection vested prior to the repeal, Congress was without power to divest the right; and the action of the Land Department in cancelling the selection and patenting the selected land to another was a taking of property without due process of law. *Fletcher* v. *Peck*, 6 Cranch, 87; See Story on Constitutional Law, § 1391; *McGee* v. *Mathis*, 4 Wall. 143; *Citizens' Assn.* v. *Topeka*, 20 Wall. 663; *Davis* v. *Gray*, 16 Wall. 232; *State* v. *Wilson*, 7 Cranch, 166; *Telfener* v. *Russ*, 145 U. S. 522; *Montgomery* v. *Kas-*

son, 16 California, 189; *Gulf Island R. R. Co.* v. *United States*, 22 L. D. 560; 23 L. D. 565; 12 L. D. 547, and 9 L. D. 237.

The prohibitions contained in Amendment V of the Constitution against taking property without due process of law or compensation, apply to vested, contractual rights, and are not confined to judicial proceeedings, but are a restraint on every department of the Government. They apply as well to the Land Department as to Congress. *Sinking Fund Cases*, 99 U. S. 700, 718, 719, 720; and see *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 34; *Houston & Tex. Cent. Ry. Co.* v. *Texas*, 170 U. S. 261; *Cornelius* v. *Kessel*, 128 U. S. 456.

A revocation of the approval of the Secretary of the Interior by his successor in office is an attempt to deprive the plaintiff of its property without due process of law, and is void. *Noble* v. *Union River Logging Co.*, 147 U. S. 165.

Where an entryman or selector has done everything required to perfect his right, but fails to attain it through an erroneous construction of the law by the Land Department, which patents the land to another, the latter can, in equity, be held as his trustee, and compelled to make a conveyance of the legal title. *Johnson* v. *Towsley*, 13 Wall. 72; *Silver* v. *Ladd*, 7 Wall. 219; *Stark* v. *Starr*, 6 Wall. 402.

The Land Department was not required to complete its administration of a land grant statute within a designated time, and the same rule applies here. *Humbird* v. *Avery*, 195 U. S. 506; *Lars Winquist*, 4 L. D. 324; *United States* v. *Burlington*, 98 U. S. 198.

The uniform construction of the Land Department should not be changed. *Bate Refrig. Co.* v. *Sulzberger*, 157 U. S. 34; *Ranch San Rafael*, 4 L. D. 482; *Germania* v. *James*, 89 Fed. Rep. 817; *Shreve* v. *Cheesman*, 32 U. S. App. 676, 689; *United States* v. *Winona & St. P. R. R.*

Co., 67 Fed. Rep. 948; *Olcott* v. *Supervisors*, 16 Wall. 678; *United States* v. *Alabama Ry. Co.*, 142 U. S. 615; *St. Paul, M. & M. Ry. Co.*, 8 L. D. 255, 263; *Masterson's Case*, 7 L. D. 577; *Minor* v. *Marriott*, 2 L. D. 709; Instruction of September 15, 1889, L. D. 145; *Weaver's Case*, 35 L. D. 553; *McDonald's Case*, 36 L. D. 205; *Douglass* v. *Pike*, 101 U. S. 687; *Kean* v. *Calumet*, 190 U. S. 460; Cooley, Const. Lim., 7th ed., p. 86.

The Land Department decides whether title vested at all or not. If its decision is based upon an erroneous construction of the law and not upon a question of fact the courts are open to litigants after the Department has decided the case one way or the other. *Thayer* v. *Spratt*, 189 U. S. 346. The repeal of an act does not affect any right which has accrued under it. *Trippet* v. *State*, 149 California, 521.

The act of June 4, 1897, was a remedial act and should be liberally construed, as should also the clause in the repealing act which was intended to preserve the rights of pending cases.

Mr. S. D. Luckett and *Mr. Chas. R. Pierce* for defendant in error:

The act of June 4, 1897, 30 Stat. 34, extended an invitation to exchange lands. Until the offeree relinquishes the base land, selects the lieu land, complies with all of the valid reasonable regulations, and the exchange is approved, there is no change in the legal or equitable status of either tract, and no obligation arises on either side to continue with the arrangement. An exchange may be initiated by filing a deed and selection and in no other way. *Moses Land Co.*, 34 L. D. 458; *Hyde's Case*, 28 L. D. 284, 286; *Tevis' Case*, 29 L. D. 576.

A full application under the act of June 4, 1897, is as essential as an application for entry. See 28 L. D. 472. The act of June 4, 1897, was an exchange act. *Hyde* v.

Shine, 199 U. S. 62, 80; *United States* v. *Conklin*, 177 Fed. Rep. 55; *Pacific Livestock Co.* v. *Isaacs*, 96 Pac. Rep. 460, 464. An exchange is a mutual grant of equal interests. *Windsor* v. *Collinson*, 52 Pac. Rep. 26, 27; *Harlin's Heirs* v. *Eastland*, 3 Kentucky (Hardin), 590, 593; *Speigle* v. *Meridith*, 22 Fed. Cas. 910; *Wilcox* v. *Randall*, 7 Barb. 633, 638; *Hartwell* v. *Devault*, 32 N. E. Rep. 789; *Long* v. *Fuller*, 21 Wisconsin, 121.

An exchange is an executed contract. *Preston* v. *Keene*, 14 Pet. 133; *Lessieur* v. *Price*, 12 How. 59, 74; *Brennan* v. *Ford*, 46 California, 7.

The Land Department did not err in construing the act of June 4, 1897, as an offer of exchange.

While the decisions of the Land Department are not binding on the courts, they should not be overruled except where they are clearly erroneous. *Hastings & Company* v. *Whitney*, 132 U. S. 357; *Leonard* v. *Lennox*, 181 Fed. Rep. 760; *Wis. Cent. R. R. Co.* v. *Price County*, 133 U. S. 496; *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301; *United States* v. *McClure*, 174 Fed. Rep. 510; *United States* v. *Conklin*, 177 Fed. Rep. 55. *Arizona* v. *Perrin*, 83 Pac. Rep. 361, distinguished.

The act of March 3, 1905, 33 Stat. 1264, repeals the Forest Reserve Act of June 4, 1897, 30 Stat. 34, and rejects all uncompleted attempts or proposals to comply with said act, with the three exceptions spoken of in the repealing act. The power of Congress over public lands is plenary, and the Land Department had no authority to accept selections after March 3, 1905, not within the exceptions in the repealing act. *Moses Land Co., supra; Roughton* v. *Knight*, 103 Pac. Rep. 844. There is at the most only a moral obligation on the part of Congress to act. See Sen. Res., March 19, 1906, and circular 35, L. D. 8; *Tevis's Case, supra.*

The most claimed by the plaintiff is an inchoate right to select. Such a right, when recognized, is only a float

until selection is definitely made and approved, and until such approval Congress cannot be presumed to have parted with its power to dispose of the land. *Wis. Cent. R. R. Co.* v. *Price County*, 133 U. S. 496, 512; *Sjoli* v. *Dreschel*, 199 U. S. 564; *Sioux City & St. P. R. R. Co.* v. *C., M. & St. P. R. R. Co.*, 177 U. S. 406; *Hutchins* v. *Lowe*, 15 Wall. 77.

It requires very clear language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control by mere settlement of a party with declared intention to purchase could be attributed to its legislation. *Rancho San Rafael*, 4 L. D. 482; *Campbell* v. *Wade*, 132 U. S. 34; *Telfener* v. *Russ*, 162 U. S. 174.

To hold the defendant a trustee for the plaintiff, he must allege that the action of the United States amounted to a double sale of the land, first to the plaintiff and then to the defendant. *Carroll* v. *Safford*, 3 How. 441, 460. The sole duty violated by the United States in such cases is the execution of a conveyance to the proper party. *Bohall* v. *Dilla*, 114 U. S. 47, 51.

The complaint does not state facts sufficient to constitute a cause of action. *Marquez* v. *Frisbie*, 101 U. S. 473; *Leonard* v. *Lennox*, 181 Fed. Rep. 760, 766.

Mr. Justice Lurton delivered the opinion of the court.

The question in this case is whether the complainant below, and appellant here, has acquired a vested right to an exchange of a one hundred and sixty-acre tract of land owned by him and situated inside the exterior boundary of a forest-reserve, for a tract of public land of similar area, by reason of acts done in compliance with the terms of that provision of the Forest Reserve Act of June 4, 1897, providing for such exchanges. The Supreme Court of California sustained a demurrer and dismissed his

bill. 103 Pac. Rep. 844. A writ of error to that court brings the case here for review as to the Federal question.

That the complainant came within the terms of the act of June 4, 1897, there can be no doubt. He owned one hundred and sixty acres of patented land within the exterior lines of a public forest reservation, and was entitled to relinquish title to the United States and receive a patent for one hundred and sixty acres of public land outside the reservation, to be selected by himself. The provision of that act conferring this privilege is set out in the margin, being found in the act of June 4, 1897, c. 2, 30 Stat. 36.[1]

The contention is that he lost his right because he neglected to make a selection and thereby complete any exchange until the act extending the privilege was repealed by the act of March 3, 1905, c. 1495, 33 Stat. 1264. The repealing act is set out in the margin.[2]

---

[1] "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided, further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

[2] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, are hereby repealed so far as they provide for the relinquishment, selection and patenting of lands in lieu of tracts covered by an unperfected *bona fide* claim or patent within a forest reserve, but the validity of contracts entered into by the Secretary of the Interior prior to the passage of this Act shall not be impaired: *Provided*, That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued

Before the repeal of the act the appellant, in pursuance of the provisions thereof and of the regulations prescribed by the Secretary of the Interior, did these things:

He executed a deed of relinquishment to the United States and caused the same to be duly recorded in June, 1899. He deposited this deed, together with an abstract of title, in the Land Office of the United States for the proper district at Visalia, California. This was in June, 1899. It is then averred that the deed and the abstract were forwarded to the Commissioner of the Land Office at Washington, and reached there about June 25, 1899, and were there retained until January 3, 1905, when they were returned to the Visalia land office for delivery to the complainant, and were delivered to him January 9, 1905, and that no objection as to either form or sufficiency of the relinquishment was made by the Commissioner or any other official of the United States. Thus the matter stood from January 9, 1905, until March 3, when the repealing act was passed.

On March 14, 1905, eleven days after the repealing act, the appellant undertook to make a selection, and for that purpose filed his application to select the one hundred and sixty acres subsequently patented to the defendant, with notice of the prior selection so made by complainant. Upon these facts he demanded that a patent should issue to him for the land so selected, but the Commissioner and the Secretary of the Interior denied power to issue any such patent, the law having been repealed before the selection was made.

The issue is a sharp one. The complainant insists that when he made and delivered his deed, with an abstract showing a clear title to one hundred and sixty acres

therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof."

within a forest reservation, he became entitled to make a selection of one hundred and sixty acres in lieu thereof at any time, and that the repeal of the act did not deprive him of the right to a patent for the land selected on March 14, 1905. The appellant does not bring himself within any of the exceptions to the repealing act. No selection actually made before the repeal has proven invalid and there was no contract with the Secretary of the Interior to be saved from impairment, unless the acts referred to constitute in and of themselves such part performance as to constitute a contract with the Secretary of the Interior. That there was no such contract is evident from a consideration of the character of the exchange provision and the regulations adopted by the Secretary of the Interior prescribing the method of carrying out the act. Upon its face the act is neither more nor less than a proposal by the Government for an exchange of claims to land unperfected or lands held under patents situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere. The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his right before the creation of a reservation in the public lands surrounding him. He was thereby isolated from neighborhood association and deprived of the advantage of schools, churches and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes. But the act did not prescribe the method by which one so situated might avail himself of the proposal. It was therefore competent for the Land Department to adopt rules and regulations for the administration of the act in this particular, and this was done, and those rules are found in 24 L. D. 592, 593.

In *Cosmos Co.* v. *Gray Eagle,* 190 U. S. 301, 309, these regulations are referred to as reasonable and valid rules,

"entitled to respect and obedience." The regulations which have a bearing here are rules 14, 15 and 16.

To take advantage of the proposal contained in this act the applicant must select the land he wishes to receive in lieu and file a sufficient relinquishment of land within a forest reserve. Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency and an assent to the particular selection made in lieu.

It was not unreasonable that in the administration of this act the Land Department should limit the authority of any official to accept a relinquishment. As far back as April 14, 1899, the Secretary of the Interior construed the act and made the regulations before mentioned. In *Hyde's Case*, 28 L. D. 284, he instructed the Commissioner of the General Land Office that "the officers of the Land Department are not authorized to accept, consider or pass upon a relinquishment of the tract within the limits of a forest reservation, except in connection with a proffered or tendered selection of other lands in lieu thereof."

In the case of William S. Tevis, February 28, 1900, 29 L. D. 575, 576, the Secretary instructed the Commissioner in the same terms, saying: "Paragraphs 15 and 16 of the rules and regulations issued June 30, 1897, under said act (24 L. D. 589, 592), clearly require that in all cases of exchange of lands under said act, whether the land relinquished be 'a tract covered by an unperfected *bona fide* claim or by a patent,' an application to select lieu lands must accompany the relinquishment of the lands within the limits of a forest reservation."

In a ruling made February 24, 1906, 34 L. D. 458, in connection with the application for an exchange, the facts were nearly identical with those in the present case. The applicant filed his deed of relinquishment with abstract of title on January 12, 1905. He made no selection until March 30, 1905, a date subsequent to the repeal of the

act. The proposal was rejected. Upon a review by the Secretary the rejection was sustained, upon the ground that "no contract arises until a selection is made and the conveyance of the base tract filed in the Land Department. . . . Under the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

The regulation and practice of the Land Department in requiring that a deed of relinquishment shall be accompanied by a selection was not unreasonable. The return to this complainant of his deed of relinquishment several months before the repeal of the act was obviously due to his delay in presenting a case for the consideration of the Department.

That a proposal for an exchange of land within a forest reservation for lands outside may be withdrawn before acceptance is an obvious proposition. There having been no contract in force between this appellant and the Secretary of the Interior at the date of the repeal, he had no right to save under the exceptions in the repealing act.

There was no error in the judgment of the California Supreme Court, and it is, therefore,

Affirmed.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* McGUIRE.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 62. Argued December 5, 6, 1910.—Decided February 20, 1911.

Neither the excellence nor the defects of a legislative scheme may be permitted to determine the constitutionality of a state statute; in this court the only question is whether the statute transcends the limits of power defined by the Federal Constitution.

The legislature, provided it acts within constitutional limitations, is the arbiter of the public policy of the State; and it may by amendment enlarge the scope of a statute beyond the limits set upon the previous statute by the courts.

While the court may, in the absence of legislation and in the light of the common law, uphold or condemn contracts in the light of what is conceived to be public policy, that determination must yield to the legislative will when constitutionally expressed thereafter.

A State has power to prohibit contracts limiting liability for injuries made in advance of the injury received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract. Such a statute does not impair the liberty of contract guaranteed by the Fourteenth Amendment; and so held as to the Iowa statute relative to employés of railway companies.

Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to contract as one chooses. Liberty implies the absence of arbitrary restraint—not immunity from reasonable regulations.

Where police legislation has a reasonable relation to an object within governmental authority the legislative discretion is not subject to judicial review.

The scope of judicial inquiry as to a statute is limited to the question of power to enact, while the scope of legislative consideration includes the matter of policy.

Where the legislature has power to establish a regulation, it has also power to prohibit contracts in derogation of such regulation.

Whether the relief scheme of a railroad company involving contracts with its employés and contributions from both employés and the

company, such as the one involved in this case, is a wise and proper scheme which should be approved, or an unwise scheme which should be disapproved by the public policy of the State is under the control of the legislative power of the State; and the statute of Iowa prohibiting contracts between the railway companies and their employés limiting the right to recover damages at common law, is within the police power of the State, has a reasonable relation to the matter regulated, and is not unconstitutional under the due process or equal protection clause of the Fourteenth Amendment.

A statute does not necessarily deny equal protection of the law because limited to railway employés of a certain class.

The classification of the original statute having been sustained by this court, and there being no criticism of the amendment thereto involved in this case that would not equally apply to the original statute, the amendment will not be declared unconstitutional as denying equal protection of the law.

131 Iowa, 340, affirmed.

THE facts, which involve the constitutionality of a law of the State of Iowa, are stated in the opinion.

Mr. John J. Herrick, with whom *Mr. Chester M. Dawes* was on the brief, for plaintiff in error:

The statute is void as in violation of the due process provision of the Fourteenth Amendment. Freedom to enter into contracts is both a liberty and a property right, secured alike to all and not to be encroached upon by the State under guise of its police power. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Adair* v. *United States*, 208 U. S. 161; *McLean* v. *Arkansas*, 211 U. S. 539.

The contract of accord and satisfaction, resulting from the acceptance of benefits under the contract of membership, is based on mutual consideration, valid and enforcible. *Donald* v. *C., B. & Q. Ry. Co.*, 93 Iowa, 284; *Maine* v. *C., B. & Q. Ry. Co.*, 109 Iowa, 260.

A statute which prohibits the exercise of the power to make contracts, otherwise lawful, must have for its pur-

pose one within the police power, and must be reasonably appropriate to accomplish it. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Railway Co.* v. *Smith*, 173 U. S. 684, 689, 699; *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161.

The statute cannot be sustained as an authorized exercise of the police power. It did not prohibit or otherwise make unlawful the contracts of benefit, or the contracts of release, by the acceptance of benefits under them, but only provided that such contracts, and the acceptance of benefits under them, should not bar a recovery from the class of corporations referred to, by a particular class of employés, for a particular class of liabilities. As to construction of the statute by the state courts see *Deppe* v. *Railroad Co.*, 36 Iowa, 52; *Malone* v. *Railway Co.*, 65 Iowa, 417; *Akeson* v. *Railway Co.*, 106 Iowa, 54; *Reddington* v. *Railway Co.*, 108 Iowa, 96; *Hughes* v. *Railway Co.*, 128 Iowa, 207; *Dunn* v. *Railway Co.*, 130 Iowa, 580.

It follows that in all other classes of cases in which there was a common-law liability for negligence—in which the fellow-servant rule did not apply—there could be a recovery at common law. *Baldwin* v. *St. L., K. & N. Ry. Co.*, 75 Iowa, 297; *McQueeny* v. *C., M. & St. P. Ry. Co.*, 120 Iowa, 522, 524; *Beresford* v. *American Coal Co.*, 124 Iowa, 34; *Klaffke* v. *Bettendorf Axle Co.*, 125 Iowa, 223; *Scott* v. *Iowa Telephone Co.*, 126 Iowa, 524, 527.

The statute cannot be sustained as an exercise of the police power on the ground that the end in view was to promote the public safety and welfare, and that it was appropriate and reasonably necessary to that end.

Neither the rule of the defendant's Relief Department nor the contract of membership, nor the contract of release, which, under the decisions results from the acceptance of the benefits after the cause of action has accrued, limits in any way the company's liability for negligence.

Nothing in the rule of defendant's Relief Department, or the contract of release, that results from the acceptance of the benefits on the terms of the membership contract, is at all detrimental to the public welfare. *Donald* v. *C., B. & Q. Ry. Co.*, 93 Iowa, 284; *Maine* v. *C., B. & Q. Ry. Co.*, 109 Iowa, 260; *P., C., C. & St. L. Ry. Co.* v. *Moore*, 152 Indiana, 345; *P., C., C. & St. L. Ry. Co.* v. *Cox*, 55 Ohio St. 497; *C., B. & Q. R. R. Co.* v. *Bell*, 44 Nebraska, 44; *Beck* v. *Pennsylvania Co.*, 63 N. J. Law, 232; *Johnson* v. *P. & R. Ry. Co.*, 163 Pa. St. 127; *Ringle* v. *Penna. R. R. Co.*, 164 Pa. St. 529; *Otis* v. *Pennsylvania Co.*, 71 Fed. Rep. 136; *Hamilton* v. *St. L., K. & N. W. Ry. Co.*, 118 Fed. Rep. 92; *Atlantic Coast Line Ry. Co.* v. *Dunning*, 166 Fed. Rep. 850; *Day* v. *Atlantic Coast Line Ry. Co.*, 179 Fed. Rep. 26; *Owen* v. *B. & O. R. R. Co.*, 35 Fed. Rep. 715; *State* v. *B. & O. R. R. Co.*, 36 Fed. Rep. 655; *Martin* v. *B. & O. R. R. Co.*, 41 Fed. Rep. 125; *Vickers* v. *C., B. & Q. R. R. Co.*, 71 Fed. Rep. 139; *Shaver* v. *Penna. R. R. Co.*, 71 Fed. Rep. 931. See also *State* v. *Railway Co.*, 68 Ohio St. 9; *Cox* v. *Railway Co.*, 1 Ohio N. P. 213; *Railroad Co.* v. *Hosea*, 152 Indiana, 412; *Railroad Co.* v. *Gipe*, 160 Indiana, 360; *Lease* v. *Penna. R. R. Co.* (Ind. App.), 37 N. E. Rep. 423; *Clinton* v. *C., B. & Q. R. R. Co.*, 60 Nebraska, 692; *C., B. & Q. R. R. Co.* v. *Curtis*, 51 Nebraska, 442; *Oyster* v. *Railway Co.*, 65 Nebraska, 789; *Eckman* v. *C., B. & Q. R. R. Co.*, 169 Illinois, 312; *Fivey* v. *Railroad Co.*, 67 N. J. Law, 627; *Fuller* v. *Relief Assn.*, 67 Maryland, 433; *Petty* v. *Railway Co.*, 109 Georgia, 666; *Carter* v. *Railroad Co.*, 115 Georgia, 853; *Harrison* v. *Railway Co.*, 144 Alabama, 246.

The statute cannot be sustained as an authorized exercise of the police power on the ground that it was passed for the protection of labor, and by reason of a supposed inequality of advantage between the employer and its employés, or on any of the grounds stated in the opinion of the Supreme Court of Iowa.

The act is an unauthorized interference with the freedom of contract, guaranteed by the Fourteenth Amendment. *Cox* v. *Railway Co.*, 1 Ohio N. P. 213; *Farrow* v. *Railway Co.*, 7 Ohio N. P. 606; *Shaver* v. *Penna. R. R. Co.*, 71 Fed. Rep. 931; *Sturgiss* v. *Atlantic Coast Line R. R. Co.*, 80 S. Car. 167; *Atlantic Coast Line R. R. Co.* v. *Dunning*, 166 Fed. Rep. 850; *P., C., C. & St. L. Ry. Co.* v. *Cox*, 55 Ohio St. 497; *Railway Co.* v. *Moore*, 152 Indiana, 345.

The statute denies the equal protection of the laws. A classification for the purpose of legislation cannot be made arbitrarily, but must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is made. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 155; *Railway Co.* v. *Paul*, 173 U. S. 404; *Life Assn.* v. *Mettler*, 185 U. S. 308; *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Railway Co.* v. *Smith*, 173 U. S. 684, 696; *Cotting* v. *Stockyards Co.*, 183 U. S. 79; *Connolly* v. *Pipe Co.*, 184 U. S. 540; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369.

The classification made by the limitation of the prohibition of the act—that the particular contracts of settlement shall not be set up in bar of a recovery—of liabilities to a particular class of employés does not rest upon any difference which bears a reasonable and just relation to the thing prohibited, and is therefore a mere arbitrary classification.

Mr. A. J. Baker for defendant in error submitted:

The Temple amendment is not unconstitutional.

In passing on the constitutionality of any given law this court may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary; nor is it its province to pass upon the policy, wisdom, or justice of the statute or the expediency of its enactment. *Howard* v. *Illinois Central R. R. Co.*, 207 U. S. 492; *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512;

State v. *Evans*, 110 N. W. Rep. 241; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Kiley* v. *Railway Co.*, 119 N. W. Rep. 314.

Liberty of contract is not a universal right and may be abridged when required for the public good. *McLean* v. *Arkansas*, 211 U. S. 539; *M. & S. L. R. R. Co.* v. *Beckwith*, 129 U. S. 26; *People* v. *Railway Co.*, 91 N. E. Rep. 849; *Welch* v. *C., B. & Q. R. R. Co.*, 53 Iowa, 632; *Jones* v. *Railroad Co.*, 16 Iowa, 6; *Railway Co.* v. *McCann*, 174 U. S. 805; Iowa Code, §§ 2055, 2074; *Smeltzer* v. *Railway Co.*, 158 Fed. Rep. 649; *Brush* v. *Railroad Co.*, 83 Iowa, 554; *Davis* v. *Railway Co.*, 83 Iowa, 744; *Lucas* v. *Railroad Co.*, 112 Iowa, 594; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *McCune* v. *Railroad Co.*, 52 Iowa, 602; *Rose* v. *Railroad Co.*, 39 Iowa, 246; *Solan* v. *Railroad Co.*, 95 Iowa, 260; *C., M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 133; *Smith* v. *Alabama*, 124 U. S. 465; *N. C. & St. L. R. R. Co.* v. *Alabama*, 128 U. S. 96; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *Pennington* v. *Georgia*, 165 U. S. 299; *Gladson* v. *Minnesota*, 166 U. S. 427; *Central Trust Co.* v. *Sloan et al.*, 65 Iowa, 656; Iowa Code, § 2046.

The legislature has a discretion vested in it, ordinarily, to determine when an act is necessary in the exercise of the reserved and police powers. The legislature is conclusively presumed to have made a thorough investigation as to the necessity of each statutory amendment. *Legal Tender Cases*, 12 Wall. 457; *Powell* v. *Penn*, 127 U. S. 678; *Kiley* v. *Railway Co.*, 119 N. W. Rep. 309; *Watson* v. *Railway Co.*, 169 Fed. Rep. 947; *Mugler* v. *Kansas*, 123 U. S. 623; *People* v. *Rudd*, 117 N. Y. 7; *Charles Beverage* v. *Warren*, 11 Pet. 605. See also *Ohio Life Ins. Co.* v. *De Bolt*, 16 How. 428; *Mo. Pac. R. R. Co.* v. *Mackey*, 124 U. S. 205; *Missouri* v. *Lewis* 101 U. S. 22; *Hayes* v. *Missouri*, 120 U. S. 68; *A., T. & S. F. R. R. Co.* v. *Matthews*, 174 U. S. 104; *Duncan* v. *Missouri*, 152 U. S. 377; *Mer-*

chant v. *Railroad Co.*, 153 U. S. 380; *K. & W. R. R. Co.* v. *Pontius*, 157 U. S. 209; *Low* v. *Kansas*, 163 U. S. 81; *Plessy* v. *Ferguson*, 163 U. S. 537; *C. & L. Turnpike Co.* v. *Sanford*, 164 U. S. 578; *Jones* v. *Brown*, 165 U. S. 180; *West. Un. Tel. Co.* v. *Indiana*, 165 U. S. 304; *C., B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 366; *Holden* v. *Hardy*, 169 U. S. 306; *Saving Society* v. *Multnomah Co.*, 169 U. S. 421; *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283; *Tinsley* v. *Anderson*, 171 U. S. 101; *M. & St. L. R. R. Co.* v. *Beckwith*, 129 U. S. 26; *Mo. Pac. R. R. Co.* v. *Humes*, 115 U. S. 465; *Skinner* v. *Garnett Gold Mining Co.*, 96 Fed. Rep. 735; *Daniels* v. *Hilliard*, 77 Illinois, 650; *Commonwealth* v. *Hamilton*, 120 Massachusetts, 383; *S. C.*, 169 U. S. 393; *State* v. *Wilson*, 7 Kansas, 428; *Knoxville* v. *Harbinson*, 183 U. S. 17.

The mere fact that legislation is special, and made to apply to certain persons and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions. Cases *supra* and *Hayes* v. *Missouri*, 120 U. S. 68; *Commonwealth* v. *Railroad Co.*, 187 Massachusetts, 436; *State* v. *Nelson*, 52 Ohio St. 88; *People* v. *Smith*, 108 Michigan, 527; *People* v. *Wallbridge*, 6 Cow. (N. Y.) 512; *Dugger* v. *Insurance Co.*, 95 Tennessee, 245; *Walston* v. *Nevin*, 128 U. S. 578; *Kane* v. *Railroad Co.*, 133 Fed. Rep. 681; *Herrick* v. *Railroad Co.*, 31 Minnesota, 11; *Railroad Co.* v. *Herrick*, 127 U. S. 210; *Broadfoot* v. *Fayetteville*, 121 N. Car. 422; *Railroad Co.* v. *Montgomery*, 152 Indiana, 1; *Railroad Co.* v. *Paul*, 173 U. S. 404; *State* v. *Tower*, 185 Mo. Sup. 79; *State* v. *Brown*, 18 Rhode Island, 16; *People* v. *Bellapp*, 99 Michigan, 151; *McAunich* v. *Railroad Company*, 20 Iowa, 338; *Patterson* v. *Eudora*, 190 U. S. 169; *Hancock* v. *Yaden*, 121 Indiana, 366.

An act is not open to the objection that it denies to certain persons or classes the equal protection of the law

if all persons brought under its influence are treated alike under the same condition. Cases *supra* and *Railroad Co.* v. *Hackey*, 127 U. S. 205. See also *Tullis* v. *Railroad Co.*, 175 U. S. 348; *People* v. *Hadnor*, 149 N. Y. 205; *Pierce* v. *Van Dusen*, 78 Fed. Rep. 693; *Duncan* v. *Missouri*, 152 U. S. 377; *Watson* v. *Nevin*, 128 U. S. 578; *Giozza* v. *Tierman*, 148 U. S. 657; *Railroad Co.* v. *Crider*, 91 Tennessee, 501; *Butte* v. *Paltrovich*, 30 Montana, 18.

The courts have upheld statutes depriving railway companies of the benefit of the fellow-servant doctrine. Cases *supra*.

Likewise other statutes specially relating to railroads. *Gano* v. *Railroad Co.*, 114 Iowa, 719; *Railway Co.* v. *Humes*, 115 U. S. 512; *Railroad Co.* v. *Beckwith*, 129 U. S. 26; *Railroad Co.* v. *Backus*, 154 U. S. 421; *Railroad Co.* v. *Paul*, 173 U. S. 704. See also *Railroad Co.* v. *Gutierrez*, 215 U. S. 87.

The Temple amendment under consideration was properly enacted in the exercise of the police power residing in the State of Iowa at the time it was exercised. Cases *supra* and *Munn* v. *Illinois*, 94 U. S. 113; *Barron* v. *Baltimore*, 7 Pet. 243; *Slaughter House Cases*, 16 Wall. 36; *Ex parte Davis*, 21 Fed. Rep. 396; *Railroad Co.* v. *Day*, 82 Iowa, 344; *Shelley* v. *St. Charles Co.*, 17 Fed. Rep. 210; *Farmers' Loan & Trust Co.* v. *Stone*, 20 Fed. Rep. 273; *Sarony* v. *Burrow Giles Lith. Co.*, 17 Fed. Rep. 591; 20 Wall. 655; *McAunich* v. *Railroad Co.*, 20 Iowa, 343; *Pepp* v. *Railroad Co.*, 36 Iowa, 52; *Iowa Med. College Ass'n.* v. *Shraider*, 86 Iowa, 668; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Miller* v. *C., B. & Q. R. R. Co.*, 65 Fed. Rep. 305; *Jones* v. *Railroad Co.*, 161 Iowa, 6; *Welsh* v. *Railroad Co.*, 53 Iowa, 632; *M. & St. L. R. R. Co.* v. *Beckwith*, 129 U. S. 26; *Brush* v. *Railroad Co.*, 43 Iowa, 554; *Davis* v. *Railroad Co.*, 83 Iowa, 744; *Lucas* v. *Railroad Co.*, 112 Iowa, 594; *McCune* v. *Railroad Co.*, 52 Iowa, 602; *Rose* v. *Railroad*

Co., 39 Iowa, 246; *Rodymaker* v. *Railroad Co.*, 41 Iowa, 297; *Small* v. *Railroad Co.*, 50 Iowa, 388; *St. L. & S. F. R. R. Co.* v. *Matthews*, 165 U. S. 1; *Dayton Coal Co.* v. *Barton*, 183 U. S. 23; *Barron* v. *Burnsides*, 121 U. S. 186; *Loughton* v. *Steel*, 152 U. S. 133; *Litchfield Coal Co.* v. *Taylor*, 81 Illinois, 500; *Commonwealth* v. *Alger*, 7 Cush. 53; *Commonwealth* v. *Hamilton M. Co.*, 20 Massachusetts, 283; *Avent B. Coal Co.* v. *Kentucky*, 28 L. R. A. 273; *G., C. & S. F. R. R. Co.* v. *Ellis*, 165 U. S. 150.

The right of contract, like others possessed by individual members of society, is held subject to such reasonable restrictions and regulations as may be imposed for the public good. 6 Words and Phrases, 5, 424; *People* v. *Budd*, 117 N. Y. 1; *Barbier* v. *Connolly*, 113 U. S. 27; *State* v. *Harrington*, 68 Vermont, 622; *State* v. *Reynolds* (Conn.) 58 Atl. Rep. 755.

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it. Mill on Liberty, chap. 4; *Powell* v. *Commonwealth*, 114 Pa. St. 265; *Oil City* v. *Trust Co.*, 151 Pa. St. 454; *Crowley* v. *Christenson*, 137 U. S. 89; *Jamieson* v. *Oil Co.*, 128 Indiana, 566; *Garrett* v. *Mayer*, 47 La. Ann. 630; *Stone* v. *Mississippi*, 101 U. S. 814; *State* v. *Tower*, 185 Mo. Sup. 79.

The argument that such statutes deprive the laborer himself of the liberty of contract, is not valid, but fallacious. Freund on Police Power, 500; *Archer* v. *James*, 2 Best and S. 73; *Hancock* v. *Yaden*, 121 Indiana, 366; *S. C.* 23 N. E. Rep. 255. The corporate person has no rights except those with which it is endowed by the law-making powers, and the power of creation necessarily implies the power of regulation. Cases *supra* and *Railroad Co.* v. *Bristol*, 151 U. S. 556; *Railroad Co.* v. *Matthews*, 174 U. S. 96; *Hooper* v. *California*, 155 U. S. 648; *Insurance Co.* v. *Daggs*, 172 U. S. 557; *Dayton* v. *Iron Co.*, 183 U. S. 23; *Insurance Co.* v. *Needles*, 113 U. S. 574; *Sinking Fund Cases*, 99 U. S. 700;

State v. *Brown*, 18 R. I. 16; 25 Atl. Rep. 246; *Railroad Co.* v. *Lyon*, 123 Pa. St. 140; 16 Atl. Rep. 607; *State* v. *Peel S. C. Co.*, 36 W. Va. 802; *Railroad Co.* v. *Paul*, 64 Arkansas, 83; *Tullis* v. *Railroad Co.*, 175 U. S. 353; *Skinner* v. *Barnett*, 96 Fed. Rep. 735 (C. C.); *Union Pac. R. R. Co.* v. *M. C. R. R. Co.*, 128 Fed. Rep. 238; *Commonwealth* v. *Railroad Co.*, 129 Pa. St. 324; *Iron Co.* v. *Harbison*, 183 U. S. 13; *Street R. R. Co.* v. *Sioux City*, 78 Iowa, 746.

The fact that the corporation is the creature of another State cuts no figure in the determination as to whether regulating acts are valid or not.

As to the extent to which the police power may restrict the liberty of contract, see cases *supra* and *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Northern Securities Case*, 193 U. S. 197; *Re House Bill 147*, 23 Colorado, 504; *White* v. *Reservoir Co.*, 22 Colorado, 191; *Cook* v. *Howland*, 74 Vermont, 393; *Commonwealth* v. *Newman*, 164 Pa. St. 306; *Commonwealth* v. *Mfg. Co.*, 120 Massachusetts, 385; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Smiley* v. *Kansas*, 196 U. S. 447; *McLean* v. *Arkansas*, 211 U. S. 539; *Sweeny* v. *Hunter*, 145 Pa. St. 363; *Kriebohm* v. *Yancey*, 154 Mo. Sup. 67; *Naglebaugh* v. *Harter*, 21 Ind. App. 551; *State* v. *Crescent Co.*, 83 Minnesota, 284; *State* v. *Moore*, 104 N. Car. 714; *Richardson* v. *Railroad Co.*, 149 Mo. Supp. 311; *State* v. *Wagner*, 77 Minnesota, 483; *Firmston* v. *Mack*, 49 Pa. St. 387; *Eton* v. *Keegan*, 114 Massachusetts, 433; *Davis* v. *State*, 68 Alabama, 58; Act of Congress June 26, 1884, 23 Stat. 53, c. 121, construed in case of *The Edwin* (D. C.), 23 Fed. Rep. 255; *Higgins* v. *Graham*, 143 California, 131; *Bowlley* v. *Cline*, 28 Ind. App. 659; *Hurdy* v. *Railroad Co.*, 162 N. Y. 49; *Wheeler* v. *Russle*, 17 Massachusetts, 258; *Karns* v. *Insurance Co.*, 144 Mo. Sup. 413; *Breckbill* v. *Randle*, 102 Indiana, 528; *Buttler* v. *Chambers*, 32 Minnesota, 71; *Graham* v. *Lumber Co.*, 26 Ky. Law Rep., 70; *Hotel* v. *A. B. Co.*, 54 C. C. A. 165; 116 Fed. Rep. 793; *Railroad Co.* v.

Wilson, 4 Wilson Ct. Civ. App. (Tex.) 568; *Booth* v. *Illinois*, 184 U. S. 425; *Skinner* v. *Garrett M. Coal Co.* (C. C.), 96 Fed. Rep. 735; *Garrett* v. *West. Un. Tel. Co.*, 83 Iowa, 257; *Miller* v. *Railroad Co.* (C. C.), 65 Fed. Rep. 305; *Squire* v. *Tellier*, 185 Massachusetts, 18; *Carroll* v. *Insurance Co.*, 199 U. S. 401; *State* v. *Wilson*, 61 Can. 32; *Warren* v. *Sohn*, 112 Indiana, 213; *Riley* v. *Insurance Co.*, 43 Wisconsin, 449; *Insurance Co.* v. *Leslie*, 47 Ohio St. 409; *Walp* v. *Mooar*, 76 Connecticut, 515; *State* v. *Reynolds* (Conn.), 58 Atl. Rep. 755.

Special legislation affecting the rights and liabilities of railroad companies or a distinct class or kind of corporations, does not constitute a denial of the equal protection of the laws, simply because the same regulation or restriction is not extended over other corporations or other kinds of business. Cases *supra* and *Railroad Co.* v. *Pontius*, 157 U. S. 209; *Fidelity Co.* v. *Mettler*, 185 U. S. 308; *Railroad Co.* v. *Backus*, 154 U. S. 421; *Railroad Co.* v. *Beckwith*, 129 U. S. 26; *Railroad Co.* v. *Duggan*, 109 Illinois, 537; *Railroad Co.* v. *Dey*, 82 Iowa, 312; *Cameron* v. *Railroad Co.*, 63 Minnesota, 384; *Railroad Co.* v. *Simonson*, 64 Kansas, 802; *Insurance Co.* v. *Dobney*, 189 U. S. 301; *Insurance Co.* v. *Lewis*, 187 U. S. 335; *Campbell* v. *Railroad Co.*, 121 Missouri, 340; *State* v. *Nelson*, 52 Ohio St. 88; *Railroad Co.* v. *May*, 194 U. S. 267; *Railroad Co.* v. *Snell*, 193 U. S. 30.

MR. JUSTICE HUGHES delivered the opinion of the court.

Charles L. McGuire, the defendant in error, while acting as a brakeman in the service of the Chicago, Burlington and Quincy Railroad Company in Iowa, in the year 1900, received injuries through negligence imputable to the Company and recovered judgment in the District Court of that State for the sum of $2,000. By stipulation, the Chicago, Burlington and Quincy Railway Company

was joined in the judgment. It was affirmed by the Supreme Court of the State of Iowa and the companies bring this writ of error.

The question presented is with respect to the validity of § 2071 of the Code of Iowa as amended in the year 1898, which was held to preclude the Railroad Company from making the defense that recovery was barred by the acceptance of benefits under a contract of membership in its Relief Department.

The section in its original form was as follows:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including the employés of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employés thereof, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employés; when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed and no contract which restricts such liability shall be legal or binding."

The amendment of 1898 added the following provision:

"Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received."

The question arose upon demurrer to the defense in the

answer of the Railroad Company, which asserted the bar denied by the statute. This defense, in substance, alleged that in November, 1900, and prior to his injury, the defendant in error had voluntarily become a member of the Relief Department of the Railroad Company and thereupon had agreed that the acceptance of benefits payable to him in accordance with the regulations of the department should discharge the Company from all liability for damages; that after he had sustained the injuries alleged in his petition, he had received benefits from the Relief Fund of the department amounting to $822; and that the payment and acceptance of these benefits constituted, under the agreement, full satisfaction of the claim in suit.

The facts with regard to the organization, purpose and management of the Relief Department, and the regulations governing it, were fully averred. The department was organized in 1889, as a part of the service of the Railroad Company, with the object of creating a fund out of which definite amounts of money should be paid to contributing employés in the event of disability from sickness or accident, or in case of death for their proper burial and the relief of their families. The various companies forming the Burlington system organized similar departments, and by agreement these were associated in joint administration.

The regulations of the Relief Department provided that membership in the department should be voluntary and defined the amount of contributions to be paid monthly, the members being classified for this purpose according to their monthly wages. The amount of benefits according to these classes was also specified. The Relief Fund consisted of the contributions of members, income from investments, interest paid by the Railroad Company on monthly balances and appropriations made by the Company when necessary to cover deficiencies. From the time of organization to December 31, 1900, there was paid

in benefits out of the fund so constituted the sum of $2,671,510.54, of which $1,294,790.50 was paid by reason of sickness and $1,376,720.04 for injuries and death.

The Railroad Company had general charge of the Relief Department and guaranteed the fulfilment of its obligations. It was responsible for the safe-keeping of the moneys of the Relief Fund, paid into the fund interest at the rate of four per centum per annum on monthly balances, supplied without expense to the fund the necessary facilities for the business of the department, and defrayed from the moneys of the Company the operating expenses. It was alleged that for these expenses the Company had paid to December, 1900, $621,572.44. This sum did not include office rent for the department or of medical examiners or various sundry expenses; nor did it embrace the service of officers and of clerks who were not wholly concerned with the work of the department, and this service and incidental expenses were alleged to be worth approximately $50,000 a year. In addition, during the period mentioned the Railroad Company paid to make up deficits in the fund the sum of $42,532.94, for which it had no right to reimbursement.

Among the regulations by which the members of the Relief Department agreed to be bound was the following:

"64. In case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the Company or any Company associated therewith in the administration of their Relief Departments.

"The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the Company and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member no part of the death benefit or unpaid disability benefit shall be due or payable unless and until

good and sufficient releases shall be delivered to the superintendent, of all claims against the Relief Department, as well as against the Company and all other companies associated therewith as aforesaid, arising from or growing out of the death of the member, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against the Company or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the Relief Department and of the Company created by the membership of such member in the Relief Fund shall thereupon be forfeited without any declaration or other act by the Relief Department or the Company; but the superintendent may, in his discretion waive such forfeiture upon condition that all pending suits shall first be dismissed.

"The payment by the Company, or any Company associated therewith as aforesaid, of any amount in compromise of a claim for damages arising from or growing out of an injury to, or the death of, a member, shall preclude any and all claims for benefits from the Relief Fund arising from or growing out of such injury or death."

In support of the defense based upon this regulation, the Railroad Company further asserted that the amended statute above quoted did not deprive it of the right to plead the contract with the defendant in error, and its satisfaction, as a discharge, for the reason that the statute was repugnant to the Fourteenth Amendment of the Constitution of the United States, (1) as an unwarranted interference with liberty to make contracts, and (2) as a denial of the equal protection of the laws.

The District Court overruled the demurrer, but its judgment was reversed by the Supreme Court of the State, which held the statute to be valid and in consequence that the demurrer should have been sustained.

McGuire v. *C., B. & Q. R. R. Co.*, 131 Iowa, 340. This ruling was adhered to when the question was again raised on the appeal to that court from the final judgment. 138 Iowa, 664. And to review this decision as to the constitutionality of the statute, the case has been brought here.

We pass without comment the criticisms which are made of certain details of the relief plan, for neither the suggested excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. The question with which we are concerned is not whether the regulations set forth in the answer are just or unjust, but whether the amended statute transcends the limits of power as defined by the Federal Constitution.

The first ground of attack is that the statute violates the Fourteenth Amendment by reason of the restraint it lays upon liberty of contract. This section of the Code of Iowa (§ 2071), as originally enacted, imposed liability upon railroad corporations for injuries to employés, although caused by the negligence or mismanagement of fellow-servants. And it was held by this court that it was clearly within the competency of the legislature to prescribe this measure of responsibility. *Minneapolis & St. Louis Railway Co.* v. *Herrick*, 127 U. S. 210, following *Missouri Railway Co.* v. *Mackey*, 127 U. S. 205. The statute in its original form also provided that "no contract which restricts such liability shall be legal or binding."

Subsequent to this enactment the Railroad Company established its Relief Department, and the question was raised in the state court as to the legality of the provision then incorporated in the contract of membership, by which, in case of suit for damages, the payment of benefits was to be suspended until the suit should be discon-

tinued, and the acceptance of benefits was to operate as a full discharge. The two principal contentions against it were, first, that it was against public policy, and second, that it was in violation of the statute. Both were overruled, and with reference to the statute it was held that the contract of membership did not fall within the prohibition for the reason that it did not restrict liability but put the employé to his election. *Donald* v. *C., B. & Q. Ry. Co.*, 93 Iowa, 284; *Maine* v. *C., B. & Q. R. R. Co.*, 109 Iowa, 260. The legislature then amended the section by providing expressly that a contract of this sort and the acceptance of benefits should not defeat the enforcement of the liability which the statute defined.

Manifestly the decision that the existing statute was not broad enough to embrace the inhibition did not prevent the legislature from enlarging its scope so that it should be included. Nor was the holding of the court final upon the point of public policy, so far as the power of the legislature is concerned. The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. If the legislature had the power to incorporate a similar provision in the statute when it was passed originally, it had the same power with regard to future transactions to enact the amendment.

It may also be observed that the statute, as amended, does not affect contracts of settlement or compromise made after the injury, and the question of the extent of the legislative power with respect to such contracts is not presented. The amendment provides, "but nothing contained herein shall be construed to prevent or invalidate

any settlement for damages between the parties subsequent to the injuries received." As was said by the state court in construing the act (131 Iowa, p. 377): "The legislature does not in this act forbid or place any obstacle in the way of such insurance, nor does it forbid or prevent any settlement of the matter of damages with an injured employé fairly made after the injury is received. On the contrary, the right to make such settlement is expressly provided for in the amendment to Code § 2071. The one thing which that amendment was intended to prevent was the use of this insurance or relief for which the employé has himself paid in whole or in part, as a bar to the right which the statute has given him to recover damages from the corporation." It is urged, however, that the amendatory act prohibits the making of a contract for settlement "by acts done after the liability had become fixed." The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages. It is in this aspect that the question arises as to the restriction of liberty of contract.

It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161. In *Allgeyer* v. *Louisiana*, *supra*, the court, in referring to the Fourteenth Amendment, said (p. 589): "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use

them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Crowley* v. *Christensen*, 137 U. S. p. 89; *Jacobson* v. *Massachusetts*, 197 U. S. p. 11. "It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." *Frisbie* v. *United States*, 157 U. S. pp. 165, 166.

The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as for example the regulation of commerce with foreign nations and among the

several States. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. pp. 228–231; *Patterson* v. *The Eudora*, 190 U. S. 174–176; *Atlantic Coast Line Co.* v. *Riverside Mills*, 219 U. S. 186; *Louisville & Nashville R. R. Co.* v. *Mottley*, decided this day, *ante*, p. 467.

It is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the State to require reasonable maximum charges for public service (*Munn* v. *Illinois*, 94 U. S. 113; *C., B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19), and to prescribe the hours of labor for those employed by the State or its municipalities (*Atkin* v. *Kansas*, 191 U. S. 207), this court has sustained the validity of state legislation in prohibiting the manufacture and sale of intoxicating liquors within the State (*Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen*, *supra*); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day except in cases of emergency (*Holden* v. *Hardy*, 169 U. S. 366); in prohibiting the sale of cigarettes without license (*Gundling* v. *Chicago*, 177 U. S. 183); in requiring the redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (*Booth* v. *Illinois*, 184 U. S. 425); in prohibiting the employment of women in laundries more than ten hours a day (*Muller* v. *Oregon*, 208 U. S. 412); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight

of the coal as originally produced in the mine (*McLean* v. *Arkansas*, 211 U. S. 539).

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

The principle was thus stated in *McLean* v. *Arkansas*, 211 U. S. 547, 548: "The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. [Cases cited.] . . . If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public

within the scope of legislative power, the act must fail."

In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What differences, as to the extent of this power, may exist with respect to particular employments, and how far that which may be authorized as to one department of activity may appear to be arbitrary in another, must be determined as cases are presented for decision. But it is well established that, so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, the legislature undoubtedly may prevent them from being nullified by prohibiting contracts which by modification or waiver would alter or impair the obligation imposed. If the legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and if the power exists to accomplish the latter, the interference is justified as an aid to its exercise. As was pointed out in *Holden* v. *Hardy*, *supra*, 169 U. S. on page 397: "The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or

strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.' "

Here there is no question as to the validity of the regulation or as to the power of the State to impose the liability which the statute prescribes. The statute relates to that phase of the relation of master and servant which is presented by the case of railroad corporations. It defined the liability of such corporations for injuries resulting from negligence and mismanagement in the use and operation of their railways. In the cases within its purview it extended the liability of the common law by abolishing the fellow-servant rule. Having authority to establish this regulation, it is manifest that the legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power, the legislature was not limited with respect either to the form of the contract, or the nature of the consideration, or the absolute or conditional character of the engagement. It was as competent to prohibit contracts, which on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability which would otherwise exist as it was to deny validity to agreements of absolute waiver.

The policy of the amendatory act was the same as that

of the original statute. Its provision that contracts of insurance relief, benefit or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition cannot be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance relief, benefit or indemnity, as well as in other agreements. But if the legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment, under the contract?

The asserted distinction is sought to be based upon the fact that under the contract of membership the employé has an election after the injury. But this circumstance, however appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative power. The power to prohibit contracts, in any case where it exists, necessarily implies legislative control over the transaction, despite the action of the parties. Whether this control may be exercised in a particular case depends upon the relation of the transaction to the execution of a policy which the State is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance.

For the reasons we have stated, the considerations which properly bear upon the wisdom of the legislation

need not be discussed. On the one hand it is said that the Relief Department is in the control of the corporation; that by reason of their exigency the employés may readily be constrained to become members; that the relief fund consists in larger part of contributions made from wages; that the acceptance of benefits takes place at a time when the employé is suffering from the consequences of his injury and, being seriously in need of aid, he may easily be induced to accept payment from the fund in which, by reason of his contributions, he feels that he is entitled to share; and that such a plan, if it were permitted through the payment of benefits to result in a discharge of the liability for negligence, would operate to transfer from the corporation to its employés a burden which, in the interest of their protection and the safety of the public, the corporation should be compelled to bear. On the other hand it is urged that the relief plan is a beneficent scheme avoiding the waste of litigation, securing prompt relief in case of need due to sickness or injury, making equitable provision for deserving cases, and hence tends in an important way to promote the good of the service and the security of the employment. Even a partial statement of these various considerations shows clearly that they are of a character to invoke the judgment of the legislature in deciding, within the limits of its power, upon the policy of the State. And, whether the policy declared by the statute in question is approved or disapproved, it cannot be said that the legislative power has been exceeded either in defining the liability or in the means taken to prevent the legislative will, with respect to it, from being thwarted.

The second ground upon which the statute, as amended, is assailed is that it constitutes a denial of the equal protection of the laws.

It is urged that the prohibition of the amendatory act applies only to those employés of railroad corporations who were embraced within the provision of the original

statute, and to the enforcement of the particular liabilities which that statute defined. The limitation to a particular class of employés of railroad corporations is based upon the decisions of the state court that the benefits of the original statute were confined to those who were engaged in the hazardous business of operating railroads. *Deppe* v. *Railroad Co.*, 36 Iowa, 52; *Malone* v. *Railway Co.*, 65 Iowa, 417; *Akeson* v. *Railway Co.*, 106 Iowa, 54. It is said that all employés of the plaintiffs in error may become members of the Relief Department and that the limited application of the amendment, as to the effect of the acceptance of benefits under the membership contract, is an invalid discrimination.

It was, however, entirely competent for the legislature in enacting the prohibition, for the purpose of securing the enforcement of the liability it had defined, to limit it to those cases in which the liability arose. As the purpose of the amendment was to supplement the original statute, the classification was properly the same. And with respect to subsequent transactions the amendment must be regarded as having the same validity as it would have had if it had formed a part of the earlier enactment. No criticism on the ground of discrimination can successfully be addressed to the amendatory act which would not likewise impeach the statute in its earlier form.

But the propriety of the classification of the original statute was considered and upheld by this court. And the validity of legislation abrogating the fellow-servant rule, both with respect to the class of cases embraced in the statute, and also where it is abolished as to railway employés generally, has been sustained. *Minneapolis & St. Louis Ry. Co.* v. *Herrick, supra; Missouri Railway Co.* v. *Mackey, supra; Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed, ante*, p. 35. In view of the full discussion of this subject in the recent decisions

above cited, nothing further need be said upon this point.

We find none of the objections which have been made to the validity of the amendatory act to be well taken, and the judgment is, therefore,

Affirmed.

NOBLE STATE BANK *v.* HASKELL.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

No. 71. Submitted January 27, 1911.—Decided February 20, 1911.

Motion for leave to file petition for rehearing in *Noble State Bank* v. *Haskell*, *ante*, p. 104, denied.

Even where powerful arguments can be made against the wisdom of legislation this court can say nothing, as it is not concerned therewith.

Among the public uses for which private property may be taken are some which, if looked at only in their immediate aspect according to the approximate effect of the taking, may seem to be private. *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527.

Payments required by a bank guarantee statute which can be avoided by going out of the banking business, and are required only as a condition for keeping on in such business from corporations created by the State, do not amount to a taking of private property without compensation or a deprivation of property without due process of law; and so *held* as to the Oklahoma Bank Guarantee statute heretofore sustained as to its constitutionality, *ante*, p. 104.

THE facts are stated in the opinion.

Mr. C. B. Ames for plaintiff in error:

Counsel hardly presumes to expect this court to reconsider a conclusion reached by unanimous agreement, but respectfully suggests that the opinion is based on an

erroneous assumption of fact and on a principle of law not supported by former decisions.

The erroneous assumption of fact is that the property taken by the law under consideration is a comparatively insignificant portion of the bank's capital.

The principle of law referred to is that a portion of the bank's property may be taken without return to pay debts of a failing rival in business.

While the amount of the particular assessment involved in this case is small when considered alone, it is large when considered as a percentage of the bank's capital stock, amounting to 3.30/100 per cent, and if this law is valid, then, of course, similar laws might be passed applicable to all state and national banks. Two per cent of the deposits in the United States would be over $280,000,000 which is more than fifteen per cent of the total capital stock.

Even if two per cent may never be levied, still the law permits the levy. A law which takes eight per cent of the aggregate capital of all the banks as a preliminary step towards creating a guaranty fund, which authorizes an annual taking thereafter of fifteen per cent, which, when applied to aggregates, mounts up into the hundreds of millions of dollars, cannot be justified as the taking of a comparatively insignificant portion of the bank's property.

As to the bank's reversionary interest in the unused portion of the fund, the last message of the Governor of Oklahoma shows an average loss of approximately two per cent per annum on the entire capital and surplus as of November 10, 1910.

This law not only takes from the banks this enormous sum of money, but it takes from the banker the value of his reputation and reduces all bankers, good, bad and indifferent, to the same level.

The fact that the average annual losses of our national banks has been only a small per cent of their deposits is

no argument that the same condition would prevail under a guarantee law. See addresses delivered by J. W. McNeal before American Bankers' Association, and by Daniel W. Hogan before the Nebraska State Bankers' Association in September, 1908. They illustrate that the conclusion of law that a portion of the bank's property may be taken without return to pay debts of a failing rival in business is unsupported by authority. In *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield* v. *New York, N. H. & H. R. R. Co.*, 203 U. S. 372; and *Bacon* v. *Walker*, 204 U. S. 311, 315, the basis in each case was that the property was taken for public use. As to *Bacon* v. *Walker* see *Sweet* v. *Valentine*, 8 Idaho, 431.

When property is taken for public use the compensation must be in money and not in some so-called general benefit. Lewis on Em. Dom., 3d ed., §§ 502–505.

The legislature is the exclusive judge of the existence of an emergency and when one is declared it is binding on the courts, *Oklahoma City* v. *Shields*, 22 Oklahoma, 265; *S. C.*, 100 Pac. Rep. 559; *In re Menefee*, 22 Oklahoma, 365; 97 Pac. Rep. 1014; but the doctrine laid down in the opinion substitutes public opinion for the constitution. Public opinion can only be ascertained from the will of the people as declared by the legislature, and, therefore, the decision substitutes the act of the legislature for the constitution. *C., B. & Q. R. R. Co.* v. *Illinois*, 200 U. S. 341.

The legal objection to such a law would be that it takes private property for private use. The practical objection would be that it discourages careful scrutiny in taking checks, and encourages reckless and incompetent business.

Putting the cost of an examination upon the bank does not take its property for a private use because the fee charged goes to the public officers of the State and is for a public use.

The opinion is in direct conflict with the entire range of decisions holding that state action imposing a railroad

rate too low to furnish return on the investment is unconstitutional as a taking of private property for private use. *Munn* v. *Illinois*, 94 U. S. 113.

There is a twilight zone separating public use from private use and within this zone the line of division is irregular and here it is that the courts differ from each other in the application of the principle, but the difficulty heretofore has been in determining whether the use was public or private.

When it has once been determined that the property is being taken for a private use that has heretofore been regarded as the complete settlement of the controversy. *L. & N. R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132; *Missouri Pacific R. R. Co.* v. *Nebraska*, 217 U. S. 196.

Private property cannot be taken for private use, and if taken for public use, there must be compensation. *Missouri Pacific R. R. Co.* v. *Nebraska*, 164 U. S. 403; *Wilkinson* v. *Leland*, 2 Pet. 626, 658; *Boyd* v. *United States*, 116 U. S. 616, 635; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Cole* v. *City of LaGrange*, 113 U. S. 1; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Muhlker* v. *N. Y., N. H. & H. R. R. Co.*, 197 U. S. 544; *C., B. & Q. R. R. Co.* v. *Illinois*, 200 U. S. 561.

Private property cannot be taken for private use under the taxing power. 8 Rose's Notes, 362; *Missouri &c. Ry. Co.* v. *Nebraska*, 164 U. S. 417; *Garland* v. *Board of Revenue*, 87 Alabama, 227; *McClelland* v. *State*, 138 Indiana, 332. *Osawakee* v. *Township*, 14 Kansas, 420, 428; *Blain* v. *Agricultural Society*, 21 Kansas, 560; *Atchison &c. R. R. Co.* v. *Atchison*, 47 Kansas, 714; *Geneseo* v. *Gas Co.*, 55 Kansas, 362; *Lancaster* v. *Clayton*, 86 Kentucky, 380; *Baltimore &c. R. R. Co.* v. *Spring*, 80 Maryland, 517; *Kingman* v. *Brockton*, 153 Massachusetts, 259; *Opinion of Justices*, 155 Massachusetts, 601; *State* v. *Foley*, 30 Minne-

sota, 356; *Deal* v. *Mississippi Co.*, 107 Missouri, 469; *State* v. *Switzler*, 143 Missouri, 314; *Manning* v. *Kippel*, 9 Oregon, 370; *Feldman* v. *City Council*, 23 S. Car. 63; *Maudlin* v. *City Council*, 53 S. Car. 293; *Williams* v. *Davidson*, 43 Texas, 37; *Brooke Academy* v. *George*, 14 W. Va. 420; *Pittsburgh &c. R. R. Co.* v. *Iron Works*, 31 W. Va. 734; *Keeley Institute* v. *Milwaukee County*, 95 Wisconsin, 161; *State* v. *Sargent*, 12 Mo. App. 228. See also 2 Kent, 329; *I. & N. R. R. Co.* v. *Baldwin*, 5 So. Rep. 311; *Sadlin* v. *Langham*, 34 Alabama, 311, 330; *Billings* v. *Hall*, 7 California, 1, 10; *Enfield T. B. Co.* v. *Hartford R. R. Co.*, 42 Am. Dec. 716, 727; *Great Western Gas Co.* v. *Hawkins*, 30 Ind. App. 566; *Blockman* v. *Holms*, 72 Indiana, 515; *Banshead* v. *Brown*, 25 Iowa, 540; *Harding* v. *Funk*, 8 Kansas, 315, 323; *Bank of Louisville* v. *Board of Trustees*, 5 S. W. Rep. 735, 737; *Allen* v. *Inhabitants of Jay*, 11 Am. Rep. 185; *Regents* v. *Williams*, 31 Am. Dec. 72, 97; *Lowell* v. *Boston*, 15 Am. Rep. 39, 56; *Michigan Sugar Co.* v. *Auditor General*, 83 Am. St. Rep. 354, 357; *Coates* v. *Campbell*, 35 N. W. Rep. 366; *State* v. *Washington Co.*, 15 N. W. Rep. 375, 379; *Moody* v. *Hoskins*, 1 So. Rep. 622; *Newby* v. *Platte County*, 25 Missouri, 258, 261; *Dickey* v. *Tennison*, 27 Missouri, 373; *A. & N. R. R. Co.* v. *Baty*, 29 Am. Rep. 356, 362; *Ten Eyck* v. *D. & R. Canal Co.*, 37 Am. Dec. 233; *Coster* v. *Water Co.*, 18 N. J. Eq. 54, 63; *Taylor* v. *Porter*, 40 Am. Dec. 274; *Bloodgood* v. *Mohawk & H. Ry. Co.*, 31 Am. Dec. 313, 316; *Embury* v. *Conner*, 3 N. Y. 515; *Reeves* v. *The Treasurer*, 8 Ohio St. 333, 347; *Lamb & McKee* v. *Lane*, 4 Ohio St. 167, 178; *Lucas County* v. *Bayles*, 78 N. E. Rep. 955; *Witham* v. *Osburn*, 4 Oregon, 218; *Sharpless* v. *Mayor of Phila.*, 21 Pa. St. 147, 169; *Feldman* v. *Charleston*, 55 Am. Rep. 6, 9; *Harding* v. *Goodlet*, 11 Tennessee, 43; *Clack* v. *White*, 32 Tennessee, 540, 549; *Delworth* v. *State*, 36 S. W. Rep. 274, *State* v. *Froehlich*, 99 Am. St. Rep. 985; *United States* v. *Douglas-William Sartoris Co.*, 22 Pac. Rep. 92, 96.

MR. JUSTICE HOLMES delivered the opinion of the court.

Leave to file an application for rehearing is asked in this case. We see no reason to grant it, but, as the judgment delivered, *ante*, p. 104, seems to have conveyed a wrong impression of the opinion of the court in some details, we add a few words to what was said when the case was decided. We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern. *Clark* v. *Nash*, 198 U. S. 361, *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, etc., were cited to establish, not that property might be taken for a private use, but that among the public uses for which it might be taken were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private. This case, in our opinion, is of that sort. The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the State. We have given what we deem sufficient reasons for holding that such a condition may be imposed.

Leave to file petition denied.

BUCK'S STOVE & RANGE COMPANY *v.* AMERICAN FEDERATION OF LABOR.

AMERICAN FEDERATION OF LABOR *v.* BUCK'S STOVE & RANGE COMPANY.

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

Nos. 190, 394. Argument commenced January 27, 1911. The court declined to hear further argument.

Appeals dismissed without costs to either party, it having developed from statements of counsel for both parties that the cases had become purely moot because of the settlement between the parties of every material controversy which the record presented.

THE facts are stated in the opinion.

Mr. Daniel Davenport and *Mr. J. J. Darlington* for The Buck's Stove & Range Company.

Mr. Jackson H. Ralston, Mr. F. L. Siddons and *Mr. William E. Richardson* for The American Federation of Labor *et al.*

Per Curiam: When these cases were reached for hearing and after the argument had materially progressed, it developed from statements made by counsel for both parties that the cases had become purely moot because of the settlement between the parties of every material controversy which the record presented. On the disclosure of this situation further argument was dispensed with; and for the reason which led to that action, that is, as we have said, that the controversies between the parties had become in all respects moot, the appeals must be dismissed. *Richardson* v. *McChesney*, 218 U. S. 487, 492, and cases cited. Appeals dismissed, without costs to either party.

OPINIONS PER CURIAM, ETC., FROM DECEMBER 19, 1910, TO FEBRUARY 20, 1911.

No. 586. THE STATE OF MINNESOTA EX REL. JALMER M. LARSEN, PLAINTIFF IN ERROR, *v.* HUGH R. SCOTT, AS AUDITOR OF THE COUNTY OF HENNEPIN. In error to the Supreme Court of the State of Minnesota. Motion to dismiss submitted December 12, 1910. Decided December 19, 1910. *Per Curiam.* Dismissed with costs. *Mr. Milton D. Purdy*, for defendant in error, in support of the motion. *Mr. Carl Strover*, for plaintiff in error, in opposition thereto.

No. 497. SAMUEL LOEB, PLAINTIFF IN ERROR, *v.* HENRY JENNINGS, CHIEF OF POLICE OF THE CITY OF ATLANTA. In error to the Supreme Court of the State of Georgia. Motion to dismiss or affirm submitted December 19, 1910. Decided January 3, 1911. *Per Curiam.* Judgment affirmed on the authority of *Waters-Pierce Oil Company* v. *State of Texas*, 212 U. S. 112, 118; *Goodrich* v. *Ferris*, 214 U. S. 79; *Griffith* v. *Connecticut*, 218 U. S. 563. *Mr. Thomas B. Felder* for plaintiff in error. *Mr. William A. Wimbish* for defendant in error.

No. 192. G. WASH HUNTER, PLAINTIFF IN ERROR, *v.* THE STATE OF SOUTH CAROLINA. In error to the Supreme Court of the State of South Carolina. Motion to dismiss or affirm submitted January 9, 1911. Decided January 16, 1911. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 112;

King v. *West Virginia*, 216 U. S. 92; *Griffith* v. *Connecticut*, 218 U. S. 563. *Mr. John G. Capers*, *Mr. Joseph D. Wright*, *Mr. Coleman L. Blease* and *Mr. William R. Andrews* for plaintiff in error. *Mr. J. Fraser Lyon* for defendant in error.

No. 216. CLARENCE H. VENNER ET AL., PLAINTIFFS IN ERROR, *v.* THE DENVER UNION WATER COMPANY ET AL. In error to the Supreme Court of the State of Colorado. Motion to dismiss or affirm submitted January 30, 1911. Decided February 20, 1911. *Per Curiam.* Writ of error dismissed for want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100; *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 112; *King* v. *West Virginia*, 216 U. S. 92; *Griffith* v. *Connecticut*, 218 U. S. 563. *Mr. Elijah N. Zoline* and *Mr. Caldwell Yeaman* for plaintiffs in error. *Mr. Arthur H. Van Brunt*, *Mr. Gerald Hughes*, *Mr. Frederick D. Van Vorst* and *Mr. Joel F. Vaile* for defendants in error.

Decisions on Petitions for Writs of Certiorari from December 19, 1910, to February 20, 1911.

No. 477. GEORGE GODFREY MOORE ET AL., ETC., PETITIONERS, v. SECURITY TRUST & LIFE INSURANCE COMPANY. December 19, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Robert Stone*, *Mr. D. R. Hite* and *Mr. James A. Troutman* for petitioners. *Mr. Joseph B. Wright* and *Mr. John G. Capers* for respondent.

No. 805. PABST BREWING COMPANY, PETITIONER, *v.* CHARLES THORLEY. December 19, 1910. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. A. S. Gilbert* and *Mr. J. M. Mayer* for petitioner. *Mr. Harold Nathan* for respondent.

No. 816. MURRAY CORRINGTON ET AL., PETITIONERS, *v.* THE WESTINGHOUSE AIR BRAKE COMPANY. December 19, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William G. Choate* for petitioners. *Mr. Thomas B. Kerr, Mr. J. Snowden Bell* and *Mr. E. A. Wright* for respondents.

No. 823. LIZZIE M. TROXELL, PETITIONER, *v.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY. January 3, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. George Demming* for petitioner. *Mr. James F. Campbell* for respondent.

No. 826. C. H. REXFORD, PETITIONER, *v.* THE BRUNSWICK-BALKE-COLLENDER COMPANY. January 3, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Julius C. Martin* for petitioner. *Mr. James H. Merrimon* for respondent.

No. 820. A. F. MILLAN, PETITIONER, *v.* EXCHANGE BANK OF MANNINGTON ET AL. January 9, 1911. Peti-

tion for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John W. Davis* for petitioner. *Mr. E. M. Showalter* for respondents.

No. 833. THE CITY OF NEW ORLEANS ET AL., PETITIONERS, *v.* THE WAKEFIELD SHEET PILING COMPANY. January 9, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Omer Villere* and *Mr. Edgar H. Farrar* for petitioners. No appearance for respondent.

No. 824. DEWITT C. HILLEGAS, PETITIONER, *v.* THE UNITED STATES. January 16, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Wilton J. Lambert* for petitioner. *The Attorney General* and *Mr. Assistant Attorney General Fowler* for respondent.

No. 835. FRANK HORN ET AL., PETITIONERS, *v.* THE UNITED STATES. January 16, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank Hagerman, Mr. Wash. Adams* and *Mr. James S. Botsford* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for respondent.

No. 845. LA COMPAGNIE GENERALE TRANSATLANTIQUE, OWNER, ETC., PETITIONER, *v.* THE BALTIMORE & OHIO

RAILROAD COMPANY. January 16, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph P. Nolan* and *Mr. John M. Nolan* for petitioner. *Mr. Frederick M. Brown* for respondent.

No. 848. WILLIAM H. GRAY, PETITIONER, *v.* ALLEN W. FIELD ET AL. January 16, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Horace G. Stone* for petitioner. *Mr. S. S. Gregory, Mr. Jacob Newman, Mr. S. O. Levinson, Mr. B. V. Becker* and *Mr. C. H. Poppenhusen* for respondents.

No. 550. EDWARD J. SCHURMEIER ET AL., AS EXECUTORS, ETC., PETITIONERS, *v.* THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY. January 16, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit dismissed for the want of prosecution. *Mr. Harris Richardson* for petitioners. *Mr. James E. Markham, Mr. George W. Markham* and *Mr. John B. Sanborn* for respondent.

Nos. 843 and 844. COMPTOGRAPH COMPANY, PETITIONER, *v.* BURROUGHS ADDING MACHINE COMPANY. January 23, 1911. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John W. Munday* for petitioner. *Mr. Edward Rector* and *Mr. Robert H. Parkinson* for respondent.

No. 839. NAPOLEON B. SMITH ET AL., PETITIONERS, *v.* NELLIE MAE MOORE. January 30, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. R. Lee Word, Mr. William Wallace* and *Mr. A. B. Browne* for petitioners. *Mr. William Scallon, Mr. T. J. Walsh* and *Mr. Cornelius B. Nolan* for respondent.

No. 847. THE STATE OF NEW JERSEY, PETITIONER, *v.* ARTHUR LOVELL, TRUSTEE, ETC. January 30, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Edmund Wilson* and *Mr. Francis H. McGee* for petitioner. *Mr. Howard H. Williams* for respondent.

No. 852. M. B. SHELTON, AS TRUSTEE, ETC., PETITIONER, *v.* CHARLES H. PRICE. January 30, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lawrence Cooper* for petitioner. *Mr. J. T. Kirk* for creditors. *Mr. Richard W. Walker* for respondent.

No. 842. EDMUND S. NASH ET AL., PETITIONERS, *v.* THE UNITED STATES. February 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. John C. Spooner* and *Mr. Samuel B. Adams* for petitioners. *The Attorney General, The Solicitor General, Mr. Assistant to the Attorney General Kenyon* and *Mr. Edwin P. Grosvenor* for respondent.

No. 875. DOWAGIAC MANUFACTURING COMPANY, PETITIONER, *v.* MINNESOTA MOLINE PLOW COMPANY ET AL.; and No. 876. DOWAGIAC MANUFACTURING COMPANY, PETITIONER, *v.* ERNEST F. SMITH ET AL. February 20, 1911. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Fred. L. Chappell* for petitioner. *Mr. Thomas A. Banning* for respondents.

No. 856. SANITARY STREET FLUSHING MACHINE COMPANY, PETITIONER, *v.* ST. LOUIS STREET FLUSHING MACHINE COMPANY ET AL. February 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James L. Hopkins* for petitioner. No appearance for respondent.

No. 867. WHITNEY ELEVATOR & WAREHOUSE COMPANY, PETITIONER, *v.* BELLE N. WHITNEY. February 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph McLean* for petitioner. *Mr. William G. Tracy* for respondent.

No. 870. THE SCHMERTZ WIRE GLASS COMPANY ET AL., PETITIONERS, *v.* HIGHLAND GLASS COMPANY. February 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John W. Griggs, Mr. Arthur J. Baldwin, Mr. Thomas B. Kerr* and *Mr. Drury W. Cooper* for petitioners. *Mr. Charles Neave* and *Mr. William G. McKnight* for respondent.

No. 873. FRANK L. NEALL, AS TRUSTEE, PETITIONER, *v.* MARYLAND DREDGING & CONTRACTING COMPANY ET AL. February 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Montgomery* for petitioner. *Mr. Frederick M. Brown* for respondent.

No. 874. E. G. COFFIN ET AL., PETITIONERS, *v.* CHARLES R. FLINT. February 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. D. T. Watson*, *Mr. John M. Freeman* and *Mr. R. W. Sutton* for petitioners. *Mr. J. Frank Snyder* and *Mr. James H. Merrimon* for respondent.

No. 877. THE EMPIRE TIMBER COMPANY, PETITIONER, *v.* THE WOODBINE TIMBER COMPANY. February 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Philip Walker* for petitioner. No appearance for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM DECEMBER 19, 1910, TO FEBRUARY 20, 1911.

No. 78. THE GOVERNMENT OF HIS MAJESTY THE KING OF ITALY, THROUGH A. RAYBOUDI MASSIGLIA, ITS CONSUL GENERAL AT NEW YORK, APPELLANT, *v.* GIROLAMO ASARO, ALIAS VINCENZO FUDERA. Appeal from the Circuit Court of the United States for the Southern District

of New York. January 11, 1911. Dismissed with costs, on motion of counsel for appellant. *Mr. Walter V. R. Berry*, *Mr. Benjamin S. Minor*, *Mr. Hugh B. Rowland* and *Mr. Gino C. Speranza* for appellant. *Mr. John J. Hamilton* for appellee.

No. 863. Heirs of Maria Luisa Lopez et al., Appellants, *v.* Rubert Hermanos. Appeal from the Supreme Court of Porto Rico. January 18, 1911. Docketed and dismissed with costs on motion of *Mr. Frederick S. Tyler* for appellees. No one opposing.

No. 864. Maria del Encarnacio Prado, Widow of Suro, Appellant, *v.* The Succession of Alonzo del Rio, etc. Appeal from the Supreme Court of Porto Rico. January 18, 1911. Docketed and dismissed with costs on motion of *Mr. Frederick S. Tyler* for appellee. No one opposing.

No. 76. Choctaw, Oklahoma & Gulf Railroad Company, Plaintiff in Error, *v.* Mrs. Myra Burgess and W. N. Burgess. In error to the Supreme Court of the State of Oklahoma. January 26, 1911. Dismissed with costs per stipulation. *Mr. Ernest E. Blake* for plaintiff in error. *Mr. A. C. Cruce* for defendants in error.

No. 93. Philadelphia & Reading Railway Company, Plaintiff in Error, *v.* The United States. In error to the District Court of the United States for the

Eastern District of Pennsylvania. January 27, 1911. Dismissed, on motion of counsel for the plaintiff in error. *Mr. J. D. Campbell* and *Mr. James F. Campbell* for plaintiff in error. *The Attorney General* for defendant in error.

No. 912. JUSTO PUENTE Y ARMSTERDAM ET AL., APPELLANTS, *v.* FELIX PUENTE ET AL. Appeal from the Supreme Court of Porto Rico. February 20, 1911. Docketed and dismissed with costs, on motion of *Mr. Frederic D. McKenney* for appellees. No one opposing.

No. 178. THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* MRS. MARY A. STEVENSON ET AL. In error to the United States Circuit Court of Appeals for the Fifth Circuit. February 20, 1911. Dismissed per stipulation. *Mr. John F. Dillon*, *Mr. Rush Taggart* and *Mr. W. L. Hall* for plaintiff in error. *Mr. Cone Johnson* and *Mr. James M. Edwards* for defendants in error.

INDEX.

ACTIONS.

ACTS OF CONGRESS.

AGENCY.

See CARRIERS, 4.

AMENDMENT.

See BILL OF EXCEPTIONS;
BONDS, 2.

AMENDMENTS TO CONSTITUTION.

Fifth. See CONSTITUTIONAL LAW, 7, 24.

Fourteenth. See CONSTITUTIONAL LAW, 5, 13, 17, 18, 25, 28, 34, 35, 36, 37, 63, 71, 72, 75, 82.

Thirteenth. See CONSTITUTIONAL LAW, 50–55.

Generally. See CONSTITUTIONAL LAW, 31, 32.

APPEAL AND ERROR.

Finality of judgment below; effect of petition for rehearing—Law applicable.

The effect of a petition for rehearing, if duly filed and entertained by the court, is to prevent the judgment from becoming final and reviewable until disposed of, and when disposed of, an appeal from the judgment is regulated by the statutes then in force, even if enacted after the original decision; and so held as to an appeal from the Supreme Court of Hawaii under the act of March 3, 1905. *William W. Bierce, Ltd.*, v. *Waterhouse*, 320.

See ARMY AND NAVY, 3;
BILL OF EXCEPTIONS;
BONDS, 3;
CONTEMPT OF COURT;
HABEAS CORPUS;
INJUNCTION, 1, 2, 3;
JURISDICTION;
MOOT CASE, 2.

ARMY AND NAVY.

ASSESSMENT AND TAXATION.

See CONSTITUTIONAL LAW, 19, 46, 66;
TAXES AND TAXATION; WAR REVENUE ACT.

ASSIGNMENT.

See ACTIONS, 5.

CASES QUALIFIED.

CLASSIFICATION.

COLLATERAL ATTACK.

CONSTITUTIONAL LAW.

States may be exercised thereon, implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. (*Chisholm* v. *Georgia*, 2 Dall. 431.) *Ib.*

58. *Judicial power; when this court may declare act of Congress unconstitutional.*

This court has no veto power on legislation enacted by Congress; and its right to declare an act of Congress unconstitutional can only be exercised when a proper case between opposing parties is submitted for determination. (*Marbury* v. *Madison*, 1 Cranch, 137.) *Ib.*

59. *Judicial power; appellate jurisdiction of this court; case or controversy defined.*

The determination by the Court of Claims, and on appeal by this court, of the constitutional validity of an act of Congress in a suit brought by authority of a subsequent act of Congress clothing such courts with jurisdiction for the avowed purpose of settling such question with provision for payment of expenses of the suit in certain contingencies out of funds in the Treasury of the United States, is not within the appellate jurisdiction conferred by the Constitution upon this court; such a suit is not a case or controversy to which the judicial power extends, nor would such a judgment conclude private parties in actual litigation. *Ib.*

60. *Legislative power; Congress may not assign to Federal courts duties not properly judicial.*

The rule laid down in *Heyburn's Case*, 2 Dall. 409, that neither the legislative nor the executive branch of the Government of the United States can assign to the judicial branch any duties other than those that are properly judicial, to be performed in a judicial manner, applied; and *held*, that it is beyond the power of Congress to provide for a suit of this nature to be brought in the Court of Claims with an appeal to this court to test the constitutionality of prior acts of Congress, such a suit not being a case or controversy within the meaning of the Constitution. *Ib.*

61. *Legislative power; assignment to judiciary of non-judicial duties not within.*

That part of the act of March 1, 1907, c. 2285, 34 Stat. 1015, 1028, which requires of this court action in its nature not judicial within the meaning of the Constitution, exceeds the limitation of legislative authority and is unconstitutional, and the suits brought thereunder are dismissed for want of jurisdiction. *Ib.*

CONSTRUCTION OF STATUTES.

CONTEMPT OF COURT.

Appeal; pendency of; acts constituting contempt; commission after decision but before mandate.

An appeal to this court must be regarded as pending and undisposed of until the mandate issues, even though a decision may have been announced. Defendants under order to show cause why they should not be punished for contempt for having, after decision in their favor but before mandate, destroyed the subject-matter of the litigation, are adjudged in technical contempt; but having under oath denied any intent of contempt and satisfied the court of their good faith, the vindication of the court is satisfied by discharging the rule on payment of costs. *Merrimack River Sav. Bank* v. *Clay Center*, 527.

CONTRACTS.

1. *Freedom of contract not absolute.*

There is no absolute freedom of contract. The Government may deny liberty of contract by regulating or forbidding every contract reasonably calculated to injuriously affect public interests. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 186.

2. *Government; construction as to liability for damage resulting to work in course of erection.*

A Government contract for building a bulkhead in Manila provided that the contractor would be responsible for damages arising from wave action or pressure of the revetment against the timber structure, but that the Government would be responsible for break caused by pressure of the mud fill. There was a break owing to pressure of the mud fill and before it could be repaired there was a further damage caused by a typhoon but which would not have happened had the original break not existed. *Held*, as

held by the courts below, that the contractor must bear the loss caused by the typhoon. *Atlantic, Gulf & Pacific Co.* v. *Philippine Islands*, 17.

See ACTIONS, 1, 3, 4, 5, 6;
BONDS, 1;
CARRIERS, 2;
CONGRESS, POWERS OF, 1;
CONSTITUTIONAL LAW, 4–8, 24, 25, 49, 52, 53, 55, 66, 67, 81–83;
COURTS, 9;
INTERSTATE COMMERCE, 2, 3, 5;
LOCAL LAW (PA.);
PEONAGE, 1;
PUBLIC LANDS, 3.

CORPORATIONS.

See CONSTITUTIONAL LAW, 8;
LOCAL LAW (PA.).

COURT AND JURY.

See BONDS, 7.

COURT OF CLAIMS.

See STATUTES, A 3.

COURTS.

1. *Functions of this court.*

From its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature. *Muskrat* v. *United States*, 346.

2. *This court; duty to reconcile decisions.*

It is the duty of this court to reconcile decisions and, in order to enforce the correct doctrine, to determine which rest upon the right principle and to overrule or qualify those conflicting therewith. *Ex parte Harding*, 363.

3. *Province of; determination of wisdom of legislation not within.*

Where the subject is within the police protection of the State, it is not for the court to determine whether the enactment is wise or not; that is within legislative discretion. *Engel* v. *O'Malley*, 128.

4. *Power to review legislative discretion in police legislation.*

Where police legislation has a reasonable relation to an object within governmental authority the legislative discretion is not subject to judicial review. *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 549.

5. *Scope of inquiry as to validity of statute.*

The scope of judicial inquiry as to a statute is limited to the question

See ARMY AND NAVY, 2;
CONSTITUTIONAL LAW, 17, 56–59;
CONTEMPT OF COURT;
HABEAS CORPUS, 2, 3;
INJUNCTION, 1, 2, 3;
INTERSTATE COMMERCE COMMISSION, 5;
MANDAMUS, 1;
REMOVAL OF CAUSES, 1;
STATUTES, A 4, 5, 6.

CRIMINAL LAW.

INTERSTATE COMMERCE ACT.

INTERSTATE COMMERCE COMMISSION.

MANDAMUS.

PRIVILEGES AND IMMUNITIES.

See CONSTITUTIONAL LAW, 63.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW, 7, 11, 12, 13, 15, 22, 23, 27, 30–33, 64–72, 83;
OPINIONS, 2;
PUBLIC LANDS.

PUBLIC HEALTH.

See CONSTITUTIONAL LAW, 79, 80.

PUBLIC LANDS.

1. *Forest Reserve Act; exchange of lands; competency of Secretary of Interior to adopt rules and regulations.*

As the Forest Reserve provision of the Sundry Civil Act of June 4, 1897, c. 2, 30 Stat. 36, did not prescribe the method which those entitled to avail of its provision should pursue, it was competent for the Secretary of the Interior to adopt the rules and regulations, which this court has already held to be reasonable and valid, and entitled to respect and obedience. (*Cosmos Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301.) *Roughton* v. *Knight*, 537.

2. *Same; effect of non-compliance with rules of Land Department.*

One not following the rules and regulations adopted by the Land Department for exchange of lands under the Forest Reserve Act and not accompanying his relinquishment deed with a proper selection in lieu of the land relinquished, and whose relinquishment was returned to him by the Department, did not become entitled to a selection and exchange after the repeal of the act. *Ib.*

3. *Same; effect of repealing act of 1905 to save rights initiated but not perfected.*

Where one attempting to avail of the statutory provision to exchange under the Forest Reserve Act of 1897 failed to comply with the rules and regulations of the Land Department, and his relinquishment deed was returned to him, no contract was created with the Government which saved him any rights under the repealing act of March 3, 1905, c. 1495, 33 Stat. 1264. *Ib.*

4. *Forfeiture for non-performance of condition subsequent; who may take advantage of; procedure on part of United States.*

No one can take advantage of the forfeiture provided for non-performance of a condition subsequent in a land grant *in præsenti*, except the Government, *Schulenberg* v. *Harriman*, 21 Wall. 44; nor

REMOVAL OF CAUSES.

1. *Sufficiency of designation of court.*

The United States court at a particular place named is a sufficient designation of the only court of the United States held at that place, which has jurisdiction of the case; and an order transmitting a case under the act of June 28, 1898, c. 517, 30 Stat. 511, to the United States court at Paris, Texas, is sufficient to transfer the case to the District Court of the United States for the Eastern District of Texas and to give that court jurisdiction. *Hendrix* v. *United States*, 79.

2. *Petition; failure to comply with statutory requirements; when not fatal to jurisdiction of court.*

Where the record is not here, and the jurisdictional facts are admitted, and the order recited that the court was well advised in the premises, this court will not hold that the court to which the case was removed on petition of plaintiff in error himself did not acquire jurisdiction because the petition did not state all the jurisdictional facts required by the statute authorizing the removal. *Ib.*

See MANDAMUS.

REPLEVIN.

See BONDS, 4, 5, 6, 7;
LOCAL LAW (HAWAII).

RESERVATIONS.

See CRIMINAL LAW, 4, 5.

RES JUDICATA.

See BONDS, 5.

RETROACTIVE LAWS.

See CONSTITUTIONAL LAW, 45, 46, 47;
EX POST FACTO LAWS.

SALES.

See CONSTITUTIONAL LAW, 2, 81, 83.

SEALED INSTRUMENTS.

See BONDS, 1.

SECRETARY OF THE INTERIOR.

See PRACTICE AND PROCEDURE, 8;
PUBLIC LANDS, 1, 8, 9.

SERVITUDE.

See CONSTITUTIONAL LAW, 50–55.

SIMULTANEOUS TRANSACTIONS.

See BONDS, 1.

STAMP TAX.

See CONSTITUTIONAL LAW, 2;
TAXES AND TAXATION, 3, 4;
WAR REVENUE ACT.

STATES.

1. *Power to classify subjects.*

A State may classify subjects so long as all persons similarly situated are treated alike. (*Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245.) *Kentucky Union Co.* v. *Kentucky*, 140.

2. *Legislative power to enlarge scope of state statute.*

The legislature, provided it acts within constitutional limitations, is the arbiter of the public policy of the State; and it may by amendment enlarge the scope of a statute beyond the limits set upon the previous statute by the courts. *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 549.

3. *Police power; extent of exercise.*

A State is not bound to go to the full extent of its power in legislating against an evil from which it seeks to protect the public. *German Alliance Ins. Co.* v. *Hale*, 307.

4. *Police power to regulate in respect of relative rights and duties and prescribe means of enforcing regulations.*

All corporations, associations and individuals, within its jurisdiction, are subject to such regulations in respect of their relative rights and duties as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good; and the State may also prescribe, within such limits, the particular means of enforcing such regulations. *Ib.*

5. *Police power; public needs within; protection of bank deposits.*

The police power extends to all the great public needs, *Camfield* v. *United States*, 167 U. S. 518, and includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them by compelling coöperation so as to prevent failure and panic. *Noble State Bank* v. *Haskell*, 104.

See CONGRESS, POWERS OF, 2;
CONSTITUTIONAL LAW, 2, 5, 6, 9, 13, 16, 17, 18, 21, 23, 25, 26, 27, 49, 53, 63, 65, 66;
COURTS, 3, 6, 8;
CRIMINAL LAW, 4, 5;
INTERSTATE COMMERCE, 7, 8, 9;
LOCAL LAW (PA.);
PEONAGE, 2;
PRACTICE AND PROCEDURE, 2, 3, 4.

STATUTE OF LIMITATIONS.

See CRIMINAL LAW, 3;
CONSTITUTIONAL LAW, 21.

STATUTES.

A. CONSTRUCTION OF.

1. *Looking to purpose and intent of superseded act.*

The purpose and intent leading to the adoption of an act affords a means for discerning the intent of a subsequent act relating to the same subject and superseding the earlier act. *United States* v. *Press Publishing Co.*, 1.

2. *Proceedings in Congress considered.*

Proceedings in Congress in the course of adoption of a statute and amending its form as originally proposed considered, in this case, in determining the purpose and scope of the act and the intent of Congress in adopting it. *Ib.*

3. *Legislative intent—Act of March 1, 1907, construed as not investing Court of Claims with jurisdiction.*

An act of Congress, conferring jurisdiction on the Court of Claims and on this court on appeal, testing the constitutionality of prior acts of Congress will not be sustained as to the jurisdiction of the Court of Claims alone if it cannot be also sustained as to this court. *Muskrat* v. *United States*, 346.

4. *Intent of Congress; how ascertained; power of court circumscribed.*

The intent of Congress is to be gathered from the words of the act according to their ordinary acceptation, and the act should be construed in the light of circumstances existing at the time it was passed. Personal hardships cannot be considered, nor can the court mold the statute to meet its views of justice in a particular case. *Louisville & Nashville R. R. Co.* v. *Mottley*, 467.

5. *Words used; introduction of new word as indicating intent to cure defect in former law.*

The court must have regard to all the words used by Congress in a statute and give effect to them as far as possible; and the introduction of a new word into a statute indicates an intent to cure a defect in, and suppress an evil not covered by, the former law. *Ib.*

6. *Judicial modification on equitable grounds.*

The court cannot on equitable grounds add an exception to the classes to which a statute clearly applies if Congress forbears to do so. *Ib.*

TAXES AND TAXATION.

1. *Nature of tax as debt; right to recover by suit.*

A tax may or may not be a debt under a particular statute according to the sense in which the word is found to be used. But whether the Government may recover a personal judgment for a tax depends upon the existence of the duty to pay for the enforcement of which another remedy has not been made exclusive. *United States* v. *Chamberlin*, 250.

2. *Tender of tax; what amounts to.*

An offer to compromise not in accord with the terms of the statute under which lands have been declared forfeited does not amount to an offer to pay the taxes properly assessed thereunder. *Kentucky Union Co.* v. *Kentucky*, 140.

3. *Stamp tax; penalties for non-payment not exclusive of right to sue to recover.*

Penalties may be provided to induce payment of the tax, and not as a substitute for such payment, and it will not be presumed that Congress intends by penalizing delinquency to deprive the Government of suitable means of enforcing the collection of revenue. *United States* v. *Chamberlin*, 250.

4. *Stamp tax; obligation to affix stamp; exclusiveness of penalties prescribed.*

Nothing in the nature of a stamp tax negatives *per se*, either the personal obligation to purchase and affix the stamps or the collection of the amount by action; nor do provisions for penalties necessarily exclude personal liability. *Ib.*

See CONSTITUTIONAL LAW, 2, 19, 20, 23, 37, 46;
STATES, 9, 10;
WAR REVENUE ACT.

TENDER.

See BONDS, 7;
TAXES AND TAXATION, 2.

TERMINAL CHARGES.

See INTERSTATE COMMERCE COMMISSION, 2, 3, 4.

THIRTEENTH AMENDMENT.

See CONSTITUTIONAL LAW, 50–55.

THROUGH RATES.

See CARRIERS, 3, 4, 5.