UNITED STATES REPORTS

VOLUME 220

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 JUSTICE 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 and United States Circuit Judge for the Eighth Circuit: Nominated December 12, 1910, by President Taft, to succeed

MR. JUSTICE WHITE, appointed to be Chief Justice of the United States, resigned.* 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 MOODY, resigned.† He was confirmed by the Senate on 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 recorded with the court December 19, 1910.

* The statement in 218 U. S. v, and 219 U. S. iii, that MR. JUSTICE VAN DEVANTER was appointed to succeed MR. JUSTICE MOODY was error.

† The statement in 218 U. S. v, and 219 U. S. iv, that MR. JUSTICE LAMAR was appointed to succeed MR. JUSTICE WHITE was error.

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.

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 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.) Foreign Statutes.

(D.) Treaties.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1910.

VIRGINIA *v.* WEST VIRGINIA.

IN EQUITY.

No. 3, Original. Argued January 20, 23, 24, 25, 26, 1911.—Decided March 6, 1911.

A suit brought by one State against another, formed by its consent from its territory, to determine what proportion the latter should pay of indebtedness of the former at the time of separation, is a quasi-international controversy and should be considered in an untechnical spirit. In such a controversy there is no municipal code governing the matter and this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone.

A State is superior to the forms that it may require of its citizens; and where a part of a State separates and is created into a new State, a contract can be created by the constitutive ordinance of the parent State followed by the creation of the contemplated State.

A provision of the constitution of a new State, which is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent State and by Congress as embodying a just term which conditions the parent's consent, amounts to a contract.

In this case, the ordinance of Virginia, the constitution of West Virginia, and the act of Congress admitting West Virginia into the Union, when taken together, establish a contract that West Virginia will pay her share of the debt of Virginia existing at the time of separation.

Where all expenditures for which the debt of a State is created have the ultimate good of the whole State in view, the whole State, and not the particular locality in which the improvements are made, should equally bear the burden; and so *held* in apportioning the debt of Virginia between that State and West Virginia, that the latter should bear its share of the debt so created.

Provisions in the constitution of one State which is a party to a contract with another State cannot be taken as the sole guide to determine obligations under the contract.

What is just and equitable under a contract between States is a judicial question within the competence of this tribunal to decide.

A State may, by suit in this court, enforce against another State a contract in the performance of which the honor and credit of the plaintiff State is concerned. *New Hampshire* v. *Louisiana*, 108 U. S. 76, distinguished.

The liability assumed by West Virginia to bear a fair proportion of the debt of Virginia is a deep-seated equity not discharged by the fact that the creditors of Virginia may have released that State from the obligation of the portion to be assumed by West Virginia as ultimately determined; and Virginia may maintain a suit in this court to determine the liability of West Virginia even if the proceeds are to be applied to those holding certificates on which Virginia is no longer liable.

In apportioning the debt of Virginia between that State and West Virginia, the court rejects other methods proposed and adopts the ratio determined by the master's estimated valuation of real and personal property of the two States at the date of separation.

The value of slaves is properly excluded from such valuation.

There are many elements to be considered in determining the liability for interest by a newly created State on its share of the debt of the parent State, and this court will, before passing on that question in a suit of this nature, afford the parties an opportunity to adjust it between themselves.

A suit between States to apportion debt is a quasi-international controversy involving the honor and constitutional obligation of great States, which have a temper superior to that of private litigants; and, when this court has decided enough, patriotism, fraternity of the Union and mutual consideration should bring the controversy to an end.

THE facts, which involve the adjustment between Virginia and West Virginia of the debt of Virginia at the time

of the formation of the State of West Virginia, are stated in the opinion.

Mr. Samuel W. Williams, Attorney General of Virginia, *Mr. William A. Anderson*, *Mr. Randolph Harrison* and *Mr. John B. Moon* for Virginia:

The insistance of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to be ascertained under the Wheeling ordinance construed so as not to defeat the expressed controlling purpose of its enactment, and qualified and ruled by the provisions of Article VIII of the West Virginia constitution, upon which the consent of the legislature of Virginia and of the Congress of the United States to the formation of the new State was predicated.

Agreeably to the decision of this court in its opinion, delivered by the late Chief Justice, the view of Virginia is, and has been, that the ordinance and the provisions of the West Virginia constitution, should be read as being in *pari materia;* but that the constitutional provision, being the latest, must prevail, if, and whenever there is any conflict between them.

Under paragraph 1 of the master's report, the public debt of the Commonwealth of Virginia as of January 1, 1861, is ascertained to be $33,897,073.82. The only controverted questions which have arisen under this paragraph have been as to the inclusion of the bonds of the Commonwealth, held by her Sinking Fund Board, and her Literary Fund Board, as part of the public debt. Virginia withdraws her objections to the master's action in excluding these bonds from the amount of the public debt.

Under paragraph 2 of the master's report, "the extent and assessed valuation of the territory of Virginia and of West Virginia, June 20, 1863, and the population thereof, with and without slaves, separately," as ascertained and reported by the master, are acceptable to Virginia.

Under paragraph 3 of the master's report, he has reported "all expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted."

This is one of the accounts which is called for under § 9 of the Wheeling ordinance. The only questions to be considered in determining whether any particular expenditure made during that period should be charged against West Virginia, are: First, Was it made by Virginia, and Second, Was the money expended in West Virginia? The expenditures made in West Virginia in the construction of the Covington & Ohio Railroad, amounting to $1,146,460.42, are allowed by the master, but this allowance is objected to by West Virginia on the ground that by reason of the public acts and transactions of Virginia and West Virginia, in reference to this railroad, Virginia has lost her right to have those expenditures charged against West Virginia.

The Wheeling ordinance prescribed the basis on which the proportion of the Virginia debt to be assumed by West Virginia was to be ascertained and vested in the new State the ownership of the portion of the Covington & Ohio Railroad located in Virginia, and there is nothing in the concurrent acts of the two States, in reference to the Covington & Ohio Railroad, which repeals or modifies the provisions of that ordinance.

The master rejected, as proper charges against West Virginia, all expenditures made by Virginia in West Virginia territory in the construction of works of internal improvement located in West Virginia, but built through the agency of joint stock companies.

The master erred in the rejection of those items of the account against West Virginia. Paragraph 3 of the decree, closely following the terms of the Wheeling ordinance, directs the master to ascertain and report "*all*

expenditures made by the Commonwealth of Virginia within the territory now constituting West Virginia." The ground relied on for excluding these items from the debit account against West Virginia is, because of the manner in which the expenditures were made; that is, because they were not made by the State directly, through her own officers or employés, but were made through the medium of joint stock companies. There is no such qualification of the expenditures which are to be charged, either in the decree or in the ordinance. The words "direct" or "indirect" are not found in either the decree or in the ordinance. No such classification is to be found in either the decree or in the ordinance.

The view which is here urged as to the expenditures of the Commonwealth in works of internal improvement constructed in West Virginia territory, and as to the classification of such of those expenditures as were made through the agency of joint stock companies, is the view heretofore consistently taken by the representatives of West Virginia most familiar with the subject. The construction of the Wheeling ordinance in respect to the expenditures made by Virginia, through the agency of joint stock companies in the territory of West Virginia and adopted by public officials of West Virginia, remained unchallenged for more than a generation, and until this case, when this new and forced construction is attempted to be placed upon the Wheeling ordinance. We submit that this construction is not warranted, and that there is no authority for the master, under the language of the decree, which requires a report of all expenditures, to classify expenditures as "direct" and "indirect."

The fourth paragraph of the decree directs the master to ascertain "such proportion of the ordinary expenses of the government of Virginia, since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the

basis of the average total population of Virginia, with or without slaves, as shown by the census of the United States."

This inquiry is manifestly predicated upon the language of the Wheeling ordinance, which provides that the new State shall be charged with "a just proportion of the ordinary expense of the state government, since any part of the said debt was contracted."

Nor are the ordinary expenses of a state government merely those which are necessary and regular in their occurrence, but quite as largely such as are usual, though not periodical, and such as are appropriate though not essential to the needs and aspirations of an enlightened and progressive people, and as are lawful.

In a modern State, and particularly in a State of the American Union, caring for, conserving and promoting the economic and material, as well as the social, sanitary, physical, intellectual and moral welfare of its people, many expenditures which may not be regarded as strictly governmental, and some which may not be absolutely necessary, are proper, lawful, usual and ordinary.

Under the decree the master was directed to ascertain and report "such proportion of the ordinary expenses of the government of Virginia since any of the debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia, on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

This paragraph is clearly in the alternative with the last clause of paragraph 4. The land assessments in Virginia were made in 1856, seven years before June, 1863, at which latter date at least four-fifths of the present territory of Virginia and one-fifth of the present territory of West Virginia had been ravaged and desolated by war, so that the valuation in 1856 afforded no just measure of

value in 1863. The lands were assessed as of their cash value in 1856. The personal property in Virginia counties was assessed annually on the first of February of each year, as of its then value, in the currency which then constituted the medium of exchange and the standard of value. The currency in 1863, with reference to which, as a standard of value, all their transactions were conducted was the depreciated currency of the Confederate States. The market values of all property, real and personal, in Confederate Virginia, was, throughout 1863, fictitiously enhanced by reason of the depreciation of the currency in circulation in those regions, in which currency alone those values were measured. The uncontradicted evidence in the case shows that the depreciation in value extended not only to slaves, but to all personal property, and was at least fifty per cent as a minimum.

The sixth paragraph of the decree directs the master to ascertain all money paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

The defendant objects to the master's findings under this head because he fails to give West Virginia credit for certain items.

The master's findings upon these items is evidently justified by the facts, and is consistent with the language of the decree and of the Wheeling ordinance.

The amounts received by Virginia upon the accounts and items objected to by defendant, particularly the dividends upon bank stock, were in no sense money paid into the treasury of the Commonwealth from the counties included in the State of West Virginia. They were profits earned by Virginia's own money which she had invested in fiscal institutions, and not money paid to Virginia from West Virginian counties, within the meaning or within the reason of the sixth paragraph of the decree, or

of the ninth section of the Wheeling ordinance, on which that paragraph is based.

The seventh paragraph of the decree directs an account ascertaining "the amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items, and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof."

This direction of the decree was doubtless given in response to the provisions of §§ 1, 2 and 5 of the act of the Wheeling legislature passed February 3, 1863. There were large amounts of property, chiefly unappropriated, abandoned, and delinquent and forfeited lands to which the Commonwealth had title, which passed to the new State by the said act of the Wheeling legislature and with the value of which property West Virginia was chargeable by the terms of that act, upon such settlement as should be had between the two States.

It was found to be impracticable to obtain satisfactory evidence of the disposition which had been made by the new State of large quantities of land, delinquent and forfeited to the Commonwealth prior to June, 1863. So that the only charges made by Virginia under the seventh paragraph of the decree are for money and bank stocks actually received by West Virginia from Virginia, after the formation of the new State in 1863 and 1864.

West Virginia received from the Commonwealth amounts aggregating $170,771.46, as assented to and certified by the accountants of both parties, and is reported by the master at page 181 at his report. Under these circumstances it is difficult to understand upon what ground the master excluded these items amounting to $170,771.46, as to which the facts are unquestionable.

These sums of money were undoubtedly received by the new from the old State. At that time the officials of the restored government of Virginia were West Virginians. That government dominated by West Virginians and the new State of West Virginia could appropriate and take out of the treasury of the State of Virginia at Wheeling, whatever it chose, and it did undoubtedly receive from the restored government of Virginia $170,771.46 for which sum it is properly chargeable.

What should West Virginia pay? What is West Virginia's share of the debt?

There can be no question but that the provisions of Article 8, § 8 of the West Virginia constitution, the act of Virginia and the act of Congress created a compact, and that the provisions of the constitution constituted an essential stipulation and condition upon which the consent of the legislature of Virginia to the creation of the new State was predicated. The Congress of the United States would never have given its consent to the partition of Virginia, and the erection of the new State out of her domain, but for the fact that the new State had undertaken to assume an equitable proportion of the then existing debt of the Commonwealth of Virginia, and pay the same with interest thereon.

As to the liability of West Virginia for interest; the contract here considered was a Virginia contract. Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due the debtor is bound to pay interest unless relieved from this obligation by agreement. "The interest follows the principal as the shadow does the substance." The decisions of the highest court in West Virginia are in accord with the decisions of the Virginia courts. This rule is applied in Virginia to debts due by the Commonwealth. The framers of the Wheeling ordinance must be presumed to have drawn that instru-

ment with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest courts.

The language of the Wheeling ordinance is that "The new State shall take upon herself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," etc.

The debt of Virginia therein referred to was an interest-bearing debt. It was evidenced by the bonds of the Commonwealth, all of which, by the express terms of the obligations, bore interest, payable in the future.

The stipulation of West Virginia expressed in her constitution and accepted and acted upon by Virginia, was that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

The claim of Virginia is that West Virginia is bound both by the terms of the Wheeling ordinance and of her first constitution to pay a just and equitable part of this debt, with interest thereon until the same shall be fully paid, and that she shall not be suffered to repudiate either obligation.

Mr. Holmes Conrad, counsel for the bondholding creditors, appearing as *amicus curiæ:*

Counsel for bondholders dissents from the views expressed in the briefs and arguments of the Attorneys General of Virginia and West Virginia, respectively, as to the validity and application here of the ninth section of the Wheeling ordinance.

1. The ninth section of the ordinance was not "the basis upon which the consent of the Commonwealth of Virginia was given to the formation of the new State." Such ninth section was never, for one instant of time, recognized by any convention or legislature as having

any binding force upon either State or person, and that as a proposition made by Virginia to West Virginia it was never accepted by the latter State.

2. The ninth section was not "a stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given and which was afterwards accepted and assented to by the people of West Virginia."

3. It was not "a contractual or a fundamental provision, and it did not constitute a primary obligation, or lie at the foundation of the right of West Virginia to be a State."

West Virginia became a State by being admitted into the Union by the Congress of the United States, upon the consent, first obtained, of the restored State of Virginia, and such consent, in its express terms, referred to the constitution framed for West Virginia, and did not by expression or implication refer to the ordinance or to any of its provisions.

4. The "basis of settlement prescribed by the Wheeling ordinance," whether taken alone or in connection with any legislation or constitutional provision, was never binding "on both States" or on either State.

It was not referred to in the case of *Virginia* v. *West Virginia*, 11 Wall. 39, and, as shown by Mr. Faulkner, the counsel for West Virginia in that case, had no relevancy or connection with the line of argument taken by either the counsel or the court in that case.

The bondholding creditors, whose interests this court has allowed to be represented here, are creditors of Virginia and of West Virginia alike. They are not formal parties to this cause, but their interests are fully recognized and secured by the several acts of the General Assembly of Virginia, which form part of this record, and under which Virginia has received and holds the bonds deposited by them, as a trustee, as to the unfunded one-third of the amounts of such bonds.

On the part of the bondholding creditors, it is insisted that the only just and reasonable plan for ascertaining the proportion of the debt proper to be borne by West Virginia, is that stated and approved by the writers on international or public law, and which was adopted by this court, in its opinion, delivered by Mr. Justice Field, in *Hartman* v. *Greenhow*, 102 U. S. 672.

Both on the ground of international law, and on the express provision of the constitution of the State, under which Congress admitted it into the Union, the liability of West Virginia, for an equitable proportion of the public debt of Virginia, appears to be inevitable.

The bonds evidencing the public debt of Virginia, prior to the first day of January, 1861, and deposited by the holders thereof, with the Commonwealth of Virginia, under the provisions of the several funding acts, were not cancelled or extinguished as to the one-third of the amount thereof, estimated to be the equitable proportion of such debt to be borne by the State of West Virginia.

The Commonwealth of Virginia has never been discharged from liability on the bonds issued by her prior to January 1, 1861, except as to the extent of the two-thirds of the amount thereof for which amount the holders surrendered them, as to such two-thirds, and received in lieu thereof the new bonds of the Commonwealth.

The Wheeling ordinance, as shown by its title, was "to provide for the formation of a new State, out of a portion of the territory of this State." All of its sections, except the ninth, were directed to that end. The State was formed when its constitution was framed and adopted by its people. The ordinance then became *functus officio*, and ceased to have any operation. The ninth section, as contended by counsel for West Virginia, was a proposition made by Virginia and tendered to West Virginia.

West Virginia's time for accepting it, was when she was assembled in convention in November, 1861; then, and

only then, while she was framing her constitution could she have signified her acceptance of the proposition, by embodying it in her constitution. She did not embody it. She embodied something altogether different, and made no reference to the ninth section of the Wheeling ordinance.

A "plan by which the new State should ascertain her just proportion of the public debt of Virginia" was not a matter as to which the parent State, Virginia, could prescribe or dictate terms to the new State. In none of the compacts made by States does it appear that the parent State has ever sought or been allowed to impose on the new State any such burdens, limitations or conditions, as were not immediately connected with the territory ceded to the new State. The extent of such territory, its boundaries, and the rights and assessments incident thereto, and these only, can be the subject-matters of such compacts. All other matters fall within the domestic power and control of the new State.

At no time and in no manner did West Virginia ever accept the proposition contained in the ninth section of the Wheeling ordinance. The provision made by West Virginia in her constitution was not an acceptance of the ninth section of the Wheeling ordinance. It differed in its most material features from that section. Acceptance of a proposition must be absolute and unconditional without the omission or addition of a single term.

The method of ascertainment proposed by the ninth section of the ordinance cannot be accepted as a proper plan for ascertaining West Virginia's just proportion of the public debt of Virginia, because—as the master has found in his report—"The Wheeling ordinance is not predicated upon the *amount* of the public debt," and counsel for West Virginia have repeatedly stated that "the ninth section of the ordinance has no relation to the amount of the public debt of Virginia," etc. "The amount of the

Virginia debt is not a factor to be taken into consideration in ascertaining West Virginia's just proportion."

The "just proportion" of an amount cannot be ascertained without knowing the *amount* itself.

The convention that framed the constitution for the proposed new State did not regard itself as bound by any suggestions offered by the Wheeling ordinance. It either ignored or repudiated the suggestion made as to the name of the new State, and also as to the plan for ascertaining the proper proportion of the public debt of Virginia to be borne by West Virginia.

The act of Congress of December 31, 1862, admitting the State of West Virginia into the Union, did not refer to the Wheeling ordinance, but did refer only to the act of the Virginia legislature and to the constitution adopted by West Virginia.

The act of the legislature of Virginia giving consent to the erection of the new State within its territory did not refer to the Wheeling ordinance, and her consent was not given on any condition, either express or implied, that the ordinance or any of its provisions should form a compact between the two States, but such consent was given to the formation of the new State according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, proposed by the convention which assembled in Wheeling on November 26, 1861.

The Wheeling ordinance was adopted by a convention which sat in August, 1861, and the purpose of the Virginia legislature appears to have been to exclude the inference that it referred in any way to the acts of that convention.

Mr. Charles E. Hogg, *Mr. George W. McClintic* and *Mr. John C. Spooner*, with whom *Mr. William G. Conley*, Attorney General of the State of West Virginia, *Mr.*

Wm. Mollohan, Mr. Wm. M. O. Dawson and *Mr. W. G. Matthews* were on the brief, for West Virginia:

When the great transactions occurred which are under review, the Confederate States of America had been formed. Ordinances of secession had been passed by South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana. Virginia had passed an ordinance of secession, had borrowed $1,000,000, had called for 10,000 men to serve for twelve months and has arranged with the Confederate government for admission to the Confederacy, and in the meantime that her troops should, under the Confederate government, be employed against the United States.

Her troops had seized the Norfolk and Gossport Navy Yards, the arsenal at Harper's Ferry, the Customs Houses, and other property of the United States within her borders; had hauled down the flag of the United States and hoisted in its place another. President Buchanan in a message to Congress had taken the position that there was no power in the Federal Government under the Constitution to coerce a State. Fort Sumter had been surrendered.

President Lincoln had called for 75,000 troops to serve three months. The battle of Bull Run had been fought in which the Federal troops were disastrously defeated. The "New York Tribune," edited by Mr. Greeley, exercising a most potent influence upon public opinion, advocated a peaceful separation of the States determined to withdraw, and many eminent men of undoubted love for the Union in both parties seemed to be of the same opinion. There was grave doubt throughout the country as to the ultimate result. The people of West Virginia could not be blind to the fact that if the Confederacy should be established, that territory would, unless action were taken, be irrevocably a part of that Confederacy.

Isolated from eastern Virginia, and differing in senti-

ment from her people in respect to the right of secession and the institution of slavery, her people are not to be justly chided here or elsewhere for embracing that opportunity to become a State in the Union. In this situation, is to be found the genesis of West Virginia; and in the light of this situation, her people are to be judged and her compacts and "constating" instruments are to be construed.

This court has never decided that when a State is divided the debts of the original State should be ratably apportioned between it and the new State. That question was not involved in or decided by either *Hartman* v. *Greenhow*, 102 U. S. 672, or *Antoni* v. *Greenhow*, 107 U. S. 769.

The true rule of public law in case of the division of a State is that general debts are apportioned on the basis of taxable value. Local debts are assumed by the State for the exclusive benefit of whose territory they were incurred. See Hall's International Law, 78, 80. No rule of international law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon its successor. See also Treaty of Berlin of 1878, and Huber, Nos. 125–135 and 205; Oppenheim's Int. Law, § 84; and Glenn's Int. Law, 36. As to effect of change of sovereignty upon the public rights and obligations, see Hannis Taylor, Int. Law, §§ 166, 168. Pradier Fodéré, in "Traité de Droit International Public," Vol. 1, § 156, states that the state to which cession is made is bound by local debts of ceded territory.

Bluntschli says, § 59, that the debts of the state ought not to be divided proportionally to the population, but that the taxes furnish a juster basis. Bonfils, 3d ed., §§ 223–226, limits the liability exclusively to the debts contracted for the exclusive benefit of its territory, and makes taxation the basis. Franz v. Liszt, University of

Berlin, 2d ed., Berlin, 1902, § 23, p. 175, takes the same view; see also Piédelièvre, Paris, 1894, §§ 154, 155. The proportion of the debt to be borne should be determined in accordance with the relative wealth of the detached portion and of the remainder of the dismembered state, and this wealth is disclosed by the taxes. Alphonse Rivier, Paris, 1826, Vol. 1, p. 213 (Art. 40, V).

Pasquale Fiore, Int. Law, § 132, of his codified Int. Law, § 360 of Nouveau Droit International, says that Bluntschli is correct, that the apportionment should not be made proportionally to population, but apportioned proportionally to the taxes. Pradier Fodéré, §§ 156, 157, states that the state to which cession is made is bound by local debts of ceded territory, citing as instances the acquisition of Lombardy and Venice by Italy, and the Alsace-Lorraine cession of 1871, as the general rule, to which the treaty of Berlin of 1878, imposing part of the public Turkish debt upon Bulgaria, Montenegro, Servia, was an exception.

Max Huber, on Staatensuccession (1898), says, pp. 90–92, § 34, that the division *pro rata regionis* has no reasonable basis, and on p. 96 limits the assumption to special debts; see also § 272, as to debts incurred in the interest of the particular domain. See also Henri Appleton on Annexation and Debts, Paris, 1895, Ch. IV, § II, 65–67.

Even if the court should be of opinion that the rule of international law does not govern the present case, yet if the court, apart from the method prescribed by the ordinance and notwithstanding the provision in the constitution of West Virginia referring the matter for ascertainment to the legislature of that State, should undertake to determine the equitable proportion of the old Virginia debt which West Virginia should assume, it cannot fail to give great weight to the authorities on international law which we have cited. The rules of international law are

based entirely upon considerations of equity and fairness. They have no force nor sanction except from the consent of nations by reason of their evident justice. This court, therefore, in determining what would be an equitable apportionment of the Virginia debt, would undoubtedly desire to take into most careful consideration the unanimous opinion of the modern international law authorities that, in apportioning the debt of a state after its division, equity requires a distinction to be made between the portion of the debt which is local or special in its character and that which is general, so that the parent state and the new state are bound respectively to assume the whole of the local debts relating to their respective territories, leaving only the general debt to be apportioned on the basis of taxable value.

The distinction between general and local debts was recognized in the division of territory of Dakota. Act of Congress of Feby. 22, 1889, § 6, 25 U. S. Stat. 682.

The distinction between general and special debt was discussed in negotiation of treaty between United States and Spain. The American commissioners recognized the distinction, but refused to accede to the demand of Spain, upon the ground that Cuba had had no debt, but, on the contrary, had been a self-supporting colony, and the commissioners considered that the indebtedness was incurred, and its proceeds used, to wage war upon Cuba and to resist by arms the aspirations and struggles of her people to be freed from long-continued despotism and misrule and that the debt was, therefore, a part of Spain's national or general debt.

If we had taken over Cuba in the absence of strife between Cuba and Spain and the United States and Spain, and there had been found an indebtedness incurred by Spain, the proceeds of which had been expended in public improvements in Cuba and for the benefit and betterment of the island and its inhabitants, the question would have

been a different one, and from the standpoint of international law and justice, our attitude must have been different.

The distinction between general debt and local debt is substantial and just and rests upon a sound principle.

The public debt of Virginia prior to January 1, 1861, was a local or special and not a general debt.

In respect of all of the debt, the proceeds of which were expended in West Virginia, the schedule shows that the loans which she effected were numbered as required by law, the certificate of debt or certificates of debt, referring to the act which authorized the particular expenditure, so that it is not only true that the debt represents expenditures for internal improvements, but it is true, so far as the expenditures in West Virginia were concerned, that the moneys which were expended, the proceeds of loans, are traceable to the particular improvements and the stocks and dividends thereon were pledged for the repayment of the loan.

The rule of public law does not govern this case because the Wheeling ordinance and the constitution of West Virginia constitute a special agreement as to the proportion of the old Virginia debt to be assumed by West Virginia.

Virginia is not in a position to insist upon the elimination of the ordinance from the case. Virginia does not contend that the ordinance has ceased to be binding. There is no conflict between the ordinance and the constitution; the latter was adopted within ninety days of the former. The constitutional provision was silent as to method. There was no occasion for repeating in it the language of the ordinance so recently adopted as to the ordinance being a compact. See *Virginia* v. *West Virginia*, 11 Wall. 39; and as to whether Congress consented to it, see *Virginia* v. *Tennessee*, 148 U. S. 503; *Wedding* v.

Meyler, 192 U. S. 582. It certainly was a compact, and wherever it was not carried into the constitution, it remains binding as such.

When the Congress admitted West Virginia into the Union, there were two States, and the ordinance so far as it was not merged into the constitution, was a compact binding from the beginning.

The vice in the argument for Virginia is in the assumption that the ordinance is to be read as if it consisted only of these words: The new State shall take upon itself a just proportion of the public debt of Virginia prior to the first of January, 1861. The ordinance was not confined to the debt.

"Just" and "equitable" are synonymous. See Webster; "1. Justice, right."

If the ordinance is in conflict with the constitution the ordinance must be wholly eliminated; and with the ordinance eliminated the ascertainment of West Virginia's proportion of the debt must be left to the legislature of West Virginia. What proportion of the debt of a county or a city or a town which is divided by legislative authority, shall be borne by the portion set off to make a new town, or included within the boundaries of another county, city or town, is a legislative question and not a judicial one. *Laramie Co.* v. *Albany Co.*, 92 U. S. 307; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514. If the legislature of West Virginia has failed, with or without justification, to discharge the duty imposed upon it by the constitution, the matter was left by the legislature of Virginia and by the Congress to the honor of the legislature of West Virginia. There is no recourse to courts. With the ordinance eliminated the matter is not justiciable. *Tulare County* v. *Kings County*, 117 California, 195; *Los Angeles County* v. *Orange County*, 97 California, 329; *Taylor* v. *Brewer*, 1 Maule & Selwin, 290; and *Cummer* v. *Butts*, 40 Michigan, 322.

This court, however, has declared that the ordinance and the constitution do not conflict and are to be read in *pari materia*. See former opinion in this case, 206 U. S. 290, 319.

The master was right in holding that bonds held by the Sinking Fund and by the Literary Fund were not a part of the public debt of Virginia. *Board of Public Works* v. *Gannt*, 76 Virginia, 465; *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz*, 107 U. S. 711.

The master was right in excluding under paragraph III of the decree expenditures by corporations in which Virginia was a stockholder.

Virginia legislature and courts recognize the distinction between private corporations with stock and public corporations without stock. *Sayre* v. *The Northwestern Turnpike Road*, 10 Leigh, 454.

The master was wrong in finding that interest on the public debt of Virginia was part of the ordinary expenses of the state government.

Interest on a state debt is not an ordinary expense of government because it is payable only during a limited period.

Interest on the old Virginia debt was not an ordinary expense of government because the debt was incurred for extraordinary purposes.

West Virginia is not bound to pay interest from January 1, 1861, on the proportion of the old Virginia debt assumed by her.

There is no basis for Virginia's claim for interest. *Commonwealth* v. *Marston's Administrator*, 9 Leigh, 36.

Neither by the ordinance nor by her constitution did West Virginia *in præsenti* assume any portion of the public debt of Virginia.

The Virginia rule as to private contracts that interest follows the principal does not and cannot apply to contracts between sovereign States. *Higginbotham's Execu-*

trix v. *Commonwealth*, 25 Grattan, 627, does not apply in this case.

United States v. *North Carolina*, 136 U. S. 211, holds that interest is not to be awarded against a sovereign government, unless its consent to pay interest has been clearly manifested by an act of its legislature, or by a lawful contract of its executive officers. Citing *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251, 260.

West Virginia did not agree to assume a just proportion of all the outstanding obligations of Virginia, but only of her debt.

There is no evidence that the improvements constructed by Virginia within her present limits were for the benefit of the region now West Virginia.

Under the ordinance and her constitution West Virginia cannot be charged with interest until after the ascertainment, in the manner prescribed, of her equitable proportion of the old Virginia debt.

If there had been any intent to assume, or pay, the accrued interest on the bonds of Virginia, outstanding, the constitution would have so expressed it.

Following the principle announced in *United States* v. *North Carolina*, 136 U. S. 211, many of the state courts have laid down in distinct terms the same proposition. *Sawyer* v. *Colgan*, 102 Florida, 293; *Hawkins* v. *Mitchell*, 34 Florida, 421; *Molineaux* v. *State*, 109 Florida, 380; *Flint &c. R. R. Co.* v. *State Auditors*, 102 Michigan, 502; *Carr* v. *State*, 127 Indiana, 204; *S. C.*, 22 Am. St. Rep. 624, note, p. 448.

Virginia alone is responsible for the delay in apportioning the debt and West Virginia cannot be charged with that delay.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the Commonwealth of Vir-

ginia to have the State of West Virginia's proportion of the public debt of Virginia as it stood before 1861 ascertained and satisfied. The bill was set forth when the case was before this court on demurrer. 206 U. S. 290. Nothing turns on the form or contents of it. The object has been stated. The bill alleges the existence of a debt contracted between 1820 and 1861 in connection with internal improvements intended to develop the whole State, but with especial view to West Virginia, and carried through by the votes of the representatives of the West Virginia counties. It then sets forth the proceedings for the formation of a separate State and the material provisions of the ordinance adopted for that purpose at Wheeling on August 20, 1861, the passage of an act of Congress for the admission of the new State under a constitution that had been adopted, and the admission of West Virginia into the Union, all of which we shall show more fully a little further on. Then follows an averment of the transfer in 1863 to West Virginia of the property within her boundaries belonging to West Virginia, to be accounted for in the settlement thereafter to be made with the last-named State. As West Virginia gets the benefit of this property without an accounting, on the principles of this decision, it needs not to be mentioned in more detail. A further appropriation to West Virginia is alleged of $150,000, together with unappropriated balances, subject to accounting for the surplus on hand received from counties outside of the new State. Then follows an argumentative averment of a contract in the constitution of West Virginia to assume an equitable proportion of the above-mentioned public debt, as hereafter will be explained. Attempts between 1865 and 1872 to ascertain the two States' proportion of the debt and their failure are averred, and the subsequent legislation and action of Virginia in arranging with the bondholders, that will be explained hereafter so far as needs. Substantially all the bonds outstanding in 1861

have been taken up. It is stated that both in area of territory and in population West Virginia was equal to about one-third of Virginia, that being the proportion that Virginia asserts to be the proper one for the division of the debt, and this claim is based upon the division of the State, upon the above-mentioned Wheeling ordinance and the constitution of the new State, upon the recognition of the liability by statute and resolution, and upon the receipt of property as has been stated above. After stating further efforts to bring about an adjustment and their failure, the bill prays for an accounting to ascertain the balance due to Virginia in her own right and as trustee for bondholders and an adjudication in accord with this result.

The answer admits a debt of about $33,000,000, but avers that the main object of the internal improvements in connection with which it was contracted was to afford outlets to the Ohio River on the west and to the seaboard on the east for the products of the eastern part of the State, and to develop the resources of that part, not those of what is now West Virginia. In aid of this conclusion it goes into some elaboration of details. It admits the proceedings for the separation of the State and refers to an act of May, 1862, consenting to the same, to which we also shall refer. It denies that it received property of more than a little value from Virginia or that West Virginia received more than belonged to her in the way of surplus revenue on hand when she was admitted to the Union, and denies that any liability for these items was assumed by her constitution. It sets forth in detail the proceedings looking to a settlement, but as they have no bearing upon our decision we do not dwell upon them. It admits the transactions of Virginia with the bondholders and sets up that they discharged the Commonwealth from one-third of its debt and that what may have been done as to two-thirds does not concern the defend-

ant, since Virginia admits that her share was not less than that. If the bonds outstanding in 1861 have been taken up it is only by the issue of new bonds for two-thirds and certificates to be paid by West Virginia alone for the other third. Liability for any payments by Virginia is denied and accountability, if any, is averred to be only on the principle of § 9 of the Wheeling ordinance, to be stated. It is set up further that under the constitution of West Virginia her equitable proportion can be established by her legislature alone, that the liquidation can be only in the way provided by that instrument, and hence that this suit cannot be maintained. The settlement by Virginia with her creditors also is pleaded as a bar, and that she brings this suit solely as trustee for them.

The grounds of the claim are matters of public history. After the Virginia ordinance of secession, citizens of the State who dissented from that ordinance organized a government that was recognized as the State of Virginia by the Government of the United States. Forthwith a convention of the restored State, as it was called, held at Wheeling, proceeded to carry out a long entertained wish of many West Virginians by adopting an ordinance for the formation of a new State out of the western portion of the old Commonwealth. A part of § 9 of the ordinance was as follows: "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new state during the said period." Having previously provided for a popular vote, a constitutional convention, etc., the ordinance in § 10 ordained that when the General Assembly should give

its consent to the formation of such new State, it should forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the new State might be admitted into the union of States.

A constitution was framed for the new State by a constitutional convention, as provided in the ordinance, on November 26, 1861, and was adopted. By Article 8, § 8, "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." An act of the legislature of the restored State of Virginia, passed May 13, 1862, gave the consent of that legislature to the erection of the new State "under the provisions set forth in the constitution for the said State of West Virginia." Finally Congress gave its sanction by an act of December 31, 1862, c. 6, 12 Stat. 633, which recited the framing and adoption of the West Virginia constitution and the consent given by the legislature of Virginia through the last mentioned act, as well as the request of the West Virginia convention and of the Virginia legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the act of Congress should take effect, and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a State on June 20, 1863.

It was held in 1870 that the foregoing constituted an agreement between the old State and the new, *Virginia* v. *West Virginia*, 11 Wall. 39, and so much may be taken

practically to have been decided again upon the demurrer in this case, although the demurrer was overruled without prejudice to any question. Indeed, so much is almost if not quite admitted in the answer. After the answer had been filed the cause was referred to a master by a decree made on May 4, 1908, 209 U. S. 514, 534, which provided for the ascertainment of the facts made the basis of apportionment by the original Wheeling ordinance, and also of other facts that would furnish an alternative method if that prescribed in the Wheeling ordinance should not be followed; this again without prejudice to any question in the cause. The master has reported, the case has been heard upon the merits, and now is submitted to the decision of the court.

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. *Missouri* v. *Illinois*, 200 U. S. 496, 519, 520. *Kansas* v. *Colorado*, 206 U. S. 46, 82–84. Therefore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits, with which we proceed to deal. See *Rhode Island* v. *Massachusetts*, 14 Peters, 210, 257. *United States* v. *Beebe*, 127 U. S. 338.

The amount of the debt January 1, 1861, that we have to apportion no longer is in dispute. The master's finding was accepted by West Virginia and at the argument we understood Virginia not to press her exception that it should be enlarged by a disputed item. It was $33,897,073.82, the sum being represented mainly by interest-bearing bonds. The first thing to be decided is what the final agreement was that was made between the two States. Here again we are not to be bound by techni-

cal form. A State is superior to the forms that it may require of its citizens. But there would be no technical difficulty in making a contract by a constitutive ordinance if followed by the creation of the contemplated State. *Wedding* v. *Meyler*, 192 U. S. 573, 583. And, on the other hand, there is equally little difficulty in making a contract by the constitution of the new State, if it be apparent that the instrument is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent State and by Congress as embodying a just term which conditions the parent's consent. There can be no question that such was the case with West Virginia. As has been shown, the consent of the legislature of the restored State was a consent to the admission of West Virginia under the provisions set forth in the constitution for the would-be State, and Congress gave its sanction only on the footing of the same constitution and the consent of Virginia in the last-mentioned act. These three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.

We are of opinion that the contract established as we have said is not modified or affected in any practical way by the preliminary suggestions of the Wheeling ordinance. Neither the ordinance nor the special mode of ascertaining a just proportion of the debt that it puts forward is mentioned in the constitution of West Virginia, or in the act of Virginia giving her consent, or in the act of Congress by which West Virginia became a State. The ordi-

nance required that a copy of the new constitution should be laid before Congress, but said nothing about the ordinance itself. It is enough to refer to the circumstances in which the separation took place to show that Virginia is entitled to the benefit of any doubt so far as the construction of the contract is concerned. See opinion of Attorney-General Bates to President Lincoln, 10 Op. Atty. Gen. 426. The mode of the Wheeling ordinance would not throw on West Virginia a proportion of the debt that would be just, as the ordinance requires, or equitable, according to the promise of the constitution, unless upon the assumption that interest on the public debt should be considered as part of the ordinary expenses referred to in its terms. That we believe would put upon West Virginia a larger obligation than the mode that we adopt, but we are of opinion that her share should be ascertained in a different way. All the modes, however, consistent with the plain contract of West Virginia, whether under the Wheeling ordinance or the constitution of that State, come out with surprisingly similar results.

It was argued, to be sure, that the debt of Virginia was incurred for local improvements and that in such a case, even apart from the ordinance, it should be divided according to the territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that two or three-fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one-fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole State

would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand. If we should attempt to look farther, many of the corporations concerned were engaged in improvements that had West Virginia for their objective point, and we should be lost in futile detail if we should try to unravel in each instance the ultimate scope of the scheme. It would be unjust, however, to stop with the place where the first steps were taken and not to consider the purpose with which the enterprise was begun. All the expenditures had the ultimate good of the whole State in view. Therefore we adhere to our conclusion that West Virginia's share of the debt must be ascertained in a different way. In coming to it we do but apply against West Virginia the argument pressed on her behalf to exclude her liability under the Wheeling ordinance in like cases. By the ordinance West Virginia was to be charged with all state expenditures within the limits thereof. But she vigorously protested against being charged with any sum expended in the form of a purchase of stocks.

But again, it was argued that if this contract should be found to be what we have said, then the determination of a just proportion was left by the constitution to the legislature of West Virginia, and that irrespectively of the words of the instrument it was only by legislation that a just proportion could be fixed. These arguments do not impress us. The provision in the constitution of the State of West Virginia that the legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be and an indication of the way. Apart from the

language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in nowise beyond the competence of a tribunal to decide.

The ground now is clear, so far as the original contract between the two States is concerned. The effect of that is that West Virginia must bear her just and equitable proportion of the public debt as it was intimated in *Hartman* v. *Greenhow*, 102 U. S. 672, so long ago as 1880, that she should. It remains for us to consider such subsequent acts as may have affected the original liability or as may bear on the determination of the amount to be paid. On March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, passed an act authorizing an exchange of the outstanding bonds, etc., and providing for the funding of two-thirds of the debt with interest accrued to July 1, 1871, by the issue of new bonds bearing the same rate of interest as the old, six per cent. There were to be issued at the same time, for the other one-third, certificates of same date, setting forth the amount of the old bond that was not funded, that payment thereof with interest at the rate prescribed in the old bond would be provided for in accordance with such settlement as should be had between Virginia and West Virginia in regard to the public debt, and that Virginia held the old bonds in trust for the holder or his assignees. There were further details that need not be mentioned. The coupons of the new bonds were receivable for all taxes and demands due to the State. *Hartman* v. *Greenhow*, 102 U. S. 672. *McGahey* v. *Virginia*, 135 U. S. 662. The certificates issued to the public under this statute and outstanding amount to $12,703,451.79.

The burden under the statute of 1871 still being greater than Virginia felt able to bear, a new refunding act was passed on March 28, 1879, reducing the interest and providing that Virginia would negotiate or aid in negotiating

with West Virginia for the settlement of the claims of certificate holders and that the acceptance of certificates 'for West Virginia's one-third' under this act should be an absolute release of Virginia from all liability on account of the same. Few of these certificates were accepted. On February 14, 1882, another attempt was made, but without sufficient success to make it necessary to set forth the contents of the statute. The certificates for balances not represented by bonds, "constituting West Virginia's share of the old debt," stated that the balance was "to be accounted for by the state of West Virginia without recourse upon this commonwealth."

On February 20, 1892, a statute was passed which led to a settlement, described in the bill as final and satisfactory. This provided for the issue of bonds for nineteen million dollars in exchange for twenty-eight millions outstanding, not funded, the new bonds bearing interest at two per cent for the first ten years and three per cent for ninety years; and certificates in form similar to that just stated, in the act of 1882. On March 6, 1894, a joint resolution of the Senate and House of Delegates was passed, reciting the passage of the four above mentioned statutes, the provisions for certificates, and the satisfactory adjustment of the liabilities assumed by Virginia on account of two-thirds of the debt, and appointing a committee to negotiate with West Virginia, when satisfied that a majority of the certificate holders desired it and would accept the amount to be paid by West Virginia in full settlement of the one-third that Virginia had not assumed. The State was to be subjected to no expense. Finally an act of March 6, 1900, authorized the commission to receive and take on deposit the certificates, upon a contract that the certificate holders would accept the amount realized from West Virginia in full settlement of all their claims under the same. It also authorized a suit if certain proportions of the certificates should be so de-

posited, as since then they have been—the State, as before, to be subjected to no expense.

On January 9, 1906, the commission reported that apart from certificates held by the State and not entering into this account, there were outstanding of the certificates of 1871 in the hands of the public $12,703,451.79, as we have said, of which the commission held $10,851,294.09, and of other certificates there were in the hands of the public $2,778,239.80, of which the commission held $2,322,141.32.

On the foregoing facts a technical argument is pressed that Virginia has discharged herself of all liability as to one-third of the debt; that, therefore, she is without interest in this suit, and cannot maintain it on her own behalf; that she cannot maintain it as trustee for the certificate holders, *New Hampshire* v. *Louisiana*, 108 U. S. 76; and that the bill is multifarious in attempting to unite claims made by the plaintiff as such trustee with some others set up under the Wheeling ordinance, etc., which, in the view we take, it has not been necessary to mention or discuss. We shall assume it to be true for the purposes of our decision, although it may be open to debate, *Greenhow* v. *Vashon*, 81 Virginia, 336, 342, 343, that the certificate holders who have turned in their certificates, being much the greater number, as has been seen, by doing so, if not before, surrendered all claims under the original bonds or otherwise against Virginia to the extent of one-third of the debt. But even on that concession the argument seems to us unsound.

The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two States. If one-third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining

two-thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire* v. *Louisiana* into play. For even if Virginia is not liable she has the contract of West Virginia to bear an equitable share of the whole debt, a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See *United States* v. *Beebe*, 127 U. S. 338, 342. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125, 126. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his *cestui que trust*. *Lloyd's* v. *Harper*, 16 Ch. D. 290, 309, 315. *Lamb* v. *Vice*, 6 M. & W. 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.

It remains true then, notwithstanding all the transactions between the old Commonwealth and her bondholders, that West Virginia must bear her equitable proportion of the whole debt. With a qualification which we shall mention in a moment, we are of opinion that the nearest approach to justice that we can make is to adopt a ratio determined by the master's estimated valuation of the real and personal property of the two States on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger share on West Virginia, but the relative resources of the

debtor populations are generally recognized, we think, as affording a proper measure. It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia $300,887,367.74, and for West Virginia $92,416,021.65. These figures are criticised by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia cannot complain of the result. They would give the proportion in which the $33,897,073.82 was to be divided, but for a correction which Virginia has made necessary. Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt, whereas at the ratio shown by the figures her share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the creditors were content to accept from her, say $22,598,049.21, is $3,333,212.26; subtracting the last sum from the debt leaves $30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have $7,182,507.46 as her share of the principal debt.

We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a final decree there would be figures to be agreed upon or to be ascertained by reference to a master. Among other things there still remains the question of interest. Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on the other. The circumstances of the asserted default and

the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar. As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.

UNITED STATES *v.* ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

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

No. 504. Argued February 28, 1911.—Decided March 13, 1911.

In determining whether an office is one continuously operated, a trifling interruption will not be considered; and *quære*, whether a railway station shut for two periods of three hours each day and open the rest of the time is not a station continuously operated night and day within the meaning of §§ 2 and 3 of the act of March 4, 1907, c. 2939, 34 Stat. 1415.

Under §§ 2 and 3 of the act of March 4, 1907, c. 2939, 34 Stat. 1415, a telegraph operator employed for six hours and then, after an interval, for three hours, is not employed for a longer period than nine consecutive hours.

The presence of a provision in one part of a statute and its absence in another is an argument against reading it as implied where omitted; and so *held* that the word "consecutive" is not to be implied in connection with limiting the number of hours during the twenty-four that telegraph operators can be employed under the act of March 4, 1907.

177 Fed. Rep. 114, affirmed.

THE facts, which involve the construction of the act of March 4, 1907, regulating the hours of service of railway employés, are stated in the opinion.

Mr. Wm. S. Kenyon, Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Philip J. Doherty*, Special Assistant United States Attorney, were on the brief, for the United States:

The telegraph office at Corwith was "continuously operated night and day" within the meaning of the statute. *Wood* v. *Sutcliffe*, 8 Eng. L. & Eq. 217, 220; *Garrison* v.

United Railways Co., 91 Maryland, 347. Such was the intent of Congress.

The distinction was between offices "operated only during the daytime" on the one hand and those operated "night and day" on the other hand. No distinction was attempted or intended between offices operated without interruption all day and all night, and such as were operated practically all day and all night, but not without interruption for one or another reason. Congress intended by the proviso to legislate concerning all offices, towers, etc.

In using the language in question Congress was merely classifying offices into two general classes and was not attempting exact definitions of either class; too much significance should not be given to a single word, but the general purpose of Congress should be carried out by construction.

The word "continuously" may be read in the sense of "regularly" or "habitually" or "customarily." *Hodge* v. *U. S. Steel Corporations*, 64 N. J. Eq. 807.

There is nothing in the statute which says that the operations must continue all day and all night.

As to the meaning of the expression "on duty for a longer period than nine hours in any twenty-four hour period," the purpose of the act is to secure rest for the employé in order that he may be able better to do his work with more safety to the public. Such rest should be a continuous rest, not intermittent, as would be possible under the construction contended for by defendants.

The Government contends that the term "on duty for a longer period than nine hours in any twenty-four hour period" is plain, and that the word period must be given some significance; that the period commences when the operator goes to work and continues nine hours therefrom. The word "period" cannot be construed as an unmeaning and useless word in this statute; it carries

with it the idea of a cycle, a term. A man works for a period of time. That may not mean that he works every hour of the time; that he cannot stop for lunch or sleep; but whether he stops or whether he works, the period goes on. *Sampson* v. *Peaslee*, 20 How. 571; 22 Am. & Eng. Ency. Law, 678; see definition in Webster and Standard Dictionary and Crabb's English Synonyms, p. 799; *People* v. *Lesk*, 67 N. Y. 521, 528; *State* v. *Strauss*, 49 Maryland, 288; *Re Becker*, 80 N. Y. Supp. 1115; Sutherland on Stat. Const., 2d ed., § 369.

The railroad's practice of splitting tricks breaks into the consecutive hours of rest which it was the intention of Congress that operators should have. Even if this is a penal statute, the forced and technical construction contended for by respondent should not be given. *Northern Securities Co.* v. *United States*, 193 U. S. 357; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Morris*, 14 Pet. 464; *People* v. *Bartow*, 6 Cowan, 290.

The mischief sought to be remedied is the splitting of tricks and the long hours of service. The remedy is continuous hours of rest. Hence, a period of nine hours of duty and no more in any twenty-four hour period. See *Heyden's Case*, 3 Coke, 7; Endlich on Interp. Stat., § 103; Potter's Dwarris, Stat. Constr., 194.

The act is remedial. When statutes are primarily remedial and the penal provisions are merely incidental to its enforcement, they are to be construed, if not liberally, at least so as to accomplish the congressional purpose. *Johnson* v. *So. Pac. R. R. Co.*, 196 U. S. 1, 17; *Schlemmer* v. *B. R. & C. Ry. Co.*, 205 U. S. 1, 10; *N. Y., N. H. & H. R. R. Co.* v. *Inter. Comm. Comm.*, 200 U. S. 361, 391.

As to history and phraseology of the proviso with reference to telegraph operator, see Sen. Bill 5133, 59 Cong.; 41 Cong. Rec., pt. 1, p. 893; H. R. Rept. No. 7641, 59th Cong., 2d sess., p. 1; 41 Cong. Rec., pt. 4, pp. 3235, 3756,

3761; pt. 5, p. 4342; 41 Cong. Rec., pt. 5, p. 4597; pt. 5, pp. 4621, 4636 and 4637; pp. 4597, 4621, 4599; pt. 5, pp. 4637, 4663.

The law does not unwarrantably interfere with the right of contract guaranteed by the Constitution. *Holden* v. *Hardy*, 169 U. S. 366; see *Muller* v. *Oregon*, 208 U. S. 412; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186. The law is a fair, reasonable and appropriate exercise of the powers of Congress.

Mr. Robert Dunlap, with whom *Mr. Gardiner Lathrop* was on the brief, for respondent:

The office in which the operators in question worked was not one "continuously operated night and day" within the purview of the statute and, therefore, such operators were not confined to nine hours' work. Their case fell rather under the general sixteen-hour provision.

Supplying the words which are necessarily omitted for the sake of brevity, the phrase would read, "offices, etc., which are continuously operated during the night and daytime." See *State* v. *Vanderbilt*, 37 Ohio St. 598; *Black* v. *D. & H. Canal Co.*, 22 N. J. Eq. 402; *Garrison* v. *United Railways Co.*, 91 Maryland, 347; *People* v. *Sullivan*, 9 Utah, 195; *Hodge* v. *Steel Corporation*, 64 N. J. Eq. 807. *El Paso* v. *Bank*, 71 S. W. Rep. 799, distinguished, and see *Rasmussen* v. *People*, 155 Illinois, 70; *Toberg* v. *Chicago*, 164 Illinois, 752; *Casey* v. *People*, 165 Illinois, 49; *Washington* v. *Bassett*, 15 R. I. 563.

Provisos or exceptions are strictly construed in taking cases out of general provisions. *United States* v. *Dickson*, 15 Pet. 158; *Savings Bank* v. *United States*, 19 Wall. 228.

Courts cannot suppose omissions were not intentional, and undertake to supply the same. *United States* v. *C. & N. W. Ry. Co.*, 157 Fed. Rep. 321; *State* v. *C., C., C. & St. L. Ry. Co.*, 157 Indiana, 288; *S. C.*, 61 N. E. Rep. 669, 670; *Re Herring*, 117 N. Y. Supp. 747; Sutherland, Stat.

Const., § 328. Penal statutes should be strictly construed. *Robinson* v. *Harmon*, 157 Michigan, 266, 278; *People* v. *Weinstock*, 193 N. Y. 481; *Nance* v. *Southern Railway*, 149 N. Car. 116; *United States* v. *Harris*, 177 U. S. 305, 309; *Bolles* v. *Outing Company*, 175 U. S. 265; *Lau Ow Bew* v. *United States*, 144 U. S. 59; *Chicago N. W. Ry. Co.* v. *Dey*, 35 Fed. Rep. 876; *Tozer* v. *United States*, 52 Fed. Rep. 917.

Penalties are not to be extended by construction. *A., T. & S. F. Ry. Co.* v. *People*, 227 Illinois, 270, 278; *State* v. *C., C., C. & St. L. Ry. Co.*, 157 Indiana, 288. The court cannot supply supposed omissions in the proviso. *Hobbs* v. *McLean*, 117 U. S. 579; *United States* v. *I. C. R. R. Co.*, 170 Fed. Rep. 549; *D., L. & W. R. R. Co.* v. *Inter. Comm. Comm.*, 166 Fed. Rep. 498; *S. C.*, 216 U. S. 531; *Konda* v. *United States*, 166 Fed. Rep. 91.

But if the nine-hour provision were applicable yet defendant would not be liable, since it did not permit operators at this office to be on duty longer than nine hours in any twenty-four hour period and the law does not forbid a splitting of the time or adjustment of the hours of service.

The manifest purpose of the law was to fix the number of hours of labor required and not the period within which by agreement the given number of hours of labor should be performed, beyond the limit prescribed of "any twenty-four hour period."

As to the word "period" in congressional legislation, see chap. 3594, 34 Stat. 607; H. R. Rep. 7641, 59th Cong., 2d Sess., on "Limiting the Hours of Service of Railroad Employés."

For Congress to undertake to say that the hours of work could only be consecutive and may not by agreement of the parties be distributed within the period of a day, would exceed the limit of police power and seriously impinge upon the liberty of contract. *Lochner* v. *New*

York, 198 U. S. 45; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161; 22 Op. Atty. Gen. 62; *United States* v. *Langston*, 85 Fed. Rep. 613; *United States* v. *McCrory*, 119 Fed. Rep. 862.

As to the purpose of the law as manifested by Committee Reports during its passage, see Report No. 7,641, *supra;* Reports of Inter. Comm. Comm. for 1904, 1905; Resolution of Brotherhood of Railroad Trainmen, cited in report.

It is plain that Congress was considering the question of the number of hours of labor which should be fixed and was seeking to prohibit employés from working an excessive number of hours a day.

A sensible construction should be adopted and one not leading to any unreasonable or absurd consequences. *East* v. *Brooklyn R. Co.*, 195 N. Y. 409; *In re the Opinion of Justices*, 72 Atl. Rep. 754; *Market Co.* v. *Hoffman*, 101 U. S. 116; *United States* v. *Kirby*, 7 Wall. 486; *Darlington Lumber Co.* v. *Mo. Pac. Ry. Co.*, 216 Missouri, 658; *Thompson* v. *State*, 20 Alabama, 62.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover penalties for violation of the 'Act to promote the safety of employés and travellers upon railroads by limiting the hours of service of employés thereon.' March 4, 1907, c. 2939, §§ 2, 3, 34 Stat. 1415, 1416. The Government had a verdict in the District Court, subject to exceptions, and the judgment was reversed by the Circuit Court of Appeals. 177 Fed. Rep. 114. 100 C. C. A. 534.

The case is this: By § 2 it is made unlawful for common carriers subject to the act to permit any employé subject to the act to be on duty 'for a longer period than sixteen consecutive hours,' or after that period to go on duty again until he has had at least ten consecutive hours off

duty, or eight hours after sixteen hours' work in the aggregate: Provided that no telegraph operator and the like shall be permitted to be "on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the day time," with immaterial exceptions. By § 3 there is a penalty of not exceeding five hundred dollars for each violation of § 2. The defendant was subject to the act. It had a station and telegraph office at Corwith, in the outer limits of Chicago, which was shut from twelve to three by day and by night, but open the rest of the time. The Government contends that this was a place "continuously operated night and day." At this station the same telegraph operator was employed from half past six o'clock in the morning until twelve and again from three P. M. to half past six, or nine hours, in all, of actual work. The Government contends that when nine hours have passed from the moment of beginning work the statute allows no more labor within twenty-four hours from the same time, even though the nine hours have not all of them been spent in work. According to the Government's argument the operator's nine hours expired at half past three in the afternoon. These questions on the construction of the statute are the only ones that we have to decide.

We are of opinion that the Government's argument cannot be sustained, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the Government is right in saying that the proviso is meant to deal with all offices, and if so, we should go farther than otherwise we might in holding offices not

operated only during the daytime as falling under the other head. A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.

But if we concede the Government's first proposition it is impossible to extract the requirement of fifteen hours' continuous leisure from the words of the statute by grammatical construction alone. The proviso does not say nine 'consecutive' hours, as was said in the earlier part of the section, and if it had said so, or even 'for a longer period than a period of nine consecutive hours,' still the defendant's conduct would not have contravened the literal meaning of the words. A man employed for six hours and then, after an interval, for three, in the same twenty-four, is not employed for a longer period than nine consecutive hours. Indeed, the word consecutive was struck out, when the bill was under discussion, on the suggestion that otherwise a man might be worked for a second nine hours after an interval of half an hour. In order to bring about the effect contended for it would have been necessary to add, as the section does add in the earlier part, a provision for the required number of consecutive hours off duty. The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied. The Government suggests that if it is not implied a man might be set to work for two hours on and two hours off alternately. This hardly is a practical suggestion. We see no reason to suppose that Congress meant more than it said. On the contrary, the reason for striking out the word consecutive in the proviso given, as we have mentioned, when the bill was under discussion, and the alternative reference in § 2 to 'sixteen consecutive hours' and 'sixteen hours in the aggregate,' show that the obvious possibility of two periods of service

in the same twenty-four hours was before the mind of Congress, and that there was no oversight in the choice of words.

Judgment of Circuit Court of Appeals affirmed.

HIPOLITE EGG COMPANY *v.* UNITED STATES.

ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 519. Submitted January 5, 1911.—Decided March 13, 1911.

The object of the Pure Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 768, is to keep adulterated articles out of the channels of interstate commerce, or if they enter such commerce to condemn them while in transit, or in original or unbroken packages after reaching destination; and the provisions of § 10 of the act apply not only to articles for sale but also to articles to be used as raw material in the manufacture of some other product.

In construing the Pure Food and Drug Act, all articles, compound or single, not intended for consumption by the producer, are regarded as designed for sale, and for that reason it is the concern of the law to have them pure.

The remedies given by the statute *in personam* and by condemnation are not inconsistent and they are not dependent. *The Three Friends*, 166 U. S. 1.

By the Pure Food and Drug Act adulterated articles are, while in interstate commerce, made culpable as well as their shipper; while in original unbroken packages they can be seized and they carry their own identification as contraband of law; they are subject to the power of Congress to regulate interstate commerce, and they are not beyond the jurisdiction of the National Government because within the borders of a State. *Quære*, how far such articles can be pursued beyond the original package.

Congress can use appropriate means to execute the power conferred upon it by the Constitution and the seizure and condemnation of prohibited articles in interstate commerce at their point of destination in original unbroken packages is an appropriate means. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U. S. 321, 355.

In a proceeding *in rem* under § 10 of the Pure Food and Drug Act the court has jurisdiction to enter personal judgment for costs against the claimant. *Quære*, whether the certificate in this case presents the question of jurisdiction to award costs.

THE facts, which involve the construction of certain provisions of the pure food act of June 30, 1906, are stated in the opinion.

Mr. Thomas E. Lannen and *Mr. Edward T. Fenwick* for plaintiff in error:

Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other food product. *United States* v. *Sixty-five Casks Liquid Extracts*, 170 Fed. Rep. 449; *United States* v. *Knowlton Danderine Co.*, 175 Fed. Rep. 1022. See also opinion of Judge Sater in the District Court for the Southern District of Ohio, Western Division, in *United States* v. *Forty-six Packages and Bags of Sugar*, No. 1964, on exceptions and demurrer, rendered about September 3, 1910.

When goods shipped into a State have been so acted upon by the party in the State receiving them that they become mixed with the general property in the State and the goods become incorporated with the mass of state property they are no longer in interstate commerce. *Waring* v. *The Mayor*, 8 Wall. 110; *Low* v. *Austin*, 13 Wall. 29; *Cook* v. *Pennsylvania*, 97 U. S. 566.

The court does not obtain jurisdiction to proceed against the *res* when the statute makes the *res* liable to be proceeded against only under a certain state of facts and such facts do not exist with respect to the *res* pro-

ceeded against. And in such a case the court has no jurisdiction to confiscate the *res*.

A United States District Court has no jurisdiction to proceed *in rem* under § 10 of the Food and Drugs Act of June 30, 1906, against goods that have passed out of interstate commerce before the proceeding *in rem* was commenced.

In a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against a claimant who simply files an answer but who does not enter into a stipulation to pay the costs of the proceeding. *The Monte A*, 12 Fed. Rep. 331.

Where the law provides only for a proceeding *in rem*, a proceeding *in rem* and one *in personam* cannot be joined in the same libel. *The Alida*, 12 Fed. Rep. 343.

Mr. Assistant Attorney General Fowler for the United States:

The article of food in question was, when seized, in the original packages as shipped, and had not passed beyond the jurisdiction of the court by having become mixed and intermingled with other property of the consignee.

The cans of eggs in question had not lost their identity as articles of interstate commerce. *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Waring* v. *The Mayor*, 8 Wall. 110; *Low* v. *Austin*, 13 Wall. 29; *Cook* v. *Pennsylvania*, 97 U. S. 566, are not antagonistic to the principles recently decided in cases cited by appellant.

As to what constitutes an original package, see definition given in *McGregor* v. *Cone*, 104 Iowa, 465, 471. The cans in question had not passed beyond the jurisdiction of the United States authorities.

The fact that the articles in question were the property of consignor when shipped to themselves, to be used in the manufacture of pastry, does not deprive them of the

privileges or relieve them from the liabilities of an interstate shipment.

The articles in question having been shipped from one State into another in violation of an act of Congress and having thus become liable to seizure, they might be pursued and seized wherever and in whatever condition Congress has prescribed, regardless of whether they had or had not become subject to the state laws. See §§ 3062, 3456, Rev. Stat. The same principle applies to the statute under consideration.

Congress has provided that the products may be seized as long as they remain unloaded, unsold, or in the original unbroken packages. The fact that the packages had been commingled with other goods can only be material in determining whether the goods had become subject to the state laws, but that fact is wholly immaterial, as their subjection to state laws set no limitation upon the power of Congress to authorize that they be further pursued.

Section 10 of the act when properly construed, authorizes the seizure of the cans of eggs in question at the instance of the United States Government.

The Food and Drugs Act is a remedial statute, and as § 10 prescribes one of the methods of suppressing the frauds aimed at by the act, it should be liberally construed. *Taylor* v. *United States*, 3 How. 197, 210; *Rankin* v. *Hoyt*, 4 How. 327, 332; *United States* v. *Stowell*, 133 U. S. 1, 12; *Anglo-California Bank* v. *Secretary of the Treasury*, 76 Fed. Rep. 742, 748; *In re Coy*, 31 Fed. Rep. 794; *S. C.*, 127 U. S. 733, 739; *Farmers' Bank* v. *Dearing*, 91 U. S. 29, 35; *New Haven R. R. Co.* v. *Interstate Commerce Com.*, 200 U. S. 361, 391; Endlich, Inter. Stats., § 333; *Gray* v. *Bennett*, 3 Metcalf, 522, 529; *Reed* v. *Northfield*, 13 Pick. 94, 101; *Ellis* v. *Whitlock*, 10 Missouri, 781; *Sickles* v. *Sharp*, 13 Johnson, 497.

The statute is a remedial one designed to prevent frauds upon the general public, and the intention of Con-

gress in creating the same is undoubted. *United States* v. *Freeman*, 3 How. 556, 565; Endlich, Inter. Stats., § 110. When all parts of the act are read together it clearly appears that Congress intended that the shipment of an article of food under the circumstances and for the purpose under and for which the preserved whole egg in question was shipped, should render such product liable to seizure.

A reasonable and natural interpretation of the exact language used in § 10 of the act includes the articles of food seized in this case.

The construction insisted upon by plaintiff in error would in a large measure nullify the beneficent effect of the act, and defeat the object which Congress had in mind in passing the same and should not be adopted, unless the language of the act can admit of no other interpretation.

The court did not err in adjudging the costs of the cause against plaintiff in error. While at common law costs were not recoverable *eo nomine*, and hence cannot be recovered except by statutory authority, 11 Cyc. 24, under § 823, Rev. Stat., certain costs may be taxed and allowed to the officials mentioned. *Jordan* v. *Agawam Woolen Co.*, 3 Cliff. 239. See also chap. 33, Illinois Code of 1908, §§ 7, 8, p. 582; *The Monte A*, 12 Fed. Rep. 331, and *The Alida*, 12 Fed. Rep. 343, distinguished; and see *The Ethel*, 66 Fed. Rep. 340; *Dubois* v. *Kirk*, 158 U. S. 58, 67; 1 Cyc. 730.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case is here on a question of jurisdiction certified by the District Court.

On March 11, 1909, the United States instituted libel proceedings under § 10 of the act of Congress of June 30,

1906, c. 3915, 34 Stat. 768, against fifty cans of preserved whole eggs, which had been prepared by the Hipolite Egg Company of St. Louis, Missouri.

The eggs, before the shipment alleged in the libel, were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill.

Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon the receipt of them placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

Upon the close of libellant's evidence, and again at the close of the case, counsel for the Egg Company moved the court to dismiss the libel on the ground that it appeared from the evidence that the court, as a Federal court, had no jurisdiction to proceed against or confiscate the eggs, because they were not shipped in interstate commerce for sale within the meaning of § 10 of the Food and Drugs Act, and for the further reason that the evidence showed that the shipment had passed out of interstate commerce before the seizure of the eggs, because it appeared that they had been delivered to Thomas & Clark and were not intended to be sold by them in the original packages or otherwise.

The motions were overruled and the court proceeded to hear and determine the cause and entered a decree finding the eggs adulterated, and confiscating them. Costs were assessed against the Egg Company.

The decree was excepted to on the ground that the

court was without jurisdiction *in rem* over the subject matter, and on the further ground that the court was without jurisdiction to enter judgment *in personam* against the Egg Company for costs.

The jurisdiction of the District Court being challenged, the case comes here directly.

Section 2 of the Food and Drugs Act prohibits the introduction into any State or Territory from any other State or Territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise.

In giving a remedy § 10 provides that if "any article of food that is adulterated and is being transported from one State . . . to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. . . . The proceeding of such libel cases shall conform, as near as may be, to the proceedings in admiralty . . . and all such proceedings shall be at the suit of and in the name of the United States."

The shipment to Thomas & Clark consisted of 130 separate cans, each can corked and sealed with wax. The eggs were intended to be used for baking purposes. The only can sold was that sold to the inspector for the purpose of having the eggs analyzed. They contained approximately two per cent of boric acid, which the court found was a deleterious ingredient, and adjudged that they were adulterated within the meaning of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 771.

The Egg Company, whilst not contending that the

shipment of the eggs was not a violation of § 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States District Court has no jurisdiction to proceed *in rem* under § 10 against goods that have passed out of interstate commerce before the proceeding *in rem* was commenced. (3) The court had no jurisdiction to enter a personal judgment against the Egg Company for costs.

It may be said at the outset of these contentions that they insist that the remedies provided by the statute are not coextensive with its prohibitions, and hence that it has virtually defined the wrong and provided no adequate means of punishing the wrong when committed. Premising this much, we proceed to their consideration in the order in which they have been presented. The following cases are cited to sustain the first contention: *United States* v. *Sixty-five Casks of Liquid Extracts*, 170 Fed. Rep. 449, affirmed by the Circuit Court of Appeals in *United States* v. *Knowlton Danderine Company*, 175 Fed. Rep. 1022, and *United States* v. *Forty-six Packages and Boxes of Sugar*, in the District Court for the Southern District of Ohio, not yet reported.

The articles involved in the first case were charged with having been misbranded and consisted of drugs in casks, which were shipped from Detroit, Michigan, to Wheeling, West Virginia, there to be received by the Knowlton Danderine Company in bulk in carload lots and manufactured into danderine, of which no sale was to be made until the casks should be emptied and the contents placed in properly marked bottles.

It was contended that the articles, not having been shipped in the casks for the purpose of sale thus in bulk,

but shipped to the owner from one State to another for the purpose of being bottled into small packages suitable for sale, and when so bottled to be labeled in compliance with the requirements of the act, were not transported for sale, and were therefore not subject to libel under § 10 of the act.

The contention submitted to the court the construction of the statute. The court, however, based its decision upon the want of power in Congress to prohibit one from manufacturing a product in a State and removing it to another State "for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles, to be legally branded when so manufactured;" and concluded independently, or as construing the statute, that the danderine company, being the owner of the property, shipped it to itself and did not come within any of the prohibitions of the statute. The case was affirmed by the Circuit Court of Appeals, 175 Fed. Rep. 1022. The court, however, expressed no opinion as to the power of Congress. It decided that the facts did not exhibit a case within the purpose of the statute, saying: "No attempt to evade the law, either directly or indirectly or by subterfuges, has been shown, it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. In reaching this conclusion we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court."

In *United States* v. *Forty-six Packages and Boxes of Sugar* the court construed the statute as applying only to transportation for the purpose of sale. To explain its view the court said: "Following the words 'having been

transported' is an ellipse, an omission of words necessary to the complete construction of the sentence. These words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, 'any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one State to another *for sale* [italics ours], remains unloaded, unsold, or in original, unbroken packages, . . . shall be liable,' " etc. And the court was of opinion that this view was in accord with the other two cases which we have cited. This may be disputed. It may well be considered that there is no analogy between an article in the hands of its owner or moved from one place to another by him, to be used in the manufacture of articles subject to the statute and to be branded in compliance with it, and an adulterated article *itself* the subject of sale and intended to be used as adulterated in contravention of the purpose of the statute.

A legal analogy might be insisted upon if cakes and cookies, which are the compounds of eggs and flour which the record presents, could be branded to apprise of their ingredients like compounds of alcohol. The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.

It is, however, insisted that "the proceeding *in per-*

sonam authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law"; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. *The Three Friends*, 166 U. S. 1, 49.

The first contention of the Egg Company is, therefore, untenable.

2. Under this contention it is said that "the jurisdiction of the food and drugs act in question can go no farther than the power given to Congress under which it was enacted," and that the District Court, therefore, "had no jurisdiction *in rem* because at the time of the seizure the eggs had passed into the general mass of property in the State and out of the field covered by interstate commerce."

To support the contention, *Waring* v. *The Mayor*, 8 Wall. 110, is cited. That case involved the legality of a tax imposed by an ordinance of the city of Mobile upon merchants and traders of the city equal to one-half of one per cent on the gross amount of their sales, whether the merchandise was sold at public or private sale. Waring was fined for non-payment of the tax, and he brought suit to restrain the collection of the fine, alleging that he was exempt from the tax on the ground that the sales made by him were of merchandise in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were

in the lower harbor of the port. He obtained a decree in the trial court which was reversed by the Supreme Court of the State of Alabama. A writ of error was sued out from this court and the decree was affirmed, on the ground that Waring was not the shipper or consignee of the imported merchandise, nor the first vendor of it, and it was the settled law of the court "that merchandise in the original packages once sold by the importer is taxable as other property," citing *Brown* v. *Maryland*, 12 Wheat. 443; *Almy* v. *California*, 24 How. 173; *Pervear* v. *Commonwealth*, 5 Wall. 479. This also was said:

"When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import."

This case is clear as far as it goes, but the facts are not the same as those in the case at bar.

In the case at bar there was no sale of the articles after they were committed to interstate commerce, nor were the original packages broken. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the Egg Company. We prefer to decide the case on another ground which is sustained by well-known principles.

The statute declares that it is one "for preventing . . . the transportation of adulterated . . . foods . . . and for regulating traffic therein;" and, as we have seen, § 2 makes the shipper of them criminal and § 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain "in the original, unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part

of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U. S. 321, 355.

3. Had the court jurisdiction to adjudge costs against the Egg Company? This is contended, and in support of the contention the claimant assimilates this proceed-

ing to one in admiralty. In consequence, it may be supposed of the provisions of § 10 of the Food and Drugs Act that the proceedings "shall conform, as near as may be, to the proceedings in admiralty," and *The Monte A*, 12 Fed. Rep. 331, and *The Alida*, 12 Fed. Rep. 343, are cited as deciding that in a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against the claimant, who simply files an answer, but who does not enter into a stipulation to pay the costs of the proceeding. Too broad a deduction is made from these cases. They undoubtedly decide that a process *in rem* and *in personam* cannot be joined in admiralty in the same libel, but it was not held that this was because of a want of jurisdictional power in the court. Such view was disclaimed in *The Monte A*, and to show that the framing of a libel against the owner *in personam* and against the vessel *in rem* was not jurisdictional, the court said that a breach of a contract of affreightment could have been so framed "long before the adoption of the Supreme Court rules in admiralty."

It is stated in Benedict's Admiralty, § 204, that "the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction." It may be, as stated in § 359 of the same work, that "in a suit *in rem*, unless some one intervenes, the power and process of the court is confined to the thing itself and does not reach either the person or property of the owner." If, however, the owner comes in, or an intervenor does, his appearance is voluntary. He becomes an actor and subjects himself to costs, and this even if his ownership be averred in the libel. Waple Proceedings In Rem, page 100, § 73; *United States* v. *422 Casks of Wine*, 1 Pet. 547.

And such seems to be the necessary effect of Admiralty Rules 26 [1] and 34.[1] It is provided (Rule 34) that if a third

[1] For these Rules in full see 210 U. S. 552, 554.

person intervene, for his own interest, he is required to give a stipulation with sureties to abide the final decree rendered in the original or appellate court. It is in effect conceded that if such a stipulation be given, a judgment for costs can be rendered. But, upon what theory? The concession confounds the relation between the stipulation and the judgment, and makes the security for the payment of the judgment the source of jurisdiction to render it—jurisdiction according to the contention, which the court does not have as a Federal court.

Even, therefore, upon the supposition that the principles of the admiralty law are to apply to the proceedings under § 10, we think the court had jurisdiction to render a judgment for costs against the Egg Company.

So far our discussion has been in deference to the contention of the Egg Company, but it is disputable if the certificate presents a question of jurisdiction as to costs. The District Court gets its jurisdiction of the cause from § 10 of the Food and Drugs Act, and whether the libel may be *in rem* and *in personam*, or whether a personal judgment for costs can be rendered, may be said to be simply a question of the construction of the section, and not one which involves the jurisdiction of the court. In other words, the rulings of the court may be error only, not in excess of its power. It certainly had jurisdiction of the person of the Egg Company.

Decree affirmed.

LINDSLEY v. NATURAL CARBONIC GAS COMPANY.

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

No. 260. Argued January 3, 4, 1911.—Decided March 13, 1911.

Courts of the United States must accept the construction put upon a state statute by the highest court of the State; and, in determining the constitutionality of a state statute, this court is not concerned with provisions thereof which the highest court of the State has declared invalid.

It is within the power of the State, consistently with due process of law, to prohibit the owner of the surface by pumping on his own land, water, gas and oil, to deplete the subterranean supply common to him and other owners to their injury; and so held that the statute of New York protecting mineral springs is not, as the same has been construed by the Court of Appeals of that State, unconstitutional as depriving owners of their property without due process of law. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190.

This court cannot give effect to statements not supported by the record and contrary to the situation as it appears to have been regarded by the highest court of the State, and which is not inconsistent with the allegations of the bill.

If the facts alleged by one contesting the constitutionality of a state statute take him out of the operation of the statute, as construed by the highest court of the State, he is not harmed by the statute and cannot draw in question or test its validity.

The equal protection clause of the Fourteenth Amendment admits of a wide exercise of discretion and only avoids a classification which is purely arbitrary being without reasonable basis; nor does a classification having some reasonable basis offend because not made with mathematical nicety or resulting in some inequality.

This court will assume the existence at the time the statute was enacted of any state of facts that can reasonably be conceived and which will support a classification in a state statute attacked as denying equal protection of the law.

The burden of showing that a classification in a state statute denies

equal protection of the law as not resting on a reasonable basis is on the party assailing it.

A police statute may be confined to the occasion for its existence. If there is a substantial difference in point of harmful results between various methods of pumping gas and mineral water, that difference justifies a classification, and the burden is on the attacking party to prove the classification unreasonable; and so *held* that the classification in the New York Mineral Springs Act does not appear to be arbitrary but to rest on a reasonable basis.

Where it is not an arbitrary discrimination, and there is a rational connection between two facts, a State may make evidence of one of such facts *prima facie* evidence of the other, so long as the right to make a full defense is not cut off, *Mobile &c. R. R. Co.* v. *Turnipseed*, 219 U. S. 35; and so *held* that the New York Mineral Springs Act is not rendered unconstitutional as denying equal protection of the law by the ruling of the Court of Appeals, read into the statute, that proof of certain designated facts amounts to *prima facie* proof establishing a reasonable presumption, but one that can be overcome, that other acts of defendants fall within the prohibition of the statute.

170 Fed. Rep. 1023, affirmed.

By a bill in equity exhibited in the Circuit Court the appellant, as owner and holder of capital stock and bonds of the Natural Carbonic Gas Company, sought a decree enjoining that company from obeying, and the other defendants from enforcing, a statute of the State of New York, approved May 20, 1908, entitled "An act for the protection of the natural mineral springs of the State and to prevent waste and impairment of its natural mineral waters," and containing, among others, this provision: "Pumping, or otherwise drawing by artificial appliance, from any well made by boring or drilling into the rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing an unnatural flow of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of ex-

tracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful." Laws 1908, vol. 2, 1221, ch. 429.

In addition to what properly may be passed without special mention the bill alleges that the gas company owns twenty-one acres of land in Saratoga Springs, New York, which contain mineral waters of the class specified in the statute; that these waters are percolating waters, not naturally flowing to or upon the surface, and can be reached and lifted to the surface only by means of pumps or other artificial appliances; that the gas company is engaged in collecting natural carbonic acid gas from these waters and in compressing and selling the gas as a separate commodity; that this business has come to be both large and lucrative, and as a necessary incident to its successful prosecution the gas company has sunk upon its land wells of great depth, made by boring or drilling into the underlying rock, and has fitted these wells with tubing, seals and pumps, whereby it lifts the waters and the gas contained therein to the surface; that these pumps do not exercise any force of compulsion upon waters in or under adjoining lands, but lift to the surface only such waters as flow by reason of the laws of nature into the wells; that when the waters are lifted to the surface the excess of carbonic acid gas therein naturally escapes and is caught and compressed preparatory to its sale, none thereof being wasted and no process being employed to increase the natural separation of the excess of gas from the waters; and that many other land owners in Saratoga Springs have like wells which are operated in a like way with a like purpose.

It also is alleged that the gas company bottles and sells for drinking purposes and for use by invalids and others all of the mineral waters pumped from its wells "for

which there is any market or demand," but there is no allegation of the extent of this market or demand, and it was conceded in argument that a large proportion of the waters pumped from the company's wells is not used, but is suffered to run to waste.

In terms the bill predicates the right to the relief sought upon the claim that the state statute deprives the appellant and others of property without due process of law and denies to them the equal protection of the laws, and therefore is violative of the Fourteenth Amendment to the Constitution of the United States.

In the Circuit Court the defendants other than the gas company demurred to the bill, the demurrers were sustained (170 Fed. Rep. 1023), and a decree dismissing the bill was entered, whereupon this appeal was prayed and allowed.

Mr. Guthrie B. Plante and *Mr. Edgar T. Brackett*, with whom *Mr. Robert C. Morris* was on the brief, for appellant:

The statute violates the Fourteenth Amendment in that it deprives the gas company without due process of law of liberty and property—meaning the profitable and free use of property by its owner. *Chicago Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Smyth* v. *Ames*, 169 U. S. 466, 523; *Munn* v. *Illinois*, 94 U. S. 113; *In re Jacobs*, 98 N. Y. 98; *People* v. *Otis*, 90 N. Y. 48, 52.

At common law the owner of land has a property right in all water and gases that percolate or flow through the soil or rocks, that he is able to reduce to possession, and to use the same for his own purposes at his free will and pleasure. *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Bradford* v. *Pickles*, Law Reporter, 1895, App. Cas. 587; and see *Acton* v. *Blundell*, 12 Mees. & Wels. 324, which was early followed in this country; *Chatfield* v. *Wilson*, 28 Vermont, 49; *Roath* v. *Driscoll*, 20 Connecticut, 533; *Pix-*

ley v. *Clark*, 35 N. Y. 520; *Delhi* v. *Youmans*, 45 N. Y. 362; *Bloodgood* v. *Ayres*, 108 N. Y. 400, 405; *Huber* v. *Merkel*, 117 Wisconsin, 368; *United States* v. *Alexander*, 148 U. S. 186.

For recent cases in New York, see *Smith* v. *Brooklyn*, 18 App. Div. 340; *S. C.*, 32 App. Div. 257; aff'd 160 N. Y. 357; *Merrick Water Co.* v. *Brooklyn*, 32 App. Div. 454; aff'd 160 N. Y. 657; *Forbell* v. *New York*, 47 App. Div. 37; aff'd 164 N. Y. 522.

The owner of lands owns the percolating water in the soil by the same title as that on which he holds the land. He may make such use of the percolating water as he chooses, and is not liable for the interception of percolating water, even though it cuts off the supply of the adjoining owner, unless one owner uses his lands solely to obtain water from adjoining premises for purposes of transportation and sale. The same rule has been held to apply to petroleum, oil and natural gas. *Brown* v. *Spilman*, 155 U. S. 665, 669; *Brown* v. *Vandergrift*, 80 Pa. St. 142, 147; *Westmoreland Nat. Gas Co.'s Appeal*, 25 Weekly Notes of Cases (Pa.), 103; *Kansas Natural Gas Co.* v. *Haskell*, 172 Fed. Rep. 545; *Westmoreland Nat. Gas Co.* v. *DeWitt*, 130 Pa. St. 235, 249.

If an adjoining or even a distant owner drills his own land and taps your gas so that it comes into his well and under his control it is no longer yours, but his. See also *People's Gas Co.* v. *Tyner*, 131 Indiana, 277; *Simpson* v. *Pittsburgh Plate Glass Co.*, 28 Ind. App. 352; *Commonwealth* v. *Trent*, 117 Kentucky, 46; *Acme Oil Co.* v. *Williams*, 140 California, 681; *Preston* v. *White*, 57 W. Va. 284; *Lanyon Zinc Co.* v. *Freeman*, 68 Kansas, 696; *Federal Oil Co.* v. *Western Oil Co.*, 121 Fed. Rep. 675; *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. Rep. 801, 809; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 208.

The right to percolating waters is a vested one. *Twining* v. *New Jersey*, 211 U. S. 78, 100; *Missouri Pacific Ry.*

Co. v. *Humes*, 115 U. S. 512, 519; *Hurtado* v. *California*, 110 U. S. 516; *Scott* v. *McNeal*, 154 U. S. 34, 46, 50; *Smyth* v. *Ames*, 169 U. S. 466, 522.

Although the statute in question does not take the property of the defendant and appropriate it to a public use, it does effectually deprive it of the beneficial use and enjoyment of the property, not only without due process of law, but without any pretense of compensation. Property does not consist alone in something that is tangible, but the right to use is as much property as the land itself. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Chicago &c. R. R. Co.* v. *Minnesota*, 134 U. S. 418, 458; *Muhlker* v. *R. R. Co.*, 197 U. S. 544; *Westervelt* v. *Gregg*, 12 N. Y. 202, 209; *Forter* v. *Scott*, 136 N. Y. 577, 584.

The police power only begins where the Constitution ends; and when its exercise encroaches upon vested constitutional rights, courts should not be concerned with the probable purposes for which it is exercised, or the evils which it was designed to correct. The legislation defended under this power must be reasonable, must be moderate, and have proportion in its means to the end sought to be reached. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Wright* v. *Hart*, 182 N. Y. 330, 341; *Fisher* v. *Woods*, 187 N. Y. 90, 94; *Health Dept.* v. *Rector*, 145 N. Y. 32, 39.

The business conducted by this defendant is purely private and not affected by public interest. The purpose of the act is a purely private and selfish one, namely, to deprive the owners of wells which are bored or sunk into the rock of their property, and create business for the benefit of owners of wells which are not sunk or drilled into the rock, and to legislate out of existence the natural gas industry. *People* v. *Gillson*, 109 N. Y. 389, 399; *Wright* v. *Hart*, 182 N. Y. 330, 344; *Huber* v. *Merkel*, 117 Wisconsin, 355.

The act in question is unreasonable. Freund on Po-

lice Power, p. 61; *People* v. *Gas Co.*, 196 N. Y. 421, 440.

The burden in this case is not fanciful, but real and substantial; the placing of this burden of proof upon one and not upon his neighbor similarly situated is forbidden by the Fourteenth Amendment. *County of San Mateo* v. *Southern Pacific Ry. Co.*, 13 Fed. Rep. 722, 733; *Wynehamer* v. *People*, 13 N. Y. 378, 446; *People* v. *Lyon*, 27 Hun, 180; *Railroad Co.* v. *Husen*, 95 U. S. 465.

Defendant alike in civil as in criminal actions is entitled to a presumption of innocence. Especially is this so in civil actions where the judgment will establish the commission of a penal offense. *Grant* v. *Riley*, 15 A. D. 190; *Pollock* v. *Pollock*, 71 N. Y. 137, 142; *Wilcox* v. *Wilcox*, 46 Hun, 32, 40; *N. Y. & B. F. Co.* v. *Moore*, 18 Abb. N. C. 106, 119. The applicable rule is that plaintiffs having invoked the aid of a statute have the burden of showing that their case is within the provisions of the statute. *Cohoes* v. *D. & H. C. Co.*, 134 N. Y. 397; *Miller* v. *Roessler*, 4 E. D. Smith, 234.

The act denies the equal protection of the laws by prohibiting pumping for the purpose of vending the gas, while permitting the same for any other purpose or use, and prohibiting pumping of wells that go into the rock and permitting pumping of wells that do not go into the rock.

Before classification of this kind can be successfully accomplished some difference must be shown bearing a reasonable and just relation to the things as to which the classification is established. To be constitutional, the law must bear equally upon all engaged in a like business. *Missouri* v. *Lewis*, 101 U. S. 22; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 399; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, 155; *State* v. *Loomis*, 115 Missouri, 307, 314; *Vanzant* v. *Waddel*, 2 Yerger, 260, 270; *Dibrell* v. *Morris' Heirs*, 15 S. W. Rep. (Tenn.) 87, 95; *Cotting* v. *Kansas*,

183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *People* v. *Van De Carr*, 91 App. Div. 20; aff'd 178 N. Y. 425; *People* v. *Murphy*, 195 N. Y. 126; *People* v. *Zimmerman*, 102 App. Div. 103; *Lindsley* v. *Gas Co.*, 162 Fed. Rep. 954, 960; *Hathorn* v. *Gas Company*, 194 N. Y. 326, 341.

The statute violates the Fourteenth Amendment in that it takes private property for private purposes. *Re Albany Street*, 11 Wend. 151; *Bloodgood* v. *R. R. Co.*, 18 Wend. 9; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Gilman* v. *Line Point*, 18 California, 229; *Tyler* v. *Beacher*, 44 Vermont, 656; *Cole* v. *LaGrange*, 113 U. S. 1; *Great Western Gas & Oil Co.* v. *Hawkins*, 30 Ind. App. 566.

Restricting the use of property or the taking or depriving of any right therein is a taking of property within the meaning of the Constitution, and when such restriction or taking is primarily for the benefit of other individuals, or to aid the use by individuals of their property, in which the public has no use but only an indirect benefit, if any, then the taking is of private property for private purposes and is prohibited by the constitutional enactments.

Mr. Charles C. Lester and *Mr. Nash Rockwood*, with whom *Mr. Edward R. O'Malley*, Attorney General of the State of New York, was on the brief, for appellees:

This court will accept and follow the interpretation of the statute as given by the state tribunals; and the judgment of the state courts construing the meaning and scope of the act is conclusive here. The interpretation of this act by the Court of Appeals is in precise accord with the common-law rule of relative property rights which has long been declared and enforced in the State to which the statute applies. The statute, as so construed, infringes no property right, and transcends no constitutional limitation. *People* v. *N. Y. Carbonic Co.*, 196 N. Y. 421; *Hathorn* v.

Natural Carbonic Gas Co., 194 N. Y. 326; *Forbell* v. *City of New York*, 164 N. Y. 522; *People* v. *Squires*, 107 N. Y. 593; *Smith* v. *City of Brooklyn*, 18 App. Div. 340; *Hathorn* v. *Strong*, 55 Misc. Rep. 445.

The courts of the several States have the right to construe their own statutes; this is a function to be exercised exclusively by them, and their judgment upon such matters is conclusive upon all Federal tribunals. *Palmer* v. *Texas*, 212 U. S. 118, 131; *United States* v. *Munson*, 213 U. S. 118, 131; *Stutsman Co.* v. *Wallace*, 142 U. S. 293; *Moores* v. *National Bank*, 104 U. S. 625; *Bauserman* v. *Blut*, 147 U. S. 647; *Fairfield* v. *Gallatin*, 100 U. S. 47.

The act is constitutional. The doctrine enunciated by the Court of Appeals in the cases arising under the present statute is not a new doctrine, but has been stated in successive decisions and recognized as the law of the State of New York. See cases *supra*. *Merrick Water Co.* v. *Brooklyn*, 32 App. Div. 454, distinguished. See 160 N. Y. 657.

The foundation of this rule of common ownership of percolating waters is recognized by high authority as applicable to this State. *Westphal* v. *New York*, 75 App. Div. 562; aff'd 177 N. Y. 140, 256.

Ownership in the particular drops of water begins only when they are reduced to possession, prior to which they are a common stock, the taking of which and their reduction to possession the legislature may regulate. *State* v. *Ohio Oil Well Co.*, 150 Indiana, 21; *Westmoreland Gas Co.* v. *DeWitt*, 130 Pa. St. 235; *Jones* v. *Forest Oil Co.*, 44 Atl. Rep. 1074; *Brown* v. *Vandergrift*, 80 Pa. St. 142; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; and see as to power of legislature exercised in similar cases, *American Express Co.* v. *People*, 9 L. R. A. 139; *Phelps* v. *Racey*, 60 N. Y. 10; *Magner* v. *People*, 97 Illinois, 333; *Lawton* v. *Steele*, 152 U. S. 139; *Commonwealth* v. *Chapin*, 5 Pick. 199; *McCready* v. *Virginia*, 94 U. S. 391; *Vinton* v. *Welsh*,

9 Pick. 87; *Commonwealth* v. *Essex Co.*, 13 Gray, 239; *Smith* v. *Levinus*, 8 N. Y. 472; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Gentile* v. *State*, 29 Indiana, 409.

The act does not deny equal protection of the laws. It creates no class of persons deprived of the equal protection of the laws. All are alike forbidden to pump such wells; all persons similarly situated are affected alike; it does not unlawfully discriminate against any. *State* v. *Hogan*, 63 Ohio St. 202; *Dent* v. *West Virginia*, 129 U. S. 114; *Jones* v. *Brim*, 165 U. S. 184; *Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 29; *Soon Hing* v. *Crowley*, 113 U. S. 705; *Louisiana* v. *Schlemmer*, 42 La. Ann. 1166; *Des Moines* v. *Keller*, 116 Iowa, 648; *Sutton* v. *State*, 96 Tennessee, 696.

A statute is not obnoxious to the constitutional provision in question because its effect may be confined to a particular class of citizens, if the law be general in its application to the class to which it applies and if the distinction be not arbitrary, but rests upon some reason of public policy growing out of the condition of business of such class. *People* v. *Havnor*, 149 N. Y. 195; *Missouri* v. *Lewis*, 101 U. S. 22, 30; *Powell* v. *Pennsylvania*, 127 U. S. 678; *People ex rel. Armstrong* v. *Warden*, 183 N. Y. 223.

If the statute does create classes its classification is reasonable and neither unnecessary nor arbitrary. *Peel Splint Co.* v. *West Virginia*, 36 W. Va. 302.

For cases which uphold legislative classifications that rest upon rational foundations see *Hayes* v. *Missouri*, 120 U. S. 68; *Railroad Co.* v. *Mackey*, 127 U. S. 205; *Walston* v. *Nevin*, 128 U. S. 578; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Giozza* v. *Tiernan*, 148 U. S. 657; *Columbus Southern Ry. Co.* v. *Wright*, 151 U. S. 470; *Manhant* v. *Pa. R. R. Co.*, 153 U. S. 380; *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U. S. 1; *Bacon* v. *Walker*, 204 U. S. 316.

The legislature has the right of judging what it deems harmful or what it deems should be safeguarded and need not include all harmful acts or guard against everything that apparently needs guarding. *Musco* v. *United Surety Co.*, 132 App. Div. 300.

The act is a valid exercise of the police power. Its purpose and effect are to prevent the waste and destruction of the natural resources of the State. Cooley on Const. Lim. 572; *People* v. *Squires*, 107 N. Y. 650; *Commonwealth* v. *Alger*, 7 Cushing, 85; *Meffert* v. *Packer*, 66 Kansas, 710; *S. C.*, 195 U. S. 625; *People* v. *King*, 110 N. Y. 418; *Barbier* v. *Connolly*, 113 U. S. 31; *C., B. & Q. Railway Co.* v. *Drainage Comm.*, 200 U. S. 592; *Thorpe* v. *Rutland R. R. Co.*, 27 Vermont, 140.

With questions of expediency, wisdom, fairness and other like questions the courts have nothing to do, unless the act exceeds all bounds of reason; the judgment of the legislature is final. *Hunter* v. *Pittsburgh*, 207 U. S. 161, 176; *Booth* v. *Illinois*, 184 U. S. 425, 429; *Welch* v. *Swasey*, 214 U. S. 91, 105; *Forsythe* v. *Hammond*, 166 U. S. 506, 518; *Williams* v. *Eggleston*, 170 U. S. 304; *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Wilson* v. *North Carolina*, 169 U. S. 586, 593; *Clayborne County* v. *Brooks*, 111 U. S. 400, 410; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514; *Laramie County* v. *Albany Co.*, 92 U. S. 307; *Covington* v. *Kentucky*, 173 U. S. 731.

In the exercise of this power, there is no taking of property in the sense in which the Constitution requires compensation to be made therefor. *Chicago &c. Ry. Co.* v. *Chicago*, 166 U. S. 226, 255; *C., B. & Q. R. R. Co.* v. *Drainage Comm.*, 200 U. S. 561, 583; *West Chicago R. R. Co.* v. *Chicago*, 201 U. S. 506, 526.

Nor is property taken without due process of law. *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1, 15.

The public have such an interest in the mineral waters

of Saratoga as justifies the interposition of the legislature for their protection. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355; *Kansas* v. *Colorado*, 185 U. S. 141, 142; *S. C.*, 206 U. S. 46, 99; *Georgia* v. *Tenn. Copper Co.*, 206 U. S. 230, 238; *Hathorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326, 349; *Geer* v. *Connecticut*, 161 U. S. 519; *Lawton* v. *Steele*, 152 U. S. 133; *Munn* v. *Illinois*, 94 U. S. 113; *License Cases*, 5 How. 504; *Kidd* v. *Pearson*, 128 U. S. 1; *Barbier* v. *Connolly*, 113 U. S. 27; *Crowley* v. *Christensen*, 137 U. S. 86; *People* v. *Rosenberg*, 184 N. Y. 135; *People* v. *Squire*, 107 N. Y. 593; aff'd 145 U. S. 175; *Smith* v. *Maryland*, 18 How. 71. See 22 Am. & Eng. Ency. Law, p. 917.

The presumption in favor of the validity of the act is not overthrown by any of the allegations of the bill of complaint. *People* v. *N. Y. Carbonic Acid Gas Co.*, 196 N. Y. 421.

It is not for one who asserts rights under a statute to prove, as a condition precedent to its enforcement, that the legislature had the right to enact it. He may stand upon the presumption of validity until such presumption is overthrown. *Beecher* v. *Allen*, 5 Barb. 169; *Rochester* v. *Briggs*, 50 N. Y. 533, 558; *People* v. *Draper*, 15 N. Y. 532, 543; *Carter* v. *Rice*, 135 N. Y. 437, 484; *Sturgis* v. *Fallon*, 152 N. Y. 1, 11; *Cronin* v. *People*, 82 N.Y. 318, 323; *Granger* v. *Jockey Club*, 148 Fed. Rep. 513; *McLean* v. *Arkansas*, 211 U. S. 547.

Mr. Justice Van Devanter, having made the foregoing statement, delivered the opinion of the court.

The statute, against whose enforcement the suit is directed, contains several restrictive provisions more or less directly connected with the purpose suggested by its title, but we are concerned with only the one before set forth, because the Court of Appeals of the State has pronounced

the others invalid and counsel have treated them as thereby eliminated from the statute and from present consideration.

Coming to the provision in question, it is necessary to inquire what construction has been put upon it by the highest court of the State, for that construction must be accepted by the courts of the United States and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution. *Weightman* v. *Clark*, 103 U. S. 256, 260; *Morley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 166; *Olsen* v. *Smith*, 195 U. S. 333, 342. The Court of Appeals of the State had the statute before it in *Hathorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326, and again in *People* v. *New York Carbonic Acid Gas Co.*, 196 N. Y. 421, and the elaborate opinions then rendered disclose that the court, having regard to the title of the act and to the doctrine of correlative rights in percolating waters which prevails in that State, as recognized in *Forbell* v. *City of New York*, 164 N. Y. 522, construed this provision, not as prohibiting the specified acts absolutely or unqualifiedly, but only when the mineral waters are drawn from a source of supply not confined to the lands of the actor but extending into or through the lands of others, and then only when the draft made upon that source of supply is unreasonable or wasteful, considering that there is a coequal right in all the surface owners to draw upon it. In other words, the court, by processes of interpretation having its approval, read into the provision an exception or qualification making it inapplicable where the waters are not drawn from a common source of supply, and also where, if they be drawn from such a source, no injury is done thereby to others having a like right to resort to it.

As so interpreted, the statute presupposes (1) the existence, in porous rock beneath the lands of several pro-

prietors, of a supply of mineral waters of the class specified; (2) a right in each proprietor to penetrate the underlying rock or natural reservoir and to draw upon the supply therein; and (3) a practice or tendency on the part of proprietors who exercise this right in the manner and for the purpose specified, that is, by boring or drilling wells into the rock and pumping or artificially drawing the waters for the purpose of collecting and vending the gas as a separate commodity, to make excessive or wasteful drafts upon the common supply to the injury and impairment of the rights of other proprietors. And what is thus presupposed is treated in several decisions of the courts of the State and in other public papers as having actual existence and as being widely recognized. It is to prevent or avoid the injury and waste suggested that the statute was adopted. It is not the first of its type. One in principle quite like it was considered by this court in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190. There oil and gas in a commingled form were contained in a stratum of porous rock, underlying the lands of many owners, and because these fluids were inclined to shift about in the common reservoir in obedience to natural laws one surface owner could not excessively or wastefully exercise his right of tapping the reservoir and drawing from its contents without injuriously affecting the like right of each of the others. The oil and gas were both of value, but as the greater value attached to the oil some surface owners, whose wells tapped the common reservoir and brought to the surface both oil and gas, collected and used only the oil and suffered the gas to disperse in the air. This and kindred practices resulted in the adoption of a statute declaring them unlawful, and the validity of the statute was called in question. The objections urged against it were much the same as those now pressed upon our attention, but upon full consideration all were overruled. After commenting upon the peculiar attributes of oil and gas

which cause them be to excepted from the principles generally applied to minerals having a fixed situs, and also upon the prevailing rule that each surface owner in an oil and gas area has the exclusive right on his own land to seek the oil and gas in the reservoir beneath, but has no fixed or certain ownership of them until he reduces them to actual possession, this court said:

"They [meaning the surface owners] could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which, in the nature of things, are united, though separate. It follows, from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession and to reach the like end by preventing waste. . . . Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law . . . which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others."

And, taking up subordinate contentions advanced in support of the principal one, the court also said:

"First. It is argued that as the gas, before being al-

lowed to disperse in the air, serves the purpose of forcing up the oil, therefore it is not wasted, hence is not subject to regulation. Second. That the answer averred that the defendant was so situated as not to be able to use or dispose of the gas which comes to the surface with the oil; from which it follows that the gas must either be stored or dispersed in the air. Now, the answer further asserted that when the gas is stored and not used the back pressure, on the best-known pump, would, if not arresting its movement, at least greatly diminish its capacity. Hence it is said the law, by making it unlawful to allow the gas to escape, made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into the atmosphere and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the State we may not interfere."

If the statute there assailed did not work a deprivation of property without due process of law, it is difficult to perceive that there is any such deprivation in the present case. The mineral waters and carbonic acid gas exist in a commingled state in the underlying rock, and neither can be drawn out without the other. They are of value in their commingled form and also when separated, but the greater demand is for the gas alone. Influenced by this demand, some surface owners, having wells bored or drilled into the rock, engage in extensive pumping operations for the purpose of collecting the gas and vending it as a separate commodity. Usually where this is done an undue proportion of the commingled waters and gas is taken from the common supply and a large, if not the larger, portion of the waters from which the gas is col-

lected is permitted to run to waste. Thus these pumping operations generally result in an unreasonable and wasteful depletion of the common supply and in a corresponding injury to others equally entitled to resort to it. It is to correct this evil that the statute was adopted, and the remedy which it applies is an enforced discontinuance of the excessive and wasteful features of the pumping. It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, so regulates its exercise as reasonably to conserve the interests of all who possess it. That the State, consistently with due process of law, may do this is a necessary conclusion from the decision in the case cited. But were the question an open one we still should solve it in the same way.

We do not overlook the statement in appellant's brief that the mineral waters reached by the gas company's wells do not exist in any underground reservoir and do not come from any common source, but we cannot give it any effect. It is contrary to what the courts of the State apparently regard as the real situation at Saratoga Springs, and is without support in the present record. While the bill alleges that the waters are percolating waters, not naturally flowing to or upon the surface, that description of them is not inconsistent with their existence in a natural reservoir of porous rock underlying the lands of several owners. Besides, if we accepted it as true that they do not constitute a common source of supply, that is, one to which other surface owners have an equal right to resort, it then would have to be held that the gas company's acts are not within the prohibition of the statute, as construed by the Court of Appeals of the State, and therefore that the appellant, as owner and holder of capital stock and bonds of the company, is not harmed by the statute and is not entitled to draw in question or test its validity.

Clark v. *Kansas City*, 176 U. S. 114, 118; *Tyler* v. *Judge*, 179 U. S. 405; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Hatch* v. *Reardon*, 204 U. S. 152, 160.

Neither do we overlook the allegation in the bill that the gas company's pumps do not exert any force upon waters in or under adjoining lands, but lift to the surface only such waters "as flow by reason of the laws of nature into the wells;" but we regard it as of little importance, because if the wells reach a common source of supply excessive or wasteful pumping from them may affect injuriously the rights of other surface owners, although the force exerted by the pumps does not reach their lands.

Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One

who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U. S. 36, 41; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256; *Munn* v. *Illinois*, 94 U. S. 113, 132; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 615.

Unfortunately the allegations of the bill shed but little light upon the classification in question. They do not indicate that pumping from wells not penetrating the rock appreciably affects the common supply therein, or is calculated to result in injury to the rights of others, and neither do they indicate that such pumping as is done for purposes other than collecting and vending the gas apart from the waters is excessive or wasteful, or otherwise operates to impair the rights of others. In other words, for aught that appears in the bill, the classification may rest upon some substantial difference between pumping from wells penetrating the rock and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters and pumping for other purposes, and this difference may afford a reasonable basis for the classification.

In thus criticising the bill, we do not mean that its allegations are alone to be considered, for due regard also must be had for what is within the range of common knowledge and what is otherwise plainly subject to judicial notice. *Brown* v. *Piper*, 91 U. S. 37, 43; *Brown* v. *Spilman*, 155 U. S. 665, 670; *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 51; *McNichols* v. *Pease*, 207 U. S. 100, 111. But we rest our criticism upon the fact that the bill is silent in respect of some matters which, although essential to the success of the present contention, are neither within the range of common knowledge nor otherwise plainly subject to judicial notice. So, applying the rule that one who assails the classification in such a law must carry the

burden of showing that it is arbitrary, we properly might dismiss the contention without saying more. But it may be well to mention other considerations which make for the same result.

From statements made in the briefs of counsel and in oral argument we infer that wells not penetrating the rock reach such waters only as escape naturally therefrom through breaks or fissures, and if this be so, it well may be doubted that pumping from such wells has anything like the same effect—if, indeed, it has any—upon the common supply or upon the rights of others, as does pumping from wells which take the waters from within the rock where they exist under great hydrostatic pressure.

As respects the discrimination made between pumping for the purpose of collecting and vending the gas apart from the waters and pumping for other purposes, this is to be said: The greater demand for the gas alone and the value which attaches to it in consequence of this demand furnish a greater incentive for exercising the common right excessively and wastefully when the pumping is for the purpose proscribed than when it is for other purposes; and this suggestion becomes stronger when it is reflected that the proportion of gas in the commingled fluids as they exist in the rock is so small that to obtain a given quantity of gas involves the taking of an enormously greater quantity of water and to satisfy appreciably the demand for the gas alone involves a great waste of the water from which it is collected. Thus, it well may be that in actual practice the pumping is not excessive or wasteful save when it is done for the purpose proscribed.

These considerations point with more or less persuasive force to a substantial difference, in point of harmful results, between pumping from wells penetrating the rock and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters and pumping for other purposes.

If there be such a difference it justifies the classification, for plainly a police law may be confined to the occasion for its existence. As is said in *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411: "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms."

In conclusion upon this point, it suffices to say that the case as presented, instead of plainly disclosing that the classification is arbitrary, tends to produce the belief that it rests upon a reasonable basis.

Another objection urged against the statute arises out of a ruling of the Court of Appeals of the State, to the effect that in proceedings for the enforcement of the statute one who, for the purpose of collecting and vending the gas as a separate commodity, engages in pumping such waters from wells bored or drilled into the rock, is *prima facie* within the prohibition of the statute, and must take the burden of showing that he comes within the exception or qualification, before mentioned, whereby the statute is made inapplicable where the waters are not drawn from a common source of supply, and also where, if they be drawn from such a source, no injury is done thereby to others having a right to resort to it. Because of this ruling, which is treated as if read into the statute, it is insisted that the latter impinges upon the guarantees of due process of law and equal protection of the laws. But we think the insistence is untenable, and for these reasons:

Each State possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be *prima facie* evidence of another fact. Many such exertions of this power are

shown in the legislation of the several States, and their validity, as against the present objection, has been uniformly recognized save where they have been found to be merely arbitrary mandates or to discriminate invidiously between different persons in substantially the same situation. *Bailey* v. *Alabama*, 219 U. S. 218, 238; *Board of Commissioners* v. *Merchant*, 103 N. Y. 143, 148. The validity of such a statute was brought in question in the recent case of *Mobile &c. Railroad Co.* v. *Turnipseed*, 219 U. S. 35, 43, and it was there said by this court:

"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."

The statute now before us, as affected by the ruling mentioned, makes proof of certain designated facts *prima facie*, but not conclusive, evidence of the common source of the waters and of the injurious effect of the pumping, that is to say, it establishes a rebuttable presumption, but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense. As respects the source of the waters, the presumption appropriately may be regarded as prompted by the

fact, now well recognized, that the pervious rock in which the waters exist usually is of such extent as to reach much beyond the lands of a single proprietor and to constitute a common source of supply, and, as respects the effect of the pumping, the presumption appropriately may be regarded as prompted by the fact, before stated, that pumping from a common supply in the rock for the purpose of collecting and vending the gas as a separate commodity usually is carried on in a manner which is calculated to affect injuriously, and does so affect, the rights of others to take from that supply. Regarding the presumption as prompted by these considerations, as we think should be done, it cannot be said that there is not a rational connection between the designated facts which must be proved and the facts which are to be presumed therefrom until the contrary is shown. What we have said upon the subject of classification sufficiently answers the suggestion or claim that by reason of the presumption the statute discriminates invidiously between different persons in substantially the same situation.

For these reasons none of the objections urged against the statute can be sustained, and so the decree dismissing the bill is

Affirmed.

MATTER OF EASTERN CHEROKEES, PETITIONERS.

PETITION FOR WRIT OF MANDAMUS.

No. 15, Original. Argued February 20, 1911.—Decided March 20, 1911.

Mandamus to Court of Claims to require it to modify its decree to conform to a decree of this court and make a distribution *per stirpes* instead of *per capita* refused on the ground of laches.

Where the Court of Claims decrees a distribution *per capita*, parties who feel aggrieved thereby, and claim that the distribution should

be *per stirpes* in order to conform to the decree of this court, are not obliged to await the completion of the rolls on which the distribution is to be made. They can apply at once to this court for mandamus, *Re Sandford Fork & Tool Co.*, 160 U. S. 247, and are chargeable with laches if they wait and permit all the steps to be taken at great expense and the fund disbursed, so that in case of their success the Government might be required to pay twice; and so *held* in this case.

THE facts, which involve the distribution of a fund between Cherokee Indians pursuant to decrees of this court and of the Court of Claims, are stated in the opinion.

Mr. John B. Daish, with whom *Mr. Joseph D. Sullivan* was on the brief, for the petitioner.

Mr. George M. Anderson, with whom *Mr. John Q. Thompson* was on the brief, for the respondent, the Court of Claims.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition for mandamus to the Court of Claims to require it to conform to a decree of this court modifying a decree of that court in the case of the *United States* v. *Cherokee Nation*, 202 U. S. 101.

A rule to show cause was issued, to which a response has been made by the Court of Claims.

A recitation of the facts of the litigation between the Eastern Cherokees and the United States need not be made. They are set out in 202 U. S. 101. We are only concerned with the decree and what took place in accordance with it in the Court of Claims. It is enough to say that the Eastern Cherokees under the authority of acts of Congress brought suit against the United States for certain sums alleged to be due under treaties with the United States, and the Court of Claims decreed May 18,

1905, that, after deducting counsel fees, costs and expenses, the sum of $1,111,284.70, among other sums, with interest, should be paid to the Secretary of the Interior, to be by him received and held for the use and purpose of paying costs and expenses as stated, and the remainder to be distributed "directly to the Eastern and Western Cherokees, who were parties to the treaty of New Echola, as proclaimed May 23, 1836, or to the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

We held that the decree, "in directing that the distribution be made to 'the Eastern and Western Cherokees'" was "perhaps liable to misconstruction," though limited by a reference to the treaties, and decided that the decree should be modified "so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, exclusive of the Old Settlers." As modified, the decree was affirmed.

We also decided that the amount of the decree "should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it."

Upon the going down of the mandate the Court of Claims modified its decree, as directed, by explicitly excluding the Old Settlers in terms from its operation and distributing the fund "to the Eastern Cherokees as individuals," omitting the words "or to the legal representatives of such individuals." And the court directed the Secretary of the Interior to prepare or have prepared a roll of the Cherokees entitled to share in the amount of the decree and to "accept as a basis for the distribution of said fund the rolls of 1851, upon which the *per capita* payment to the Eastern Cherokees was made, and make such distribution in pursuance of article 9 of the treaty of 1846."

It is stated in the response of the Court of Claims to the rule to show cause that the special agent appointed by the Secretary encountered difficulties in making up the roll "upon a *per capita* basis and otherwise," and that the Secretary of the Interior called the attention of the court to the difficulties and asked the following questions: "First. Shall the rolls of 1851 be used as the exclusive basis for the present distribution? Second. Shall the distribution be *per stirpes* or *per capita?* Third. If *per capita*, what disposition shall be made of those portions for which there have been no applications?"

The court, considering that its decree, as modified by our mandate, directed a *per capita* distribution, ordered the commissioner named for the purpose to "enroll as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee tribe of Indians at the date of the treaties of 1835–36 and 1846, or are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation."

The court subsequently (as appears from its response to the rule to show cause), "at the written request of the Secretary of the Interior and sundry other persons who petitioned therefor, as well as at the request of counsel engaged in said cause," vacated the order which directed the Secretary of the Interior to prepare the roll, and employed Guion Miller, who had theretofore been employed by the Secretary, to prepare the roll under its supervision. The roll was prepared as directed, to which exceptions were filed, most of which were overruled, and on March 7, 1910, it was approved.

Miller was also designated as a special commissioner to receive from the Treasury Department all the warrants

for the persons enrolled, and to visit the various localities where the Indians resided, as he had done in preparing the roll, and to deliver the warrants, which he did prior to the filing of the petition herein for mandamus, the response of the court stating as follows:

"The money arising from said judgment was long prior to October 17, 1910, the date of the filing of said petition for said mandate to show cause, distributed and paid to practically all of those on said roll, so that of the 30,827 enrolled only 313 remained unpaid, as we are advised by said commissioner, who was also intrusted, under the order of the court, with the delivery of the warrants issued by the Treasury Department to the parties so enrolled, respectively. Since which time 44 additional payments have been made, leaving 269 unpaid on October 28, 1910."

The court further states that on the authority of the special report of Miller, made for its information, persons of the same name as those signing the power of attorney authorizing the filing of the petition for mandamus were enrolled, as were those whom they claimed to represent, and have been paid their respective shares, for which they receipted in full.

It is contended by petitioners that the treaties of 1835–36 and 1846 required the Court of Claims to make a distribution *per stirpes*, and that in its original decree of May 18, 1905, it was so provided. And, it is further contended, that the mandate of this court so required, and that such interpretation was put upon it by the Court of Claims and the commissioner appointed by the Secretary of the Interior. It is insisted that, in consequence of the error of the court, the roll prepared in accordance with its orders contains the names of numerous persons not entitled under the mandate of this court to participate in the fund.

The respondent opposes these contentions and makes

the counter one that petitioners have been guilty of laches, which, if it be justified, makes a notice of other contentions unnecessary. A summary of the proceedings shows that the contention is justified. The first decree of the court, as we have seen, distributed the fund to the Eastern and Western Cherokees *as individuals, or to the legal representatives of such individuals.* The decree, as modified by this court, limited the distribution to the Eastern Cherokees, and omitted the words "or to the legal representatives of such individuals." A question arose as to whether the mandate of this court directed a *per capita* or *per stirpes* distribution, and, on March 5, 1907, the Court of Claims gave notice that it would hear the parties on the question.

The matter came on for hearing April 8, 1907, all parties being represented, and a *per capita* distribution of the judgment was ordered and a commissioner appointed to prepare the roll of those entitled to share under the decree.

This was done, and a report made to the court, to which exceptions were filed, which "in the main" were overruled. On March 10, 1910, the report as corrected was approved, and the amount of the decree distributed, as we have seen, to the persons entitled thereto.

This summary demonstrates the laches of petitioners. If it be conceded that the mandate of this court and the decree of the Court of Claims as modified in accordance with it were ambiguous, the Court of Claims decided, as early as April 28, 1907, that it required a *per capita* distribution. The petitioners took no action against the decision nor the order of distribution based on it. They permitted the distribution to be made. And they might have taken action. *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 259. Mandamus was available then, as now, and the circumstances condemn the delay. The amount of the judgment was to be distributed among

many thousands of persons. Such persons were to be ascertained, their names enrolled, and payment made to them. Every step involved expense, and the fund, once disbursed, could not be recovered, and the United States might be required to pay a second time.

In explanation of these circumstances, which, on their face, make a clear demonstration of negligence on the part of petitioners, they urge that after the modification on April 28, 1907, of the final decree there were other proceedings, instancing as such the ruling, on March 7, 1910, on exceptions to the roll, and urge that "within eighty-five days thereafter" they "secured counsel and invoked the jurisdiction of this court for the protection of their rights." They further urge that "until the roll had been approved there was uncertainty what the Court of Claims might do," and that "when the final order had been taken the petitioners were then only at liberty to institute the present proceeding."

This overlooks that they attack the principle upon which distribution was decreed by the Court of Claims; in other words, their contention is that a *per capita* instead of a *per stirpes* distribution of the fund was directed by the decree of April 28, 1907, the consequence of which was that "numerous persons not entitled under the mandate of this court" were made participants in the fund and their (petitioners') shares thereby "much lessened." Petitioners are mistaken, therefore, when they say that they were "only at liberty to institute the present proceeding" when the roll was approved. The decree constituted their grievance, if they had any, and if it did not execute the mandate of this court the action of the Court of Claims in rendering it could have been reviewed and corrected by appeal or mandamus. *In re Sanford Fork & Tool Co., supra.*

Rule discharged and petition dismissed.

TAYLOR *v.* LEESNITZER.

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

No. 45. Argued March 8, 1911.—Decided March 20, 1911.

Although generally slow to overrule decisions of courts other than those of the United States on questions of local practice, this court will do so where, as in this case, the court below yields a consideration of the merits to form and takes too strict a view of its own powers.

When an appeal is taken in open court, all parties are present in fact or in law and have notice; formalities are not needed to indicate that it is taken against all parties.

The requirement of a bond in the Court of Appeals of the District of Columbia does not go to the essence of the appeal, and the form should be objected to within twenty days; and where the appeal was taken in open court, objections to the form of bond cannot be taken on a motion to dismiss the appeal filed six months after the appeal was taken based on defects in the appeal.

Although too late for an appeal to be dismissed on account of the form of bond, if the proper parties are before the court, leave can be given to file an additional bond if desired.

31 App. D. C. 92, reversed.

THE facts are stated in the opinion.

Mr. J. J. Darlington, with whom *Mr. J. Nota McGill* was on the brief, for appellant.

Mr. Edmund Burke for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia dismissing an appeal from a

decree of the Supreme Court. The bill was brought by the appellee Leesnitzer, as one of the heirs of Thomas Taylor, for a partition between herself and the other heirs of lands acquired by Taylor after the execution of his last will. By the will Taylor left all his estate, both real and personal, to his widow, the appellant. See *Bradford* v. *Matthews*, 9 App. D. C. 438. *Crenshaw* v. *McCormick*, 19 App. D. C. 438. Code D. C., § 1628. *Hardenbergh* v. *Ray*, 151 U. S. 112. The bill, of course, was adverse to the appellant's right under the will, and also prayed that she might be declared barred of her dower. See *Clark* v. *Roller*, 199 U. S. 541, 545. After a trial there was a decree for the plaintiff "unless the defendant Margaret E. Taylor shall perfect her appeal from this decree, which is prayed by her in open court and allowed, by giving a supersedeas bond in the penal sum of One Thousand dollars." The decree was filed on May 28, 1907. On June 3, 1907, an appeal bond was filed, but in accordance with the rules, under ordinary conditions, was not printed in the transcript of the record sent to the Court of Appeals. The record was filed in that court on July 17, 1907. On February 12, 1908, the plaintiff Leesnitzer filed a motion that the appeal be dismissed, because 1. Elizabeth E. Padgett, an heir and one of the defendants, "has not been joined either as an appellee or appellant or as a party hereto. 2. That there has been no summons and severance, or service of notification of appeal upon said Elizabeth E. Padgett. Edmund Burke, solicitor for appellee." This motion was granted, on the ground that Mrs. Padgett was not made a party to the appeal.

Thereupon the appellant moved to modify the decree by allowing the appellant to correct her appeal by citing the omitted parties and for such further proceedings as might be necessary to a decision of the cause upon its merits. The court held that as Mrs. Padgett had admitted the allegations of the bill and had arrayed herself

on the plaintiff's side, and as she had got all that she could expect by the decree, the appellant did not need to obtain a severance, but that the appeal should have been taken against her as well as against the plaintiff and that the supersedeas bond should have run to both, which 'an inspection of the bond in the office of the clerk below' showed not to have been the case. It was objected that the court could not look beyond the record before it, which, as we have indicated, contained only a memorandum that a bond had been filed. But the record was entitled 'Margaret E. Taylor etc. *v.* Mary J. Leesnitzer' until within a few days before the case was called for hearing, when the appellant *ex parte* caused the cover of the printed record to be changed so as to name also Elizabeth E. Padgett and Franklin Padgett as appellees. It was said that if the court should confine itself to the record the presumption was that the title of the appeal followed the obligation of the bond. On this ground the court, with expressions of regret, considered itself not at liberty to entertain a motion for leave to file an additional bond.

We generally are slow to overrule the decisions of courts other than courts of the United States upon matters of local practice. But as the Court of Appeals unwillingly yielded a consideration of the merits to what in the circumstances probably was little more than form, we feel less hesitation than otherwise we might in acting upon our opinion that it took too strict a view of its own powers. The first decision went on the ground that Mrs. Padgett was not made a party to the appeal, and, if we correctly understand the second, it also seems to have stood on the same notion deduced as a conclusion from the form of the bond, as disclosed by inspection or presumed. No other was open under the motion except one discarded by the court as we have shown, and no other was or was likely to be taken by the Court of Appeals. But this ground cannot be taken on the record,

because the decree in the Supreme Court states that an appeal was prayed in open court.

When an appeal is taken in open court it does not need the formalities of ancient law to indicate that it is taken against all adverse interests. All parties are present in fact or in law, and they have notice then and there. No citation is required. *Chicago & Pacific R. R. Co.* v. *Blair*, 100 U. S. 661. *Brockett* v. *Brockett*, 2 How. 238. The requirement of a bond by a rule of the Court of Appeals does not go to the essence of the appeal, as is shown by the condition in the rule that the motion to dismiss for want of one must be "made within the first twenty days next after the receipt of the transcript in this Court." Rule X. As the parties in this case had notice of the appeal, they were put upon inquiry as to the scope of the bond, and if, as the Court of Appeals says, there is a presumption that the title of the transcript follows the obligation of the bond, they had actual notice of its form. But the bond cannot create a retrospective presumption as to the effect of the words spoken in open court on the scope of the appeal. That was settled when the appeal was claimed. It follows that no excuse is shown for not objecting to the form of the bond within twenty days. The motion to dismiss was not made until more than six months after the receipt of the transcript, and then was not based on the defect of the bond, but on supposed defects in the appeal. It was not made on behalf of the party aggrieved by the omission from the bond. The time has gone by when the appellant can be turned out of court because Mrs. Padgett was not joined as obligee, but if, as we have tried to show, the proper parties were all before the higher court, no doubt leave would be given to file an additional bond if an amendment were desired.

Decree reversed.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY *v.* UNITED STATES.

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

Nos. 7, 8. Argued March 4, 1910; restored to docket for reargument April 4, 1910; reargued January 5, 6, 1911.—Decided March 20, 1911.

Every penal statute has relation to time and place; and corporations, whose operations are conducted over a large territory by many agents, may commit offenses at the same time in different places, or at the same place at different times.

The construction given to an identical former act prior to its reënactment by Congress, that penalties thereunder were not measured by number of cattle or number of cars, followed. *United States* v. *Boston & Albany R. R. Co.*, 15 Fed. Rep. 209; *United States* v. *St. Louis R. R. Co.*, 107 Fed. Rep. 807.

The act of June 29, 1906, c. 3594, 34 Stat. 607, to prevent cruelty to animals in transit, is general and applies to all shipments of cattle as made. The statute is not for the benefit of shippers but is restrictive of their rights, and violations are not to be measured by the number of shippers, but as to the time when the duty is to be performed.

Under the act of June 29, 1906, to prevent cruelty to animals in transit, offenses are separately punishable for every failure to comply with its provisions by confining animals longer than the prescribed time; and there is a separate offense as to each lot of cattle shipped simultaneously as the period expires as to each lot, regardless of the number of shippers or of trains or cars.

Where cases are properly consolidated below, as these and others were, the aggregate amount of possible penalties in all the actions consolidated is the measure of the amount in controversy to give jurisdiction to this court.

159 Fed. Rep. 33, modified and affirmed.

"THE act to prevent cruelty to animals while in transit," approved June 29, 1906 (c. 3594, 34 Stat. 607), provides:

"SEC. 1. That no railroad . . . whose road forms

any part of a line of road over which cattle . . . or other animals shall be conveyed . . . [in interstate commerce] . . . shall confine the same in cars, boats or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by . . . unavoidable causes. . . . *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to 36 hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of 28 hours, except upon the contingencies hereinbefore stated. . . .

"SEC. 2. That animals so unloaded shall be properly fed and watered during such rest. . . .

"SEC. 3. That any railroad . . . who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. . . .

"SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States. . . ."

Under this act eleven actions were instituted in the Southern District of Ohio against the Baltimore and Ohio Southwestern Railway Company.

The complaint in each case gave the name of the station in Illinois from which the animals were shipped to

Cincinnati, the marks of the cars in which they were shipped, the hour on February 2, 1907, when they were loaded, and the various periods of confinement, which varied from 37 to 45 hours. The separate shipments consisted of one, two, three, and four carload lots, aggregating twenty-one cars, containing several hundred cattle and hogs. Most of the shipments were loaded at different times; but because one (1872) was forwarded under the 36-hour rule, the time for its unloading was the same as that of another shipment (1871), made eight hours later under the 28-hour rule, from a different station. At another station there were three shipments of one carload each of cattle, belonging to different owners loaded at the same time, but two (1869, 1873) of the cars were forwarded under the 28-hour rule and the other (1874) under the 36-hour rule.

The railroad company filed a separate plea in each case, admitting the allegations of the complaint, but setting up that "the shipment therein was forwarded to Cincinnati on its train No. 98, on which there were also loaded and forwarded other cattle, referred to in each of the other suits, and in the said several causes the said plaintiff is entitled to recover but one penalty, not to exceed five hundred dollars, which it is ready and willing to pay, and it pleads the said separate suits in bar to the recovery of more than five hundred dollars for all of the same."

The district attorney's motions for separate judgments on the admission in the several pleas were overruled. The court sustained the company's motion to consolidate the causes, entered judgment for a single penalty, and ordered "that the within order in case 1866 shall apply to, operate upon and be conclusive of all the rights of the plaintiff in each of the several causes, to wit, 1867–1874, 1880 and 1884." The Government sued out a writ of error in case 1866 and, apparently out of abundant cau-

tion, another in 1867, later entering into a stipulation in the Circuit Court of Appeals that the result in these two cases should control all the others.

The Circuit Court of Appeals for the Sixth Circuit (159 Fed. Rep. 33), held that the order of consolidation was proper, but reversed the judgment on the ground that the United States were entitled to recover eleven penalties or one for each of the eleven shipments.

Mr. Edward Colston, with whom *Mr. Judson Harmon*, *Mr. A. W. Goldsmith* and *Mr. George Hoadly* were on the brief, for plaintiff in error:

At the expiration of the 28-hour and also of the 36-hour period, all the cars constituted but a single train. Under § 3, the penalty is for failure to comply with the requirement that no live stock be confined in cars for a longer period than 28 hours without unloading. The number confined, whether estimated by the head, by the number of shipments, or by the carloads, is unimportant.

Under the Government's claim, if fifty horses, each belonging to a different shipper but shipped on the same train, were detained beyond the statutory time, there should be fifty penalties, but if all the horses belonged to the same person and were shipped to the same consignee by the same train, there would be but one penalty. As to construction of the old statute, §§ 4386, 4388, Rev. Stat., see *United States* v. *Boston & Albany R. R. Co.*, 15 Fed. Rep. 209; *United States* v. *St. Louis & S. F. R. R. Co.*, 107 Fed. Rep. 870. As Congress knew how the law had been interpreted in these two decisions and that the penalty did not multiply by either the number of cattle or by the number of cars, or by the number of shipments, it may be considered that a like construction was intended, and was expected to be given to those words. *Mason* v. *Fearson*, 9 How. 258; *United States* v. *G. Falk & Bro.*, 204 U. S. 143; *United States* v. *Hermanos*, 209

U. S. 339; *New Haven R. R. Co.* v. *Int. Comm. Comm.*, 200 U. S. 401; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 14; and see communication from Secretary of Agriculture, p. 3774, Cong. Rec., 59th Cong., 1st Sess.

The practice of the railroads in running solid stock trains was well known to Congress, and if the Congress had intended this law should carry the multiple penalties it would have said so. Whether $500 is not punishment enough to deter the railroads from violating the statute is a consideration of the sort that addressed itself to the legislature and not to the judiciary. *N. Y. C. & H. R. R. R. Co.* v. *United States*, 165 Fed. Rep. 833.

Being penal, this statute should be favorably construed for the carrier. For cases below on this point, see *United States* v. *N. Y. C. & St. L. R. Co.*, 168 Fed. Rep. 699; *Southern Pacific Ry. Co.* v. *United States*, 171 Fed. Rep. 363; *United States* v. *Oregon R. & N. Co.*, 163 Fed. Rep. 640; *United States* v. *A., T. & S. F. Ry. Co.*, 166 Fed. Rep. 160.

The rule for the interpretation of penal statutes is against the conclusion reached by the Court of Appeals. *United States* v. *Corbett*, 215 U. S. 233; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Wiltberger*, 5 Wheat. 95. It is the legislature, not the court, which is to define a crime and ordain its punishment. But courts do ordain punishment when they undertake, as was done here, to multiply the penalty that the legislature has prescribed. *Elliott* v. *Railroad Co.*, 99 U. S. 576; *France* v. *United States*, 164 U. S. 682; *Bolles* v. *Outing Co.*, 175 U. S. 262; *United States* v. *Harris*, 177 U. S. 305.

It cannot be said it was an oversight or inadvertence, that Congress did not attach a penalty to each shipment, or carload or head of stock. If Congress had intended that the penalty clause should receive a different construction from that put on it by the prior decisions it would have made provision to that effect at the time of

this reënactment. *Werckmeister* v. *American Tobacco Co.*, 207 U. S. 381.

One offense cannot be split into many, and penalties thereby multiplied. 1 Bishop's New Crim. Law, §§ 793, 1061. In a criminal case no significance attaches to ownership except as it is a matter of identification of the property. *Nichols* v. *Commonwealth*, 78 Kentucky, 180; *State* v. *Fayetteville*, 2 Murphey (N. C.), 371; *Crepps* v. *Durden*, 2 Cowper, 640.

Congress did not esteem it necessary to inflict a fine of five hundred dollars for each shipment in a trainload containing possibly fifty shipments. See *State* v. *Stevens*, 81 Vermont, 445; Bishop on Statutory Crimes (2d ed.), ch. LXI (bot. p. 627), § 1121; *Fontaine* v. *State*, 6 Baxter, 514; *Woodford* v. *People*, 62 N. Y. 117; *United States* v. *Patty*, 2 Fed. Rep. 664; *Commonwealth* v. *O'Brien*, 107 Massachusetts, 208; *Louisiana* v. *Batson*, 108 Louisiana, 479; *Ward* v. *State*, 90 Mississippi, 249.

As to whether offenses committed against different persons are multiple or constitute but a single offense, see 12 Cyc. 289; 22 Cyc. 383; 25 Cyc. 61; and see also as to what constitutes a single offense: *Friedborn* v. *Commonwealth*, 113 Pa. St. 244; *Commonwealth* v. *Robinson*, 126 Massachusetts, 260; *Hurst* v. *State*, 86 Alabama, 604; *Hoiles* v. *United States*, 3 MacArthur, 371; *State* v. *Hennessey*, 23 Ohio St. 339, 347; *Smith* v. *State*, 59 Ohio St. 357, 358.

The amount in controversy is $5,500, the maximum fine that could be assessed if the claim of the United States prevails. The effect of the consolidation of all the eleven cases into one case makes the amount in controversy $5,500. *Beadles* v. *Smyser*, 209 U. S. 393.

All the cases representing, as they do, but a single controversy, and all having in fact been taken to the Court of Appeals and to this court as one case, it matters not, even if it be conceded, that the stipulation was that

no writ of error should be taken except in two of the cases. Such agreement would be invalid for want of consideration. *Ogdensburg &c. Ry. Co.* v. *Vermont &c. R. R. Co.*, 63 N. Y. 176; *Southern Railway Co.* v. *Glenn*, 98 Virginia, 309, 318; *Jones* v. *Spokane Valley Co.*, 87 Pac. Rep. 65; *Ward* v. *Hollins*, 14 Maryland, 158; *Mackey* v. *Daniel*, 59 Maryland, 484.

Mr. Solicitor General Bowers for the United States on the original argument; *Mr. Assistant Attorney General Denison* for the United States on the reargument:

Four theories as to the unit of offense have been suggested from time to time. They are: The individual animal, the carload, the trainload, and the shipment. The individual-animal theory was rejected in *United States* v. *Boston & Albany R. R. Co.*, 15 Fed. Rep. 209, as was the carload theory in *United States* v. *St. Louis & San Francisco R. Co.*, 107 Fed. Rep. 870. The trainload theory has had no substantial support in the lower courts. The shipment theory has been upheld by all the courts in which it has been involved excepting the District Court below. *United States* v. *Balt. & Ohio S. W. R. R. Co.*, 159 Fed. Rep. 33; *United States* v. *N. Y., C. & St. L. R. R. Co.*, 168 Fed. Rep. 699; *Southern Pacific Co.* v. *United States*, 171 Fed. Rep. 360, 363, aff'g 162 Fed. Rep. 412, and also in effect 157 Fed. Rep. 459; *N. Y. Central & H. R. R. R. Co.* v. *United States*, 165 Fed. Rep. 833, 843; *United States* v. *Oregon R. R. & Nav. Co.*, 163 Fed. Rep. 642; *United States* v. *Atchison, T. & S. F. R. R. Co.*, 166 Fed. Rep. 160.

The unit of offense under the act is not a continuing "confining cattle" in general, but it is the distinct "failure" to unload, feed, water, and rest whatever cattle shall then and there have completed 28 hours of confinement. It is for "every such failure" that the statute provides a penalty.

Where each item of an illegal doing of business is made a separate offense, penalties may be recovered for each. *State* v. *Broeder*, 90 Mo. App. 169; *State* v. *Heard*, 107 Louisiana, 60; *State* v. *Shafer*, 20 Kansas, 226; *Benson* v. *State*, 44 S. W. Rep. 168. Such items of action, even though coincident or concurrent or similar, are, nevertheless, separate offenses. *United States* v. *St. Louis Southwestern R. Co.*, decided December 13, 1910; *People* v. *N. Y. Central R. R. Co.*, 13 N. Y. 78; *Chic. &c. R. R. Co.* v. *People*, 82 Ill. App. 679; *Indiana So. R. Co.* v. *State*, 165 Indiana, 613.

In this case, the statute makes each failure a separate offense, and not the whole series.

Failures to perform statutory obligations are separate offenses if they occur at different times or different places.

If, one by two strokes or shots injures two persons, there are two offenses, even though there was only one brawl; *Flemister* v. *United States*, 207 U. S. 373; *State* v. *Temple*, 194 Missouri, 228; *Augustine* v. *State*, 41 Tex. Cr. R. 59; *Kelly* v. *State*, 43 Tex. Cr. R. 40; *People* v. *Ocholski*, 115 Michigan, 601; *Baker* v. *Commonwealth*, 20 Ky. Law R. 879; 12 Cyc. 289; although where defendant by the same shot wounded four fishermen seated around a camp fire, it was held to be only one crime. *Sadberry* v. *State*, 39 Tex. Cr. R. 466; 12 Cyc. 289.

So as to counterfeits at different times; *Bliss* v. *United States*, 105 Fed. Rep. 508; *United States* v. *Radenbush*, 8 Pet. 288; although it may be only a single offense to possess two counterfeiting plates. *United States* v. *Miner*, 11 Blatch. 511; *S. C.*, 26 Fed. Cas., No. 15,780; *Miller* v. *State*, 72 S. W. Rep. 856; *Collins* v. *State*, 39 Tex. Cr. R. 30. See also *Stevens* v. *State*, 58 S. W. Rep. 96; *State* v. *Burlingham*, 146 Missouri, 207; *O'Neill* v. *Vermont*, 144 U. S. 323, 331; *Suydam* v. *State*, 52 N. Y. 383; *Pittsburg &c. R. Co.* v. *Moore*, 33 Ohio St. 384; *Parks* v. *Railroad Co.*, 13 Lea (Tenn.), 1; *Commonwealth* v. *Hazlett*, 16 Pa. Super.

Ct. 534; *Commonwealth* v. *Rockafellow*, 3 Pa. Super. Ct. 588.

The failures to unload charged in nine of the eleven cases all occurred at separate times and places.

In all of the eleven cases the failures to unload, etc., were separate offenses, because the statute intended that the mistreatment of cattle of different shipments should be separate offenses.

An incidental policy of the act is to protect the interests of the owners of the cattle. *United States* v. *Pere Marquette R. R. Co.*, 171 Fed. Rep. 586; *United States* v. *Oregon R. R. & N. Co.*, 163 Fed. Rep. 640; *United States* v. *Sioux City Stockyards Co.*, 162 Fed. Rep. 556; *United States* v. *L. & N. R. R. Co.*, 18 Fed. Rep. 480; *Chicago &c. R. R. Co.* v. *People*, 82 Ill. App. 679; *Southern Railroad Co.* v. *State*, 165 Indiana, 613; *Commonwealth* v. *Jay Cooke*, 50 Pa. St. 201; and see Sen. Rep. No. 975, 59th Cong., 1st Sess.

The alleged mechanical inconveniences of operating a train under the shipment theory of this statute can be and in practice have been surmounted, and in any event they could not override the intention of Congress.

The natural and normal unit in which railroads deal with freight is by shipments, and those provisions make it clear that that point of view is the one taken by this statute.

The trainload theory has no affirmative recognition in the statute, and not even practical railroad administration requires it. Furthermore, it would tend to make the statute ineffective because the penalty which it would provide is so small.

Under the stipulation in this case this court has not jurisdiction; only two cases, each involving $500, are appealed, and the total amount in controversy is only $1,000. The amount in controversy in a case is not measured by the full amount of plaintiff's claim when defendant ad-

mits or agrees to a part of it, but is measured by the excess of plaintiff's claim above what defendant admits or acquiesces in. *Jenness* v. *Citizens' Nat. Bank*, 110 U. S. 52; *Hilton* v. *Dickinson*, 108 U. S. 165; *Gorman* v. *Havird*, 141 U. S. 206.

And the matter in dispute is the amount involved on the writ of error—not necessarily the same as was involved below. *Gordon* v. *Ogden*, 3 Pet. 33. The amount in dispute may, and must, be determined from the whole record. *Bowman* v. *C. & N. W. Ry. Co.*, 115 U. S. 611, 613.

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

The consolidated record of the eleven cases shows that several hundred cattle and hogs of eleven different owners, shipped in 21 cars, loaded at different stations at various hours on February 2, 1907, were in one train at the time of the expiration of the successive periods for the unloading required by the act of 1906, "to prevent cruelty to animals in transit." The question is as to the number of penalties for which, in such a case, the carrier is liable.

Under the nearly identical act of 1873, Rev. Stat. § 4386, it was held that the penalties were not to be measured by the number of cattle in the shipment, nor the number of cars in which they were transported. *United States* v. *Boston & Albany R. R. Co.*, 15 Fed. Rep. 209; *United States* v. *St. Louis R. R. Co.*, 107 Fed. Rep. 807. And the company contends that as the cattle here were in one train the failure to unload was one offense, punishable by one penalty. In support of its position it relies, among others, on authorities which hold that in larceny, if the goods stolen at one time belong to several persons the offense is single; and that, on conviction for working on Sunday, there is only one breach of the statute, the penalty for which cannot be multiplied by the number of items of work done on the day of rest.

But this does not mean, that if the thief should, at a different time, steal property from the same place, he could not be punished for the new transaction, nor that because a man had been convicted for working on one Sunday he could not be convicted and punished for subsequently working on a different Sunday. For every penal statute must have relation to time and place, and corporations whose operations are conducted over a large territory, by many agents, may commit offenses at the same time in different places, or at the same place at different times.

Here the 21 cars, loaded at different periods, had been gathered into one train. As the period of lawful confinement of the cattle first loaded expired, there was a failure to unload. For that failure the statute imposed a penalty. But there was then no offense whatever as to the animals in the other 20 cars of the same train, which, up to that time, had not been confined for 28 hours.

When, however, later in the day, at the same or a different place, the time for the lawful confinement of the animals in the other 20 cars successively expired, there were similar, but distinct and separate failures then and there to unload. They were separately punishable, since the provision that "for every such failure" the company shall be liable to a penalty prevented a merger. If the period of lawful confinement of several carloads of cattle expires at the same time and place, and the company fails to unload them as required by the statute, and if these cattle all belong to one owner, it is conceded that there is only one offense. It is not different if the same cattle, at the same time and place, had belonged to various owners, or had been shipped under different consignments.

Several expressions in the statute, and particularly the provision that, in estimating the period of lawful confinement, "the time consumed in loading and unloading shall not be considered," recognize that the proper load-

ing or unloading of a number of animals may be treated as a single act, and there is nothing to indicate that it is to be treated as more than one act because the animals happen to belong to different persons. The loading of numerous cars might proceed concurrently; or if not discontinuous or unduly prolonged several cars of cattle of the same consignor might be loaded at the same time within the meaning of the act, in which event the period of their lawful confinement, on the same train, would end at the same time and place. There would in this latter case be coincidence between the one shipment and the one offense.

But in determining whether the number of penalties is always to be measured by the number of shipments on the same train, even when the animals were loaded at different times, it is to be remembered that the statute is general. It applies to the transportation of a trainload of cattle belonging to one owner; to the more usual case where animals belonging to one or more owners are loaded into different cars at different times, and also to those instances where one or a few horses or other animals are shipped and at a different time or farther on during the journey other animals are loaded into the same car. These differences in shipments do not affect the duty of the carrier to the animals, but only the time when the duty to unload is to be performed. The number of consignors, the consent of the owner or agent in charge of the particular shipment that the cattle might be confined for 36 hours, the number of bills of lading and the particulars of the shipment are immaterial, except as they serve to fix the limit of lawful confinement.

To illustrate: It appears in this record that several hundred animals belonging to one owner and consigned to one dealer were loaded into four cars at the same time. The 28 hours of their lawful confinement necessarily expired at the same time. The simultaneous failure to unload these four cars was single, and punishable as a single

offense. But the duty and offense in this transaction would not have been quadrupled if the company had issued to the owner four bills of lading instead of one. Nor would there have been any increase of duty if these same cattle had been received from four consignors instead of one.

The statute was not primarily intended for the benefit of the owners. Indeed, it is restrictive of their rights. The penalty does not go to the consignor, but to the United States for each failure to unload cattle, regardless of who may own them; and even if the owner consented to their confinement beyond a period of 36 hours. The title of the act is "to prevent cruelty to animals in transit," its declared "intent being to prohibit their continuous confinement beyond a period of 28 hours, except upon the contingencies hereinbefore stated." Regardless of the number of shipments, at any time and place where they are willfully and knowingly confined beyond the lawful period there is a violation of the statute as to the animal or animals then and there in custody for transit in interstate commerce.

The point is made in the brief that this court has no jurisdiction, because the amount involved in the cases embraced in these writs of error was only $1,000. The court, we think properly, consolidated all the cases (Rev. Stat., § 921) and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars. The company is liable for nine penalties, because nine times it failed to unload as required by the statute. One penalty should be imposed as to animals referred to in cases numbered 1871 and 1872, and one as to those in 1869 and 1873, where the time for the required unloading respectively coincided.

In other respects the judgment of the Circuit Court of Appeals reversing the judgment of the District Court is affirmed.

FLINT *v.* STONE TRACY COMPANY.

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

VAN DERHOEFF *v.* CONEY ISLAND AND BROOKLYN RAILROAD COMPANY.

HINE *v.* HOME LIFE INSURANCE COMPANY.

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

SMITH *v.* NORTHERN TRUST COMPANY.

MINER *v.* CORN EXCHANGE NATIONAL BANK.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

CEDAR STREET COMPANY *v.* PARK REALTY COMPANY.

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

JARED *v.* AMERICAN MULTIGRAPH COMPANY.

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

GAY *v.* BALTIC MINING COMPANY.

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

BRUNDAGE *v.* BROADWAY REALTY COMPANY.

LACROIX *v.* MOTOR TAXIMETER CAB COMPANY.

LYMAN *v.* INTERBOROUGH RAPID TRANSIT COMPANY.

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

PHILLIPS *v.* FIFTY ASSOCIATES.

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

MITCHELL *v.* CLARK IRON COMPANY.

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

FLUHRER *v.* NEW YORK LIFE INSURANCE COMPANY.

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

COOK *v.* BOSTON WHARF COMPANY.

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

Nos. 407, 409, 410, 411, 412, 415, 420, 425, 431, 432, 442, 443, 446, 456, 457. Argued March 17, 18, 1910; restored to docket for reargument May 31, 1910; reargued January 17, 18, 19, 1911.—Decided March 13, 1911.

The Corporation Tax, as imposed by Congress in the Tariff Act of 1909, is not a direct tax but an excise; it does not fall within the apportionment clause of the Constitution, but is within, and complies with, the provision for uniformity throughout the United States; it is an excise on the privilege of doing business in a corporate capacity

and as such is within the power of Congress to impose; franchises of corporations are not governmental agencies of the State and the tax is not invalid as an attempt to tax state governmental instrumentalities; not being direct taxation, but an excise, the tax is properly measured by the entire income of the parties subject to it notwithstanding a part of such income may be derived from non-taxable property; the tax does not take property without due process of law nor is it arbitrarily unequal in its operation either by differences in corporations or by reason of the classes exempted; the method of its enforcement is within the power of Congress and all corporations, not specially exempted by the act itself, carrying on any business, are subject to the provisions of the law.

The substitution of a tax on incomes of corporations for a tax on inheritance in a bill for raising revenue is an amendment germane to the subject-matter and not beyond the power of the Senate to propose under § 7, Art. I, of the Constitution, providing that such bills shall originate in the House of Representatives but that the Senate may propose or concur in amendments as in other bills. The corporation tax provision of the Tariff Act of 1909 is not unconstitutional as being a revenue measure not originating in the House of Representatives under § 7, Art. I, of the Constitution; but so held without holding that the journals of the House or Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of both branches of Congress, approved by the President and deposited with the State Department.

A tax, such as the Corporation Tax imposed by the Tariff Act of 1909, on corporations, joint stock companies, associations organized for profit and having a capital stock represented by shares, and insurance companies, and measured by the income thereof, is not a tax on franchises of those paying it, but a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described in the act.

Joint stock companies and associations share many benefits of corporate organization and are properly classified with corporations in a tax measure such as the Corporation Tax. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

While the legislature cannot by a declaration change the real nature of a tax it imposes, its declaration is entitled to weight in construing the statute and determining what the actual nature of the tax is.

The Corporation Tax is not a direct tax within the enumeration provision of the Constitution, but is an impost or excise which Congress

has power to impose under Art. I, § 8, cl. 1, of the Constitution. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, distinguished.

Indirect taxation includes a tax on business done in a corporate capacity; the difference between it and direct taxation imposed on property because of its ownership is substantial and not merely nominal.

Excises are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges; the requirement to pay such taxes involves the exercise of the privilege and if business is not done in the manner described no tax is payable.

The only limitations on the power of Congress to levy excise taxes are that they must be for the public welfare and must be uniform throughout the United States; they do not have to be apportioned.

Courts may not add any limitations on the power of Congress to impose excise taxes to that of uniformity, which was deemed sufficient by those who framed and adopted the Constitution.

The revenues of the United States must be obtained from the same territory, and the same people, and its excise taxes collected from the same activities, as are also reached by the States to support their local governments; and this fact must be considered in determining whether there are any implied limitations on the Federal power to tax because of the sovereignty of the States over matters within their exclusive jurisdiction.

Enactments of Congress levying taxes are, as are other laws of the Federal Government acting within constitutional authority, the supreme law of the land.

Business activities such as those enumerated in the Corporation Tax Law are not beyond the excise taxing power of Congress because executed under franchises created by the States.

The power of Congress to raise revenue is essential to national existence and cannot be impaired or limited by individuals incorporating and acting under state authority. The mere fact that business is transacted pursuant to state authority creating private corporations does not exempt it from the power of Congress to levy excise laws upon the privilege of so doing.

The exemption from Federal taxation of the means and instrumentalities employed in carrying on the governmental operations of the States does not extend to state agencies and instrumentalities used for carrying on business of a private character. *South Carolina* v. *United States*, 199 U. S. 437.

The constitutional limitation of uniformity in excise taxes does not require equal application of the tax to all coming within its operation, but is limited to geographical uniformity throughout the United States. *Knowlton* v. *Moore*, 178 U. S. 41.

Even if the principles of the equal protection provision of the Fourteenth Amendment were applicable there is no such arbitrary and unreasonable classification of business activities enumerated in and subject to the Corporation Tax Law as would render that law invalid. There is a sufficiently substantial difference between business as carried on in the manner specified in the act and as carried on by partnerships and individuals to justify the classification.

There are distinct advantages in carrying on business in the manner specified in the Corporation Tax Law over carrying it on by partnerships or individuals, and it is this privilege which is the subject of the tax and not the mere buying, selling or handling of goods.

While a direct tax may be void if it reaches non-taxable property, the measure of an excise tax on privilege may be the income from all property, although part of it may be from that which is non-taxable; and the Corporation Tax is not invalid because it is levied on total income including that derived from municipal bonds and other non-taxable property.

The measurement of the Corporation Tax by net income is not beyond the power of Congress as arbitrary and baseless. Selection of the measure and objects of taxation devolve upon Congress and not on the courts; it is not the function of the latter to inquire into the reasonableness of the excise either as to amount or property on which it is to be imposed.

Congress has power to impose the Corporation Tax and the act is not void as lacking in due process of law under the Fifth Amendment.

Although the power to tax is the power to destroy, *McCulloch* v. *Maryland*, 4 Wheat. 316, the courts cannot prevent its lawful exercise because of the fear that it may lead to disastrous results. The remedy is with the people by the election of their representatives.

Business is a comprehensive term and embraces everything about which a person can be employed; and corporations engaged in such activities as leasing and managing property, collecting rents, making investments for profit and leasing taxicabs, are engaged in business within the meaning of the Corporation Tax Law.

It is no part of the essential governmental function of a State to provide means of transportation and to supply artificial light, water and the like; and although the people of the State may derive a benefit therefrom, the public service companies carrying on such enterprises

are private, and are subject to legitimate Federal taxation, such as the Corporation Tax the same as other corporations are.

Congress has the right to select the objects of excise taxation, and this includes the right to make exemptions; exceptions in the Corporation Tax Law of labor, agricultural, religious and certain other organizations, do not invalidate the tax or render the law unconstitutional.

Courts cannot substitute their judgment for that of the legislature; where details as to estimating the amount of an excise tax, such as the deductions for interest on bonded and other indebtedness provided by the Corporation Tax Law, are not purely arbitrary, they do not invalidate the tax.

If an excise tax operates equally on the subject-matter wherever found its geographical uniformity is not affected by the fact that it may produce unequal results in different parts of the Union.

Corporations, acting as trustees or guardians under the authority of laws of a State and compensated by the interests served and not by the State, are not agents of the state government in a sense that exempts them from the operations of Federal taxation.

If it is within the power of Congress to impose the tax, it is also within its power to enact effectual means to collect the tax. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

The unreasonable search and seizure provision of the Fourth Amendment does not prevent the Federal Government from requiring ordinary and reasonable tax returns such as those required by the Corporation Tax Law.

This court will not pass on questions of constitutionality of a statute until they arise, and no question is now presented as to whether the provisions of the Corporation Tax Law offend the self-incrimination provisions of the Fifth Amendment or whether the penalties for non-compliance are so high as to violate the Constitution; the penalty provisions of the act are separable and their constitutionality can be determined if a proper case arises.

No case is presented on this record involving the question of lack of power to tax foreign corporations doing local business in a State, or whether, if the tax on foreign corporation is unconstitutional, it would invalidate the tax on domestic corporations as working an inequality against the latter; nor is any case presented involving the invalidity of the act as a tax on exports.

THE facts, which involve the constitutional validity of the Corporation Tax Law, being section 38, of the

Payne-Aldrich Tariff Act of August 5, 1909, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. Henry S. Wardner* and *Mr. John G. Sargent*, Attorney General of the State of Vermont, were on the brief, for appellant in No. 407:

The Corporation Tax Law, so far as it affects the defendant corporation, is unconstitutional because it invades the sovereignty of the States.

The tax and the other burdens of the Corporation Tax Law fall upon the corporate franchise of the defendant corporation. See President's message, June 16, 1909, declaring that it is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock. 44 Cong. Rec. 3344; and speech of Senator Newlands, *Id.* 3757, and the several amendments and speeches thereon, *Id.* 3836, 3935, 4024.

Senator Root placed the corporation tax on the same plane as the tax on the privilege of dealing on boards of exchange, citing *Nicol* v. *Ames*, 173 U. S. 509; 44 Cong. Rec. 4005, but see pp. 4025, 4029. The leading lawyers of both parties in the Senate admitted that the tax was understood to be a tax on the privilege or franchise of acting in a corporate capacity.

No opportunity for a hearing was given to the corporations by any committee of the Senate or House of Representatives and no novel revenue measure ever passed through Congress with less scrutiny of its constitutionality. See *Veazie Bank* v. *Fenno*, 8 Wall. 533, 44 Cong. Rec. 4032, 4036; *Id.* 3977, 3978.

Individuals or copartnerships, though carrying on the same character of business, being exempt, corporations are taxed not on account of the character of their business but on account of their being corporations.

As to what constitutes a corporate franchise see *Home*

Insurance Co. v. *New York*, 134 U. S. 594, 599; *Hall* v. *Sullivan Railroad Co.*, 11 Fed. Cas. 257; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 312.

This law, therefore, is a burden upon the right to be a corporation. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, dissent of Fuller, Ch. J., p. 581; and of Brown, J., p. 691.

Until 1870 no Federal tax had been checked by this court on the ground that it invaded the sovereignty of a State; but long before that it did declare that a state tax had invaded the sovereignty of the United States. In *McCulloch* v. *Maryland*, 4 Wheat. 316, this court held that an instrumentality of government could not be taxed in respect to its operation by one of the States. See also *Osborn* v. *United States Bank*, 9 Wheat. 738, 859.

A state tax so far as it invades the constitutional powers and sovereignty of the United States is void and a Federal tax so far as it invades the reserved powers and sovereignty of the States is equally void. *Weston* v. *Charleston*, 2 Pet. 449; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Dobbins* v. *Erie County*, 16 Pet. 435.

As to impropriety of taxation of state instrumentalities, see expressions of this court in *Worcester* v. *Georgia*, 6 Pet. 515, 570; *Ableman* v. *Booth*, 21 How. 506; *License Tax Cases*, 5 Wall. 462, 470; *Pervear* v. *The Commonwealth*, 5 Wall. 475; *Collector* v. *Day*, 11 Wall. 113, affirming 3 Cliff. 376; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30; *United States* v. *Railroad Co.*, 17 Wall. 322, 327.

As to exemption of municipal bonds from Federal taxation, see *Mercantile Bank* v. *New York*, 121 U. S. 138, 162; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 583, 601–652; *Plummer* v. *Coler*, 178 U. S. 115. For other cases preventing invasion of sovereignty through taxation, see *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Ambrosini* v. *United States*, 187 U. S. 1; *Bettman* v. *Warwick*, 108 Fed. Rep. 46.

States cannot tax United States patents. *Patterson* v. *Kentucky*, 97 U. S. 501; *Webber* v. *Virginia*, 103 U. S. 344; *Allen* v. *Riley*, 203 U. S. 347; *Re Sheffield*, 64 Fed. Rep. 833; *Commonwealth* v. *Westinghouse Mfg. Co.*, 151 Pa. St. 265; *Edison Co.* v. *Board of Assessors*, 156 N. Y. 417.

A patent is a franchise. *Bloomer* v. *McQuewan*, 14 How. 539, 549; *Seymour* v. *Osborne*, 11 Wall. 516; *Patterson* v. *Kentucky*, 97 U. S. 501, 506. A State cannot tax a Federal corporate franchise. *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1; *Cent. Pac. R. R. Co.* v. *California*, 162 U. S. 91.

Taxation of a state corporate franchise is beyond the power of Congress. The granting of charters and franchises to corporations is a prerogative of the crown; as such, it is owned by the States. *Wheeler* v. *Smith*, 9 How. 55, 78. In *Veazie Bank* v. *Fenno*, 8 Wall. 533, the tax was not on the franchise; the statute there under discussion may be sustained on the strength of the Government's power to regulate currency. See *Head Money Cases*, 112 U. S. 580.

If § 122 of the Internal Revenue Act of 1864, as amended in 1866, affords a precedent for the corporation tax of 1909, *Railroad Co.* v. *Collector*, 100 U. S. 595, does not sustain the corporation tax nor does *United States* v. *Railroad Co.*, 17 Wall. 322; or *Nicol* v. *Ames*, 173 U. S. 509.

The transmission of property on the occasion of the owner's death, being an inevitable occurrence, can be taxed to any extent by the United States without preventing the transmission. On the other hand, corporate franchises are government creations; they may easily be taxed to extinction, and the granting of franchises may easily be prevented by the mere enactment of a tax statute.

There is a clear distinction between a Federal tax on the doing of a thing with or in respect to property which the State did not create, and a Federal tax on a corporate

franchise created and granted out of state sovereignty. *Thomas* v. *United States*, 192 U. S. 363; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, do not support the constitutionality of the corporation tax. The latter case sustained § 27 of the War Revenue Act as an excise tax on a particular business and was in line with *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433. The Corporation Tax Law mentions no particular business except insurance. *South Carolina* v. *United States*, 199 U. S. 437, does not apply. The tax was laid on the dispensaries not because they were empowered by the State, but because they dealt in liquors. The Corporation Tax Law falls upon corporations because they are empowered by the State and not because they do a general business.

Until the enactment of the Corporation Tax Law no such tax had been imposed by Congress. In 122 years of legislation under the Constitution the corporation tax of 1909 is the first of its kind. *Hale* v. *Henkel*, 201 U. S. 43, 86.

The burdens of the Corporation Tax Law fall on the franchise of every corporation. The law therefore puts the burden on the power of the States to create corporations, and mere phraseology counts for little as against the substance and effect when the constitutionality of the law is attacked. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 580; *Knowlton* v. *Moore*, 178 U. S. 41, 81; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 411.

The plain language of the Tenth Amendment to the Constitution is not to be evaded by a device which clothes an invasion of state sovereignty in a new name.

Among the "ordinary functions" of state government is the creation of corporations, and the exercise of a prerogative of sovereignty in creating them is strictly governmental. The invasion of state sovereignty through the corporation tax is actual and real.

The operation of the law would result in confiscation

instead of taxation. "For taking away our charters" was one of the grievances of the American colonies against the King of Great Britain.

The corporations are deprived of their property without due process of law.

No justification for this tax is to be derived from any analogy to state corporation taxes. The relation of the States to corporations is different from the relation of the Federal Government to state corporations. A State grants a corporate charter, and it may impose on that charter such conditions, whether in the form of taxes or otherwise, as it sees fit.

Congress, in classifying corporations as the objects of a special corporation tax, assumes that apart from the reasons why a State may so classify them, there is some other basis for classification. There is none, however, and every feature of business peculiar to corporations is an incident inherent in the franchise granted and exempt from Federal taxation. *Kansas Pac. R. R. Co.* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 414; *McKinley* v. *Wheeler*, 130 U. S. 630.

For Congress to classify corporations as the objects of a special and discriminating tax, whether the burdens are light, oppressive or wholly confiscatory, is utterly arbitrary. *San Bernardino County* v. *Southern Pac. R. R. Co.*, 118 U. S. 417.

Due process of law is a process which accords with those immutable principles of justice which inhere in the very idea of free government. *Holden* v. *Hardy*, 169 U. S. 366, 389; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Columbia Bank* v. *Okely*, 4 Wheat. 235, 244; *Twining* v. *New Jersey*, 211 U. S. 78, 101.

Congress must conform to these principles in the passage of every law. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272; *Sinking Fund Cases*, 99 U. S. 700, 718.

The arbitrary action of Congress in placing these unprecedented and oppressive burdens on the defendant corporations and wholly exempting their business competitor from every one of them is not due process of law. *Ballard* v. *Hunter*, 204 U. S. 241; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Duncan* v. *Missouri*, 152 U. S. 377; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150.

It is of no importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot from such omission claim the right to enact laws which are unjust, unequal, oppressive and arbitrary.

The Fourteenth Amendment is but declaratory of the law as it had long existed. See Historical Remarks on Taxation of Free States, 1778, p. 39; *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 241; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The corporation tax declares a discrimination "clear and hostile" upon companies which owe the General Government no allegiance and no debt for their creation. It is a discrimination "unusual" to the extent of being without a precedent in the history of the country and is therefore wholly "unknown." It does not proceed within reasonable limits for in the reason of things there is no basis for the discrimination; and as for being within "general usage," the fact that it was hitherto unknown condemns it upon that ground. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; *Billings* v. *Illinois*, 188 U. S. 97, 101; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

The act is unconstitutional because it takes property for public use without just compensation, not only as to the one per cent tax, but also as to the peculiar requirement of subd. 6 of the law, which says that the returns "shall constitute public records and be open to inspection as such."

This publicity is not required for the purpose of imposing the tax. It can in no way enhance the public revenues. It is arbitrary, visitatorial and disciplinary in its nature. It is not, in any sense, for revenue purposes. A corporation is protected under the Fifth Amendment against the taking of its property without just compensation. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Hale* v. *Henkel*, 201 U. S. 43, 76.

The corporation tax is a direct tax on the franchise and therefore unconstitutional because not apportioned. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; *S. C.*, 158 U. S. 601; *Nicol* v. *Ames*, 173 U. S. 509, 520; *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1, 41. It is in the nature of a poll tax. Beale on Foreign Corp., § 508, p. 665; *Lumberville Delaware Bridge Co.* v. *Assessors*, 55 N. J. Law, 529, 537.

Any tax when placed on the right of the man or of the corporation to live is a capitation tax and as direct as any tax can be.

The inclusion of joint stock companies within the terms of the statute does not affect the argument on the previous points. *Liverpool* v. *Massachusetts*, 10 Wall. 566; *Attorney General* v. *Mercantile Marine Ins. Co.*, 121 Massachusetts, 524; *Platt* v. *Wemple*, 117 N. Y. 136.

Mr. Richard V. Lindabury, with whom *Mr Charles W. Pierson* and *Mr. Robert Lynn Cox* were on the brief, for appellants in Nos. 409 and 410:

The tax is not an excise tax upon business or occupation, but is either a corporate franchise tax, or an income tax; it is imposed only on artificial persons; it is measured by a percentage of net income, not from business carried on, but from all sources. No kind or kinds of business are specified but the tax extends to income from business of exporting, and to income from business done outside the jurisdiction. The nature of the tax does not depend on what Congress has seen fit to label it.

If the tax be construed as a franchise tax, it constitutes, so far as state corporations are concerned, an interference with sovereign powers and functions of the States not surrendered to the General Government and expressly reserved to the States by the Tenth Amendment.

The fact that the tax is laid on joint stock companies as well as on corporations does not necessarily indicate that it is not a franchise tax.

The right to grant corporate charters for ordinary business purposes is an attribute of sovereignty belonging to the States, not to the General Government. As to implied limitations on Federal power of taxation, see *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1.

The true test is found in the nature of the function performed by the State in chartering the corporation, not in the nature of the function performed by the corporation after it is chartered; as to this see taxation of patent rights and copyrights; as to the general limitations of taxing power, see *Railroad Co.* v. *Collector*, 100 U. S. 595; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Knowlton* v. *Moore*, 178 U. S. 41. *South Carolina* v. *United States*, 199 U. S. 437, discussed and distinguished.

The tax is an attempted encroachment by Congress on a new field; it cannot be sustained as a tax on franchises as property. The claim of a right in Congress to tax franchises of state corporations is dangerous and the practical consequences if such a claim be upheld will be serious.

If the tax be construed as an income tax it is unconstitutional because imposed upon income from real estate and personal property, and therefore a direct tax not apportioned among the States according to population; also because imposed upon income from state and municipal securities and therefore a burden on the borrowing power of the States. As these are essential and inseparable parts of the taxing scheme, the tax must fall as a whole.

The tax is non-uniform, arbitrary and unequal, and if imposed and enforced would deprive the corporations and joint stock associations against which it is levied of their property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution.

The classification is arbitrary because limited to artificial persons; and because some corporations such as fraternal benefit societies and domestic building and loan associations are exempted.

The apportionment is arbitrary because the tax is not limited to income from business done; and as between corporations whose indebtedness does and does not exceed amount of their paid capital stock; also as between domestic corporations doing business abroad and foreign corporations.

Whatever view may be taken of the act in its other aspects, it must be held unconstitutional, so far as it imposes a tax on the franchises or business of state railroads or other public service corporations, because an interference with state agencies or instrumentalities.

The fact that insurance companies are specifically mentioned does not differentiate them from the other corporations subject to the tax.

Mr. John G. Johnson and *Mr. Frederic Jesup Stimson*, with whom *Mr. Lawrence M. Stockton* and *Mr. Harris Livermore* were on the brief, for appellants in Nos. 425 and 457:

It was not within the power of the States before the Fourteenth Amendment to deprive citizens of the equal protection of the laws. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 155.

The words "due process of law" in the Fifth Amendment have therefore the full meaning and intention more amply expressed in the Fourteenth Amendment by the addition of the words "equal protection of the laws."

For comparison of these phrases, see Stimson's Fed. and State Const. pp. 75, 80, 90; Taswell-Langmead, English Const. Hist., 6th ed., quoting Coke, 104–107; 2 Hannis Taylor, Eng. Const. p 3.

Words in the Federal Constitution are to be construed and extended according to their full historical meaning acquired at the time of its adoption. Cooley, Const. Law, 4th ed., p. 387; *Mattox* v. *United States*, 156 U. S. 237; *Kepner* v. *United States*, 195 U. S. 100.

Unequal taxation, not based upon a reasonable classification, is not "due process of law," and an excise tax imposed on the doing of business (save where imposed as a charter limitation by the sovereignty creating a corporation), like a simple property tax must apply alike to all persons and all corporations engaged in the same business. A franchise tax may be imposed in lieu of or in addition to a simple property tax, but where the tax is not imposed upon the charter to do business as a corporation as such, it must apply equally to corporations and individuals.

Mr. Richard Reid Rogers for appellants in No. 442:

The act of Congress is unconstitutional with especial respect to the Interborough Rapid Transit Company, inasmuch as it imposes a tax upon a public agency engaged in carrying on a municipal, and therefore, under the decisions of this court, a state enterprise.

A railroad chartered by the Congress of the United States, employed to transport the mails of the United States, or its troops and munitions of war, and engaged in conducting broadly an interstate commerce business, notwithstanding the fact that its existence is due to private initiation, and its profits are distributed to private investors, is nevertheless an agency of the Federal Government, so that its right to exist and carry on its work cannot be taxed by any state government.

A municipality is but the arm of a state government;

a municipal undertaking is a public undertaking of the State itself, and, therefore, municipal property and municipal agencies enjoy the same protection from Federal taxation as the property and agencies of the State of which the municipality is a mere subdivision. *People ex rel. Interborough R. T. Co.* v. *Tax Commissioners*, 126 App. Div. 610.

The public agencies of a State, or of a municipality of a State, may not be taxed by the Federal Government. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547; *The Collector* v. *Day*, 11 Wall. 113, 125; *United States* v. *Railroad Co.*, 17 Wall. 322; *United States* v. *Louisville*, 169 U. S. 249; *Mercantile Bank* v. *New York*, 121 U. S. 138; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 584; *Van Allen* v. *The Assessors*, 3 Wall. 573, 591; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529; *United States* v. *Stanford*, 161 U. S. 412; *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 92; *Railroad Co.* v. *Peniston*, 18 Wall. 30; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 162; *Fagan* v. *Chicago*, 84 Illinois, 227, 233, 234; *Knowlton* v. *Moore*, 178 U. S. 41, 59; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *United States* v. *Railroad Co.*, 17 Wall. 322, 330; *United States* v. *Louisville*, 169 U. S. 249.

The act of Congress is unconstitutional in so far as it attempts to impose a tax upon the franchises of foreign corporations, or at least upon their right to carry on a purely intrastate business—a matter over which the Federal Government has no control. The whole act, therefore, must fail, inasmuch as it cannot be assumed that Congress intended to pass a law which would place state corporations at a disadvantage with respect to foreign corporations engaged in the same character of business. *License Tax Cases*, 5 Wall. 462, 471; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210.

The tax is so unequal that by definition it is not such an act as Congress has the delegated power to impose.

Mr. Julien T. Davies, with whom *Mr. Frederic D. McKenney* was on the brief, for appellant in No. 415:

The tax imposed by the Corporation Tax Law is a direct tax upon income from real estate and personal property, and not being apportioned among the several States is unconstitutional.

If the tax is not upon net income, it is a tax upon the franchise to be a corporation, and as such, void, because in conflict with the implied limitations upon the taxing power contained in the Constitution.

The Corporation Tax Law, if the tax falls upon "carrying on or doing business," must fail for want of equality and uniformity in the tax thereby imposed.

The provisions of the Corporation Tax Law with regard to the making of returns and constituting such returns public records are unconstitutional as requiring an unreasonable search.

The power of Congress to raise revenue for the support of the General Government, that is, its power of taxation, and the power of Congress to regulate commerce with foreign nations and among the several States, are both derived from the same articles of the Constitution of the United States. In their origin, they are equal and coordinate powers. The power to regulate commerce is, however, exclusive of the power to tax concurrent with the powers of the several States.

The right of all persons, as well as corporations, to engage in interstate commerce is a constitutional right and one which cannot be taken away or prohibited, although it can be regulated by Congress.

The corporation tax is unconstitutional; as to corporations engaged in interstate commerce it is clearly a tax on the doing of the business of interstate commerce, as it exceeds regulation.

To engage in interstate commerce is a constitutional right and not a privilege; therefore Congress cannot pro-

hibit the exercise of such right. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Reid* v. *Colorado*, 187 U. S. 137; *Howard* v. *Illinois Cent. R. R. Co.*, 207 U. S. 463; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Paul* v. *Virginia*, 8 Wall. 168.

There is a distinction between the power to regulate commerce between the States and the power to regulate commerce with foreign nations and with Indian tribes. *Int. Comm. Comm.* v. *Brimson*, 154 U. S. 447; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Williams*, 194 U. S. 279; *United States* v. *Ju Toy*, 198 U. S. 253; *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320.

Taxation is not included within the power of regulation granted by the Constitution. The power to tax is the power to destroy or prohibit. If interstate commerce can be taxed at all, it can be taxed out of existence and thus prohibited. *McCray* v. *United States*, 195 U. S. 27. The power to regulate does not include the power to prohibit. *Miller* v. *Jones*, 80 Alabama, 89; *Bronson* v. *Oberlin* (O.), 52 Am. Rep. 90; *Ex parte Patterson* (Tex.), 51 L. R. A. 654; *Duckall* v. *New Albany*, 25 Indiana, 283; *McConvill* v. *Jersey City*, 39 N. J. Law, 38; *People* v. *Codway*, 28 N. W. Rep. 101; *Mernaugh* v. *Orlando*, 41 Florida, 433; *In re Hanck* (Mich.), 38 N. W. Rep. 275; *State* v. *DeBar*, 58 Missouri, 395; *Sweet* v. *Wabash*, 41 Indiana, 7; *Andrews* v. *State* (Tenn.), 8 Am. Rep. 8; *Ex parte Byrd* (Ala.), 4 So. Rep. 397; *Muhlenbrinck* v. *Long Branch Comrs.*, 42 N. J. Law, 364.

Mr. Edward Osgood Brown, with whom *Mr. George Packard* and *Mr. Vincent J. Walsh* were on the brief, submitted for appellants in Nos. 411 and 412:

While as held in *Knowlton* v. *Moore*, Congress may tax even though it involves the power to destroy some business or property right of a citizen or corporation, it

has not the power to tax and thus destroy the right of existence of a corporation. Such a power would be tantamount to a power to tax the right to create such an existence. *California* v. *Central Pac. R. R. Co.*, 127 U. S. 1; *Collector* v. *Day*, 11 Wall. 113; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 178. *Knowlton* v. *Moore* and *Veazie Bank* v. *Fenno*, 8 Wall. 533, hold nothing to the contrary.

Whatever may be said of other corporations, public service corporations in private hands furnishing transportation, water, light, or performing other public or semi-public functions, are instrumentalities of the State in the strictest sense and for that reason are given the power of eminent domain; the functions of many of them are indeed governmental, *e. g.*, the functions of water companies. *Water Co.* v. *Fergus*, 180 U. S. 624; *Water Co.* v. *Freeport*, 180 U. S. 587; *Water Co.* v. *Danville City*, 180 U. S. 619.

The inclusion of these public service corporations is a part of the intent under which the law was passed as an "entire scheme of taxation," and if it fails as to them it must fail as a whole—under the holding in the *Pollock case.*

Under the allegations of our bill the Corporation Tax Law is an invalid and unenforceable enactment as against the defendant corporation in this case—The Northern Trust Company—because it is shown by those allegations that said company is in an especial manner an agency of the legislative and judicial departments of the government of Illinois, and in its case, therefore, the corporation tax is in a peculiar and especial sense an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers.

The Corporation Tax Law if invalid against the great mass of corporations intended to be affected by it, cannot be held valid as to national banks and other corporations

created by Federal authority. A tax falling only on such corporations was not within the intention of Congress. If it fails as to state-created corporations, therefore, it must fail as to national banks. *Pollock* v. *Trust Co.*, 158 U. S. 601; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Spraigue* v. *Thomson*, 118 U. S. 90; *Warren* v. *Charlestown*, 2 Gray, 84.

Mr. Charles H. Tyler, Mr. Owen D. Young, Mr. Burton E. Eames and *Mr. Randolph Frothingham* for appellant, in No. 443, submitted:

The defendant corporation is not within the statute, as it applies only to such corporations as are carrying on or doing business.

The defendant corporation is not carrying on or doing business.

The care and attention which is given by an owner to his property as incidental merely to the protection and preservation of his investment, does not constitute carrying on or doing business within the meaning of this act. *Parker Mills* v. *Commissioners of Taxes*, 23 N. Y. 242; *Re Ala. & Chat. R. R. Co.*, 9 Blatchf. 390.

The present act is to be interpreted not by giving the broadest possible interpretation to the words, "carrying on or doing business" because that would lead to results at once unreasonable and unconstitutional.

The carrying on or doing business is not to be applied to every activity of a corporation; and the courts have restricted the application of the words to the principal or primary pursuit or occupation of the company and have not extended it to matters purely incidental. See Marshall, Principles of Economics, 348 (London, 1891).

Mr. C. H. Williams for appellants in No. 457.

Mr. J. B. Foraker, with whom *Mr. Alton C. Dustin*,

Mr. D. Edward Morgan and *Mr. Richard Inglis* were on the brief, for appellant in No. 420.

Mr. Frederic R. Coudert for appellants in Nos. 431 and 432, submitted.

Mr. Jed. L. Washburn, with whom *Mr. William D. Bailey* and *Mr. Oscar Mitchell* were on the brief, for appellant in No. 446.

Mr. William D. Guthrie, with whom *Mr. Victor Morawetz* and *Mr. Howard Van Sinderen* were on the brief, for appellee in No. 410:

The argument in support of the contention of this appellee may be divided as follows for convenience of discussion:

A tax upon income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution.

Congress cannot constitutionally impose an excise tax measured by non-taxable income.

The act of August 5, 1909, should be construed as imposing an excise tax only upon income derived from the carrying on or doing business.

The act of August 5, 1909, is not severable.

A tax upon the carrying on or doing business or upon the net income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution. *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 443; *Railroad Co.* v. *Collector*, 100 U. S. 595, 598; *Springer* v. *United States*, 102 U. S. 586, 598; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 411; *South Carolina* v. *United States*, 199 U. S. 437, 454.

The constitutional provision that all excises shall be uniform throughout the United States merely requires

geographical uniformity. *Knowlton* v. *Moore*, 178 U. S. 41.

Congress may not tax United States bonds and particularly those issued under the acts of July 14, 1870, 16 Stat. 272, and January 14, 1875, 18 Stat. 296. Although the Constitution does not expressly prohibit the United States from impairing the obligation of contracts, the due process clause of the Fifth Amendment prevents any such impairment or destruction of contract rights. *Sinking Fund Cases*, 99 U. S. 700, 718; *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1, 33. Nor can such income be indirectly taxed by means of a so-called special excise tax upon the carrying on or doing of business by corporations. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429.

The constitutional provisions conferring upon Congress power to impose taxes make no distinction between corporations and individuals. Indeed, corporations are not mentioned in the Constitution. The power to tax private corporations organized under state laws is coextensive with the power to tax individuals and flows from exactly the same constitutional provisions as apply to individuals. Therefore, Congress cannot impose upon corporations, or upon companies or associations of any class, an excise tax that it cannot impose upon corporations and other companies or associations.

The mere franchise or license to be a corporation or to carry on business in corporate form certainly does not of itself make a corporation a governmental instrumentality or agency. *Railroad Co.* v. *Peniston*, 18 Wall. 5, 31; *South Carolina Case, supra*, 199 U. S. 437.

The classification of corporations as a separate class by the States has been sustained on grounds which are, at least partly, unavailable in support of an act of Congress. *The Delaware Railroad Tax*, 18 Wall. 206; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606; *New York* v. *Roberts*, 171

U. S. 658, 665; *Florida Central &c. R. R. Co.* v. *Reynolds*, 183 U. S. 471, 477; *Berea College* v. *Kentucky*, 211 U. S. 45, 54.

Congress, however, cannot constitutionally impose an excise tax measured by non-taxable income.

It is submitted that the underlying principle of these decisions is that a license or occupation tax cannot be imposed by a State upon foreign corporations, measured by the amount of non-taxable property or the amount of non-taxable interstate business of the corporation, and that any such attempt would establish an unconstitutional basis of classification for purposes of taxation; in other words, that a tax cannot be measured by non-taxable property or income. If we apply the same principle to the case at bar, it must follow that Congress cannot directly or indirectly measure an excise tax on corporations or individuals by property or income which is not taxable at all or only taxable by a direct and apportioned tax. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 410, 417; *Galveston, Harrisburg &c. Ry. Co.* v. *State of Texas*, 210 U. S. 217; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 416; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 519; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *State Tonnage Tax Cases*, 12 Wall. 204, 217.

The corporation tax should be construed as imposing an excise tax only upon income derived from the carrying on or doing business. If an act of Congress be reasonably susceptible of a construction that will avoid a conflict with the Constitution of the United States, such construction should be adopted. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

The act is susceptible of a construction which may render the act constitutional and avoid the grave and doubtful constitutional questions involved in the contention of the Government or suggested in the numerous

briefs filed on behalf of the various appellants. According to this construction, as the act purports to impose "a special excise with respect to the carrying on or doing business," the tax is to be assessed upon net income received "from all sources" in carrying on or doing business, but is not to be assessed upon income derived directly from United States, state, county or municipal securities, or from real and personal property not used or employed in business. Thus construed, the act imposes an excise tax upon business or occupation and not in any respect a direct tax on property or on non-taxable securities, and thereby any conflict with express or implied constitutional limitations is avoided.

Congress has acted upon the decisions of this court in the Income Tax Cases, and has proposed for adoption by the several States a Sixteenth Article of Amendment to the Constitution, to read as follows. "Article 16. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration."

The Corporation Tax Law is subject to the implied constitutional limitation that bonds issued by the Federal and state governments are not taxable directly or indirectly by Congress. *Kepner* v. *United States*, 195 U. S. 100, 125; *United States* v. *Nix*, 189 U. S. 199, 205. The test in each case should be whether the income had been received as direct income from property or as income from carrying on business. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 417.

The court will undoubtedly take judicial notice that the Sixteenth Amendment was proposed in connection with the passage of the Tariff Law of 1909. A number of senators and representatives were insisting upon inserting in that tariff law an income tax similar to the tax contained in the act of 1894, so as thereby to force a

reconsideration of the ruling in the prior cases. It was in order to prevent any general income tax provision in the act of 1909 similar to the provision contained in the act of 1894, and in order to avoid the unseemly position of the Congress declining to accept the authoritative decision of this court, that a compromise was entered into under which it was agreed to pass a joint resolution to amend the Constitution of the United States as suggested by this court in the opinion in the *Pollock Case*, 158 U. S. 635, so as to vest in Congress power to lay direct income taxes without apportionment. It would be strange, indeed, if in view of this indisputable history, it should now be held that after all it was the deliberate intention of Congress, in and by § 38 of the act of 1909, to enact a provision which, as to corporations, joint stock associations and insurance companies, should be identical in substance and effect with the income tax provision contained in the act of August 15, 1894, and thus plainly in conflict with the ruling in the Income Tax Cases of 1895.

The separate provision taxing the income of foreign corporations derived from "capital invested within the United States" is clearly unconstitutional within the ruling in the *Pollock Case*. On such capital invested in real or personal property the tax is direct and not an excise. But, so far as we have been informed, no foreign corporation is now before the court challenging the constitutionality of the act because, as to it, the tax is partly an excise tax on business transacted and partly a direct tax on capital invested.

So also as to the taxation of such corporations as are engaged in the export business or in transacting business in foreign countries. Assuming that income derived from exporting or income derived from carrying on or doing business in foreign countries is not within the taxing power of Congress under the rules declared in such cases as *Railroad Co.* v. *Jackson*, 7 Wall. 262; *State Tax on Foreign-*

Held Bonds, 15 Wall. 300; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 181; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299; *Delaware, L. &c. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 294; *Selliger* v. *Kentucky*, 213 U. S. 200; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, it may be ruled that it does not lie with those not so engaged to challenge the constitutionality of the act of Congress in so far as it affects other corporations not before the court.

The provision in the act of 1909 excluding income received as dividends upon stock of other corporations, etc., does not imply that no other deductions were intended by Congress. *People ex rel. Vandervoort Ry. Co.* v. *Glynn*, 194 N. Y. 387, 389.

Mr. James L. Quackenbush for appellees in No. 442, submitted.

Mr. Charles A. Snow and *Mr. Joseph H. Knight* for appellees in No. 425 submitted.

The Solicitor General for the United States on the reargument; *Mr. Solicitor General Bowers* on the original argument, by leave of the Court in support of the constitutionality of the Corporation Tax Law:

Appellants have presented against this tax every possible objection that could be made to any form of taxation under the Constitution.

It is said to be a tax upon exports, and void because beyond the power of Congress to lay in any manner; a direct tax and void because not apportioned among the States according to population; an excise tax and void because not uniform throughout the United States; a tax upon corporate franchises, and void as an impairment of the sovereignty of the States; a tax upon business, and

void as discriminating against corporations; not a tax at all, but a mere confiscation of private property for public use; void because in its methods of assessment and collection it involves unreasonable search and seizure and self-incrimination; and, finally, that it was not constitutionally enacted because it is a revenue measure and originated in the Senate.

The first ground of objection may be dismissed with the suggestion that none of the complainants is engaged in the business of exportation, and the last is not tenable because the bill originated in the House, and the Senate in substituting the corporation tax for another tax provided for in the original bill did no more than exercise its undoubted power of amendment.

In determining whether a tax is direct or indirect within the meaning of the Constitution, its incidence is not to be considered. The question is not an economic one, but legal, and we must look for the answer to the legislative and judicial history of the country. *Owensboro Bank* v. *Owensboro*, 173 U. S. 664; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503.

The nature of the tax is determined by its subject-matter—that upon which it is laid.

The act itself discloses this. The tax is upon the business done by the corporations.

The remainder of the act deals with the rate of the tax, its measure, exemptions, assessment, collection, etc.

Rufus King asked in the Federal Convention, "What is the precise meaning of direct taxation?" No one then answered the question. Taxes on capitation and land were, however, certainly meant. The intention even here was to tax in some measure, according to ability to pay. So slaves were to be counted as three-fifths of their real number, and the land tax was to be according to population, because land values depended largely upon density of population.

When the carriage tax was imposed in 1794 members of the Convention expressed their view of what was direct taxation.

In the administration which proposed the tax were three members of the Convention,—Washington, Hamilton and Randolph; in the House which enacted it were Baldwin, Dayton, Fitzsimmons and Madison, and in the Senate were Ellsworth, King, Morris and Martin. Of these, only Madison opposed the tax.

In the *Hylton Case*, in which the tax was challenged, of the justices participating in the decision Wilson and Paterson were members of the Federal Convention and Iredell was a member of the North Carolina Convention which ratified the Constitution.

The decision, unanimous for the tax, was acquiesced in by the country as a proper construction of the Constitution, and later Madison himself as President approved of a like tax.

The carriage tax was certainly a tax upon property, and in a sense direct, for it must be paid by the owner of the carriage on which it fell, but because it was laid not upon property generally, and only upon a peculiar species of property, it was held to be an excise. Great stress was laid by the court upon the fact that it was incapable of just apportionment according to population, as indicating that it was not such a tax as was intended to be apportioned.

During the war of 1812 and during the Civil War taxes were levied upon different species of property, upon various occupations, and upon different business pursuits of individuals and corporations, and every such tax was laid as an excise. And these could none of them be justified as war taxes, for the taxing power of the Government is the same in war and peace.

After the war some of these taxes were assailed as unconstitutional. *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433;

Veazie Bank v. *Fenno*, 8 Wall. 533; *Scholey* v. *Rew*, 23 Wall. 331; *Railroad Co.* v. *Collector*, 100 U. S. 595; *Springer* v. *United States*, 102 U. S. 586.

In these cases were involved a tax upon dividends, a tax upon state bank notes, a succession tax, and a general income tax. They were all assailed as direct and as void because unapportioned; but they were all sustained.

Railroad Co. v. *Collector*, *supra*, is directly in point, as the tax was upon the net income of corporations. It is criticised as not having been well considered, because the amount involved was small, but it was followed in *Railroad Co.* v. *United States*, 101 U. S. 543; *Bailey* v. *Railroad Co.*, 106 U. S. 109; *United States* v. *Erie Ry. Co.*, 106 U. S. 327; *M. & C. R. R. Co.* v. *United States*, 108 U. S. 228; *Little Miami* v. *United States*, 108 U. S. 277.

In some of these cases the amounts involved were large. A decision of this court six times made upon the same question certainly expresses its deliberate judgment.

For one hundred years, from 1794 to 1894, there was entire accord between the executive, legislative and judicial departments of the Government as to what was a direct tax; and during that time a tax upon business, however measured, was always held to be not a direct tax but an excise. It is said the *Income Tax Case*, 157 U. S. 429; *S. C.*, 158 U. S. 601, has settled a different rule.

The tax there was upon income from all sources, and by a divided court was held to be direct in so far and only in so far as it fell upon income from property. That a tax upon "gains or profits from business, privileges or employments" is an excise was distinctly recognized by the majority opinion, and every previous case bearing upon the question, except that of *Springer* v. *United States*, *supra*, was distinguished and in effect approved.

The cases decided by the court since deal with the *Income Tax Case* as thus limited in its scope. *Nicol* v. *Ames*, 173 U. S. 509; *Knowlton* v. *Moore*, 178 U. S. 41;

Plummer v. *Color*, 178 U. S. 115; *Murdock* v. *Ward*, 178 U. S. 139; *United States* v. *Perkins*, 163 U. S. 625; *Snyder* v. *Bettman*, 190 U. S. 249; *Patton* v. *Brady*, 184 U. S. 608; *Thomas* v. *United States*, 192 U. S. 363; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

In these cases the taxes were upon sales of merchandise on boards of trade, measured by the value of the property, upon successions, measured by their value, upon tobacco, upon the sale of stocks, measured by the par value of the stocks, and upon business, measured by the income of the business. In each of them the contention was made that the tax was a direct tax upon property, and the *Income Tax Case* was cited to support the contention; but in every case the tax was held to be not upon the property but upon the peculiar right, privilege or facility enjoyed or used, or upon the business involved, and valid as an excise. The cases preceding the *Income Tax Case*, saving *Springer* v. *United States*, were again and again cited and approved.

Every previous decision of this court, not excepting that in the *Income Tax Case*, supports the view of the Government that this tax upon the business of corporations is not a direct tax, and so need not be apportioned.

That the tax reaches income from all sources does not change its nature, for that relates only to the measure of the tax. The subject of the tax being within the power of Congress, the measure of it is largely a matter for its discretion. *United States* v. *Singer*, 15 Wall. 111.

Besides, the property held by a corporation, whether actively employed in its principal business or not, does serve as an aid to that business, adding to its financial strength and credit. Corporations, except those purely public, and eleemosynary institutions, are organized for business purposes. The law does not recognize such a thing as a corporation being "a chartered gentleman of leisure." And it is singular that if the real estate com-

panies, which claim immunity upon the ground that they do nothing, but are simply incorporated proprietors of great business buildings, are not engaged in business, they should yet complain of the tax as discriminating against them and in favor of individual and partnership competitors. The degree of the activity of the corporation can make no difference. Doing business at all, or of any kind, the company is subject to the tax, and in every case to the same measure, that is, its entire net income determined as provided by the law.

As an excise the tax is uniform in the constitutional sense, because the same throughout the United States, and no more is required. *Knowlton* v. *Moore*, 178 U. S. 41.

The exemptions do not invalidate it. The legislature has a discretion as to these and especially where, as here, the result is to lay the tax as every tax should be—in the measure of the ability to bear it.

The tax is not upon the agencies and instrumentalities of the state governments.

Public corporations are not sought to be taxed. Corporate privileges for the conduct of business, held and used for purposes of private gain, do not clothe the possessors of them with the attributes of state sovereignty.

The Stone Tracy Co. and the firm of Tuxbury & Co., referred to in brief of appellant Flint, each conduct a general merchandise business at Windsor, Vermont.

The business in each case is private. It is no more a public function when conducted by a corporation than when conducted by a partnership. If the business of the corporation is the exercise of sovereignty it cannot be taxed even though like business conducted by individuals is taxed.

The State taxes the business and property of its private corporations and the taxing power of the Nation is as broad in scope as that of the State. *McCulloch* v. *Mary-*

land, 4 Wheat. 316; *Lane County* v. *Oregon*, 7 Wall. 71; *Railroad Co.* v. *Peniston*, 18 Wall. 5.

The power of the State to grant franchises is not impaired. For its grant the State may demand a price, either present payment in full, or periodical payments running through the life of the grant. So it may dispose of land or other property. In the price obtained for its grant the Nation may not share, but the franchise, when granted, or the property, when conveyed and held in private ownership, may be taxed by State and Nation as anything else of value, or having the attributes of property, may be. *Memphis &c. Co.* v. *Shelby Co.*, 109 U. S. 398; *Metropolitan &c. Ry. Co.* v. *New York Tax Commissioners*, 199 U. S. 1; *St. Louis* v. *United Railways Co.*, 210 U. S. 266.

The question here is not *how* a tax may be laid upon corporate franchises or corporate business but whether it may be laid at all.

The right of the Government to tax state corporations is clearly implied in *McCulloch* v. *Maryland*, *supra*, and is clearly asserted in *Veazie Bank* v. *Fenno*, *supra*. And also in *Scholey* v. *Rew; Railroad Co.* v. *Collector; Plummer* v. *Coler*, *supra*.

The doctrine of these and other cases which might be cited is after all nothing more than that whatever has pecuniary value—intangible as well as tangible property—is a subject of taxation.

That corporate powers and privileges have pecuniary value is attested by the continually growing extent of their use.

When the Federal Convention was in session there were but six corporations doing business in the United States.

Two hundred sixty-two thousand four hundred ninety corporations made returns under the Corporation Tax Law. They had a capital stock of $52,371,626,752, bonded and other debt of $31,333,952,696, and a net income—upon

stock—of $3,125,481,101. If this capitalization is substantial they have absorbed the major part of the taxable wealth of the country.

That the business of the corporation is affected with a public interest will not exempt it from taxation. No distinction of that sort is recognized in the adjudicated cases.

Public interest brings a business within the police power, but does not place it beyond the taxing power of the Government.

The policy of Government changes as to the exercise of police power over a business. One generation may regulate a business and another leave it free. The taxing power with respect to it remains the same.

A State may itself assume the conduct of a business, as South Carolina has done with respect to the liquor traffic, but that does not withdraw it from reach of the taxing power of the Government. *South Carolina* v. *United States*, 199 U. S. 437.

So the business of supplying water, light, power, and conducting transportation is just as much subject to taxation when carried on by quasi-public corporations as it was in earlier days when carried on in crude, simple ways by private individuals.

If by putting upon a business the stamp of public interest, a State could withdraw it from the sphere of national taxation, the General Government might be seriously impaired in its means of revenue.

The real question presented by the corporation tax is that of discrimination. Is the selection of corporations, individuals and partnerships not being included, arbitrary and unjust?

Government may tax one calling and leave another free, and so it may and does select between different species of property, and great freedom must be allowed in this respect. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

We lay an excise upon liquor and tobacco and not upon bread and meat, and there is here a purpose of discrimination, but that does not avoid the tax. We may select the objects of taxation for various reasons, convenience of collection, relation to ability to pay, discouragement of use, or whatever other reason may commend itself to the judgment of the lawmaker.

So we discriminate between callings. We may tax the doctor and exempt the lawyer, tax the shoemaker and leave the tailor free. We impose an excise upon the travelling vender and exempt the merchant with a fixed place of business. During the Civil War we differentiated peddlers into four classes, the first class being those who drove a four-horse van, and the fourth those who carried their packs upon their shoulders. We may fix such a tax at an arbitrary sum, or we may measure it by capital, or by the volume or the profits of the business.

Then why may we not discriminate in taxation between the corporation and the individual? The familiar illustration of the illegality of discrimination between the brown-haired and the red-haired man, the Protestant and the Catholic, is presented, but it is not to the purpose. We hold all men to be created equal, and to stand as equals before the law. In the differences of complexion and of creed there is nothing that has the attributes of property, nothing that makes for pecuniary gain, nothing related to the ability to bear the burdens of government.

Corporate powers and privileges are not like complexion and creed. They do have the attributes of property, they do make for gain, they do have relation to the ability to bear the burdens of government. And so they may be taxed as any other species of property, and a business conducted with their aid may be subjected to an excise when the same business conducted without their aid is left free.

In the methods provided for the assessment and collec-

tion of the tax there is no invasion of any constitutional right. Under the laws of every State in the Union individuals must make returns of their possessions. The taxgatherer may invade any household, and list its contents even to the humble utensils of the kitchen. The exercise of the taxing power is necessarily inquisitorial as to method, and must be so long as its demands are met with resentment and evasion. The law in that respect, and especially as amended, provides for nothing more than is reasonably necessary for the collection of the tax, and as to what is thus necessary the legislature must determine, and what it prescribes must be accepted unless it involves a clear violation of rights guaranteed by the Constitution. That the returns may become public is no objection to the requirement of them. The tax returns of individuals under state laws are public records and whosoever will may inspect them. Publicity in every relation of the citizen to the Government is essential to the proper conduct of Government, and no evils may be fairly apprehended from publicity in every detail of tax assessment and collection comparable with those which would surely result from secrecy.

MR. JUSTICE DAY delivered the opinion of the court.

These cases involve the constitutional validity of § 38 of the act of Congress approved August 5, 1909, known as "The Corporation Tax" law. 36 Stat. c. 6, 11, 112–117.

It is contended in the first place that this section of the act is unconstitutional, because it is a revenue measure, and originated in the Senate in violation of § 7 of Article I of the Constitution, providing that "all bills for the raising of revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." The history of the act

is contained in the Government's brief, and is accepted as correct, no objection being made to its accuracy.

This statement shows that the tariff bill, of which the section under consideration is a part, originated in the House of Representatives and was there a general bill for the collection of revenue. As originally introduced, it contained a plan of inheritance taxation. In the Senate the proposed tax was removed from the bill, and the corporation tax, in a measure, substituted therefor. The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose. In thus deciding we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate and approved by the President and duly deposited with the State Department. *Field* v. *Clark*, 143 U. S. 649; *Harwood* v. *Wentworth*, 162 U. S. 547; *Twin City Bank* v. *Nebeker*, 167 U. S. 196.

In order to have in mind some of the more salient features of the statute with a view to its interpretation, a part of the first paragraph is here set out, as follows (36 Stat. 11, 112, c. 6):

"SEC. 38. That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject

to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed."

A reading of this portion of the statute shows the purpose and design of Congress in its enactment and the subject-matter of its operation. It is at once apparent that its terms embrace corporations and joint stock companies or associations which are organized for profit, and have a capital stock represented by shares. Such joint stock companies, while differing somewhat from corporations, have many of their attributes and enjoy many of their privileges. To these are added insurance companies, and they, as corporations, joint stock companies or associations, must be such as are now or hereafter organized under the laws of the United States or of any State or Territory of the United States, or under the acts of Congress applicable to Alaska and the District of Columbia. Each and all of these, the statute declares, shall be subject to pay annually a special excise tax with respect to the carrying on and doing business by such corporation, joint stock company or association, or insurance company. The tax is to be equivalent to one per cent of the entire net

income over and above $5,000 received by such corporation or company *from all sources* during the year, excluding, however, amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by the statute. Similar companies organized under the laws of any foreign country and engaged in business in any State or Territory of the United States, or in Alaska or the District of Columbia, are required to pay the tax upon the net income over and above $5,000 received by them from business transacted and capital invested within the United States, the Territories, Alaska and the District of Columbia, during each year, with the like exclusion as to amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed.

While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the pecul-

iarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any State or Territory, as heretofore stated.

This tax, it is expressly stated, is to be equivalent to one per centum of the entire net income over and above $5,000 received from *all sources* during the year—this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. This view of the measure of the tax is strengthened when we note that as to organizations under the laws of foreign countries the amount of net income over and above $5,000 includes that received from business transacted and capital invested in the United States, the Territories, Alaska and the District of Columbia.

It is further strengthened when the subsequent sections are considered as to deductions in ascertaining net income and requiring returns from those subject to the act. Under the second paragraph the net income is to be ascertained by certain deductions from the gross amount of income received within the year "from all sources;" and the return to be made to the collector of internal revenue

under the third section is required to show the gross amount of the income received during the year "from all sources." The evident purpose is to secure a return of the entire income, with certain allowances and deductions which do not suggest a restriction to income derived from property actively engaged in the business. This interpretation of the act, as resting upon the doing of business, is sustained by the reasoning in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, in which a special tax measured by the gross receipts of the business of refining oil and sugar was sustained as an excise in respect to the carrying on or doing of such business.

Having thus interpreted the statute in conformity, as we believe, with the intention of Congress in passing it, we proceed to consider whether, as thus construed, the statute is constitutional.

It is contended that it is not, certainly so far as the tax is measured by the income of bonds non-taxable under Federal statutes, and of municipal and state bonds beyond the Federal power of taxation. And so of real and personal estates, because as to such estates the tax is direct, and required to be apportioned according to population among the States. It is insisted that such must be the holding unless this court is prepared to reverse the income tax cases decided under the act of 1894. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *S. C.*, 158 U. S. 601.

The applicable provisions of the Constitution of the United States in this connection are found in Art. I, § 8, cl. 1, and in Art. I, § 2, cl. 3, and Art. I, § 9, cl. 4. They are respectively:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers."

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It was under the latter requirement as to apportionment of direct taxes according to population that this court in the *Pollock Case* held the statute of 1894 to be unconstitutional. Upon the rehearing of the case Mr. Chief Justice Fuller, who spoke for the court, summarizing the effect of the decision, said:

"We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such." 158 U. S. 635.

And as to excise taxes, the Chief Justice said:

"We do not mean to say that an act laying by apportionment a direct tax on all real estate or personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments and vocations (p. 637)."

The *Pollock Case* was before this court in *Knowlton* v. *Moore*, 178 U. S. 41, 80. In that case this court sustained an excise tax upon the transmission of property by inheritance. It was contended there, as here, that the case was ruled by the *Pollock Case*, and of that case this court, speaking by the present Chief Justice, said:

"The issue presented in the *Pollock Case* was whether an income tax was direct within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only

capitation taxes and taxes on land as such were direct, within the meaning of the Constitution, considered as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the previous adjudications of this court had settled nothing to the contrary.

* * * * * * * *

"Undoubtedly, in the course of the opinion in the *Pollock Case* it was said that if a tax was direct within the constitutional sense the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, *because imposed upon property solely by reason of its ownership*, could not be changed by affixing to it the qualifications of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

* * * * * * * *

"Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the

tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises, which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

The same view was taken of the *Pollock Case* in the subsequent case of *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art. I, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The *Pollock Case* construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

It is unnecessary to enter upon an extended consideration of the technical meaning of the term "excise." It has

been the subject-matter of considerable discussion—the terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. As Mr. Chief Justice Fuller said in the *Pollock Case*, 157 U. S. 557:

"Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

And in the same connection the late Chief Justice, delivering the opinion of the court in *Thomas* v. *United States*, 192 U. S. 363, in speaking of the words duties, imposts and excises, said:

"We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." Cooley, Const. Lim., 7th ed., 680.

The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or quasi-corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the *Thomas Case*, 192 U. S. 363 *supra*, the requirement to pay such taxes involves the exercise of

privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.

If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population. *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433; *Springer* v. *United States*, 102 U. S. 586; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a State to grant corporate franchises, because it taxes franchises which are the creation of the State in its sovereign right and authority. This proposition is rested upon the implied limitation upon the powers of National and state governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the State cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 Wheat. 738; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *California* v. *Central Pac. R. R. Co.*, 127 U. S. 1.

An examination of these cases will show that in each case where the tax was held invalid the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal Government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers.

In *Osborn* v. *The Bank, supra*, a leading case upon the subject, whilst it was held that the Bank of the United States was not a private corporation, but a public one, created for national purposes, and therefore beyond the

taxing power of the State, Chief Justice Marshall, in delivering the opinion of the court, conceded that if the corporation had been originated for the management of an individual concern, with private trade and profit for its great end and principal object, it might be taxed by the State. Said the Chief Justice (p. 359):

"If these premises [that the corporation was one of private character] were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the Government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner."

The inquiry in this connection is: How far do the implied limitations upon the taxing power of the United States over objects which would otherwise be legitimate subjects of Federal taxation, withdraw them from the reach of the Federal Government in raising revenue, because they are pursued under franchises which are the creation of the States?

In approaching this subject we must remember that enactments levying taxes, as other laws of the Federal Government when acting within constitutional authority, are the supreme law of the land. The Constitution contains only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. As Mr. Chief Justice Chase said, speaking for the court in *License Tax Cases*, 5 Wall. 462, 471: "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited and thus only, it reaches every

subject and may be exercised at discretion." The limitations to which the Chief Justice refers were the only ones imposed in the Constitution upon the taxing power.

In *McCray* v. *United States*, 195 U. S. 27, this court sustained a Federal tax on oleomargarine, artificially colored, and held that while the Fifth and Tenth Amendments qualify, so far as applicable, all the provisions of the Constitution, nothing in those Amendments operates to take away the power to tax conferred by the Constitution on the Congress. In that case it was contended that the subject taxed was within the exclusive domain of the States, and that the real purpose of Congress was not to raise revenue, but to tax out of existence a substance not harmful of itself and one which might be lawfully manufactured and sold; but, the only constitutional limitation which this court conceded, in addition to the requirement of uniformity, and that for the sake of argument only so far as concerned the case then under consideration, was that Congress is restrained from arbitrary impositions or from exceeding its powers in seeking to effect unwarranted ends. The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others. *Patton* v. *Brady*, 184 U. S. 608, 622. And see *United States* v. *Singer*, 15 Wall. 111, 121; *Nicol* v. *Ames*, 173 U. S. 509, 515.

We must therefore enter upon the inquiry as to implied limitations upon the exercise of the Federal authority to tax because of the sovereignty of the States over matters within their exclusive jurisdiction, having in view the nature and extent of the power specifically conferred upon Congress by the Constitution of the United States. We must remember, too, that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the States in order to support their local government.

While the tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises, it becomes necessary to consider in this connection the right of the Federal Government to tax the activities of private corporations which arise from the exercise of franchises granted by the State in creating and conferring powers upon such corporations. We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of state-created franchises, are not beyond the taxing power of the United States. Taxes upon rights exercised under grants of state franchises were sustained by this court in *Railroad Co.* v. *Collector*, 100 U. S. 595; *United States* v. *Erie R. R. Co.*, 106 U. S. 327; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

It is true that in those cases the question does not seem to have been directly made, but, in sustaining such taxation, the right of the Federal Government to reach such agencies was necessarily involved. The question was raised and decided in the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533. In that well-known case a tax upon the notes of a state bank issued for circulation was sustained. Mr. Chief Justice Chase, in the course of the opinion said:

"Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

"We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that

franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

"But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue." (pp. 547, 548).

It is true that the decision in the *Veazie Bank Case* was also placed, in a measure, upon the authority of the United States to control the circulating medium of the country, but the force of the reasoning, which we have quoted, has not been denied or departed from.

In *Thomas* v. *United States*, 192 U. S. 363, a Federal tax on the transfer of corporate shares in state corporations was upheld as a tax upon business transacted in the exercise of privileges afforded by the state laws in respect to corporations.

In *Nicol* v. *Ames*, 173 U. S. 509, a Federal tax was sustained upon the enjoyment of privileges afforded by a board of trade incorporated by the State of Illinois.

When the Constitution was framed the right to lay excise taxes was broadly conferred upon the Congress. At that time very few corporations existed. If the mere fact of state incorporation, extending now to nearly all branches of trade and industry, could withdraw the legitimate objects of Federal taxation from the exercise of the power conferred, the result would be to exclude the National Government from many objects upon which indirect taxes could be constitutionally imposed. Let it be supposed that a group of individuals, as partners, were carrying on a business upon which Congress concluded to lay an excise tax. If it be true that the forming of a state corporation would defeat this purpose, by taking the necessary steps required by the state law to create a corporation and carrying on the business under rights granted by a state statute, the Federal tax would become invalid and that source of national revenue be destroyed, except as to the business in the hands of individuals or partnerships. It cannot be supposed that it was intended that it should be within the power of individuals acting under state authority to thus impair and limit the exertion of authority which may be essential to national existence.

In this connection *South Carolina* v. *United States*, 199 U. S. 437, 461, is important. In that case it was held that the agents of the state government, carrying on the business of selling liquor under state authority, were liable to pay the internal revenue tax imposed by the Federal Government. In the opinion previous cases in this court were reviewed, and the rule to be deduced therefrom stated to be that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the State in carrying on business of a private character.

The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the

governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws and similar governmental functions cannot be taxed by the Federal Government. *The Collector* v. *Day*, 11 Wall. 113; *United States* v. *Railroad Co.*, 17 Wall. 322; *Ambrosini* v. *United States*, 187 U. S. 1.

But this limitation has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the States. We, therefore, reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a State in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges.

But, it is insisted, this taxation is so unequal and arbitrary in the fact that it taxes a business when carried on by a corporation and exempts a similar business when carried on by a partnership or private individual as to place it beyond the authority conferred upon Congress. As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States. This subject was fully discussed and set at rest in *Knowlton* v. *Moore*, 178 U. S. 41, *supra*, and we can add nothing to the discussion contained in that case.

In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see

cases in the margin, decided in this court, upholding the power.[1]

Many instances might be given where this court has sustained the right of a State to select subjects of taxation, although as to them the Fourteenth Amendment imposes a limitation upon state legislatures, requiring that no per-

---

[1] *Hylton* v. *United States*, 3 Dall. 171 (a tax on carriages which the owner kept for private use); *Nicol* v. *Ames*, 173 U. S. 509 (a tax upon sales or exchanges of boards of trade); *Knowlton* v. *Moore*, 178 U. S. 41 (a tax on the transmission of property from the dead to the living); *Treat* v. *White*, 181 U. S. 264 (a tax on agreements to sell shares of stock, denominated "calls" by stockbrokers); *Patton* v. *Brady*, 184 U. S. 608 (a tax on tobacco manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article); *Cornell* v. *Coyne*, 192 U. S. 418 (a tax on "filled cheese" manufactured expressly for export); *McCray* v. *United States*, 195 U. S. 27 (a tax on oleomargarine not artificially colored, a higher tax on oleomargarine artificially colored, and no tax on butter artificially colored); *Thomas* v. *United States*, 192 U. S. 363 (a tax on sales of shares of stock in corporations); *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433 (a tax upon the amounts insured, renewed, or continued by insurance companies upon the gross amounts of premiums received and assessments made by them, and also upon dividends, undistributed sums, and incomes); *Veazie Bank* v. *Fenno*, 8 Wall. 533 (a tax of ten per centum on the amount of the notes paid out of any state bank, or state banking association); *Scholey* v. *Rew*, 23 Wall. 331 (a tax on devolutions of title to real estate); *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S. 397 (a tax on the gross receipts of corporations and companies, in excess of $250,000, engaged in refining sugar or oil); *Railroad Co.* v. *Collector*, 100 U. S. 595 (a tax laid in terms upon the amounts paid by certain public service corporations as interest on their funded debt, or as dividends to their stockholders, and also on "all profits, incomes or gains of such company, and all profits of such company carried to the account of any fund, or used for construction." Held to be a tax upon the company's earnings and therefore essentially an excise upon the business of the corporations); *Springer* v. *United States*, 102 U. S. 586 (a duty provided by the internal revenue acts to be assessed, collected, and paid upon gains, profits, and incomes, held to be an excise or duty and not a direct tax).

son shall be denied the equal protection of the laws. See some of them noted in the margin.[1]

In *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, dealing with the Fourteenth Amendment, which in this respect imposes limitations only on state authority, this court said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not

---

[1] *Beers* v. *Glynn*, 211 U. S. 477 (a state tax on personalty of non-resident decedents who owned realty in the State); *Hatch* v. *Reardon*, 204 U. S. 152 (a state tax on the transfers of stock made within the State); *Armour Packing Company* v. *Lacy*, 200 U. S. 226 (a state license tax on meat packing houses. A foreign corporation selling its products in the State, but whose packing establishments are not situated in the State, is not exempt from such license tax); *Savannah, Thunderbolt & Isle of Hope Railway* v. *Savannah*, 198 U. S. 392 (a classification which distinguishes between an ordinary street railway and a steam railroad, making an extra charge for local deliveries of freight brought over its road from outside the city, held, not to be such a classification as to make the tax void under the Fourteenth Amendment); *Cook* v. *Marshall County*, 196 U. S. 261 (a state tax on cigarette dealers); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283 (upholding the graded inheritance tax law of Illinois); *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232 (state tax upon the nominal face value of bonds, instead of their actual value, held a valid part of the state system of taxation).

allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution."

It is insisted in some of the briefs assailing the validity of this tax that these cases have been modified by *Southern R. R. Co.* v. *Greene*, 216 U. S. 400. In that case a corporation organized in a State, other than Alabama, came into that State in compliance with its laws, paid the license tax and property tax imposed upon other corporations doing business in the State, and acquired under direct sanction of the laws of the State a large amount of property therein, and, when it was attempted to subject it to a further tax on the ground that it was for the privilege of doing business as a foreign corporation, when the same tax was not imposed upon state corporations doing precisely the same business, in the same way, it was held that the attempted taxation was merely arbitrary classification, and void under the Fourteenth Amendment. In that case the foreign corporation was doing business under the sanction of the state laws no less than the local corporation; it had acquired its property under sanction of those laws; it had paid all direct and indirect taxes levied against it, and there was no practical distinction between it and a state corporation doing the same business in the same way.

In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corpo-

rations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

It is further contended that some of the corporations, notably insurance companies, have large investments in municipal bonds and other non-taxable securities, and in real estate and personal property not used in the business, that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation—upon the authority of the *Pollock Case*, *supra*. But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed. In the *Pollock Case*, as we have seen, the tax was held unconstitutional, because it was in effect a direct tax on the property solely because of its ownership.

Nor does the adoption of this measure of the amount of the tax do violence to the rule laid down in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, nor the *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1. In the *Galveston Case* it was held that a tax imposed by the State of Texas, equal to one per cent upon the gross

receipts "from every source whatever" of lines of railroad lying wholly within the State, was invalid as an attempt to tax gross receipts derived from the carriage of passengers and freight in interstate commerce, which in some instances was much the larger part of the gross receipts taxed. This court held that this act was an attempt to burden commerce among the States, and the fact that it was declared to be "equal to" one per cent made no difference, as it was merely an effort to reach gross receipts by a tax not even disguised as an occupation tax, and in nowise helped by the words "equal to." In other words, the tax was held void, as its substance and manifest intent was to tax interstate commerce as such.

In the *Western Union Telegraph Case* the State undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the States, as a condition of doing local business within the State of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid.

There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the prop-

erty as such and to measure a legitimate tax upon the privileges involved in the use of such property.

In *Home Ins. Co.* v. *New York*, 134 U. S. 594, a tax was sustained upon the right or privilege of the Home Insurance Company to be a corporation, and to do business within the State in a corporate capacity, the tax being measured by the extent of the dividends of the corporation in the current year upon the capital stock. Although a very large amount, nearly two of three millions of capital stock was invested in bonds of the United States, expressly exempted from taxation by a statute of the United States, the tax was sustained as a mode of measurement of a privilege tax which it was within the lawful authority of the State to impose. Mr. Justice Field, who delivered the opinion of the court, reviewed the previous cases in this court, holding that the State could not tax or burden the operation of the Constitution and of laws enacted by the Congress to carry into execution the powers vested in the General Government. Yielding full assent to those cases, Mr. Justice Field said of the tax then under consideration: "It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year." In that case, in the course of the opinion, previous cases of this court were cited, with approval, *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611.

In the *Coite Case* a privilege tax upon the total amount of deposits in a savings bank was sustained, although $500,000 of the deposits had been invested in securities of the United States, and declared by act of Congress to be exempt from taxation by state authority. In that case the court said: "Nothing can be more certain in legal

decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the state government. Authority to that effect resides in the State independently of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities." In *Provident Institution* v. *Massachusetts*, *supra*, a like tax was sustained.

It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, as interpreted in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 226.

It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large

capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.

It is true that in the *Spreckels Case*, 192 U. S. *supra*, the excise tax, for the privilege of doing business, was based upon the business assets in use by the company, but this was because of the express terms of the statute which thus limited the measure of the excise. The statute now under consideration bears internal evidence that its draftsman had in mind language used in the opinion in the *Spreckels Case*, and the measure of taxation, the income from all sources, was doubtless inserted to prevent the limitation of the measurement of the tax to the income from business assets alone. There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business. Departures from that rule sustained in this court are not wanting. In *United States* v. *Singer*, 15 Wall. 111, an excise tax was sustained upon the liquor business, which was fixed by the payment on an amount not less than 80 per cent of the total capacity of the distillery. Whether such capacity was used in the business was a matter of indifference, and this court said of such a measure:

"Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the produc-

ing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertakes to distill at all, he is not entitled to much consideration."

In *Society for Savings* v. *Coite*, 6 Wall. *supra*, and *Provident Institution* v. *Massachusetts*, 6 Wall. *supra*, as we have seen, the amount of excise was measured by the amount of bank deposits. It made no difference that the deposits were not used actively in the business.

In *Hamilton Company* v. *Massachusetts*, 6 Wall. 632, the tax was measured by the excess of the market value of the corporation's capital stock above the value of its real estate and machinery, and in this connection see *Home Ins. Co.* v. *New York*, 134 U. S. *supra*, where the excise was computed upon the entire capital stock measured by the extent of the dividends thereon.

We must not forget that the right to select the measure and objects of taxation devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. "It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed." *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27, 58, and previous cases in this court there cited.

Nor is that line of cases applicable, such as *Brown* v. *Maryland*, 12 Wheat. 419, holding that a tax on the sales of an importer is a tax on the import, and *Cook* v. *Pennsylvania*, 97 U. S. 566, holding a tax on auctioneer's sales of goods in original packages a tax on imports. In these cases the tax was held invalid, as the State thereby taxed subjects of taxation within the exclusive power of Congress.

What we have said as to the power of Congress to lay this excise tax disposes of the contention that the act is void as lacking in due process of law.

It is urged that this power can be so exercised by Congress as to practically destroy the right of the States to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in *McCulloch* v. *Maryland* that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the powers of Congress. Of such contention this court said in *Knowlton* v. *Moore*, *supra*:

"This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, *supra*, speaking for the court, the Chief Justice said:

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

"The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon per-

sons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

To the same effect: *McCray* v. *United States*, 195 U. S. 27. In the latter case it was said:

" . . . no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust."

And in the same case this court said, after reviewing the previous cases in this court:

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may be not judicially restrained because of the results to arise from its exercise."

The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice.

It is especially objected that certain of the corporations whose stockholders challenge the validity of the tax, are so-called real estate companies, whose business is principally the holding and management of real estate. These cases are No. 415, *Cedar Street Company* v. *Park Realty Company;* No. 431, *Percy H. Brundage* v. *Broadway Realty*

Company; No. 443, *Phillips* v. *Fifty Associates;* No. 446, *Mitchell* v. *Clark Iron Company;* No. 412, *William H. Miner* v. *Corn Exchange Bank;* and No. 457, *Cook* v. *Boston Wharf Company.*

In No. 412, *Miner* v. *Corn Exchange Bank,* the bank occupies a building in part and rents a large part to tenants.

Of the realty companies, the Park Realty Company was organized to "work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal," etc.

At the time the bill was filed the business of the company related to the Hotel Leonori, and the bill averred that it was engaged in no other business except the management and leasing of that hotel.

The Broadway Realty Company was formed for the purpose of owning, holding and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed.

The Fifty Associates are operating under a charter to own real estate with power to build, improve, alter, pull down and rebuild, and to manage, exchange and dispose of the same.

The Clark Iron Company was organized under the laws of Minnesota, owns and leases ore lands for the purpose of carrying on mining operations, and receives a royalty depending upon the quantity of ore mined.

The Boston Wharf Company is operating under a

charter authorizing it to acquire lands and flats, with their privileges and appurtenances, and to lease, manage and improve its property in whatever manner shall be deemed expedient by it, and to receive dockage and wharfage for vessels laid at its wharves.

What we have said as to the character of the corporation tax as an excise disposes of the contention that it is direct, and therefore requiring apportionment by the Constitution. It remains to consider whether these corporations are engaged in business. "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. I, p. 273.

We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

Of the *Motor Taximeter Cab Company Case*, No. 432, the company owns and leases taxicabs, and collects rents therefrom. We think it is also doing business within the meaning of the statute.

What we have already said disposes of the objections made in certain cases of life insurance and trust companies, and banks, as to income derived from United States, state, municipal or other non-taxable bonds.

We come to the question: Is a so-called public service corporation, such as The Coney Island and Brooklyn Railroad Company, in case No. 409, and the Interborough

Rapid Transit Company, No. 442, exempted from the operation of this statute? In the case of *South Carolina* v. *United States*, 199 U. S. 437, this court held that when a State, acting within its lawful authority, undertook to carry on the liquor business it did not withdraw the agencies of the State carrying on the traffic from the operation of the internal revenue laws of the United States. If a State may not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation.

Applying this principle, we are of opinion that the so-

called public service corporations, represented in the cases at bar, are not exempt from the tax in question. *Railroad Co.* v. *Peniston*, 18 Wall. 5, 33.

It is again objected that incomes under $5,000 are exempted from the tax. It is only necessary, in this connection, to refer to *Knowlton* v. *Moore*, 178 U. S. *supra*, in which a tax upon inheritances in excess of $10,000 was sustained. In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293, a graded inheritance tax was sustained.

As to the objections that certain organizations, labor, agricultural and horticultural, fraternal and benevolent societies, loan and building associations, and those for religious, charitable or educational purposes, are excepted from the operation of the law, we find nothing in them to invalidate the tax. As we have had frequent occasion to say, the decisions of this court from an early date to the present time have emphasized the right of Congress to select the objects of excise taxation, and within this power to tax some and leave others untaxed, must be included the right to make exemptions such as are found in this act.

Again, it is urged that Congress exceeded its power in permitting a deduction to be made of interest payments only in case of interest paid by banks and trust companies on deposits, and interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of the corporation or company. This provision may have been inserted with a view to prevent corporations from issuing a large amount of bonds in excess of the paid-up capital stock, and thereby distributing profits so as to avoid the tax. In any event, we see no reason why this method of ascertaining the deductions allowed should invalidate the act. Such details are not wholly arbitrary, and were deemed essential to practical operation. Courts cannot substitute their judg-

ment for that of the legislature. In such matters a wide range of discretion is allowed.

The argument that different corporations are so differently circumstanced in different States, and the operation of the law so unequal as to destroy it, is so fully met in the opinion in *Knowlton* v. *Moore*, 178 U. S. 41, *supra*, that it is only necessary to make reference thereto. For this purpose the law operates uniformly, geographically considered, throughout the United States, and in the same way wherever the subject-matter is found. A liquor tax is not rendered unlawful as a revenue measure because it may yield nothing in those States which have prohibited the liquor traffic. No more is the present law unconstitutional because of inequality of operation owing to different local conditions.

Nor is the special objection tenable, made in some of the cases, that the corporations act as trustees, guardians, etc., under the authority of the laws or courts of the State. Such trustees are not the agents of the state government in a sense which exempts them from taxation because executing the necessary governmental powers of the State. The trustees receive their compensation from the interests served, and not from the public revenues of the State.

It is urged in a number of the cases that in a certain feature of the statute there is a violation of the Fourth Amendment of the Constitution, protecting against unreasonable searches and seizures. This Amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. *Boyd* v. *United States*, 116 U. S. 632. It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. *Adams* v. *New York*, 192 U. S. 585. It does not prevent the issuing of process to require at-

tendance and testimony of witnesses, the production of books and papers, etc. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. Certainly the Amendment was not intended to prevent the ordinary procedure in use in many, perhaps most, of the States of requiring tax returns to be made, often under oath. The objection in this connection applies, when the substance of the argument is reached, to the sixth section of the act, which provides:

"Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such."

An amendment was made June 17, 1910, which reads as follows:

"For classifying, indexing, exhibiting and properly caring for the returns of all corporations, required by section thirty-eight of an act entitled 'An act to provide revenue, equalize duties, encourage the industries of the United States, and for other purposes,' approved August fifth, nineteen hundred and nine, including the employment in the District of Columbia, of such clerical and other personal services and for rent of such quarters as may be necessary, twenty-five thousand dollars: *Provided*, That any and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President."

The contention is that the above section as originally framed and as now amended could have no legitimate connection with the collection of the tax, and in substance amounts to no more than an unlawful attempt to exhibit the private affairs of corporations to public or private inspection, without any substantial connection with or

legitimate purpose to be subserved in the collection of the tax under the act now under consideration. But we cannot agree to this contention. The taxation being, as we have held, within the legitimate powers of Congress, it is for that body to determine what means are appropriate and adapted to the purposes of making the law effectual. In this connection the often quoted declaration of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, is appropriate: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional."

Congress may have deemed the public inspection of such returns a means of more properly securing the fullness and accuracy thereof. In many of the States laws are to be found making tax returns public documents, and open to inspection.[1]

[1] In Connecticut, the requirement is that the tax lists of the assessors shall be abstracted and lodged in the town clerk's office "for public inspection." R. S. Conn., 1902, § 2310. In New York, notices of the completion of the assessment rolls must be conspicuously posted in three or more public places, and a copy left in a specified place, "where it may be seen and examined by any person until the third Tuesday of August next following." Consol. Laws of N. Y., vol. 5, p. 5859; Laws N. Y., 1909, c. 62, § 36. In Maryland, a record of property assessed is required to be kept, and the valuation thereof with alphabetical list of owners recorded in a book, "which any person may inspect without fee or reward." Pub. Laws Md., vol. 2, p. 1804, § 23. In Pennsylvania, it is provided that from the time of publishing the assessor's returns until the day appointed for finally determining whether the assessor's valuations are too low, "any taxable inhabitant of the county shall have the right to examine the said return in the commissioner's office." Pepper & Lewis' Dig. Laws Pa., vol. 2, p. 4591, § 357. In New Hampshire, the list of taxes assessed are required to be kept in a book, and also left with the town clerk, and such records "shall be open to the inspection of all persons." Pub. Stat. N. H., 1901, p. 214, § 5.

We cannot say that this feature of the law does violence to the constitutional protection of the Fourth Amendment, and, this is equally true of the Fifth Amendment, protecting persons against compulsory self-incriminating testimony. No question under the latter Amendment properly arises in these cases, and when circumstances are presented which invoke the protection of that Amendment and raise questions involving rights thereby secured it will be time enough to decide them. And so of the argument that the penalties for the non-payment of the taxes are so high as to violate the Constitution. No case is presented involving that question, and, moreover, the penalties are clearly a separate part of the act, and whether collectible or not may be determined in a case involving an attempt to enforce them. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53.

It has been suggested that there is a lack of power to tax foreign corporations, doing local business in a State, in the manner proposed in this act, and that the tax upon such corporations, being unconstitutional, works such inequality against domestic corporations as to invalidate the law. It is sufficient to say of this that no such case is presented in the record. *Southern Railway Co.* v. *King*, 217 U. S. 525. This is equally true as to the alleged invalidity of the act as a tax on exports, which is beyond the power of Congress. No such case is presented in those now before the court.

We have noticed such objections as are made to the constitutionality of this law as it is deemed necessary to consider. Finding the statute to be within the constitutional power of the Congress, it follows that the judgments in the several cases must be affirmed.

Affirmed.

ELIOT *v.* FREEMAN.

MAINE BAPTIST MISSIONARY CONVENTION *v.* COTTING.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 448, 496. Argued January 19, 1911.—Decided March 13, 1911.

It was the intention of Congress to embrace within the corporation tax provisions of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 112, only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law.

A trust formed in a State, where statutory joint stock companies are unknown, for the purpose of purchasing, improving, holding and selling land, and which does not have perpetual succession but ends with lives in being and twenty years thereafter, is not within the provisions of the Corporation Tax Law.

THE facts, which involve the construction of the Corporation Tax Law, are stated in the opinion.

Mr. Moorfield Storey, with whom *Mr. Richard W. Hale* and *Mr. Frank W. Grinnell* were on the brief, for appellant in No. 448:

The respondent trustees are not taxable under the act as they are not "carrying on or doing business."

The ownership of real estate protected by the Constitution is a practical right. The property may be owned and managed in the same way by one individual, by partners, by a testamentary trustee or trustees, or by a trustee or trustees under a trust *inter vivos*, as in this case. In any case the owner is "busy" about his ownership in the colloquial sense, but in no legal sense is he "engaged in

business." *Smith* v. *Anderson*, L. R. 15 Ch. D. 247, 276. A direct tax and an excise tax differ in their essence, and this difference is not obliterated by misnaming either. However broad a meaning may be given to the phrase "excise tax" it does not include a direct tax. *Thomas* v. *United States*, 192 U. S. 363, 370; *Patten* v. *Brady*, 184 U. S. 617, 618; *Scholey* v. *Rew*, 23 Wall. 348; *Galveston Ry. Co.* v. *Texas*, 210 U. S. 217. The real estate trust in this case is not a joint stock company nor is it a joint stock association. *Smith* v. *Anderson*, L. R. 15 Ch. D. 247, 275.

By the act, it is not enough to create a liability to the tax that the beneficial interest in the property is owned in shares, but it is necessary that there be a joint stock company or association with a capital stock represented by shares.

The form of organization to be taxed is described in the act. The trust was not "organized for profit."

The purpose of the trust under consideration is the management of two parcels of land for the benefit of the owners. A company organized for such purposes would not be a company organized for profit. *Reg.* v. *Whitmarsh*, 15 Q. B. 600, 618; *Boar* v. *Bromley*, 18 Q. B. 271, 276, 277; *Moore* v. *Rawlins*, 6 C. B. (N. S.) 289, 315, 323; *Smith* v. *Anderson*, L. R. 15 Ch. Div. 247, 273 *et seq.*

The defendants have not "a capital stock represented by shares" within the meaning of the act. Corey on Accounts (London, 1839), 90, 91. There is no capital stock "represented by shares." See 28 Op. A. G. 194 (Feb. 14, 1910). Under Massachusetts law the respondents are merely trustees. *Mayo* v. *Moritz*, 151 Massachusetts, 481, and see *Howe* v. *Morse*, 174 Massachusetts, 491, 502; *Phillips* v. *Blatchford*, 137 Massachusetts, 510. Mere transferability of shares under a private contract is an immaterial fact. *Gleason* v. *McKay*, 134 Massachusetts, 419; *Opinion of the Justices*, 196 Massachusetts, 603

(1908). The defendants are not an association organized under the laws of any State or country. *Swift* v. *Tyson*, 16 Pet. 1, 18; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 369, 371.

The expression "organized under the laws of" plainly refers to an organization under some statute law authorizing such organization. *Taft* v. *Ward*, 106 Massachusetts, 518, 522; *Edwards* v. *Warren Gasoline Works*, 168 Massachusetts, 564; *Oliver* v. *Liverpool &c. Co.*, 100 Massachusetts, 531; *S. C.* 10 Wall. 566; *People* v. *Wemple*, 117 N. Y. 136; *Gregg* v. *Sanford et al.*, 65 Fed. Rep. 151.

A statute will not be construed so as to violate the Constitution "unless its language imperatively demands it." *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205; *United States* v. *Del. & Hudson Co.*, 213 U. S. 366, 407.

If the act is construed as imposing a tax on the income of the respondents in this case it is unconstitutional, for a tax on the income is a tax on the land, and therefore a direct tax, which must be levied according to the rule of apportionment. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; *S. C.*, 158 U. S. 601; *Knowlton* v. *Moore*, 178 U. S. 82. This limitation on the power of Congress cannot be evaded by the act under which this case arises.

But even if the tax is treated as an excise tax it cannot be sustained, for it lacks uniformity throughout the United States, *United States* v. *Singer*, 15 Wall. 111, 121, which is of the very essence of constitutional law. *Kitty Roup's Case*, 81½ Pa. St. 211; Cooley's Const. Lim., 695, 697, and Cooley, J., in *People* v. *Salem*, 20 Michigan, 452, 473; *Portland Bank* v. *Apthorp*, 12 Massachusetts, 252; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 155, 165; *District of Columbia* v. *Brooke*, 214 U. S. 138; *Chicago &c. R. R. Co.* v. *Westly*, 178 Fed. Rep. 619, 624. The tax

cannot be sustained as an excise tax without infringing the restrictions of the Constitution.

The whole act is unconstitutional because it invades the sovereignty of the States.

Mr. Charles H. Tyler, Mr. Owen D. Young, Mr. Burton E. Eames and *Mr. Clement F. Robinson* for appellants in No. 496:

The statute should be strictly limited to objects clearly within its terms. Sutherland on Stat. Const., 2d ed., §§ 536, 537; Cooley on Taxation, 453 *et seq.; United States* v. *Wigglesworth*, 2 Story, 369; *Benziger* v. *United States*, 192 U. S. 38; *Sewall* v. *Jones*, 9 Pick. 412; *Spreckels Sugar Refining Co.* v. *McClain*, 113 Fed. Rep. 247.

The statute is inapplicable because its terms do not include appellant. The Department Store Trust is not a "corporation." Mass. Acts of 1903, c. 437, § 7, as amended by acts of 1906, c. 286. It is not a "joint stock company or association organized under the laws," etc. *Brinckerhof* v. *Bostwick*, 99 N. Y. 185; *State* v. *Sioux City &c. R. R. Co.*, 43 Minnesota, 17; *Dodge* v. *Williams*, 46 Wisconsin, 70; *Hinds* v. *Marmolejo*, 60 California, 229, 231; *Daggs* v. *Phœnix National Bank*, 53 Pac. Rep. 201; *Lindsey & Phelps Co.* v. *Mullen*, 176 U. S. 126; *Lycoming Fire Ins. Co.* v. *Wright*, 60 Vermont, 515. *State* v. *Dyer*, 67 Vermont, 690, distinguished.

Statutory joint stock companies are not known in Massachusetts. *Ricker* v. *Am. Loan & Trust Co.*, 140 Massachusetts, 346; *Phillips* v. *Blatchford*, 137 Massachusetts, 510; see as to other States, Pennsylvania, act of June 2, 1874; Virginia, act of March 2, 1875.

No tax is laid upon these trusts in Massachusetts except the ordinary tax upon the property. This property is taxed to the trustees like the property of any other trust. The beneficiaries have a purely equitable interest in the property and no tax is laid upon their interest. *Hussey* v.

Arnold, 185 Massachusetts, 202; *Kinney* v. *Stevens*, Mass. Sup. Jud. Ct., Jany. 4, 1911. *Liverpool &c. Co.* v. *Oliver*, 100 Massachusetts, 531; *S. C.* 10 Wall. 566, distinguished.

The only reasonable interpretation of the act excludes real estate trusts. The appellant has no "capital stock represented by shares." In Massachusetts the holder of shares (so called) in a real estate trust has merely an equitable interest in the property which is held by the trustees. *Hussey* v. *Arnold*, *Kinney* v. *Stevens*, *supra*. This trust is not "carrying on or doing business." *Parker Mills* v. *Tax Commissioners*, 23 N. Y. 242; *In re, Ala. & Chatt. R. R. Co.*, 9 Blatchf. 390.

There is real distinction between "business" on the one hand and "investment" on the other; and the term "business" can no more include "investment" than the term "activity" can include "inactivity." If interpreted so as to include real estate trusts the act would be unconstitutional.

There was no appearance or brief filed for appellee in either case.

The Solicitor General, with whom *Mr. Henry E. Colton*, Special Assistant to the Attorney General, was on the brief, for the United States, by leave of the Court:

The corporation tax applies to joint stock companies and associations organized under the common law of the respective States.

The act of Congress uses the word "laws" and not "statutes." Had it intended the lesser scope of the latter word it is a fair presumption that it would have used that word. The common law is just as much as the statutes a part of the laws of a State, and the statutes are often nothing more than declarations of the common law. *Van Ness* v. *Hyatt*, 13 Pet. 293, 298; *Morsell* v. *First National Bank*, 91 U. S. 356, 359; *Bucher* v. *Ches. R. R.*

Co., 125 U. S. 555, 583; *Phelps* v. *S. S. City of Panama*, 1 Wash. Ter. 518, 523; *Insurance Co.* v. *Wright*, 60 Vermont, 515, 517.

Besides, joint stock companies organized "under the laws of any foreign country" are also made subject to the tax. Congress did not intend to tax foreign joint stock companies if organized under the statutory law of a foreign country, but not to tax them if organized under its customary laws.

The conclusion to be drawn from the use of the word "every" and from the meaning of the words "joint stock company," "organized," and "laws" is that the express language of the section subjects joint stock companies, though organized under the common law of a State or Territory, to the tax.

The Cushing Real Estate Trust and the Department Store Trust are common-law joint stock companies. *Kossakowski* v. *People*, 177 Illinois, 563, 568; 1 Bates on Partnership, § 72; *Tabor* v. *Breck*, 192 Massachusetts, 355, 361; *Howe* v. *Morse*, 174 Massachusetts, 491, 499.

Joint stock companies are frequently, if not usually, formed under deeds of settlement and declarations of trust. *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, 568, and *Tabor* v. *Breck*, 192 Massachusetts, 355, 361. The certificates of shares of each appellant has a par value of $100. It is personalty, even though all the company's capital is invested in real estate. *Pittsburg Wagon Works' Estate*, 204 Pa. St. 432.

The Cushing Real Estate Trust and the Department Store Trust are both in fact and within the meaning of § 38 engaged in business. *Wall & H. St. T. Co.* v. *Miller*, 181 N. Y. 328, 334.

Mr. Justice Day delivered the opinion of the court.

These cases present facts differing from those involved

in the consideration of the corporation tax cases just decided. *Flint* v. *Stone Tracy Co., ante,* p. 107.

In No. 448 the question is raised as to the right to lay a tax under this statute upon a certain trust formed for the purpose of purchasing, improving, holding and selling lands and buildings in Boston, known as The Cushing Real Estate Trust. By the terms of the trust the property was conveyed to certain trustees, who executed a trust agreement whereby the management of the property was vested in the trustees, who had absolute control and authority over the same, with right to sell for cash or credit, at public or private sale, and with full power to manage the property as they deemed best for the interest of the shareholders. The shareholders are to be paid dividends from time to time from the net income or net proceeds of the property, and twenty years after the termination of lives in being the property to be sold and the proceeds of the sale to be divided among the parties interested. The trustees were to issue 4,800 shares to the owners of the property at $100 each, the owners to receive a number of shares equal to the value of the interest conveyed to the trustees. The shares were transferable on the books of the trustees, and on surrender of the certificate and the transfer thereof in writing a new certificate is to issue to the transferee. No shareholder had any legal title or interest in the property and no right to call for the partition thereof during the continuance of the trust. The legal representatives of a shareholder are to succeed to the interest of a shareholder, the interest passing by operation of law. Provision is made for the termination of the trust by an instrument or instruments in writing, signed by not less than three-fourths of the value of stock held by shareholders. Meetings of the shareholders are held at their discretion, or whenever requested in writing by five shareholders, or by shareholders owning not less than one-tenth of the shares in value.

The trust has a building, leasing it to a single tenant. It also maintains and operates an office building with elevator service, janitor service, etc.

Case No. 496 involves what is known as a Department Store Trust. It was created by deed and formed for the purpose of purchasing and holding certain parcels of land in the city of Boston, and erecting a building thereon suitable for a department store. The land and buildings are leased to one tenant for a period of thirty years. The trust had transferable certificates issued to shareholders at the par value of $100 each. The trustees conduct the affairs of the trust, manage the property, and pay dividends when declared. The shareholders meet annually, and a majority of them have the power to elect and depose trustees and to alter and amend the terms of the trust agreement. This trust also continues for certain lives in being and for twenty years thereafter. Each of the trusts involved in these cases is in receipt of a net income exceeding $5,000.

Under the terms of the Corporation Tax Law, corporations and joint stock associations must be such as are "now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia."

The pertinent question in this connection is: Are these trusts organized under the laws of the State? As we have construed the Corporation Tax Law in the previous cases, *Flint* v. *Stone Tracy Co.*, *ante*, the tax is imposed upon doing business in a corporate or quasi-corporate capacity, that is, with the facility or advantage of corporate organization.

It was the purpose of the act to treat corporations and joint stock companies, similarly organized, in the same way, and assess them upon the facility in doing business which is substantially the same in both forms of organiza-

tion. Joint stock organizations are not infrequently organized under the statute laws of a State, deriving therefrom, in a large measure, the characteristics of a corporation.

The language of the act ". . . now or hereafter organized under the laws of the United States," etc., imports an organization deriving power from statutory enactment. The statute does not say under the law of the United States, or a State, or lawful in the United States or in any State, but is made applicable to such as are organized under the laws of the United States, etc. The description of the corporation or joint stock association as one organized under the laws of a State at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations.

A trust of the character of those here involved can hardly be said to be organized, within the ordinary meaning of that term; it certainly is not organized under statutory laws as corporations are. The difference between joint stock associations at common law and those organized under statutes is well recognized (Cook on Corporations, § 505):

"There is an essential difference between a joint stock company as it exists at common law and a joint stock company having extensive statutory powers conferred upon it by the State within which it is organized. The latter kind of joint stock company is found in England and in the State of New York. To such an extent have these statutory powers been conferred on joint stock companies that the only substantial difference between them and corporations is that the members are not exempt from liability as partners for the debts of the company."

The two cases now under consideration embrace trusts which do not derive any benefit from and are not or-

ganized under the statutory laws of Massachusetts. Joint stock companies of the statutory character are not known to the laws of that Commonwealth. *Ricker* v. *American L. & T. Co.*, 140 Massachusetts, 346. These trusts do not have perpetual succession, but end with lives in being and twenty years thereafter.

Entertaining the view that it was the intention of Congress to embrace within the corporation tax statute only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law, we are of opinion that the real estate trusts involved in these two cases are not within the terms of the act. In that view the decrees in both cases will be reversed and the same remanded to the Circuit Court of the United States for the District of Massachusetts with directions to overrule the demurrers and for further proceedings consistent with this opinion.

Reversed.

ZONNE *v.* MINNEAPOLIS SYNDICATE.

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

No. 627. Argued January 19, 1911.—Decided March 13, 1911.

A corporation, the sole purpose whereof is to hold title to a single parcel of real estate subject to a long lease and, for convenience of the stockholders, to receive and distribute the rentals arising from such lease and proceeds of disposition of the land, and which has disqualified itself from doing any other business, is not a corporation doing business within the meaning of the corporation tax provisions of the act of August 5, 1909, c. 6, 36 Stat. 11, 112, and is not subject to the tax.

THE facts, which involve the construction of the Corporation Tax Law, are stated in the opinion.

Mr. John R. Van Derlip, with whom *Mr. Burt F. Lum* was on the brief, for appellant:

Even if the Corporation Tax Law is constitutional, it is not operative as respects the appellant. It is not a corporation organized for profit; it is not carrying on or doing business of any kind; its only income has been rental paid to, and received by, it under a lease, for a term of 130 years, of a tract of land owned by it in the city of Minneapolis, which is the only property it possesses.

It will thus be seen that the entire property of the corporation is such that it has no power to engage in business, for profit or otherwise, and that, if the corporation be taxable at all, it is solely by reason of its ownership of the premises described, which the Attorney General concedes, in the brief filed in March, 1910, does not fall within the purview of the law.

Appellant is not organized for profit. In order to constitute a business corporation or the carrying on or doing of business by a corporation for profit, the profits must be profits arising from the carrying on and doing business. *Mundy* v. *Van Hoose*, 104 Georgia, 292. "Profit" is distinct from "income" and "organized for profit" does not mean "owning property" so as to embrace corporations which, though passive, receive incomes from invested property, but not from "carrying on or doing business." *Gray* v. *Darlington*, 15 Wall. 63; *Bennett* v. *Austin*, 81 N. Y. 308, 319; *People* v. *Supervisors*, 4 Hill, 20.

The corporation is not carrying on or doing business. *Riberts* v. *State*, 26 Florida, 362; *State* v. *Boston Club*, 45 La. Ann. 585; *Lyons-Thomas Hardware Co.* v. *Perry Stove Mfg. Co.*, 86 Texas, 153; *Graham* v. *Hendricks*, 22 La. Ann. 524; *Harris* v. *State*, 50 Alabama, 127; *In re Alabama &c. Ry. Co.*, 9 Blatchf. 390; *S. C.*, Fed. Cas. No. 124;

Holmes v. *Holmes*, 40 Connecticut, 117; *People* v. *Horn Silver Mining Co.*, 105 N. Y. 76, 83; *State* v. *Barnes*, 126 N. Car. 1063.

Individual acts performed for the private benefit of a person are not taxable as constituting the doing or carrying on of business. 21 Am. & Eng. Ency. of Law, 2d ed., 811, n. 8; Cooley on Taxation, 2d ed., 571; *State* v. *Anniston Rolling Mills*, 125 Alabama, 121.

As to what constitutes "business" see *Goddard* v. *Chaffee*, 2 Allen, 395; *Hickey* v. *Thompson*, 52 Arkansas, 237; *Shryock* v. *Latimer*, 57 Texas, 677; *Braeutigan* v. *Edwards*, 38 N. J. Eq. 545. The defendant corporation has no property except its leased land. The corporation has no income except rents; the law does not apply to holding companies.

As to the attitude of Congress in respect of this class of corporations, there is no room for debate. Not only are they excluded from the application of the act by its plain words (paragraph first), but, by the express affirmative action of Congress, they were excluded. See debates in 44 Congressional Record, 4228; and remarks of Senators Aldrich, Clapp, Cummins and others (p. 4233).

There was no appearance or brief filed for appellee.

The Solicitor General for the United States by leave of the Court.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the validity of the Corporation Tax Law just passed upon in No. 407, *Flint* v. *Stone Tracy Company*, *ante*, p. 107.

The case presents a peculiarity of corporate organization and purpose not involved in the case just decided. The Minneapolis Syndicate, as the allegations of the bill,

admitted by the demurrer, show, was originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor. On the twenty-seventh of December, 1906, the corporation demised and let all of the tracts, lots and parcels of land belonging to it, being the westerly half of block 87 in the city of Minneapolis, to Richard M. Bradley, Arthur Lyman and Russell Tyson as trustees, for the term of 130 years from January 1, 1907, at an annual rental of $61,000, to be paid by said lessees to said corporation. At that time the corporation caused its articles of incorporation, which had theretofore been those of a corporation organized for profit, to be so amended as to read:

"The sole purpose of the corporation shall be to hold the title to the westerly one-half of block 87 of the town of Minneapolis, now vested in the corporation, subject to a lease thereof for a term of one hundred and thirty years from January 1, 1907, and, for the convenience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrue under said lease, and the proceeds of any disposition of said land."

As we have construed the Corporation Tax Law (*Flint* v. *Stone Tracy Co.*, *ante*, p. 107), it provides for an excise upon the carrying on or doing of business in a corporate capacity. We have held in the preceding cases that corporations organized for profit under the laws of the State, authorized to manage and rent real estate, and being so engaged, are doing business within the meaning of the law, and are therefore liable to the tax imposed.

The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corpora-

tion, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909. Holding this view, we think the court below erred in sustaining the demurrer to the bill. The decree of the court below is therefore reversed and the cause remanded to the Circuit Court of the United States for the District of Minnesota with directions to overrule the demurrer and for further proceedings consistent with this opinion.

Reversed.

EX PARTE: IN THE MATTER OF THE STATE OF OKLAHOMA, BY CHARLES N. HASKELL, GOVERNOR, ETC., PETITIONER.

No. 9, Original. Argued April 4, 5, 1910; ordered for reargument before full bench May 31, 1910; reargued February 23, 1911.—Decided April 3, 1911.

Prohibition is an extraordinary writ which will issue against a court which is acting clearly without any jurisdiction whatever, and where there is no other remedy; but where there is another legal remedy, by appeal or otherwise, or where the question of jurisdiction is doubtful or depends on matters outside the record, the granting or refusal of the writ is discretionary. *In re Rice*, 155 U. S. 396.

Mandamus cannot perform the office of an appeal or writ of error and is only granted as a general rule where there is no other adequate remedy. *Re Atlantic City R. R. Co.*, 164 U. S. 633.

Where in an action to enjoin state officers from enforcing a state statute against articles in interstate commerce, the interlocutory injunction can be corrected in the Circuit Court of Appeals, and there is a direct appeal on the question of jurisdiction to this court after final decree, an adequate remedy is provided and the writ of prohibition could only be granted on the ground of absolute right and this court in this case declines to allow it to issue.

There is an identity of the principles which govern mandamus and prohibition and the latter writ is also refused in this case as there is a remedy by review in this court after final judgment. *Ex parte Nebraska*, 209 U. S. 436.

THE facts are stated in the opinion.

Mr. Joseph W. Bailey and *Mr. Fred S. Caldwell* for the State of Oklahoma:

The injunction suits are, in effect, against the State of Oklahoma, and barred by the Eleventh Amendment. Such suits attempt to control the acts of the State by acting directly upon its public officers and controlling their official conduct. While this would not be the case if the state laws under which the state officers were assuming to act were unconstitutional, it is so, as the laws in question are valid laws, the constitutionality of which cannot be challenged. They do not attempt to subject intoxicating liquors, which are the legitimate subject of interstate commerce, to the exercise of the police power of the State, until after arrival within the State, within the meaning of the Wilson Act.

The police power is not involved at all. There is no dispute touching its operations or limitations. But an inferior Federal court has seen fit to take exception to the judicial power of a State being invoked in such instances.

As to the difference between "the police power" and "the judicial power" of a State, see *Slaughter House Cases*, 16 Wall. 36, 62; *Munn* v. *Illinios*, 94 U. S. 113, 124, *Mugler* v. *Kansas*, 123 U. S. 623, 660; *Walker* v. *Maxwell*, 68 App. Div. 196; *S. C.*, 74 N. Y. Supp. 94.

As to the status of the liquor affected by the injunctions, see *State* v. *Intoxicating Liquors*, 71 Atl. Rep. (Me.) 758; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *Vandercook Co.*, 170 U. S. 439; *American Express Co.* v. *Iowa*, 196 U. S. 13; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17; *Heyman* v. *Southern Ry. Co.*, 203 U. S. 270; *State* v. *18 Casks of Beer* (Okla.), 104 Pac. Rep. 1093.

As their acts are supported by a valid state law, such officers are the agents of the State, their acts are the acts of the State and a suit to enjoin is, in effect, a suit against the State. *Osborn* v. *United States Bank*, 9 Wheat. 738, 846; *Ex parte Young*, 209 U. S. 123, 142; and see also *Poindexter* v. *Greenhow*, 114 U. S. 270; *In re Ayers*, 123 U. S. 443; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9; *Tindal* v. *Wesley*, 167 U. S. 204, 219; *Fitts* v. *McGhee*, 172 U. S. 516, 528; *Prout* v. *Starr*, 188 U. S. 537, 542; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241.

All search and seizure proceedings prosecuted by the State of Oklahoma under §§ 4184, 4185 of the 1909 Compiled Laws are actions *in rem*, brought under a valid state law in courts of competent jurisdiction, and, therefore, the search and seizure warrants issued therein are in no sense void, and fully protect the officer or officers executing the same. *Dwinnels* v. *Boynton*, 3 Allen (Mass.), 310; *Humes* v. *Taber*, 1 R. I. 464; *Walls* v. *Farnham*, 2 Hun, 325; *Sanford* v. *Nichols*, 7 Am. Dec. 152; *Small* v. *Orne*, 79 Maine, 81; *State* v. *McNally*, 34 Maine, 210; *Melcher* v. *Scruggs*, 72 Missouri, 408; *Boston & Maine R. R. Co.* v. *Small*, 85 Maine, 624.

The effect of the injunctions complained of by the petitioner herein is to stay proceedings in the courts of a State in violation of § 720, Rev. Stat. *American Exp. Co.* v. *Mullins*, 212 U. S. 311; *Arbuckle* v. *Blackburn*, 51 C. C. A. 122; *S. C.*, 133 Fed. Rep. 616; *Freeman* v. *Howe*, 24 How. 451; *City Bank* v. *Skelton*, 5 Fed. Cas. No. 2739; *Daly*

v. *Sheriff*, 6 Fed. Cas. No. 3553; *Fisk* v. *Union Pacific Ry. Co.*, 9 Fed. Cas. No. 4827; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *Hemsley* v. *Meyers*, 45 Fed. Rep. 283; *Whitney* v. *Wilder*, 54 Fed. Rep. 554; *American Assn.* v. *Hurst*, 59 Fed. Rep. 1; *Fenwick Hall Co.* v. *Old Saybrook*, 66 Fed. Rep. 389; *In re Chetwood*, 165 U. S. 460; *Harkrader* v. *Wadley*, 172 U. S. 148; *Cœur D'Alene Ry. Co.* v. *Spaulding*, 35 C. C. A. 295; *Mills* v. *Prov. Life & Trust Co.*, 100 Fed. Rep. 344; *Ex parte Young*, 209 U. S. 123; *Farmers' L. & T. Co.* v. *Lake St. &c. Ry. Co.*, 177 U. S. 51.

The cases at bar are proper ones for the issuance of writs of prohibition.

A writ of prohibition is to prevent the exercise of jurisdiction by a judicial tribunal over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance. It is a proper remedy where the court having jurisdiction assumes to exercise an unlawful power. It is a remedy provided by the common law against the encroachment of jurisdiction. *Mayo* v. *James* (Va.), 12 Gratt. 17, 23; *People* v. *Judge* (Mich.), 2 N. W. Rep. 919; *State* v. *Ward*, 70 Minnesota, 58; *Planters' Ins. Co.* v. *Cramer*, 47 Mississippi, 200, 202; *Johnston* v. *Hunter*, 50 W. Va. 52; *State* v. *Commissioners*, 1 Mill (S. Car.), 55, 57; *Washburn* v. *Phillips*, 43 Massachusetts (2 Metc.), 296; *Maurer* v. *Mitchell*, 53 California, 289; *People* v. *Commissioners*, 54 California, 404; *Cameron* v. *Kenfield*, 57 California, 550, 553; *State* v. *Young*, 29 Minnesota, 447, 523; *People* v. *Fitzgerald*, 73 App. Div. 339; *State* v. *Evans*, 88 Wisconsin, 255.

Mr. Joseph S. Graydon and *Mr. Lawrence Maxwell*, with whom *Mr. E. G. McAdams* was on the brief, for respondents and as *amici curiæ*, in opposition to issuing the writ of prohibition:

The writ will not issue unless it clearly appears that

the inferior court is about to exceed its jurisdiction. *In re Fassett*, 142 U. S. 479, 486; *Re Engles*, 146 U. S. 357; *Re Morrison*, 147 U. S. 14; *Re Rice*, 155 U. S. 396; *Re N. Y. and Porto Rico S. S. Co.*, 155 U. S. 523; *Smith* v. *Whitney*, 116 U. S. 167, 176.

Want of jurisdiction must not appear from facts dehors the record. *Ex parte Easton*, 95 U. S. 68, 77; *Re Cooper*, 143 U. S. 472; *Re Fassett*, 142 U. S. 479, 484; *Re The Huguley Mfg. Co.*, 184 U. S. 297; Taylor, "Jurisdiction and Procedure of the Supreme Court of the United States," §§ 334, 335.

The suits were not against the State, but only against state officials, to prevent them from enforcing against the plaintiffs a state statute which, whether valid or not on its face, was invalid as to plaintiffs under the state of facts set forth in the bills on which the Circuit Court acted. The injunctions were therefore properly granted and certainly were not beyond the jurisdiction of the court. *Ex parte Young*, 209 U. S. 123; *Western Union Tel. Co.* v. *Andrews*, 216 U. S. 165.

Granting the writ will enable local officers to interfere with the operation of the revenue laws and other laws of the United States. See § 3449, Rev. Stat., which is part of the Int. Rev. Act of July 13, 1866, c. 184, 14 Stat. 156; *United States* v. *132 Packages of Liquor*, 76 Fed. Rep. 367; *United States* v. *Campe*, 89 Fed. Rep. 697; *United States* v. *Twenty Boxes of Corn Liquor*, 123 Fed. Rep. 135.

The Federal court having first assumed jurisdiction, will retain it to the exclusion of the state courts and officers as to subsequent proceedings. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617; *Adams Express Co.* v. *Kentucky*, 206 U. S. 135; *American Express Co.* v. *Kentucky*, 206 U. S. 139.

The Federal court, also, in a proper case may take jurisdiction over the parties and determine for itself whether seizures so made are legal, and after the Federal

court has taken jurisdiction it will by injunction or other appropriate means prevent the state court from thereafter seizing or interfering with persons or things involved in the Federal case. *Sculley* v. *Bird*, 209 U. S. 481; *Vance* v. *Vandercook (No. 1)*, 170 U. S. 438; *Ex parte Young*, 209 U. S. 123; *Western Union Tel. Co.* v. *Andrews*, 216 U. S. 165.

In no case has this court awarded prohibition in proceedings similar to these. This is not a case in which the court has original jurisdiction. *In re Massachusetts, Petitioner*, 197 U. S. 482. The writ does not serve the purpose of a writ of error or certiorari, and is rarely granted where there is another legal remedy. *Smith* v. *Whitney*, 116 U. S. 167.

Mr. S. T. Bledsoe, with whom *Mr. A. B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. J. B. Cottingham* were on the brief, for respondents, in opposition to relief sought:

This being a controversy between a State and a citizen thereof, this court is without jurisdiction. Art. III, § 2, Const. of U. S.; *California* v. *Southern Pacific Ry. Co.*, 157 U. S. 229, 258.

No such peculiar character attaches to intoxicating liquors as authorizes the exercise of the judicial power of the States. This court has not, in dealing with the subject of intoxicating liquors, drawn any distinction between police and judicial powers. *Rhodes* v. *Iowa*, 170 U. S. 412, 426.

The law of the State of Oklahoma cannot be made to apply to an interstate shipment before the arrival and delivery of such shipment without causing it to be repugnant to the Constitution of the United States. Cases *supra* and *Vance* v. *Vandercook*, 170 U. S. 438, 455; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 135; *Swedes* v. *State*, 1 Oklahoma Crim. Rep. 245; *State* v. *18 Casks of Beer*, 104 Pac. Rep. 1093, 1100; see § 4753, Wilson's Stat. Okla., 1903; *McCord* v. *State*, 101 Pac. Rep. 280.

The proceedings in the Circuit Court of the United States for the Western District of Oklahoma are not against the State of Oklahoma. The Oklahoma Dispensary-Prohibition Act if at all applicable to interstate shipments before their arrival at destination and delivery to the consignee, is unconstitutional. Cases *supra* and *Heyman* v. *Southern Railway Co.*, 203 U. S. 275; *Leisy* v. *Hardin*, 135 U. S. 100; *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Scott* v. *Donald*, 165 U. S. 107; *Louisville & Nashville Ry. Co.* v. *Cook Brewing Co.*, 172 Fed. Rep. 117; *Davis Hotel Co.* v. *Platt*, 172 Fed. Rep. 775; *Crescent Liquor Co.* v. *Platt*, 148 Fed. Rep. 894; *High* v. *State*, 101 Pac. Rep. 115.

An injunction may be granted to protect the property rights of a person against the enforcement of an unconstitutional state statute, and may be addressed to the persons whose duty it is to enforce the same. *Ex parte Young*, 209 U. S. 23; *Davis* v. *Gray*, 16 Wall. 203, 220; *Virginia Coupon Cases*, 114 U. S. 270, 296; *United States* v. *Lee*, 106 U. S. 196; *Tindall* v. *Wesley*, 167 U. S. 204; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160; *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537; *McNeill* v. *Southern Railway Co.*, 202 U. S. 543, 559; *Mississippi R. R. Comm.* v. *Illinois*, 203 U. S. 335, 340; *Kansas Nat. Gas Co.* v. *Haskell*, 172 Pac. Rep. 545; *Sculley* v. *Bird*, 209 U. S. 481, 487; *Ill. Cent. Ry. Co.* v. *Adams*, 180 U. S. 28, 35.

The effect of the injunction complained of is not to stay proceedings in the state courts in violation of § 720, Rev. Stat. *Norton* v. *Shelby County*, 118 U. S. 425; *Ex parte Young*, 209 U. S. 123; 2 High on Injunctions, 4th ed., § 1308; *Tex. & Pac. Ry. Co.* v. *Kuteman*, 54 Fed. Rep. 547; *In re Beine*, 42 Fed. Rep. 545; *Schandler Bottling Co.* v. *Welch*, 42 Fed. Rep. 561.

An adequate remedy exists by appeal and the extraordinary relief sought by prohibition should for that reason be denied. *In re Rice, Petitioner*, 155 U. S. 402; *In re N. Y. S. S. Co., Petitioner*, 155 U. S. 531; *In re Huguley Mfg. Co.*, 184 U. S. 297.

The Oklahoma Dispensary-Prohibition Act in so far as it provides for searches, seizures and judgment, without any notice whatever, and in such a limited time, is violative of the Fourteenth Amendment. *Roller* v. *Holly*, 176 U. S. 398; *Fisher* v. *McGirr*, 67 Massachusetts, 1; *United States* v. *Boyd*, 116 U. S. 616.

The railway company is not the keeper of the conscience, nor the censor of the appetites or contracts of the citizens of the State of Oklahoma.

Mr. Chief Justice White delivered the opinion of the court.

On March 24, 1908, the legislature of Oklahoma enacted a statute, known as the Billups Bill, providing for a state agency for the dispensing of liquors under certain circumstances, but not for use as a beverage, and prohibiting generally the manufacture, sale, bartering, giving away or otherwise furnishing liquor within the State. Session Laws Oklahoma, 1907–1908, ch. 69, p. 605; §§ 4180 *et seq.* Comp. Laws of 1909. Sections 5 and 6 of Art. 3 of the statute, §§ 4184 and 4185 Comp. Laws of 1909, provide in substance that any judge of a District or County Court or justice of the peace, upon a showing of probable cause, may issue search and seizure warrants directed to any officer of the county to seize liquors under the circumstances therein mentioned, and provide for a hearing as to whether such liquors are being unlawfully held, etc. The statute also makes provision for the forfeiture of liquors and other personal property employed in unlawfully trafficking in liquors.

The State of Oklahoma, through its governor, is here complaining that "The Circuit Court of the United States for the Eastern District of Oklahoma and Ralph E. Campbell, the District Judge of said district, sitting as judge of said Circuit Court, have in direct violation of the Eleventh Amendment to the Constitution of the United States and contrary to and in direct violation of § 720 of the Revised Statutes of the United States, assumed jurisdiction" in nine suits in equity brought in said court, and the number of each case and the parties thereto are stated. The particular proceedings had in each case are not set out, but it is, in substance, alleged that in each the relief sought was the enjoining of the prosecution of search and seizure proceedings instituted under the statute above referred to in the courts of Oklahoma and the enjoining of the State "from prosecuting any action in its said courts, under and pursuant to said §§ 4184 and 4185, *supra*, of petitioner's said laws, against any intoxicating liquors, in all cases where it may become necessary to try and determine any one or more" of the issues set out in the margin.[1]

[1] (*a*) The issue as to whether or not the particular intoxicating liquor in question was, at the time of its seizure, a *bona fide* shipment made to a person within petitioner's borders from a place outside of petitioner's borders, which said shipment had not been delivered by the interstate carrier under the contract of interstate shipment to the consignee at the place of destination.

(*b*) The issue as to whether or not the particular intoxicating liquor in question had been shipped from a point outside of petitioner's borders to a place within petitioner's borders in violation of § 3449 of the Revised Statutes of the United States.

(*c*) The issue as to whether or not the particular intoxicating liquor in question had been shipped from a place outside of petitioner's borders to a place within petitioner's borders in violation of any one or more of §§ 238, 239, and 240 of the act of Congress of March 4, 1909 (35 Stat. L. 1136–7).

(*d*) The issue as to whether or not the particular intoxicating liquor in question, although shipped from a place outside of petitioner's borders to a place within petitioner's borders and in the possession of the

It is averred that the relief sought in the said equity suits has been granted and the State and its officials are wrongfully prevented from enforcing the statute, "and that the State of Oklahoma has suffered and is suffering great and irreparable injury, from which said petitioner has no adequate remedy at law," and "that said acts of said respondents constitute and are an unlawful and unwarranted interference with petitioner, the State of Oklahoma, in the exercise of its governmental functions and sovereign powers in connection with the enforcement of petitioner's said prohibition laws, . . ."

In substance, it was prayed in the petition that the further prosecution of the suits and the enforcement of the various restraining orders and temporary injunctions entered therein should be prohibited, as well as any further interference with the prosecution in the state courts of search and seizure process under the law in question.

As a return to a rule to show cause respondent judge has filed an answer, containing copies of the file papers in the equity suits referred to in the petition. The following facts are taken from the showing thus made:

Prior to the fall of 1908, under the assumed authority of search warrants issued for alleged violations of the foregoing statute, numerous consignments from other States than Oklahoma to residents of Oklahoma of liquor had been taken from the cars or depots at stations within the State of Oklahoma of the Missouri, Kansas and Texas Railway Company, while such property was in the custody of the company, before the completion of the interstate transportation by delivery to the consignees. Alleging diversity of citizenship, and a continuous violation of

interstate carrier, undelivered under the contract of interstate shipment at the time the seizure was made, is "adulterated" or "misbranded" within the meaning of the act of Congress of June 30, 1906, chapter 3915, 34 Stat. L. 768, commonly known as the Pure Food and Drug Act.

rights protected by the Constitution of the United States, the unlawfulness of these seizures and the irreparable character of the injury done and likely to be occasioned by further threatened seizures, the railway company commenced, on September 9, 1908, the first of the equity suits referred to in the petition. Twelve persons were made defendants, as having been concerned either in the obtaining of the various search warrants and their service, or because in possession of property seized, or on account of advising and encouraging the commission of the alleged trespasses. A decree for the restoration of eighteen specified consignments, alleged to have been unlawfully seized, was prayed, as also an injunction against future seizures. A temporary restraining order was granted; and, ultimately, a stipulation was entered into for the return of the property seized, and for its redelivery to the defendants on the payment to them of its value in the event the litigation should terminate adversely to the railway company. On September 16, 1908, the temporary restraining order was, by agreement of the parties, continued in force until a time to be fixed by consent for the hearing of an application for a temporary injunction. No further proceedings were had in the case.

Four of the equity suits referred to in the petition—three filed December 17, 1909, and one on January 18, 1910—were afterwards commenced in the same court by the railway company. The defendants were several individuals alleged to have actively participated in the seizure at various stations on the line of the company's road, like in character to the seizure complained of in the prior suit. Such seizures were averred to have been made under the assumed authority of the prohibition statute heretofore referred to. In one of the suits so commenced on December 17, 1909, a stipulation was filed to the effect that the seizures complained of had been made by the defendants acting as constables and under the authority of a

search warrant, a copy of which was attached. In each of the four cases, after hearing counsel for the respective parties, a temporary restraining order was granted, prohibiting future interference with interstate shipments before delivery to consignees, and ordering the restoration of the property alleged to have been seized, except that in one case, a portion of the seized property was ordered to be safely and securely kept by the defendants until the further order of the court. In each of the cases following the allowance of a temporary injunction a demurrer to the bill was filed alleging in substance that the court was without jurisdiction to hear and determine the controversy "and that the relief prayed for is sought in direct violation of the Seventh and Eleventh Amendments of the Constitution of the United States, and in direct violation of § 720 of the Revised Statutes of the United States;" and that the bill of complaint "is wholly without equity." These demurrers have not been passed upon.

In the interval between the commencement of the first and the last of the suits just referred to four dealers in liquors and consignors of shipments which had been taken from the custody of the railway company while in course of interstate transportation to consignees in Oklahoma, under the assumed authority of the statute in question, also commenced the other suits in equity referred to in the petition. The defendants in these suits, designated by their official titles, were the state dispensary agent and the sheriff, constables or other officials who had participated in the seizures complained of in the various bills of complaint, as also the person who held possession of the property. The prayer of each bill was for the allowance of temporary and perpetual injunctions restraining future seizures of liquors shipped by the complainant and consigned to *bona fide* consignees in Oklahoma by railroad until the interstate transportation had terminated by delivery of the property to the consignees. A temporary

restraining order was issued in each case. Thereafter, in all of these cases, a demurrer was filed to each bill upon the grounds which were made the basis of the demurrers filed in the cases commenced by the railway company, and upon the following additional ground: "That it appears from said complainants' bill of complaint that their business operations, which they seek to have protected by decree of this honorable court, are carried on and conducted in direct violation of the penal laws of the United States of America, to wit, in violation of §§ 238, 239 and 240 of an act of Congress of March 4, 1909. 35 Stat. 1136–7."

The temporary injunctions issued in the suits brought by the railway company were substantially alike and restrained the defendants and each of them, their agents and employés, "from entering the cars, depots or other premises of the complainant, Missouri, Kansas and Texas Railway Company, and from taking therefrom intoxicating liquors shipped from points outside of the State of Oklahoma to points and consigned to persons within the Eastern District of the State of Oklahoma, and that said defendants, and each of them, their agents and employés be restrained from in anywise interfering with complainant in its handling and delivery of such interstate shipments of intoxicating liquors and from inciting, aiding, abetting or advising other persons so to do." The defendants were also enjoined from taking any steps looking to the forfeiture of the seized property.

The temporary injunctions issued in the suits brought by the foreign liquor houses were also substantially alike and in each the defendants, their agents, etc., were "enjoined and restrained until further order of this court from seizing or causing to be seized, either directly or indirectly, or ordering or directing any person to seize any intoxicating liquors shipped by the complainant Thixton from the State of Kentucky to actual *bona fide* consignees within

the Eastern District of the State of Oklahoma, while the same is in the possession of the common carrier, and before the same have been delivered, either actually or constructively, to such consignees." In two of the cases commenced by shippers, however, the following proviso was inserted in the injunction order:

"Provided, however, that this order shall not apply to any liquors shipped in violation of Sec. 3449 of the Revised Statutes of the United States, or to liquors shipped in violation of Sections 238, 239 and 240, of the Act of Congress of March 4, 1909, 35 Stat. 1136–7, or to any such liquors which are adulterated or misbranded within the meaning of the Act of Congress of June 30, 1906, ch. 3915, 34 Stat. 768, commonly known as the Pure Food and Drug Act, or to any such liquors shipped in violation of any other Act of Congress."

In one of the shippers' cases the injunction order also contained a provision prohibiting action by the defendants looking to the forfeiture of any of the liquors referred to in the complaint as having been seized by such defendants.

This application for a writ of prohibition was made practically cotemporaneous with the filing of the various demurrers above referred to. In substance, the reasons which caused the respondent judge to assume jurisdiction over the causes and to award the relief against the defendants therein, of which the State now complains, are not only stated in the return, but are expounded in an opinion delivered in one of the cases which is made a part of the return. These reasons are, in substance, made manifest by two excerpts, one from the opinion referred to and the other from the return itself, as follows:

"Under the facts as stipulated in this case, the shipments seized were still in the hands of the carrier, were interstate commerce, and had not become subject to the laws of the State. If it be contended that in enacting the

search and seizure laws referred to the Legislature intended that they should apply to such interstate commerce, then the answer is that, to that extent, the law is invalid, because it is made to apply to a subject within the exclusive jurisdiction of Congress. If on the other hand it is contended that such was not the intention of the Legislature, then the state courts are exceeding the law in issuing such search and seizure warrants. They are in my judgment no protection to the officer who seeks by them to justify his acts thereunder, and to enjoin him from executing them is not a violation of section 720 of the Revised Statutes. The authority of the State does not attach to shipments of the character involved in this case until the delivery to the consignee.

* * * * * * * *

"If these seizures are permitted, complainants will either have to abandon their property so seized, or defend a multiplicity of suits, the number of which will be determined only by the zeal of the enforcement officers in their interference with interstate commerce. As the record now stands, the complainants of course must eventually win in such suits, for upon a showing to the state court that the property seized was still interstate commerce, undelivered to the consignee, it would have to be ordered returned to the complainants. It is not conceived, however, that such a course presents that adequate legal remedy which precludes the action of a court of equity. Nor is it conceived that in granting the temporary injunctions complained of, respondent is violating the 11th amendment to the Constitution, or section 720 of the Revised Statutes of the United States, because the injunction may prevent one or more of the defendants from thereafter causing such warrants of search and seizure to issue, or from executing such warrants after issuance."

It is elaborately argued by counsel for the State, first,

that the injunction suits complained of were, in effect, directed against the State, and, therefore, were barred by the Eleventh Amendment; second, that the proceedings prosecuted under §§ 4184 and 4185 of the 1909 Compiled Laws of Oklahoma are actions *in rem*, brought under a valid state law, in courts of competent jurisdiction, and, therefore, the injunctions restraining the enforcement of the search warrants were, in substance and effect, injunctions staying proceedings in the courts of the State, in violation of § 720 of the Revised Statutes. And as supporting this last contention, it is argued "the effect of the injunctions here complained of is to prevent and prohibit the 'judicial power' of the State of Oklahoma being invoked, even by the State itself, for the purpose of judicially determining the *status* of any particular quantity of intoxicating liquor found within its borders, in so far as questions touching its *status* as interstate commerce are concerned."

Counsel who oppose the allowance of the writ urge numerous reasons why the application should be denied, in part as follows: Relief it is claimed should be refused because it is sought to review in one action the proceedings in different causes involving different parties and issues. Attention is called to the fact that in the first of the suits commenced by the railway company no jurisdictional objection was raised. It is argued that the bills of complaint filed in the various suits commenced by the railway company do not show on their face that the suits were against state officers or that injunctions were sought to stay proceedings in the state courts, and that in any event the primary purpose of the bills was to restrain future seizures of interstate shipments before delivery to the consignees. As to the suits brought by the four liquor houses, it is urged that § 720 of the Revised Statutes was not violated, as the relief granted was only against future seizures and the suits were against state officials to prevent

them from enforcing against the plaintiffs a state statute, which, whether valid or not on its face, was invalid as to plaintiffs under the state of facts set forth in the bills on which the Circuit Court acted. It is additionally urged that the granting of the writ would enable local officers to interfere with the operation of the revenue laws and other laws of the United States, as the State of Oklahoma claims the right upon any hearing which may be had in respect to the validity of seizures of the character of those under consideration to determine whether the particular shipments were made in violation of any statute of the United States, and although for such violations the property would be subject to be forfeited to the United States, yet if it is found by the state court that the property had been shipped in violation of a law of the United States the goods would be adjudged not to have been legitimate subjects of interstate commerce and would be forfeited to the State. Further, it is urged that continuous seizures of liquors in transit by state authorities for the purpose of ascertaining whether they are or may be obnoxious to the police laws of the State is in itself an unconstitutional burden placed upon interstate commerce, and decisions of this court are cited as supporting the proposition. In addition, it is insisted that the law in question has been construed by the Supreme Court of Oklahoma not to be applicable to interstate shipments of intoxicating liquors until their arrival at destination and delivery to the consignees, and because of such construction, it is urged, it clearly results that "any officer or person seeking to seize or cause to be seized intoxicating liquors under the provisions of said act, before their arrival at destination and delivery to consignee, acts entirely outside of and beyond the scope of said law and is a naked trespasser, and may be enjoined."

But we do not think we are called upon to test the accuracy of these, as well as other, conflicting contentions,

because we are of the opinion that consistently with the orderly course of judicial proceeding we may not pass upon them, since we cannot do so without disregarding the plain statutory provisions providing means for reviewing the action of the court which is complained of and which, if availed of, would afford complete and adequate remedy.

The principle under which the power to issue the extraordinary writ of prohibition may be exerted was thus stated in *In re Huguley Mfg. Co.*, 184 U. S. 297, 301:

"It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. *In re Rice*, 155 U. S. 396. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. *In re Atlantic City Railroad Company*, 164 U. S. 633."

It will become apparent from even a merely superficial analysis that, consistently with the doctrine just referred to, the facts which we have stated afford no basis for the allowance of the writ of prohibition as prayed. This is obvious because, first, an adequate remedy was provided by law in each case, even before final judgment, for reviewing and correcting in the Circuit Court of Appeals any error committed by the court below in awarding interlocutory relief by injunction; second, because after final decree, if the cases so ultimated, adequate remedy existed at the election of the defendants to come directly to this court upon the question alone of the jurisdiction of the

court below as a Federal court over the respective causes; third, because even if these remedies were not resorted to and the cases had gone to final decrees against the defendants and they had chosen to appeal the whole case to the Circuit Court of Appeals, and that court had decided against them, there would be either a right in this court to review by appeal, or discretionary power, if it was deemed that the questions involved warranted such action, to bring the whole case up for review by the writ of certiorari. Bearing these considerations in mind it results that relief by the extraordinary remedy of prohibition, if here granted, could not possibly rest upon the ground that there was otherwise no adequate means of relief, but would have to be placed upon the assumption that there was a right to the writ, even although the party invoking it had declined to avail himself of the otherwise complete and adequate measures of relief which would have been afforded by following the orderly and regular course of judicial proceeding.

In view of the identity of the principles which govern the right to invoke the extraordinary remedy of mandamus to correct an unlawful assumption of jurisdiction, and those which control the power to issue the writ of prohibition for the same purpose, it was perhaps unnecessary to consider the subject from an original point of view, since the matter is settled by authority. Quite recently in *Ex parte Harding*, 219 U. S. 363, the whole subject was reviewed, and it was held that discretion to issue the writ of mandamus would not be exerted to review a question of jurisdiction where there was otherwise adequate remedy provided by statute for the review of errors in that respect asserted to have been committed by a trial court. Besides, a previous decision which was reviewed and reaffirmed in the *Harding Case* so completely controls the issue here presented as to leave no room for contention on the subject. The case is *Ex parte Nebraska*, 209

U. S. 436. That case was this. The State of Nebraska was one of the plaintiffs in a cause removed from a state court into a Circuit Court of the United States on the ground that there was a separable controversy between the other plaintiffs in the cause and the defendant. The Circuit Court having denied a motion to remand, the State of Nebraska applied to this court for a writ of mandamus to compel the remanding of the cause, averring that it was plain from the record that it was the real and in substance the only party plaintiff in the removed cause. The application for the writ, however, was denied upon the ground that the order overruling the motion to remand was subject after final judgment to be reviewed by appeal, and therefore was not properly reviewable by the writ of mandamus.

Rule discharged and prohibition denied.

EX PARTE: IN THE MATTER OF THE STATE OF OKLAHOMA (NO. 2).

No. 10. Original. Argued April 4, 5, 1910; ordered for reargument before full bench May 31, 1910; reargued February 23, 1911.—Decided April 3, 1911.

Writs of prohibition refused on authority of *Ex parte Oklahoma*, *ante*, p. 191.

THE facts are stated in the opinion.

Mr. Joseph W. Bailey and *Mr. Fred S. Caldwell* for the State of Oklahoma.

Mr. Joseph S. Graydon, with whom *Mr. Lawrence Maxwell* and *Mr. E. G. McAdams* were on the brief, for respondents and as *amici curiæ*.

Mr. S. T. Bledsoe, with whom *Mr. A. B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. J. B. Cottingham* were on the brief, for respondents in opposition.

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

In this case it is asked that a writ of prohibition be issued restraining District Judge Cotteral, sitting as judge of the Circuit Court for the Western District of Oklahoma, from further proceeding in seven separate actions commenced in said court—two brought by railroad companies and five by shippers—like in character to the cases which formed the basis of the application made in No. 9, Original. The grounds upon which the right to the writ in this case is based are also substantially the same as in the other.

Of the seven suits referred to the first was commenced by the Atchison, Topeka and Santa Fe Railway Company in August, 1908, the second by the Missouri, Kansas and Texas Railway Company in October, 1908, and the remaining cases were commenced in October and November, 1909.

The bill of the Atchison road, among other things, alleged the taking possession by the defendants of more than forty-three separate interstate shipments of intoxicating liquors while in the custody of the railway company and before delivery to the consignee and the threatened confiscation of the property. In both of the suits commenced by the railway companies no jurisdictional objection was raised at any time in the Circuit Court. Not only was this so, but in a cross complaint incorporated with answers filed in each case one of the defendants, counsel to the governor of Oklahoma, prayed relief against the railway companies, upon the theory that by the delivery of interstate shipments to persons who intended to use the

same in violation of the state prohibition law, the "complainant thereby creates a public nuisance in said State." In the five suits commenced by foreign liquor dealers, however, demurrers "for lack of jurisdiction and equity" were filed, and in all but one lengthy answers were filed. In two of the cases numerous affidavits were filed and temporary orders were refused, whereupon amended bills were filed and temporary injunctions were granted. Proceedings in contempt were also instituted in several of the cases for alleged violations of the injunctions. Moreover, in several of the cases the demurrers were heard and overruled, while in the others no action was taken subsequent to the filing of the answers or demurrers. In certain of the cases also affidavits were filed to the effect that goods which had been ordered returned by a justice of the peace upon the ground that they were exempt from seizure because the interstate transportation had not ended were again seized upon search warrants issued by another justice.

In his return to the rule to show cause the District Judge, among other things, said:

"The jurisdiction of the Circuit Court in these cases is supported in general by the averments in the pleadings of the complainants that the opposing parties are citizens of different States and that the respective amounts in dispute exceed $2,000.00; and furthermore that the cases arise under the Constitution of the United States by involving acts of alleged interference with transactions in interstate commerce and the question of the right to protection of the same. The equity jurisdiction of the court is invoked by the complainants on the ground of the necessity of relief to prevent irreparable injury and avoid a multiplicity of suits.

"The pleadings disclose that the complainants allege transactions by way of shipment of intoxicating liquors from other States to points in Oklahoma, and assert the

right to the transportation and delivery of the same to consignees in the State, as commodities of interstate commerce, and charge actual and threatened seizures thereof by the defendants before delivery within the State, not remediable at law. Wherefore, the amount in dispute being found sufficient, the jurisdiction of the court was held to arise for the purpose of hearing and investigating the grievances complained of and any defense which might be interposed, and to grant or deny relief as the facts and the law might warrant. Although the defendants sought to justify their conduct upon the ground that they were state officers and represented the State in discharging their duties, the court was of the opinion that jurisdiction existed to proceed, consistently with the Eleventh Amendment to the Federal Constitution.

* * * * * * * *

"The question made upon the jurisdiction of the court was regarded as one pertaining to the merits rather than to original jurisdiction, and as instituting the inquiry whether in the exercise of jurisdiction the defendants might be relieved of the suits on the ground that they represented the State. But it was believed that before the defendants could succeed with that defense, it was incumbent on them to justify their conduct under a valid law of the State, and that this they could not do, if the liquors they were seeking to seize and confiscate were undelivered commodities of interstate commerce.

* * * * * * * *

"With respect to the objection founded on section 720 of the Revised Statutes of the United States, it appears that the orders by their terms do not stay proceedings or direct the restoration of property, but restrain seizures. It was the opinion of the Circuit Court that the statute does not limit the federal judicial power so as to forbid injunctions against future proceedings. But aside from this, if the orders were not erroneous, they do not affect

the seizure of property subject to the police power of the State."

It is manifest that the reasons which led to the refusal to issue the writ in No. 9, Original, just decided, are applicable to and control this case, and the order therefore will be

Rule discharged and prohibition denied.

MARTINEZ *v.* INTERNATIONAL BANKING CORPORATION.

SAME *v.* SAME.

APPEALS FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Nos. 79, 80. Argued March 3, 6, 1911.—Decided April 3, 1911.

The value of the matter in dispute in this court is the test of jurisdiction. *Hilton* v. *Dickinson*, 108 U. S. 165.

Where the only question is the amount of indebtedness, which the security was sold to satisfy, that is the measure of the amount in controversy, and the counterclaim for return of the property sold cannot be added to the amount of the debt to determine the amount in controversy and give this court jurisdiction. *Harten* v. *Löffler*, 212 U. S. 397, distinguished.

The mere fact that suits are tried together for convenience does not amount to a consolidation, and where the understanding of the trial judge was that there was no consolidation this court will not unite the actions so that the aggregate amount will give jurisdiction.

A judgment of the intermediate appellate court reversing and remanding with instructions to enter judgment for plaintiff in accordance with its decision without fixing a definite amount is not such a final judgment as will give jurisdiction to this court.

THE facts are stated in the opinion.

Mr. Howard Thayer Kingsbury and *Mr. Frederic R. Coudert*, with whom *Mr. Paul Fuller* was on the brief, for appellant:

This court has jurisdiction of both appeals, with power to review the facts as well as the law.

Where the court below has rendered a judgment in favor of plaintiff for less than the jurisdictional amount and has also dismissed a counterclaim interposed by the defendant, who seeks to review the judgment, the amount of the judgment, and the amount sued for in the counterclaim, are in dispute and if the two together make up the requisite amount, this court has jurisdiction. See *Harten* v. *Löffler*, 212 U. S. 397; *Buckstaff* v. *Russell*, 151 U. S. 626; *Block* v. *Darling*, 140 U. S. 234; *Lovell* v. *Cragin*, 136 U. S. 130; *Dushane* v. *Benedict*, 120 U. S. 630. So in case of cross appeals, *Walsh* v. *Mayer*, 111 U. S. 31.

The decree in No. 79 is substantially one of foreclosure and sale. Such a decree has been expressly held by this court to be final. *Whiting* v. *United States Bank*, 13 Pet. 6, 15. Nothing remained for the court below to do except to carry out the judgment. The direction to sell the Germana, if the judgment was not otherwise paid, was absolute, and the sale would not even require confirmation by the court.

In No. 80 the judgment appealed from settled the whole law of the case and fixed the rights of the parties, leaving nothing for the court below to do except of a ministerial character. The dispositive portion of the judgment was an absolute direction for the specific performance of the agreement sued on, by the execution of an instrument in the form specified by the court. *Thomson* v. *Dean*, 7 Wall. 342; *Forgay* v. *Conrad*, 6 How. 201; *French* v. *Shoemaker*, 12 Wall. 86, 98; *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52; see 32 Stat. 695, quoted in *De la Rama* v. *De la Rama*, 201 U. S. 305.

Mr. Henry E. Davis for appellee.

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

These are two suits commenced in the Court of First Instance of the city of Manila on the same day, February 25, 1905, and numbered in that court as cases Nos. 3363 and 3365, respectively. In each suit the International Banking Corporation was plaintiff and Francisco Martinez and another person as the guardian of Martinez were defendants. After the present appeals were taken Martinez died and his administrator has been substituted in his stead.

We shall separately summarize the proceedings below in the two cases to the extent it is necessary to do so to understand the proper disposition to be made of the appeals.

Case No. 79 was a suit of an equitable nature brought by the bank against Martinez to foreclose a mortgage upon the steamer Germana, sell the steamer, and collect an alleged debt of 30,000 pesos, claimed to be secured thereby. By the answer and cross bill it was asserted that at the time of executing the mortgage Martinez was mentally incapacitated, and hence legally incompetent; that the whole transaction was void for fraud, duress and conspiracy; that the alleged indebtedness was a part of the subject-matter of the instrument sued on in the other case, the effect of which instrument was to supersede the mortgage sued on in this, and that plaintiff had wrongfully taken and held possession of the steamer and refused to account for its profits. As affirmative relief the setting aside of the whole transaction was demanded, as also the return of the steamer and an accounting of its profits.

The Court of First Instance in substance sustained these defenses, dismissed the plaintiff's suit, and directed a return of the steamer.

It was recited in the judgment: "This case was tried together with case No. 3365, it being agreed that the evidence taken on the trial pertinent to either or both cases should be considered by the court in the respective cases." On appeal the Supreme Court of the Philippine Islands reversed this judgment, held that the transaction was valid, and entered the following judgment:

"It is ordered that the judgment appealed from the Court of First Instance of the city of Manila, dated March 29, 1906, be, and the same is hereby reversed, and the record remanded to the court from which it came, with directions to that court to enter judgment in favor of the plaintiff, and against the defendants, Francisco Martinez and his guardian, Vicente Ilustre, for the sum of P 28,599.13, and interest at the rate of eight per cent per annum from the first day of January, 1904, with costs, and that the steamship 'Germana,' if said judgment is not paid, be sold in accordance with law to pay and satisfy the amount of said judgment. No costs will be allowed to either party in this court."

Case No. 80.—This case was brought to recover a judgment for 159,607.81 pesos with interest, and in default of payment for the foreclosure of an instrument alleged to be a mortgage, the sale of certain real estate described in the mortgage, execution in the event of a deficiency, and for general relief. By answer and cross bill the same general defenses were set up as in the other suit. It was further averred that the alleged considerations for the instrument sued on was "padded and fictitious," contained duplications of the same item, and included the item of 30,000 pesos which was the subject of the other case; also that the instrument sued on was not in law a mortgage, but was an agreement for the transfer of property with right of repurchase (*pacto de retro*), and that the defendant had never refused to perform such contract, but that the plaintiff had failed to perform its own obligations there-

under; also that the plaintiff had wrongfully taken possession of the property in question and received its rents and profits. The defendant demanded that the entire transaction be set aside; that plaintiff's suit be dismissed, and that plaintiff account for the rents and profits it had received.

The Court of First Instance found against the plaintiff and rendered judgment in favor of the defendant guardian for the gross amount of the rents adjudged to have been unlawfully collected by the plaintiff. The case was appealed to the Supreme Court of the Philippine Islands, and was there docketed as case No. 3472. The appellate court held "that the evidence is not sufficient to establish any of the defenses or counterclaims," and "that the defendant, Martinez, at the time the action was commenced, was indebted to the plaintiff in at least the sum of P 159,607.81 was fully established by the evidence." The court, however, decided that the instrument claimed to be a mortgage was not such, but was "a promise to sell real estate upon certain terms, and contemplates a subsequent contract of sale which should contain the terms stated in this document," and that sufficient facts were stated in the complaint "to constitute a good cause of action for the specific performance of the contract." After referring to the fact that plaintiff had been in possession of certain of the real property described in the complaint and collected rentals therefrom, the court concluded its opinion as follows:

"The net amount collected should be applied in reduction of the sum of 159,607.81 pesos, which according to the evidence the defendants owe to the plaintiff. When the case is remanded, the defendants should have an opportunity to question the expenses claimed to have been met by the plaintiff in connection with its possession of these buildings, which it has deducted from the gross amount received.

"After a consideration of the whole case, we hold that the plaintiff is entitled to a judgment in the court below, with costs, declaring that Francisco Martinez is justly indebted to it in the sum of 159,607.81 pesos, less such sum as that court may decide should be credited to Martinez for the net receipts from the real estate in question in this case, with interest on the balance from February 25th, 1905, at eight per cent per annum; and ordering that Francisco Martinez and Vicente Ilustre, as guardian of Francisco Martinez, execute and deliver to the plaintiff, within a time to be fixed by the court, such a contract as is contemplated by the contract of June 15th, 1903, which should be substantially in the form of the instrument above referred to of date of February 12th, 1904, omitting therefrom, however, the steamer 'Germana.' The judgment should contain a provision that whatever may be realized from the sale of the 'Germana' under the judgment in case No. 3471 shall be considered as a partial payment when realized upon the amount due in this action.

"The judgment of the court below is reversed, and the case is remanded with instructions to that court to enter judgment for the plaintiff in accordance with the views hereinbefore expressed. No costs will be allowed to either party in this court."

The following judgment was subsequently entered:

"It is hereby ordered that the judgment of the Court of First Instance of the city of Manila, appealed from and dated March 29, 1906, be reversed and the case remanded to the court from which it came with directions to the judge to enter judgment in favor of the plaintiff in accordance with the decision of this court, without special provision as to the costs of this appeal."

The present separate appeals from the aforementioned judgments of the Supreme Court of the Philippine Islands were then taken. The petition for the allowance of the appeal in the first case (No. 79 here; No. 3471 in the Su-

preme Court of the Philippine Islands) expressly recited that the amount in controversy therein "is 30,000 pesos, equivalent to $15,000 U. S. currency." It was, however, asserted that the cause was "an incident and part of the same transaction and controversy involved in cause No. 3472," and that the two cases "were . . . consolidated and tried together in the Court of First Instance." The appeal was allowed by one of the associate justices of the Supreme Court of the Philippine Islands. In doing so he declared "that . . . there was not a strict consolidation of the two cases . . . between the same parties by virtue of an express order of the court and in accordance with the procedural law, and . . . the amount in litigation in the first of the said cases does not exceed $15,000 United States currency." However, substantially upon the ground of the "connection and intimate relation" between the cases "the doubt produced by reasons advanced as to whether or not the appeal interposed in case No. 3471 is admissible, notwithstanding the fact that the amount involved does not reach the sum of $25,000 United States currency" was left to be determined by this court. The appeal in the second case was allowed by the same justice, it being recited that it appeared "that the amount involved exceeds $25,000 United States currency."

In the argument at bar counsel for appellee moved that the two appeals be dismissed for want of jurisdiction in this court. We, therefore, first proceed to consider this question.

The claim of want of jurisdiction in No. 79 is based upon the contention that the questions presented in the case could only be reviewed provided the value of the matter in controversy exceeds $25,000 —(§ 10, ch. 1369, act July 1, 1902, 32 Stat. 691, 695) —and that the value is less than that sum. We are of opinion that the objection is well taken. True, it is contended for the appellant that the

amount awarded to the plaintiff by the Supreme Court of the Philippine Islands was 28,599.13 pesos and interest, and that the defendants' counter-claim for the vessel and the receipts from the use of the same amounted to 38,000.00 pesos, and that the two amounts should be aggregated in determining the value of the matter in controversy. The case of *Harten* v. *Löffler*, 212 U. S. 397, is cited as authority. But conceding that cases may arise where the amount of a judgment in favor of a plaintiff may be combined with the sum demanded in a dismissed counter-claim of a defendant to determine whether the jurisdictional value exists, manifestly this is not a case for the application of the doctrine. The value of the matter in dispute in this court is the test of our jurisdiction. *Hilton* v. *Dickinson*, 108 U. S. 165. What, therefore, is that matter is the question to be considered. Plainly, it is whether Martinez was indebted to the bank, as adjudged below, since if the indebtedness existed the amount thereof is the extent of the loss which the estate of Martinez can sustain, because, irrespective of what might be the proceeds of sale of the vessel or of other property of the estate of Martinez, if realized upon, no more of such proceeds could be taken than would be sufficient to satisfy the judgment. The jurisdictional value, however, plainly would not exist even if the vessel and its profits were treated as the matter in dispute, since, as we have seen, the appellant only asserts that the value of the vessel and the profits aggregated 38,000 pesos, less than $25,000. See, in this connection, the case of *Peyton* v. *Robertson*, 9 Wheat. 527, approvingly cited in the *Hilton Case*, *supra*.

We are unable to assent to the view that the case should be treated as having been consolidated with No. 80; in other words, that the two cases are in reality but one. The suits were separately commenced, and although tried together this was done for convenience and the cases were tried not upon the theory that they were consolidated, but

as being separate and distinct suits. Thus, it is recited in the record that at the commencement of the trial, on February 28, 1906, it was stipulated "that these two cases, Nos. 3363 and 3365, may be tried together and that the defendants may amend their answer in 3365 as soon as they have opportunity, as of this date." Again, in the course of the examination of one Taylor, a witness for the plaintiff, counsel for the defendant objected to a question, whereupon the following colloquy ensued.

"Mr. Odlin. We are trying both cases together, but I can take him off the stand and put him back.

"Mr. Gibbs. If this question is asked with reference to 3365, I desire to make the further objection to the introduction of the evidence, for the reason that the complaint in that case does not state a cause of action."

The understanding of the trial judge that there was in fact no consolidation of the two cases is evidenced by the judgment which was entered by him, and that the Supreme Court of the Philippine Islands entertained the same view is shown by the judgment which it entered.

As to No. 80. The objection is that the judgment of the Supreme Court of the Philippine Islands is not a final one. This objection must prevail for the reason that although involving a decision upon the merits of the case, the judgment of the Supreme Court contemplates and requires further proceedings in the lower court not inconsistent with its opinion. *Clark* v. *Roller*, 199 U. S. 541. The Supreme Court of the Philippine Islands did not in its judgment, as was done in the judgment entered in case No. 79, fix and determine the precise amount for which the trial court should enter judgment. On the contrary, its direction was that judgment be entered "in favor of the plaintiff in accordance with the decision of this court." On referring to the opinion it is seen that the Supreme Court deemed that the plaintiff was entitled to a judicial determination of the amount of the indebtedness of Mar-

tinez to it. It is patent that the court found that the exact amount could not be determined without further proceedings, since it in effect left the case open in the trial court for a hearing upon the question of the amount of expenses incurred by the bank in and about the real property of Martinez of which it had taken possession. Thus, in the opinion of the appellate court, it was said:

"The net amount collected should be applied in reduction of the sum of 159,607.81 pesos, which according to the evidence the defendants owe to the plaintiff. When the case is remanded the defendants should have an opportunity to question the expenses claimed to have been met by the plaintiff in connection with its possession of these buildings, which it has deducted from the gross amount received."

It follows that although the appellate court fixed the rights and liabilities of the parties, it in effect referred a question in the case to the subordinate court for further judicial action; hence its judgment was not final for the purpose of an appeal or writ of error. *Drake* v. *Kochersperger*, 170 U. S. 303; *Clark* v. *Kansas City*, 172 U. S. 334. Until, therefore, the trial court by its judgment ascertains and fixes the actual indebtedness of the plaintiff and complies with the other directions contained in the mandate it cannot be said that a final decree has been entered in the cause. Indeed, on the very face of the decree of the Supreme Court of the Philippine Islands it is manifest that this court, if it took jurisdiction, could not finally dispose of the case in the event it affirmed the judgment below, since all it could do would be to consider the matters determined by the Supreme Court and do as that court did, remand the cause for further proceedings in order that the rights of the parties might be thereafter finally passed upon. But the foundation upon which rests the doctrine which, as a general rule, limits the appellate jurisdiction of this court to final judgments is that

cases should not be brought here by piecemeal through the medium of successive appeals.

The motion to dismiss the appeal in each of the cases must be granted.

Dismissed for want of jurisdiction.

PEREZ Y FERNANDEZ *v.* FERNANDEZ Y PEREZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 110. Argued March 17, 1911.—Decided April 3, 1911.

Where the District Court of the United States for Porto Rico has general jurisdiction under the act of March 2, 1901, c. 812, § 3, 31 Stat. 953, its power to award relief because of the situation of the property involved against non-resident defendants not found within the District depends on § 8 of the act of March 3, 1875, c. 137, 18 Stat. 472; and the right of absent parties defendants not actually personally notified to have the suit reopened and to make defense depends on the proviso to that section.

Where a defendant has not been actually personally notified as provided in § 8 of the act of 1875, but publication has been resorted to, he has a right to appear and make defense within a year, independently of whether he has had knowledge or notice of the pendency of the action by any methods other than those specified in the statute; and the court has no power to impose terms except as to costs.

The District Court of the United States for Porto Rico having permitted certain defendants not personally notified to come in and defend to do so but only on condition of showing they had not received the published notice, had no knowledge of the pendency of the suit and had no meritorious defense to the bill, the order is reversed, as the defendants have the right to have the case reopened without terms other than payment of costs.

THE facts are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. William Hitz* and *Mr. T. D. Mott, Jr.*, were on the brief, for appellants.

Mr. N. B. K. Pettingill and *Mr. F. L. Cornwell* for appellee submitted.

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

José Antonio Fernandez, a judgment creditor of José Perez, in October, 1906, commenced in the court below this suit to unmask alleged fraudulent and simulated mortgages and sales of certain described real property of Perez, the judgment debtor, to the end that such property might be made available to pay the unsatisfied judgment debt. The defendants were José Perez, Victor Ochoa and his wife, all three alleged to be citizens and residents of Spain and ten persons alleged to be citizens and residents of Porto Rico who were averred to be and were sued as the heirs at law of one Maristany. It was alleged that in the years 1899, 1900 and 1902 Perez, who was the registered owner of certain enumerated real estate, had executed and recorded deeds purporting to mortgage the same in favor of Ochoa and Maristany. These deeds, it was alleged, were simulations executed by Perez with the sole purpose of defrauding his creditors and preventing them from collecting their debts. It was additionally charged that to carry out the wrongful purpose which had caused the acts of mortgage to be drawn and recorded and in consequence of a conspiracy between Perez and Ochoa, the latter had in May, 1906, sued in the court below to foreclose the apparent mortgages, and had procured an order of sale and a sale thereunder to be made by the marshal of the court, and at such sale had seemingly bought in the property and received a deed therefor. Ochoa, the alleged plaintiff, was charged to have been but

an interposed person acting, not for himself, but for Perez, the ostensible defendant. Finally, it was charged that the property standing in the name of Ochoa, the alleged purchaser, had despite the sale continuously remained under the dominion and beneficial control of Perez. The prayer of the bill was for a decree recognizing the fraudulent and simulated character of the alleged mortgages and sale, that they be declared to be mere shadows cast upon the title of Perez and that the decree further direct that the property belonging to Perez be ordered to be sold to pay the judgment debt.

The ten persons who were made defendants as heirs or representatives of Maristany having been personally summoned and having failed to appear, the bill was, in December, 1906, taken for confessed against them. On the third day of June, 1907, the counsel for the complainant moved for an order to summons by publication José Perez, Victor Ochoa and his wife. The motion for this order was supported by a return of the marshal showing that the subpœnas issued to the parties named had not been served, because the marshal, after diligent inquiry, had been unable to find them in the district, and by an affidavit of counsel declaring that affiant "is unable to learn of the present whereabouts of said defendants, José Perez y Fernandez, Victor Ochoa y Perez and his wife, Dolores Olavarricia, after duly inquiring, and that, therefore, personal service upon them is not practicable." The order was granted, directing that the defendants named be summoned by publication to appear on or before the third day of August, 1907, the publication to be made "in a newspaper of general circulation in Porto Rico, to wit, 'La Bandera Americana,' once a week for six consecutive weeks." On September 13 following the defendants named not having appeared and proof of publication having been made, the bill was taken for confessed against them. On February 1, 1908, a formal decree was entered

against all the defendants, holding the mortgages and sale to be void as mere simulations, and directing their erasure from the records. The decree recognized the right of complainant to collect his unsatisfied judgment by a sale of the property, and in fact directed the marshal to proceed under an execution which was in his hands to levy upon and sell the property.

Within two months after the entry of this decree and before the marshal had executed it by sale of the property, appearance was entered for José Perez, one of the defendants, and shortly after for Ochoa, and application was made in the name of both to vacate the decree and allow them to defend the suit, on the ground that they were entitled to do so because they had not been personally notified. At the same time, in the same court, a Mrs. Perfecta Blanco, alleging herself to be a resident of Spain, filed her bill against the marshal as well as against José Fernandez and his attorneys of record, alleging that the complainant had in July, 1906, bought from Ochoa the real estate described in the Fernandez suit and that she was entitled to hold the property free from liability under the execution in the Fernandez case. The prayer was for an injunction pending the suit restraining the marshal from selling the property to pay the Fernandez judgment and for a final decree perpetuating the injunction. The application made by Perez and Ochoa to set aside the decree and allow them to appear and defend, and that of Mrs. Blanco for a preliminary injunction, were considered by the court at one and the same time. The court stayed, for a brief period, the sale of the property under the execution issued in the case of *Fernandez* v. *Perez* and the enforcement of the decree in the equity cause. In a memorandum opinion the court declared that this had been done for the following reasons:

First, to enable Perez and Ochoa "to make a first-class showing establishing that neither of them had before the

decree in the equity cause, any actual personal notice or knowledge of its pendency," and that, they or either of them never received any notice or knowledge of the pendency of the same through any of the other respondents in the same mentioned or through any of their aporderados, agents, tenants or others, either in Porto Rico or in Spain before said time, and that they, or either of them, did not personally receive a copy of or hear of or know of the publication of the notice of the pendency of said suit (the equity cause) in La Bandera Americana . . . and that they or either of them never in fact previous to the entry of the decree, received any copy of said newspaper containing such notice through the mails from José Antonio Fernandez, or any other person, or see or hear of such copy being received by any other person in their vicinity in Spain." Second. In order to enable Perez and Ochoa to make "a first-class showing under oath that they in truth and in fact have a meritorious defense to the bill" and to give both Perez and Ochoa an opportunity to swear that the "mortgage to Ochoa in 1899 was in good faith and for a valuable consideration and that the foreclosure of the same was not collusive, . . ." and that Ochoa must also state that his alleged sale to Mrs. Blanco of the property was made in good faith and for valuable consideration as in the deed stated, and if not for that amount then for how much, and that the said deed was made by said Ochoa without the knowledge of the decree in said equity cause, and "if possible he must furnish the affidavit of Mrs. Blanco," stating that her purchase was an honest one and how much she paid for the property.

The stay granted by the court was extended from time to time. There were hearings and, it may be, some evidence tending to show the existence of the facts referred to by the court in the conditions upon which it granted the stay and there was evidence to the contrary. Finally the court disposed of the matter by refusing to set aside the

decree in the equity cause and hence declining to allow Perez and Ochoa to defend and refusing to grant the application for a preliminary injunction on the bill of Mrs. Blanco.

From a final decree rejecting their application to set aside the equity decree and allow them to defend Perez and Ochoa appeal.

The defendants Perez and Ochoa being citizens of Spain, the court had general jurisdiction. Act March 2, 1901, c. 812, § 3, 31 Stat. 953. Power to award relief because of the situation of the property within the court's jurisdiction and the character of the rights asserted in and to the property even although Perez and Ochoa were nonresidents of the district and could not be found therein, depended, as recognized by the court below and by the parties, upon the act of March 3, 1875, c. 137, § 8, 18 Stat. 472. The right of the absent parties defendant to have the suit reopened and the duty of the court to permit them to make defense depended upon the proviso to the section in question. That proviso reads as follows:

"Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

As the appearance of Perez and Ochoa was within the year their right to have the decree set aside depended upon whether they had been "actually personally notified" (in the case wherein the judgment was rendered), "as above provided." Treating the words "actually personally notified" as signifying information conveyed to them in any

form of the existence of the suit and concluding from the facts before it that it was established that both Perez and Ochoa had been notified, either by information conveyed to them by persons in Porto Rico, or by the receipt of a copy of the newspaper containing the publication of notice, which the court had directed to be made, the right to appear and defend was denied. But we think the construction of the statute, which the court must necessarily have adopted in order to enable it to reach such conclusion was a mistaken one. The right to appear and defend within the year is given by the proviso to all defendants who have not been "actually personally notified as above provided." To determine, therefore, whether a defendant who appears and asks to be allowed to defend has been actually personally notified in such a manner as to exclude him from the enjoyment of the right involves ascertaining not whether he had been notified in any possible manner, but whether he had been "actually personally notified as above provided," that is, as required by the previous provisions of the section. Now, the previous provisions are these; 18 Stat. 472, c. 137, March 3, 1875, § 8:

"That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be. . . ."

After thus giving authority to the court to authorize the

actual personal service of a notice outside of the district, the statute then, in cases where such personal notice is impossible, provides for publication as follows: "Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. . . ." Plainly, therefore, the previous provision to which the proviso applies exacts an actual personal notice resulting from the service on the party outside of the district of an order of the court directed to him and requiring him to appear and defend within a time stated, the whole conformably to the express terms of the statute. In other words, where the property is situated in the district where the suit is brought as provided in the statute the right of the court to exert its authority is made to depend upon two forms of notice, which are distinct one from the other. First, an actual notice calling upon the person to appear, and which, in virtue of an express authority of the court, may be served upon the party outside of the district where the suit is pending. Second, a notice by publication calling upon the party to appear and defend within the statutory time, this latter notice, however, being only necessary where the former method cannot be employed. Considering the two distinct subjects, the proviso of the statute ordains that where the actual personal notice has not been made as provided and publication has therefore been resorted to, that within a year the party has a right to appear and the case must be reopened to permit him to make his defense. That is to say, the statute, without ambiguity, confers the right to have the case reopened wherever the jurisdiction of the court has rested upon publication and denies such right where the requirements of the statute as to actual personal notice have been complied with. It follows that in a case where the method for giving the actual notice pointed out by the statute has not been resorted to, and,

on the contrary, publication of notice was the basis of the jurisdiction of the court, an inquiry as to information conveyed by letter or by other means of knowledge of the pendency of the suit to a defendant, for the purpose of determining whether such defendant has a right to appear within the year and have the case opened to enable him to defend, is wholly immaterial. We say this because, from the text of the statute as above elucidated, it clearly results that the right which it confers to have a case reopened is rested upon the criterion afforded by the record upon which the judgment was obtained, and is not caused to depend upon the uncertainty which might result from a resort to matters extraneous to the record. As the misconstruction by the court of the statute in the respect just stated requires a reversal, it is not essential that we should go further. In order, however, that misconception may be avoided we think it well to observe that in the cases to which the statute applies the right to appear and have a cause reopened is not dependent upon terms to be fixed by the court, except to the extent that the statute provides for terms as to costs. This, we think, is clear, since, after providing for the entry in the Circuit Court of his appearance by a defendant embraced within the statute, it is said: "And thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; . . ."

Reversed and remanded with directions for further proceedings in conformity with this opinion.

BLANCO *v.* HUBBARD, UNITED STATES MARSHAL FOR PORTO RICO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 111. Argued March 17, 1911.—Decided April 3, 1911.

A demurrer in this case having been sustained, and the bill which sought to enjoin the defendant sheriff from selling under execution issued in *Perez* v. *Fernandez*, *ante*, p. 224, dismissed, on the same grounds on which the same court refused to allow defendants in that suit, who were grantors of the plaintiffs in this suit, to come in and defend, and this court having reversed the judgment in *Perez* v. *Fernandez*, and it appearing that the two cases were so inseparably united in the mind of the court below that the error in the one controlled its action in the other, *held* that the judgment in this case be also reversed.

THE facts are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. William Hitz* and *Mr. T. D. Mott, Jr.*, were on the brief, for appellants.

Mr. N. B. K. Pettingill and *Mr. F. L. Cornwell* for appellee submitted.

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

This record involves the bill filed by Perfecta Blanco in the lower court to enjoin the sale of the property under execution in the case of Perez and Fernandez. It concerns, therefore, the proceedings in the equity cause and the right to reopen the decree entered in the same, which we have just disposed of. As stated in that case, the application for injunction *pendente lite* in this case was considered by the court along with the request to be allowed

to appear and defend in the equity cause made by Perez and Ochoa. When the court temporarily stayed the execution of the judgment a suggestion was made to counsel by the court that in this case a demurrer be filed to the bill pending the delay which must transpire in considering the subject of the right to enjoin along with or in connection with the right of Perez and Ochoa to appear and defend. When it was concluded that the two latter persons had no such right and the right to an injunction *pendente lite* in this case was refused, the reasons which controlled the court in refusing to reopen and allow a defense in the equity cause were filed as its reasons for sustaining the demurrer and finally dismissing the bill in this case. As those reasons, however, did not at all concern themselves with the grounds of demurrer separately stated, but solely related to the right to stay by the process of injunction the execution of the unsatisfied judgment and the enforcement of the equity decree, we think it plainly results that the decree rendered in this case must be reversed, because the two cases in the mind of the court were so inseparably united that the error which led the court below to refuse in the other case the right to reopen the cause controlled its action in this.

The decree is, therefore, reversed and the cause remanded for further proceedings not inconsistent with this opinion.

INTERSTATE COMMERCE COMMISSION *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

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

No. 325. Argued February 25, 28, 1910.—Decided April 3, 1911.

The conclusions of the Interstate Commerce Commission on questions of fact are not reviewable by the courts. *Balt. & Ohio R. R. Co.* v. *Pitcairn*, 215 U. S. 481.

A carrier cannot make mere ownership of goods tendered for transportation the test of the duty to carry, nor may a carrier discriminate in fixing charges for carriage upon such ownership.

Under the act to regulate commerce a carrier cannot refuse to transport carload lots at carload rates because the goods do not actually belong to one shipper or are shipped by a forwarding agency for account of others.

The provisions of § 2 of the act to regulate commerce, were substantially taken from § 90, the equality clause of the English Railway Clauses Consolidated Act of 1845, and had been construed by the courts prior to the enactment of § 2 as forbidding a higher charge to forwarding agents than to others.

The right of the carrier to fix rates does not give it the right to discriminate as to those who can avail of them.

The conclusion by the Interstate Commerce Commission that the enforcement of a rule by a carrier creates a discrimination is one of fact and not open to review by the courts.

In the absence of statutory authority to exclude forwarding agents from availing of published rates the courts cannot overrule a conclusion of the Interstate Commerce Commission that such exclusion would create a preference; and this although the business of forwarding agents be competitive with the carrier itself.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, assistant to the Attorney General, with whom *Mr. P. J. Farrell* and *Mr. Edwin P. Grosvenor* were on the brief, for appellant Interstate Commerce Commission:

The power exercised by the Commission in this case

was within the authority conferred by the Hepburn Act of June 29, 1906, 34 Stat. 584, §§ 2, 13, 15. The Circuit Court rendered no opinion beyond stating that a majority of the court were in accord with the reasoning expressed in the dissenting opinion of the chairman of the Commission. This dissenting opinion challenged merely the expediency of the order. But the order being "within the scope of the delegated authority under which it purports to have been made," the question of the expediency was not for the court to pass upon. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452. See also *Honolulu Rapid Transit Co.* v. *Hawaii*, 211 U. S. 282; *Knoxville* v. *Water Co.*, 212 U. S. 1, 8, 18; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 397.

The Commission ordered the defendants to cease from refusing to apply their carload rates to carload lots consisting of packages of various ownership tendered as a single shipment by one consignor to one consignee, and to desist from making ownership or lack of ownership of property tendered for shipment a test as to the applicability of a carrier's rates, because by such practices they were discriminating "in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The Commission did not err in holding that the words "similar circumstances and conditions" refer to matters of carriage and that the ownership of the property transported is not a fact to be taken into consideration. *Wight* v. *United States*, 167 U. S. 512, 518; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 166.

Section 2 was passed to prevent the same discrimination prohibited by § 90 of the English act, known as the "Equality Clause," and this court will presume that

Congress in adopting the language of the English act had in mind the construction given to that act by the English courts. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197; *Interstate Commerce Commission* v. *Baltimore & Ohio Ry. Co.,* 145 U. S. 263; *McDonald* v. *Hovey,* 110 U. S. 619. The construction of the English courts is the same as that here contended for. *Great Western Ry. Co.* v. *Sutton,* L. R. 4 H. L. 226; *Evershed* v. *London & Northwestern Ry. Co.,* 3 App. Cas. 1029; *Denaby Main Colliery Co.* v. *Manchester, Sheffield & Lincolnshire Ry. Co.,* 11 App. Cas. 97.

One who is rightfully in possession of personal property, with authority to ship it in his own name, is a person within the meaning of § 2. *United States* v. *Mil. Refrigerator Transit Co.,* 145 Fed. Rep. 1007.

A carrier may not properly look beyond the transportation to the ownership of the traffic as a basis for determining the applicability of its rates. If this court should hold that § 2 applies only where either the consignor or the consignee is the actual owner of all the goods included in the shipment, the carrier would be free to practice much discrimination which could otherwise be prevented. If such holding were made it is apparent that the application of § 2 would depend not upon the language used by Congress but upon the will of the carrier to whom the shipment might be tendered for transportation.

The function of a railroad is merely to transport, and it was not contemplated that the railroad should be concerned with what happens before or after transportation.

Mr. Mazzini Slusser for an appellant shipper submitted.

Mr. Walker D. Hines, with whom *Mr. William S. Jenney* was on the brief, for appellees:

The Commission erroneously held that § 2 of the act

requires the same duties to forwarding agents as to the shipping public.

The differential between the carload and less than carload rates is of legal interest to the shipper, but not to the forwarding agent. As to the latter the differential is a mere accident.

Loading, unloading, billing and accounting, respecting less than carload services (which the forwarding agent seeks to perform), are part of the transportation service and at common law the carrier has the right to exclude others from performing such services in competition with it. Similar cases are: *Chicago &c. R. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79; *Central Stock Yards Co.* v. *Louisville & Nashville Ry. Co.*, 118 Fed. Rep. 113; *Lundquist* v. *Grand Trunk Western Ry. Co.*, 121 Fed. Rep. 915; *Johnson* v. *Dominion Express Co.*, 28 Ontario Reports, 203.

Fundamentally the same doctrine was applied by the *Express Cases*, 117 U. S. 1. The English doctrine to the contrary has no bearing, because squarely in conflict with the common-law doctrine in this country as declared in the *Express Cases*. Hutchinson on Carriers, §§ 514–517.

The act to regulate commerce has not changed the common law in this respect. *Baltimore & Ohio Ry. Co.* v. *Voight*, 176 U. S. 498, 509.

The act to regulate commerce seeks to secure equality between shippers. *United States* v. *Wight*, 167 U. S. 512, 518; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219; *Brownell* v. *C. & C. M. Ry. Co.*, 4 I. C. C. Rep. 285, 292. The forwarding agent is not the real shipper, and his interest in the shipment is analogous to that of the railroad company.

The Commission erroneously construed § 2 to exclude from consideration all differentiating elements except circumstances pertaining to the character of the goods and the destination.

Not even the English cases sustain this view of the English equality clause.

But the English cases do not control the construction of § 2 of our act, because this section was not taken from the English act, but is radically different and has been given a radically different construction by this court. *Interstate Commerce Commission* v. *Baltimore & Ohio Ry. Co.*, 43 Fed. Rep. 37, 44, 46, 47, 49, 54, 59, 61; *S. C.*, 145 U. S. 276, 280, 282, 283; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 217, 218, 219. A comparison of these cases with *Phipps* v. *London & Northwestern Ry. Co.*, L. R. 2 Q. B. D. 229, 249, shows the extraordinary contrast between this court's liberal construction of § 2 and the narrow construction placed by the English courts upon their equality clause. The English cases have never been approved or followed in this country as to § 2. *United States* v. *Wight*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, are entirely consistent with the liberal construction of § 2 adopted by this court.

The Commission's construction of § 2 is in irreconcilable conflict with this court's repeated declarations as to the spirit and purpose of the act to regulate commerce. *C., N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 197; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 172; *Southern Pacific Ry. Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, 554; *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 119.

The adoption of the Commission's erroneous construction of § 2 would destroy many traffic arrangements of great importance to the public.

The Commission's order was unlawful because it rested upon an erroneous construction of § 2, under which erroneous construction the Commission absolutely excluded from consideration the factors which the carriers pre-

sented and which, under the statute and the decisions, the carriers were entitled to have the Commission consider.

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

Was the court below wrong in permanently enjoining the enforcement of an order of the Interstate Commerce Commission directed to the railroad companies who are appellees, is the subject which this cause requires us to consider. As a preliminary to stating the proceedings before the Commission and the court, we refer to practices under the act to regulate commerce which gave rise to and developed the controversy with which the order of the Commission was concerned. To do this will not only abbreviate the statement of the case, but will serve to broadly define the one question essential to be decided and point to the principles applicable to its correct solution.

Before the act to regulate commerce it was usual, first, to give reduced rates to persons who shipped quantities of merchandise; and, second, to charge a proportionately less rate for a carload than was asked for a shipment in less than a carload. After the act lower rates to wholesale shippers were abandoned, it having been declared that to continue them was contrary to the act. *Providence Coal Case*, 1 I. C. C. Rep. 107. The giving, however, a lesser proportional rate for a carload than for a less than carload continued, the Commission having at an early date announced that such a practise was not prohibited. *Thurber* v. *N. Y. C. & H. R. R. Co. et al.*, 3 I. C. C. Rep. 473. Without detailing the theory upon which this conception was based it suffices broadly to say that it embodied the assumption that a carload was the unit of shipment, and rested upon the difference which existed between the cost of service in the case of a carload ship-

ment by one consignor to one consignee and that occasioned by a shipment in one car of many packages by various consignors to various consignees. Leaving aside possible qualifications arising from exceptional conditions, it is true to say that the Commission, however, recognized that the fixing of a lesser rate for a carload was not imperative, but was merely optional. Conformably to these administrative conceptions it came universally to pass that wherever a lesser charge for a carload than for a less than carload shipment was established such charge was only applicable to shipments made at one time by one consignor of merchandise consigned to one consignee at a single destination. While there was this uniformity there was, however, much divergence between carriers as to the character of traffic which was given the benefit of the lesser rate for carload shipments and the circumstances under which, when such rate was established, it would be applied. This becomes at once manifest when the rules are considered which prevails in the three geographical divisions into which the United States came to be divided by carriers in order that a similar classification might, in a general sense, obtain under like conditions. The divisions in question are the Southern, the Western and the Official Classification territory, the first including practically all points east of the Mississippi River and south of the Ohio and Potomac Rivers; the second embracing that part of the country west of the Mississippi River and the Great Lakes and an imaginary line extending from St. Louis to Chicago, and the last all of the United States not covered by the two other divisions. In the Southern and Western Classification territories the rules established by carriers allowed the lesser rate for a carload shipment only on a small percentage of the classified articles, and in both these territories restrictions were imposed prohibiting the intermingling of differently classified articles in one car for the purpose of

obtaining the carload rate, even though the articles, if they had been shipped separately in carload quantities, might have been entitled to the carload rate. The extent of these limitations upon the right to enjoy the lesser rate for the carload in the territories in question is shown by a statement made by the then chairman of the Interstate Commerce Commission, in the dissenting opinion delivered by him in *Export Shipping Co.* v. *Wabash R. R. Co.*, 14 I. C. C. Rep. 437, 443, viz.:

"A recent careful and authoritative examination of the several classifications shows that in the Southern Classification there are 3,503 less than carload and only 773 carload ratings, the carload ratings being 22.1 per cent of the less than carload; in the Western Classification there are 5,729 less than carload and only 1,690 carload ratings, the carload ratings being 29.8 per cent of the less than carload."

In the same opinion it is also stated that in both the Western and Southern Classification territory the small percentage accorded a carload rate was confined to goods embraced within lower grades of classification, taking therefor the lowest rates. In the Official Classification territory, however, a widely different allowance of carload ratings prevailed, since in that territory the carload rating was permitted on a very large number of articles. In that territory, as likewise remarked by Chairman Knapp, "there are 5,852 less than carload ratings and 4,235 carload ratings, the carload ratings being 72.4 per cent of the less than carload" against, as we have said, 25.8 per cent and 22.1 per cent in the other territories. This large difference was besides in effect made much greater not only by the higher grades of traffic to which the carload rate was extended, but also because of the enlarged right to ship in one car articles embraced in various classes of traffic to which the carload rating was extended.

There can be no doubt that the privilege of shipping at

a lesser rate for the carload shipment than was asked for a less than carload shipment came to be interwoven with and inseparable from the movement of commerce through the channels of railroad transportation. And the benefits of the lesser rate came to be obtained not alone by an owner of all the goods shipped in a carload, but by combinations of owners, by agreements between them concerning particular and isolated shipments, by the organization of associations of shippers having for their object the creating of agencies to receive merchandise belonging to the members of the association and to aggregate and ship them in carload lots in the name of one consignor to a single consignee at one destination by the use of commission houses, storage and other companies, etc. It is also undoubted that in consequence of the facility of shipping at a lesser rate for a carload than for a less than carload shipment there developed a class of persons known as forwarding agents, who embarked in the business of obtaining a carload rate for various owners of merchandise by aggregating their shipments, such agents relying for their compensation upon what they could make from the difference between the carload and less than carload rates. The business so carried on by these agents was thus described by Mr. Commissioner Knapp in his dissenting opinion, to which we have previously referred (14 I. C. C. Rep. 440):

"The business of the forwarding agent, in so far as is material to the question involved, is to collect less than carload shipments from different consignors, combine such shipments into carloads, and ship the same in the name of the forwarding agent, or of the owner of one of the less than carload shipments, to one consignee, who may be the forwarding agent himself, another forwarding agent at the point of destination with whom he has business relations, or the owner of a part of the property transported. The consignee of the shipment, whoever he

may be, receives the carload and distributes its contents to the parties for whom they are intended. The forwarding agent finds his compensation and profit in the difference between the carload and less than carload rates.

"The saving effected by securing application of the carload, rather than the less than carload rates, may be divided between the forwarding agent and his customer in any agreed proportion. To the extent that the customer secures the carriage of his property at a lower rate than the less than carload rate, which would otherwise be applied, he saves money, and the division of the difference between the carload and the less than carload rates is a matter of private bargain between him and the agent."

The extent to which the right to avail of the carload rating in the various modes above stated had come to be a part of the business of the country is described in the opinion of the Commission in *California Commercial Association* v. *Wells, Fargo & Co.*, 14 I. C. C. Rep. 442, delivered on the same day that its opinion concerning this controversy was announced. The Commission said (p. 433):

"Few practices have become more firmly established in the transportation world than that of combining small quantities of freight of various owners and shipping at the relatively lower rates applicable to large consignments, and under this practice has developed an immense volume of traffic which otherwise could never have been brought into being. It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries and more surely establish the dominance of the greater industrial and commercial institutions."

And the alertness with which those engaged in commerce utilized every means afforded of shipping at lower cost is shown in the following statement made by Mr.

Commissioner Knapp in his opinion to which we have referred (14 I. C. C. Rep. 441):

"The individual shippers are not necessarily located at the same point, nor are the individual consignees. For instance, if a reduction in rates could be effected a furniture dealer at Grand Rapids, Mich., having a shipment for a point in Maine, and a furniture dealer in Rockport, Ill., having a shipment for a point in Massachusetts, might forward their separate shipments at less than carload rates to Chicago; there the two shipments would be consolidated and forwarded at carload rates to Boston; and thence shipped again at less than carload rates from Boston to their respective destinations."

It is obviously true that the extent to which the practice prevailed of combining shipments to avail of the benefit of the less than carload rate differed largely in the various territories, dependent upon the liberality of the tariffs on the subject. That is to say, in Official Classification territory, where the right to less than carload rates was extended to many items and the right to combine different articles in one shipment was more liberal than in the other territories, the business of combining diverse shipments into carload lots assumed much greater magnitude than in the other territories. However, about 1899, in Official Classification territory rules were adopted restricting the liberal right to obtain less than carload rates and the extended power to combine like or different articles in a carload, the restrictions probably having been brought about by the development of the business of forwarding agents. *The Buckeye Buggy Company* v. *C., C., C. & St. L. Ry. Co.*, 9 I. C. C. Rep. 620. The modifications in question which took the form of notes, to Rule 5–B and to Rule 15–E of the Official Classifications which regulated carload shipments, in effect forbade the combination of goods belonging to several owners for the purpose of a carload shipment and forbade therefore not only impliedly

but expressly the combination of goods for the purpose of carload rating by means of forwarding agents. The notes were as follows:

"Rule 5–B. In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one receiving station, in one day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car-service rules and charges of the forwarding railroad. (See note.)

* * * * * * * *

"Note. Rule 5–B will apply only when the consignor or consignee is the actual owner of the property.

"Rule 15–E. Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments and freight charged accordingly. (See note.)

"Note. The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of I. C. L. shipments of articles from several consignors at point of origin."

While the restrictions in question were adopted in 1899, from that time to about 1907, when the shipments which provoked this controversy were made, it would seem that there was no general effort to enforce the restrictions, although sporadic attempts to do so were undoubtedly made. The business, therefore, of aggregating the shipments of various owners, for the purpose of obtaining the benefit of the carload rate by all the means and devices which we have hitherto described, continued

substantially unchanged. The *Buckeye Buggy Company Case, supra.* See also statement in the dissenting opinion of Mr. Commissioner Knapp in the present case. 14 I. C. C. Rep. p. 442.

In the spring of 1907 the Export Shipping Company, a New Jersey corporation doing business in Chicago and in New York, shipped from Chicago to New York, by the several railroads who are appellees, three cars of freight, consisting of merchandise belonging to various owners which had been aggregated by the Export Company for the purpose of shipment, and thus becoming entitled to the carload rate. The shipments conformed in all respects to the regulations of the companies except to the extent that they came under the operation of the restrictions above referred to. On the arrival of each car in New York the carrier, instead of collecting the carload rate, exacted the less than carload rate, because of the restrictions in question. In August, 1907, the Export Company petitioned the Interstate Commerce Commission to award it reparation against the three carriers to the extent of the difference between the less than carload rates, which had been exacted and the sums which would have been paid if the carload rate had been demanded. The right to the relief was based upon the assertion that an unlawful discrimination had been occasioned. The railroad companies having answered, the three complaints were consolidated and heard at the same time. When the hearing had somewhat proceeded it was agreed that the petitions for reparation should be considered as having been amended so as to challenge the reasonableness of the restrictions referred to. After the case had been submitted to the Commission the Rockford Manufacturers' Shippers' Association of Rockford, Illinois, the Manufacturers' Association of Jamestown and the Judson Freight Forwarding Company were allowed to intervene, and the case was reopened and further testimony was re-

ceived in support of and against the contention that the assailed rules were in conflict with the second section of the act to regulate commerce.

The Commission, at the time the complaints were pending, had also before it the complaint of the California Commercial Association against Wells, Fargo & Co., involving an analogous question. On June 22, 1908, the report, opinion and order of the Commission in both cases were filed. 14 I. C. C. Rep. pp. 422, 437.

The general subject under consideration in this case was more elaborately discussed in the opinion in the California case and in the opinion in this case reference was made to the reasoning expounded in that case. The restrictions created by the rules to which we have referred were declared void and reparation was awarded. The carrier was commanded on or before a date named to desist from attempting to enforce the restrictions. Two members of the Commission dissented. Briefly stated, the Commission held, (*a*) that a carrier could not properly look beyond goods tendered to it for transportation "to the ownership of the shipment," as the basis for determining the application of its established rates, because doing so would be a violation of the second section of the act to regulate commerce; (*b*) that the fact that the carriers in Official Classification territory had voluntarily established both liberal carload rates and opportunities for combining various articles for the purpose of obtaining the carload rate, gave the carriers no right to discriminate by depriving one person or class of persons of the right thus granted; (*c*) that a forwarding agent was equally entitled with others to the benefit of a carload rate when published and established and that to deprive a forwarding agent of such rights would be a prohibited discrimination; (*d*) that in any view the restrictions formulated by the assailed rules were void because repugnant to the act to regulate commerce, since their enforcement as a matter of fact neces-

sarily created preferences and engendered discriminations which the act forbade; (*e*) that this, among other reasons was the case because the enforcement of the assailed restrictions would not only create preferences in favor of one set of persons against another but would create discriminations between places and would be revolutionary in its operation upon interstate traffic; (*f*) that irrespective of the abstract right of a carrier to make the ownership of goods offered for shipment a basis for applying its published rates, owing to the practical impossibility of a carrier being able to adequately enforce such a rule by determining who was the owner of the goods offered, such a rule as a matter of fact would in and of itself be an unlawful preference and discrimination forbidden by the act; and (*g*) that the same principle would control as to the attempt to establish a rule applicable alone to forwarding agents, because of the practical impossibility of distinguishing one class of agents from another. The reasons which led two members of the Commission to dissent were expounded in a careful opinion, stating views which were in substance the direct antithesis of those expressed by the Commission. For example, the dissenting opinion maintained first, that to deprive a carrier of the power to exclude a forwarding agent from the benefit of the carload rate would bring about discrimination against places and preferences in favor of persons prohibited by the act; second, that as the right to the carload rate was the offspring of the voluntary act of the carrier the right to restrict the privilege thus accorded to particular classes or conditions necessarily obtained; and, third, that in any event a forwarding agent who was but a dealer in railroad transportation, and therefore in a measure a competitor in business of a railroad carrier, was not within the prohibitions of the second section of the act to regulate commerce.

The railroad companies did not comply with the order

and before the date fixed for compliance commenced the present suit by filing their joint bill to enjoin the enforcement of the order and have it declared void. It suffices to say in substance that as a basis for the right to relief the bill challenged the propositions upon which the Commission had based its order and affirmatively propounded the grounds which led two members of the Commission to dissent from the conclusions of that body. It also suffices to say that the answer of the Commission traversed the affirmative grounds for relief asserted in the bill and averred the correctness of the order by it made upon the grounds stated in the opinion and report of that body. The order of the Commission and its report and opinion in this particular case, as also its opinion in the California Commercial Association case, which, as we have said, was decided on the same day, was made part of the answer, and the opinion in the Buckeye Buggy Company case was also attached.

A motion for a preliminary injunction was heard before the Circuit Court, composed of three judges, upon the pleadings, the affidavits of two officials of one of the complainant railroad companies and the evidence taken before the Commission. The motion was granted, and the enforcement of the order of the Commission was restrained until final hearing. The Circuit Court rendered no opinion other than the statement that a majority of the court were in accord with the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Commission, and that they did not think it necessary to add anything to his exhaustive discussion of the questions presented. Thereafter the American Forwarding Company, Transcontinental Freight Company, and the Rockford Manufacturers' and Shippers' Association, were made parties defendant, and those concerns filed an answer, which adopted the averments contained in the answer of the Commission. Replications were duly filed. A decree

pro confesso was entered against the Export Shipping Company and its trustee in bankruptcy, the company having become bankrupt.

Adopting a suggestion made by the court in disposing of the motion for a preliminary injunction, it was stipulated between the solicitors for the various parties that the case should be treated as having been submitted for final hearing. Thereupon a final decree was entered, by which the order of the Commission was set aside and declared to be void. This appeal was then taken.

As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition, that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry, or what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. *Baltimore & Ohio R. R.* v. *Pitcairn*, 215 U. S. 481. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so

considered by the court because they were foreclosed by the opinion of the Commission. Doubtless the mistake of the court below in this respect was occasioned by overlooking the scope of the Hepburn Act, and because the decision below was made in June, 1909, before the announcement of the opinion in the *Pitcairn Case*. The reasons above stated also serve to narrow the contentions pressed at bar, since such conditions likewise in their essence but reiterate the conflict of opinion which developed in the Commission, but which for the reasons stated are for the purpose of our review substantially reducible to the one legal question which we have stated. We shall therefore confine ourselves to a consideration of that question and to such brief notice of the other contentions urged as will make clear that they depend ultimately upon conclusions of fact not open in this court for review.

The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transporta-

tion. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce. In substance, the contention is that as the section forbids a carrier from "charging a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property, . . . than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," authority is to be implied for basing a charge for transportation upon ownership or non-ownership of the goods tendered for carriage, upon the theory that such ownership or non-ownership is a dissimilar circumstance and condition within the meaning of the section.

But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of § 2 of the act to regulate commerce was substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either be-

fore the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co.* v. *Sutton*, 1869—L. R. 4 H. L. 226; *Evershed* v. *London & N. W. Ry. Co.*, 1878—3 App. Cas. 1029, and *Denaby Main Colliery Co.* v. *Manchester &c. Ry. Co.*, 1885—11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act, certainly to the extent that its interpretation is involved in the matter before us. *Wight* v. *United States*, 167 U. S. 512; *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U. S. 144, 166.

As these considerations are decisive of the only legal question which, as we have already pointed out the case involves and also refute a subordinate contention that a forwarding agent is not a person within the meaning of that word as employed in the second section of the act to regulate commerce, we are brought, as we have hitherto said, to briefly refer to minor considerations pressed in argument, so far as they seem to us to be of sufficient weight to be entitled to particular notice.

First. It is urged that as the wide range of carload rates and the extent of the facility for combining articles for the purpose of obtaining such rates allowed in Official Classification territory are the result of the voluntary act of the railroads, therefore the power existed in the railroads to restrict and limit the enjoyment of such rate as was done by the assailed rules. In the interest of the public it is urged a limitation should not be now enforced which would compel the carrier to withdraw the facilities which shippers enjoy by the voluntary act of the carriers. But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates it has

the right to discriminate as to those who shall be entitled to avail of them. Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the second section having been disposed of, the finding of the Commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to reëxamine.

Second. Conceding, for the sake of the argument, the correctness of the construction which we have given to the second section, it is urged that nevertheless, as a forwarding agent is a "dealer in railroad transportation," and depends for his profit in carrying on his business upon the sum which can be made by him out of the difference between the carload and the less than carload rate, and may discriminate between the persons who employ him, therefore the act to regulate commerce should be construed as empowering a carrier to exclude the forwarding agent as a means of preventing such discriminations. But in the absence of any statutory authority to exclude the forwarding agent, and basing the right to exclude merely upon the assumption that the nature and character of his business would produce discrimination, and therefore justify the exclusion, the contention is not open for our consideration, because, like the previous one, it is foreclosed by the finding of fact of the Commission. Indeed, this is not merely the result of an implication from the finding of the Commission, since it was affirmatively found that to permit the carrier to exclude the forwarding agent would be to produce preference and discrimination. The contention then comes to this—that carriers should be permitted to give preferences and make discriminations as a means of preventing those unlawful conditions from arising.

Third. It is said that as the business of the forwarding

agent is in a sense competitive with that of a carrier and may largely diminish the revenue derived by railroad companies from their less than carload rates, and hence cripple their ability to successfully conduct business, therefore the right to exclude the forwarding agent, even if there is no power to exclude the owner or the ordinary agent of owners, should be permitted. This, however, again, in a twofold sense, is directly in conflict with the findings of fact made by the Commission; first, because it disregards the findings as to the operation of the business of a forwarding agent, and, second, because it overlooks the express finding of the Commission that it would be so difficult, if not impossible, for the carrier to determine in practice the nature and character of the title of a person tendering goods for shipment that the necessary result of a rule excluding a forwarding agent would be to embarrass shipments by owners or their special agents, and thus beget universal uncertainty and constant discrimination and preference against owners.

As it follows, from the reasons just stated, that the court below erred in annulling the order of the Commission and enjoining its enforcement, its decree to that effect is reversed and the case is remanded with directions to dismiss the bill.

UNITED STATES *v.* LEHIGH VALLEY RAILROAD COMPANY.

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

No. 536. Argued January 5, 1911.—Decided April 3, 1911.

The rule that the allowance of amendments to pleadings is discretionary with the trial court and not to be reviewed on appeal except in case of gross abuse does not apply where such discretion is controlled by this court and the refusal to allow an amendment defeats the evident purpose of this court in remanding the case.

Where the refusal of the Circuit Court to allow an amendment is in conflict with the opinion and mandate of this court there is an abuse of discretion which this court can and will correct on appeal, even if such abuse be the result of misconception of the opinion and of the scope of the mandate.

While the decision of this court in this and other commodities clause cases, 213 U. S. 366, expressly held that under the commodities clause stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, does not preclude the railroad company from transporting the commodities manufactured, produced or owned by such corporation, it is still open to the Government to question the right of the railroad company to transport commodities of a corporation in which the company owns stock and uses its power as a stockholder to obliterate all distinctions between the two corporations; and an amendment to the original bill in one of the commodities cases alleging such facts as show the absolute control by the defendant railroad company, through stock ownership, over the corporation whose commodities are being transported, is germane to the original bill and should have been allowed by the trial court.

By the operation and effect of the commodities clause a duty has been cast upon an interstate carrier not to abuse its power as a stockholder of a corporation whose commodities it transports in interstate commerce by so commingling the affairs of that corporation with its own as to cause the two corporations to become one and inseparable.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Edwin P. Grosvenor,* Special Assistant to the Attorney General, were on the brief, for appellant:

The Government's right to proceed in this case is not foreclosed by the previous decision of this court in 213 U. S. 366. The facts now sought to be shown by the amendment of the Government in the court below are not the same as those which were before this court on the former appeal.

The stipulation of counsel in the original case was that the submission of the case on bill and answer should in no wise prejudice the parties in any suit or proceeding thereafter instituted.

In the recent case of *United States* v. *Reading Co.,* 183 Fed. Rep. 427, 461, 462, it has been found that the Lehigh Valley Coal Company is a mere department of the Lehigh Valley Railroad Company, and not an independent corporation.

The construction by this court of the commodities clause shows that it applies when the commodity has been manufactured, mined or produced by a carrier or under its authority and at the time of transportation the carrier has not in good faith dissociated itself from such commodity; when a carrier owns the commodity transported in whole or in part; and when a carrier at the time of transportation has an interest in the commodity, direct or indirect, but not including an interest represented only by the ownership of stock in a "separate," "distinct" and "*bona fide*" corporation.

It follows that in the present case the railroad company, as shown by the proposed amendment of the bill, is violating the commodities clause in two of the three ways indicated above.

Without regard to stock ownership, the coal transported by the Lehigh Valley Railroad Company was mined and produced "under its authority," and the railroad company has not dissociated itself from such commodity. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244; *N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 390. In other words, if the Lehigh Valley Railroad Company did not own a single share of the stock of the coal company in the present case it could not lawfully transport the coal, and certainly it cannot get that authority simply because it owns all the stock of the coal company.

The coal company is not a separate, distinct and *bona fide* corporation. *In re Watertown Paper Co.*, 169 Fed. Rep. 252; *In re Muncie Pulp Co.*, 139 Fed. Rep. 546; *Interstate Telegraph Co.* v. *Baltimore & Ohio R. R. Co.*, 51 Fed. Rep. 49.

It can make no difference in this case that the coal company was organized before the passage of the commodities clause and before the former decision of this court construing that act, for it is the effect of a relation between a railroad and a coal company, and not the motive, which constitutes a violation of the statute.

The fiction of a separate corporate entity will be disregarded whenever it is insisted upon as a protection to an illegal transaction. *In re Rieger, Capnor and Aultmark*, 157 Fed. Rep. 609; *Miller & Lux* v. *East Side Canal & Irrigation Co.*, 211 U. S. 293; *Lehigh Mining & Mfg. Co.* v. *Kelley*, 160 U. S. 327; *Gas Co.* v. *West*, 50 Iowa, 16; *Booth* v. *Bunce*, 33 N. Y. 139; *Bennett* v. *Minott*, 28 Oregon, 389; Morawetz on Corp., §§ 1, 227.

The court below erred in not allowing the Government to amend its bill of complaint; first, because it had no discretion in the matter; 3 Ency. Law & Prac. 579; *National Bank* v. *Carpenter*, 101 U. S. 567, 568; and second,

because if it had such discretion this was abused. *House* v. *Mullen*, 22 Wall. 42; *Rio Grande Dam &c. Co.* v. *United States*, 215 U. S. 266; *Texas & Pacific Railway* v. *Interstate Transp. Co.*, 155 U. S. 585; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603; *Kendig* v. *Dean*, 97 U. S. 423; *Durant* v. *Essex Co.*, 7 Wall. 107.

There are important considerations of public policy which weigh against any construction of the commodities clause which would offer inducements to the railroads to organize subsidiary companies to deal in commodities in competition with other shippers. There is no reason for denying to railroads the right to invest their funds in the stock of other corporations, where such other corporations are separate and distinct from the carrier's business. But where a railroad company organizes a subsidiary corporation not for the purpose of investing its funds but to make its profits out of the transportation of the commodity produced, the temptation of the carrier is to increase the rates of transportation to all so that no one can afford to deal in the article except the railroad which transports it. The consequences of confirming in the railroads such unlimited power are well stated in the English case of *Attorney General* v. *Great Northern R. R. Co.*, 29 L. J. Ch. (N. S.) 794, cited in the *New Haven Case*, 200 U. S. 393.

The interpretation of the commodities clause contended for by the Government in this case would make unnecessary an amendment by Congress forbidding railroads to transport, in interstate commerce, the product or property of corporations in which their only interest is the ownership of stock, for it would make vital and effective the act as it stands by so construing it as to forbid railroads to transport commodities of other corporations where such other corporations are not in fact separate, independent enterprises but are mere departments of the railroads. And this last was the real evil which the commodities clause was intended to remedy.

Mr. John G. Johnson, with whom *Mr. J. F. Schaperkotter* and *Mr. Frank H. Platt* were on the brief, for appellee:

The only question left in the case on its return to the Circuit Court was whether the defendant was violating the commodities clause by carrying the coal produced and owned by the Lehigh Valley Coal Company, whose capital stock was entirely owned by the defendant, and that of other coal companies in which the defendant had stock interests, entire or part, either majority or minority, respectively.

The complainant's motion for leave to file an amended bill of complaint was rightly denied.

The general replication had been filed and not withdrawn. Irrespective of Equity Rule 29, with which the Government wholly failed to comply, no cause was shown for leave to file an amended bill other than that which appeared on the face of the proposed amendment itself. Nothing had occurred since the original bill was filed except that this court had held that the Government's theory of the law was erroneous. There was no averment of after-discovered matter. The refusal of leave to amend the bill was discretionary, and is not reviewable. *Michigan Central Ry. Co.* v. *Pinkney*, 149 U. S. 194, 201; *Chapman* v. *Barney*, 129 U. S. 677, 681; *Bullitt Co.* v. *Washer*, 130 U. S. 142, 145.

The complainant's motion for a decree dismissing the bill of complaint without prejudice was rightly denied. *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 146; *Stevens* v. *The Railroads*, 4 Fed. Rep. 97, 105; *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.*, 109 U. S. 702, 713; *Connor* v. *Drake*, 1 Ohio, 170.

A dismissal without prejudice would have seriously prejudiced the rights of the defendant. It was clearly within the discretion of the court to deny the motion for a dismissal without prejudice, which would have opened the

door for the bringing of a new suit in which the complainant would have all of the advantage growing out of the admissions set forth in the answer. *American Bell Telephone Co.* v. *Western Union Tel. Co.*, 69 Fed. Rep. 666, 670.

It was clearly within the discretion of the court to refuse to deprive the defendant of this right by means of a dismissal without prejudice. *Hershberger* v. *Blewett*, 55 Fed. Rep. 170, 171; *Flaherty* v. *McCormick*, 14 N. E. Rep. 846, 850; *Georgia Pine Turpentine Co.* v. *Bilfinger*, 129 Fed. Rep. 131; *Ebner* v. *Zimmerly*, 118 Fed. Rep. 818.

The decision of the Circuit Court was in conformity with the opinion of this court.

The character of a coal company,—whether it be *bona fide*, or not, within the meaning of this court—cannot depend on the extent or proportion of the capital stock held by the railroad company. A railroad company owning three-quarters, or more than half, of the stock of a coal company controls its management through election as completely as it would by owning the entire capital stock. The fact of entire or majority ownership, is, therefore, not logically more relevant to the issue of *bona fides* than minority ownership, unless this court intended to hold that every majority holding constitutes *mala fides*. Obviously the decision of this court is that the question of *bona fides* shall not depend on stock holding.

The relationship between the defendant and the coal company has from its inception existed under the direct authority of law, both of the State of Pennsylvania and the Federal Government. As to the State of Pennsylvania, under whose laws the coal company was organized, it is alleged and conceded that such organization and such relationship were allowed and encouraged by the legislative policy of the State of Pennsylvania. As to the Federal laws, there is the direct interpretation of the Interstate Commerce Act in the *Chesapeake and Ohio*

Case, 200 U. S. 361, 401, to the effect that the relationship was legal. And see *Haddock and Coxe Cases*, 4 I. C. C. Rep. 296, 535.

The relationship which the Government now seeks to have declared so lacking in good faith as to render the existence of the coal company a mere fiction, forms the basis of the very rights from which arose the grave and doubtful constitutional questions which this court found it unnecessary to decide. Upon the strength of the relationship existing between the defendant and the coal company millions of dollars have changed hands, pursuant to transactions whose good faith cannot be questioned.

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

This case is one of what were known as the commodities cases previously decided and reported in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus, against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be the prohibitions of the fifth paragraph of the first section of the act to regulate commerce as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn Act. The clause is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport

from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." 34 Stat. 584, c. 3591.

In effect, the contention of the Government was that the clause in question prohibited railroad companies from moving in the channels of interstate commerce articles or commodities other than the articles excepted by the provision which had been manufactured, mined or produced by the companies or under their authority or which were at the time of the transportation owned by them or which had been previously owned by them in whole or in part or in which the companies then or previously had any interest, direct or indirect. The Government, moreover, insisted that these general propositions embraced the movement by the companies in interstate commerce of a commodity which had been manufactured, mined or produced by a corporation in which the transporting railroad company was a stockholder, irrespective of the extent of such stock ownership. The railroad companies in effect defended the suits upon the ground that the statute as construed by the Government was repugnant to the Constitution. Each of the cases was submitted upon bill and answer and petition and return to the Circuit Court of the United States for the Eastern District of Pennsylvania, held by three circuit judges under the Expediting Act of February 11, 1903. 32 Stat. 823, c. 544. The submission in each case was made as a result of a stipulation between counsel "that the submission on bill and answer and any averment or admission in the pleadings of either party

shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purpose thereof."

Treating the commodities clause in question as having the significance attributed to it by the United States the court held it to be repugnant to the Constitution. Judgments and decrees were accordingly entered, denying the applications for mandamus and dismissing the bills of complaint. The reasons which led to this action were expounded in one opinion, made applicable to all the cases, the court briefly but comprehensively stating the facts in each case which were relied upon by the Government as bringing the defendant corporation within the clause as the Government construed it. The cases were then brought here.

As was done in the lower court, the cases here were all disposed of by one opinion, the facts in each case as summarized by the court below being stated. In deciding the cases it became necessary first to ascertain the meaning of the commodities clause. In performing this duty the conclusion was reached that the clause did not have the far-reaching significance attributed to it by the Government and which had been substantially adopted by the court below, but on the contrary had a much narrower meaning. Attention was directed to the fact that the statute disjunctively applied four generic prohibitions, that is, it forbade a railway company from transporting in interstate commerce articles or commodities, 1, which it had manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect. All these prohibitions, however, were held to have but a common purpose, "that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the as-

sociation resulted from manufacture, mining, production or ownership, or interest, direct or indirect."

In coming to determine whether the Government was correct in its contention that these prohibitions operated to prevent a railroad company from transporting a product because it was owned by or had been mined, manufactured or produced by a corporation in which the railroad company was the owner of stock, irrespective of the amount of such stock ownership, it was expressly decided that the prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred, that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation.

Summing up its review as to the true construction of the commodities clause, the court held (p. 415) that it prohibited "a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined or produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

Thus construed, the clause was held to be within the

power of Congress to enact. As this conclusion rendered it necessary to reverse the action of the court below which had been exclusively predicated upon the unconstitutionality of the statute, the question arose as to what disposition should be made of the cases. That is to say, the constitutionality of the statute being settled and its true meaning being expounded, the question was whether the cases should be finally disposed of or should be left in such a position as to give the Government the right to proceed to apply and enforce the prohibitions of the statute against the various corporations which were defendants if it deemed a good case existed for so doing. Disposing of this subject in the light of the consent upon which the cases had been tried in the court below, and of the error which had obtained as to the true meaning of the statute and of the consequent concentration of the attention of the court and of the parties to the question of the constitutionality of the statute, instead of its application to the facts, when correctly construed, it was determined that the decree should not conclude the right of the United States in the respective causes to further proceed to enforce the statute as construed, and hence that that subject should be left open for future action. Referring to this matter, it was said (p. 418):

"As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were

heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it."

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, viz., the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts:

"The coal company is not a *bona fide* mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of

and has a pecuniary interest in the coal mined by the coal company, and which is transported by the defendant."

Not only was it thus charged that the railroad company used its stock ownership to so commingle the operating of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was moreover expressly in substance charged that exerting its influence as the owner of all the stock of the coal company the railroad company caused the coal company to buy up all the coal produced by other mining companies in the area tributary to the railroad and fix the price at which such coal was bought so as to control the same and the transportation thereof and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

It was charged that by these abuses the production, shipment and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

"That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the coal company, not being in substance and in good faith a *bona fide* corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transporta-

tion, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

"Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated itself from all exercise of authority over said coal but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof."

On the objection of the railway company the court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further in view of the fact that the proposed amendment had been disallowed," the court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the Government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed and in dismissing the suit.

At the threshold it is insisted by the railroad company that the action of the court below in refusing to permit the proposed amendment, however germane that amendment may have been to the cause of action stated in the original bill and even although the subject-matter of the amendment was not foreclosed by our previous decision, is not susceptible of being reviewed, because the allowance of amendments to pleadings is discretionary with a trial court, and the action of the court below in refusing to permit the amendment, even though erroneous, may not be reversed for error unless a gross abuse of discretion was

committed. The principle is elementary, but is inapplicable to this case for a twofold reason: First, because the analysis which we have hitherto made of the opinion of this court on the prior hearing makes it certain that the undoubted object was not to foreclose the right of the Government to enforce in the pending causes the commodities clause as correctly construed, and therefore in this regard the discretion of the court below was controlled by the action of this court. Second, because, in view of the express reservations in the opinion and the explicit language of the mandate of this court, the conclusion cannot be escaped that an absolute abuse of discretion resulted from refusing to permit the amendment, even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.

It remains only to consider, first, whether the proposed amendment was germane to the original cause of action, and if it was, whether it was foreclosed by our previous decision.

As to the first question. When it is borne in mind that the suit was brought by the Government to enforce as against the defendant the commands of the commodities clause, the fact that the proposed amendment was germane to such cause of action is too apparent to need anything but statement. Indeed, in the argument at bar on behalf of the railroad company this is in effect conceded, since it is insisted that the amendment should not have been allowed, because in substance its averments virtually constituted part of the original cause of action. And we think it is equally clear that the grounds of the amendment were not foreclosed by our former decision. While that decision expressly held that stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manu-

factured, mined, produced or owned by such corporation, nothing in that conclusion foreclosed the right of the Government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so excepted, because any control which it exerted or interest

which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a *bona fide* exercise of such ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in effect urged, as the railroad company held all the stock in the coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership, particularly to a case where the ownership embraced all the stock of a producing company, and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to

discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.

UNITED STATES *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

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

Nos. 537, 538, 539. Argued January 5, 1911.—Decided April 3, 1911.

Under the decision of this court in these and other commodities clause cases, 213 U. S. 364, there was no error in the Circuit Court dismissing the bill absolutely, the Government not having asked leave to amend, the stipulation to submit on bill and answer not having been withdrawn, and no violation of the law having been shown on the admitted facts.

Under such circumstances the decree must be affirmed whatever may be its scope and effect as *res judicata* in view of stipulations made in the court below.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Edwin P. Grosvenor*, Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. John G. Johnson for appellees. *Mr. Adelbert Moot* and *Mr. Geo. F. Brownell* submitted a separate brief for the appellee in No. 537.

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

These three cases were embraced in the commodities cases previously before this court, and, like the *Lehigh*

Valley Railroad Company Case, No. 536, *ante*, p. 257, they are but sequels of the controversy pointed out in the opinion in that case as having been formerly passed upon in the opinion reported in *Sand Filtration Corporation* v. *Cowardin*, 213 U. S. 366. These cases, however, differ from the *Lehigh Valley Case* in this respect. Upon the filing in the Circuit Court of the mandate of this court the United States in each case, upon the same record on which the reversed decree was based, without offering to show any further facts, or withdrawing the stipulation to submit the cause on bill and answer referred to in the opinion in the *Lehigh Valley Case*, moved that the decree to be entered be "that the bill be dismissed without prejudice." This motion was denied, whereupon the court was informed that the Government did not intend to proceed further with the cause, and in each case a decree was entered dismissing the cause absolutely.

The error alleged is in substance that the Circuit Court erred in each case in dismissing the bill of complaint absolutely. But leave to amend was not asked, and as, upon the facts appearing and admitted on each record, no violation of the commodities clause was shown, the decree entered may properly be held to have been in strict "conformity with the opinion of this court." Whatever, therefore, in view of the stipulation made below, may be the scope and effect of the decree as *res judicata*, we see no reason for concluding that error was committed by the Circuit Court in refusing to qualify its decree. The decree in each case is, therefore,

Affirmed.

STATE OF OKLAHOMA *v.* ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

BILL IN EQUITY.

No. 13, Original. Argued February 23, 1911.—Decided April 3, 1911.

While the territorial condition lasts the governmental power of Congress over a Territory and its inhabitants is exclusive and paramount, except as restricted by the Constitution.

An act of Congress, regulating railway charges of a railway in a Territory until a state government is formed and providing that thereafter such State shall have authority to regulate the charges, ceases to be of force on the admission of such State into the Union; and thereafter the State can fix such charges, subject only to the constitutional rights of the railway; and so *held* as to §§ 1–4 of the act of July 4, 1884, c. 179, 23 Stat. 73.

A State in its corporate capacity has no such interest in the rights of shippers as to entitle it to maintain an original action in this court against the carrier to restrain it from charging unreasonable rates within its jurisdiction. *Louisiana* v. *Texas*, 176 U. S. 1.

The original jurisdiction conferred by the Constitution on this court does not include every cause in which the State elects to make itself a party to vindicate the rights of its people or to enforce its own laws or public policy against wrong done generally.

THE facts, which involve the construction of the provisions of the Constitution of the United States conferring original jurisdiction on this court in controversies in which a State is a party, are stated in the opinion.

Mr. Charles West, Attorney General of the State of Oklahoma, for complainant:

The Attorney General of Oklahoma has authority to file the bill. *Leedy* v. *Brown*, unreported (Okla.); *State* v. *Welbes*, 73 N. W. Rep. 820; *St. Louis & S. F. Ry. Co.* v. *Hadley*, 161 Fed. Rep. 419; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *Ex parte Young*, 209 U. S. 123;

act of June 18, 1910; rules made for *Chisholm* v. *Georgia*, 2 Dall. 479; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199; *Florida* v. *Anderson*, 91 U. S. 667

The State has justiciable rights here. *Pennsylvania* v. *Wheeling B. Co.*, 13 How. 519; *South Carolina* v. *Georgia*, 93 U. S. 4; *Wisconsin* v. *Duluth*, 96 U. S. 379; *In re Debs*, 158 U. S. 564; *Louisiana* v. *Texas*, 176 U. S. 1; *Kansas* v. *Colorado*, 185 U. S. 141; *Georgia* v. *Tennessee Co.*, 206 U. S. 238; *Hudson Water Co.* v. *McCarter*, 209 U. S. 355.

If equity should take jurisdiction for a part it will retain jurisdiction for complete relief and not force separation of efforts in suits at law. *United States* v. *Union Pacific Co.*, 160 U. S. 1. Equity jurisdiction enjoins illegal acts by corporations affecting public at large. *Attorney General* v. *Great Northern Co.*, 62 Eng. Rep. Reprint, 337; *Attorney General* v. *Delaware Ry. Co.*, 27 N. J. Eq. 631; *Muncie Nat. Gas Co.* v. *Muncie* (Ind.), 60 L. R. A. 822; *Gas Light Co.* v. *Zanesville*, 47 Oh. St. 35; *Attorney General* v. *Chicago &c. Co.*, 35 Wisconsin, 425; *Attorney General* v. *Jamaica Pond Co.*, 123 Massachusetts, 361; Thompson, Corporations, 2d ed., §§ 5680, 5721. As to injunctions to restrain excessive rates, see *Tift* v. *Southern Ry. Co.*, 123 Fed. Rep. 794, and cases there cited; *State* v. *Pacific Express Co.* (Neb.), 115 N. W. Rep. 619; *Madison* v. *Gas Co.* (Wis.), 108 N. W. Rep. 65.

The State can ask for a cancellation of the grant. When a Territory becomes a State it may refuse recognition of anything that the State might have repudiated if the grant had come from itself in the first instance. *Railroad Co.* v. *Baldwin*, 103 U. S. 431.

If the United States might have forfeited the right before statehood, that power belongs to the State now. *Van Wick* v. *Knevals*, 106 U. S. 396. The grants in the territory purchased from France made for a public purpose create a trust for the public. *New Orleans* v. *United States*, 10 Pet. 662; see also 6 Missouri, 524; *Mayor &c.* v.

Eslava, 9 Porter, 577, 602; *Dunham* v. *Lamphere*, 3 Gray, 268; *Hart* v. *Burnett*, 15 California, 530.

The grant made to the Southern Kansas Railroad was for a public purpose. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641. The United States before statehood might have declared a forfeiture either by legislative action or judicial proceedings. *United States* v. *Repentigny*, 5 Wall. 211, 267; *Utah N. & C. Ry. Co.* v. *Utah & C. Ry. Co.*, 110 Fed. Rep. 879.

Before statehood the United States was a trustee for the Territory. *Hinman* v. *Warren*, 6 Oregon, 409; *Pollard's Lessee* v. *Hagan*, 3 How. 212, 220.

Until the primary disposal the authority of the United States to control them is complete, but ends entirely at the primary disposal thereof. *David* v. *Rickabaugh*, 32 Iowa, 543; *Farrington* v. *Wilson*, 29 Wisconsin, 383; *Gibson* v. *Chouteau*, 3 Wall. 13; *Irvine* v. *Marshall*, 20 How. 558; *State* v. *Bachelder*, 5 Minnesota, 223; *Shiveley* v. *Bowlby*, 152 U. S. 1.

Since statehood, the United States has had no authority to cancel the grant or control the trust. *United States* v. *Illinois Central Ry. Co.*, 154 U. S. 225, 239. The United States has no control over the internal commerce of a State. *Louisville* v. *Mississippi*, 133 U. S. 587; *Geer* v. *Connecticut*, 161 U. S. 519; *Sands* v. *Manistee Co.*, 123 U. S. 288; *Covington Bridge Co.* v. *Kentucky*, 145 U. S. 204.

The primary duty of the company is to the local business. *Lake Shore R. R. Co.* v. *Ohio*, 173 U. S. 285, 301; *Cleveland Company* v. *Illinois*, 177 U. S. 521.

The grant is now an act of the State. § 2 Schedule of Const. of Oklahoma.

The act of July 4, 1884, § 2, provides for a reversion to the tribe itself, but all the Indian tribes have ceased to be nations. A grant to a railroad and its successors and assigns does not give the right to it to sell or assign its property to another corporation. *Oregon R. R. Co.* v. *Ore-*

gonian R. R. Co., 130 U. S. 1; *Thomas* v. *Railroad Co.*, 101 U. S. 1. The Southern Kansas Railway had no authority to sell to the respondents. *Briscoe* v. *Southern Kansas Ry. Co.*, 40 Fed. Rep. 273.

The jurisdiction of this court if it exists should be applied. *Cohens* v. *Virginia*, 6 Wheat. 404; *California* v. *Southern Pacific Ry. Co.*, 157 U. S. 229, 269.

The limitation does not end with the Government's jurisdiction.

Laws may as well be enacted by reference as by reenacting specific words. *Chenango Bridge Co.* v. *Binghamton Co.*, 3 Wall. 51; *Schwenke* v. *Union D. & R. Co.*, 7 Colorado, 512; *S. C.* 4 Pac. Rep. 905; *In re Larkin*, 1 Oklahoma, 53; *Pridgeon* v. *United States*, 153 U. S. 53.

Though Congress may regulate interstate business and incorporate companies therefor, yet the police power of the State remains intact. *Louisville Co.* v. *Kentucky*, 161 U. S. 702; *Cleveland Co.* v. *Illinois*, 177 U. S. 516.

Mr. Robert Dunlap, with whom *Mr. Gardiner Lathrop* was on the brief, for respondent:

The General Government alone and not the State of Oklahoma has the right to enforce obedience to the terms of the grant found in one of its laws.

The act of Congress in question granting the right to construct, operate, and use the railway constructed thereunder was passed under the constitutional power of that body to regulate commerce among the several States and with the Indian tribes. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641; *California* v. *Pacific R. R. Co.*, 127 U. S. 39, 40; *United States* v. *Southern Pacific R. R. Co.*, 146 U. S. 570, 606, 607. Congressional authority to institute proceedings to revoke or forfeit the grant is necessary. *United States* v. *Northern Pacific Ry. Co.*, 177 U. S. 440; *California* v. *Southern Pacific Co.*, 157 U. S. 229; *Oregon* v. *Hitchcock*, 202 U. S. 60, 68, 69.

The provision of the act of Congress referred to in the bill in respect to freight rates ceased to be operative on the creation of the Territory of Oklahoma with reference to the lines embraced therein and certainly on the creation of the State.

In any event a bill in equity does not lie since mandamus is the appropriate remedy at law to enforce the performance of a public duty. Dillon on Municipal Corporations, 4th ed., §§ 826, 906; *In re Sawyer*, 124 U. S. 200; *Missouri Pacific Ry. Co.* v. *United States*, 189 U. S. 274; *Attorney General* v. *Utica Insurance Co.*, 2 Johnson Ch. 371.

The main purpose of the bill, however, seems to be to secure a forfeiture of the rights and privileges granted by Congress, which could only be accomplished or effected in *quo warranto* proceedings on the part of the United States.

The bill does not set up a controversy between the State and the railway company justiciable in this court under the exercise of its original jurisdiction. *Louisiana* v. *Texas*, 176 U. S. 1.

The State is not the successor of the General Government. The authority of Congress in the premises is still effective. The power of Congress was exercised not merely over a Territory or only as of a local nature, but under the power to regulate interstate commerce, a matter of national concern. *Wilmington R. R. Co.* v. *Reid*, 13 Wall. 264, 268; *Gulf & Ship Island R. R. Co.* v. *Hewes*, 183 U. S. 77; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529, 533; *Southern Pacific R. R. Co.* v. *United States*, 183 U. S. 526, 527; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 34, 35, 36.

The State is not entitled to the equitable relief sought. The provision of the act of Congress relied upon ceased to be applicable with statehood. In respect to any claim of forfeiture of rights granted by Congress no case is presented, and, in any event, the Federal Government, being

the sovereign power which granted the rights, could alone insist upon a forfeiture.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an original suit in this court by the State of Oklahoma against the Atchison, Topeka and Santa Fé Railway Company, a corporation of Kansas.

The case as *made by the allegations of the bill*, in connection with acts of Congress and with the constitution and laws of Oklahoma, is substantially as will be now stated.

The treaty of April 30, 1803, between the United States and France, by which the Territory of Louisiana was ceded to the United States, provided that the inhabitants of that Territory should be incorporated into the Union and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; in the meantime to be maintained and protected in the free enjoyment of their liberty, property and the religion they profess. Art. III. The State of Oklahoma was formed out of a part of this ceded Territory.

By an act of Congress of July 4, 1884, the Southern Kansas Railway Company of Kansas was empowered to locate, construct, own, equip, operate, use and maintain a railway, telegraph and telephone line through the Indian Territory, over a specified route. The act forbade the company to charge "the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind" and provided that "passenger rates on said railway shall not exceed three cents per mile." And Congress expressly reserved the right to regulate the charges for freight and passengers on the railway as well as messages on telegraph and telephone lines, "until a State government or governments shall exist in said Terri-

tory, within the limits of which said railway or a part thereof shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway." Congress also reserved "the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State: *Provided, however,* That the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed." §§ 1, 4, c. 179, 23 Stat. 73, 74.

The above grant was accepted by the Southern Kansas Railway Company, and the road now controlled by the appellee, the Atchison, Tokepa and Santa Fé Railway Company, in Oklahoma, is operated under that grant. The bill alleged "that ever since the defendant company took over the operation of said line of railway under said grant it had continuously violated the above condition, in that it has charged the inhabitants of said Territory a greater rate of freight than that authorized by the laws of Kansas for services or transportation of the same kind;" and that the company's tariffs of freight charges show in detail said excessive charges. After setting forth the rates charged in Oklahoma and Kansas, respectively, for carrying, for the same distances, lime, cement, plaster, brick, crude oil and refined oil, the bill proceeds: "That the State of Oklahoma at this time has about two million inhabitants, is developing and building towns, villages and individual farmhouses, and that lime, cement, plaster, brick and stone are very essential to its growth; that at this time in the State of Oklahoma there are very large and extensive petroleum oil wells, and the manufacture or refining of the same is an industry continually growing in said State; that the transportation rates on crude and refined oil, lime, cement, plaster, brick and stone are very

important and essential to the development of said State; and, that the violation by said respondent of the said conditions of said grant is a menace to the future of said State." The State further alleged that if the defendant was permitted further to operate the railroad in violation of the condition of the grant it would be a hindrance to the growth of the State, as well as an injury to the property rights of its inhabitants.

The relief asked was that the grant contained in the above act of Congress be canceled and the property granted by it confirmed and decreed to be in the State of Oklahoma as *cestui que trust;* that the defendant be perpetually enjoined and restrained, and, pending the determination of this action, be enjoined and restrained from charging the inhabitants of the State of Oklahoma a greater rate of freight than that authorized by the laws of Kansas for services or transportation of the same kind, and from charging "for lime, cement, plaster, brick, stone, crude and refined oil, the rates specified" in its tariff in so far as the same are greater than those authorized for like transportation by the laws of Kansas until the determination of this cause; and that for the continual violation of the terms of the grant it be perpetually enjoined and restrained from operating a railroad in the state of Oklahoma. The bill also contains a prayer for such further or different relief as may be required by the nature of the case and be agreeable to equity and good conscience.

The railroad company filed a demurrer upon the ground that the bill did not show that the State was entitled to the relief asked nor set forth any controversy between the State and the defendant within the original jurisdiction of this court.

The difficulty in the way of granting the relief asked by the State is, in our judgment, insurmountable. The act of 1884 appears to have had in view, primarily, the protection of the inhabitants of the Indian *Territory* from being

charged unreasonable rates by the railway company when using its right of way through that Territory. Congress undoubtedly supposed that it would be safe, at least for a time, to adopt as a test of the reasonableness of rates in Oklahoma, on domestic shipments, those which Kansas had prescribed as between its people and the corporation it had created; in other words, the inhabitants of the *Territory* were to have the same rights, in respect to railroad rates, as Kansas had prescribed for its corporations and people. But that the railway company might not act unjustly towards the inhabitants of the Territory, Congress reserved the right to regulate charges to be made by the railway company for freight and passengers transported on the railway in question. This, of course, Congress could have done without regard to any rates allowed by or in Kansas at any particular time; for, while the *territorial* conditions lasted, the governmental power of Congress over the Territory and its inhabitants was exclusive and paramount, there being no restrictions upon the exercise of that power, except such as were imposed by the Supreme Law of the Land. It is to be observed, however, that the regulations prescribed by the act of Congress were to exist and be in force "*until* a *State* government or governments shall exist in said Territory within the limits of which said railway or a part thereof shall be located; and *then* such *State* government or governments shall be authorized to fix and regulate the cost of transportation of persons and freight within their respective limits by said railway." So, when Oklahoma was organized as a State and admitted into the Union "on an equal footing with the original States" (34 Stat. 267, 271, § 4, pt. 1) the clause in the act of 1884, prescribing the Kansas rates as the test for rates that might be charged against the inhabitants of the Territory, necessarily ceased to be of any force in the State, and the whole subject of rates in domestic or local business passed under the full control of

the *State* in its corporate capacity, subject, of course, to the fundamental condition that it should authorize only such rates as were legal and not inconsistent with the constitutional rights of the railway company. If after Oklahoma became a State the company still charged the Kansas rates on local business in Oklahoma, and if those rates would have been illegal under any state regulations, or were, in themselves, unreasonable and purely arbitrary, a controversy, in the constitutional sense, would have arisen between each shipper and the company, which could have been determined by suit brought by the shipper in the proper state court, or even in the proper Federal court, where the controversy, by reason of the grounds alleged by the shipper, was one of which the latter court, under the statutes regulating the jurisdiction of the Federal courts, could take judicial cognizance. But, plainly, the *State*, in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma. The opposite view must necessarily rest upon the ground that the Constitution when conferring *original* jurisdiction on this court "in all cases affecting ambassadors and other public ministers and consuls *and those in which a State is a party*" (Art. III, § 1), intended to include any and every judicial proceeding of whatever nature which the State may choose to institute, in this court, for the purpose of enforcing its laws, although the State may have no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws. In the present case, the State seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement,

plaster, brick, stone, crude and refined oil. But the State, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway.

Upon this general subject the case of *Louisiana* v. *Texas*, 176 U. S. 1, is instructive. The State of Louisiana, by an original suit in this court against the State of Texas, her Governor and Health Officer, sought to restrain the latter State from enforcing by its officers certain quarantine regulations it had established, which Louisiana alleged were illegal and discriminative against it and injurious to the trade and business of its people, particularly interstate commerce as conducted between New Orleans and Texas. There was a demurrer to the bill upon these grounds: 1. That, within the meaning of the Constitution of the United States, the controversy was not one between Louisiana and Texas. 2. That the controversy was between Texas or her officers and certain persons in Louisiana engaged in interstate commerce, and did not concern Louisiana as an aggregate, corporate body or State. 3. That by the suit brought in this court, Louisiana was only lending its name to certain individuals in New Orleans, who were the real parties in interest. 4. That it appeared from the face of the bill that "the State of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said State possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose." 5. That "no property right of the State of Louisiana is in any manner af-

fected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

This court, speaking by Chief Justice Fuller, after referring to the provisions of the Constitution enumerating the cases and controversies to which the judicial power of the United States extended and of which the Circuit Courts of the United States could take original cognizance, and to numerous adjudged cases, said: "In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals. . . . Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these States the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained. . . . But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement, whose breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid

hold of as in themselves committing one State to a distinct collision with a sister State."

These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this court as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a State, bringing an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although, an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured.

We are of opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit "in which a State shall be a party," are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally.

Other questions of interest and importance have been elaborately discussed by counsel, but we deem it unnecessary to extend this opinion by an examination of them. What has been said is quite sufficient to show that the demurrer is well taken and that the bill must, in any event, be dismissed for want of jurisdiction in this court to entertain it by original suit on behalf or in the name of the State.

Dismissed.

STATE OF OKLAHOMA, ON THE RELATION OF WEST, ATTORNEY GENERAL, *v.* GULF, COLORADO & SANTA FE RAILWAY COMPANY.

BILL IN EQUITY.

No. 14, Original. Argued February 23, 24, 1911.—Decided April 3, 1911.

Oklahoma v. *Atchison, Topeka & Santa Fe Ry. Co., ante*, p. 277, followed to effect that a State cannot invoke the original jurisdiction of this court by suit against individual defendants on its behalf where the primary purpose is to protect citizens generally against violation of its own laws by the defendants.

A State cannot invoke the original jurisdiction of this court to enforce a judgment rendered in its courts for a violation of its penal or criminal laws, *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, or to enforce a penal statute.

A suit by a State, to enjoin carriers from conveying intoxicating liquors into its territory or an Indian reservation therein, is one to enforce by injunction regulations prescribed by the State for violations of its own penal statutes and is not within the original jurisdiction of this court; and so *held* as to a suit brought by the State of Oklahoma to enjoin railway and express companies from introducing liquor into its territory.

THE facts, which involve the construction of the provisions of the Constitution of the United States conferring original jurisdiction on this court in controversies in which a State is a party, are stated in the opinion.

Mr. Charles West, Attorney General of the State of Oklahoma, for complainant.

Mr. Lawrence Maxwell and *Mr. S. T. Bledsoe*, with whom *Mr. Martin L. Clardy*, *Mr. William W. Green*, *Mr. Charles W. Stockton*, *Mr. T. B. Harrison, Jr.*, and *Mr. Joseph S. Graydon* were on the brief, for defendants.

MR. JUSTICE HARLAN delivered the opinion of the court.

The State of Oklahoma, by the present suit, invokes the original jurisdiction of this court for its protection against certain acts, alleged to have been done or threatened to be done by the respective defendants in derogation of its rights as a State. The case has been heard upon demurrers filed by the several defendants. Some of the demurrers proceed upon the specific ground that this court cannot take jurisdiction of the cause, while others add the general ground that the bill does not show any facts entitling the State to the relief sought by the bill.

As the case involves some questions of a grave character, it is proper to set forth with some fullness the grounds upon which the State bases its claim for relief.

It is alleged in the bill that the defendant companies are corporations of States other than Oklahoma, except that the American Express Company is a partnership, composed of individuals who are citizens and residents of New York; that what were formerly the Territory of Oklahoma and the Indian Territory constitute the present State of Oklahoma; that the lands in the Indian Territory, owned by various Indian tribes, were, by agreement or treaties with the United States, to be allotted in severalty among the members of such tribes, with certain exceptions named in the treaties, which it is not necessary to set out here; that by said agreement or treaties the United States agreed to maintain strict laws in said Territory, particularly in the allotted lands, against the introduction, sale, barter or the giving away of liquors and intoxicants of any kind or quality; and, that pursuant to said agreement and treaties Congress, by the act of June 16, 1906, 34 Stat., Pt. 1, 267, c. 3335, § 3, made it a condition of the admission of Oklahoma into the Union as a State that it should provide by its constitution that "the manufacture, sale, barter, giving away or otherwise

furnishing, except as therein provided, of intoxicating liquors within those parts of the proposed State then known as the Indian Territory and the Osage Reservation and within any other parts of the proposed State which existed as an Indian reservation on the first day of January, 1906, should be prohibited for twenty-one years from the date of the admission of the State into the Union, and that in said act no reservation or exception was made whereby any one of the defendants might import into the said named portion of said State or in any other manner furnish any intoxicating liquors whatsoever, and the power to regulate interstate commerce in intoxicating liquor was thereby surrendered to the State of Oklahoma as to said portions of said State; and by the said act it was not provided that intoxicating liquor should be furnished to any person in what was formerly the Indian Territory, including the Osage Reservation and any other parts of the State which existed as Indian reservations on the first day of January, 1906, in the manner and form that the same is now furnished and imported by said defendants, as hereinafter more fully set forth, or in any other manner or form."

The bill also alleged that, by ordinance irrevocable, Oklahoma had accepted the terms and conditions of the act of June 16, 1906, including the provision relating to intoxicating liquors; and thereby the State was obligated in place of the United States, so far as the power was lodged in it, to carry out the treaties and agreements made with the said Indian tribes against the introduction, sale, or in any manner the furnishing of intoxicating liquors in what was formerly the Indian Territory; but that defendants, in violation of the law and the rights of said Indian tribes therein, and to the injury of the State of Oklahoma and its inhabitants have, since November 16, 1867, and up to this time, continuously violated all said provisions against furnishing, carrying and conveying beer, ale,

wine and intoxicating liquors into Indian Territory; that such violation of law deeply injures and irreparably destroys the good citizenship and property of the State and its inhabitants, and the defendants threaten to continue the same unless restrained; and that in continuing so to do, the defendants and each of them have committed acts that amount to the surrender and abandonment of their corporate right to be engaged and doing business in interstate commerce between the States, and against such acts the plaintiff has no adequate remedy according to the course of the common law.

The State also complains that various persons, about two hundred in number, within its limits (the names of such persons being all set forth in a list made part of the bill) have made payment of the special tax required of liquor dealers under the laws of the United States; that by the above act of Congress of June 16, 1906, it was made a condition precedent to the admission of Oklahoma into the Union that "in its constitution it should provide that the payment of the special tax required of liquor dealers by the United States, of any person within those parts of the proposed State then known as the Indian Territory and the Osage Reservation, and within any other parts of said proposed State which existed as Indian reservations on the first day of January, 1906, should constitute *prima facie* evidence of the intention of such persons to violate that provision of the act of June 16, 1906, in reference to the prohibition of the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors which it was provided as a condition precedent that the constitution of said proposed State should provide for."

The bill further shows that the State, through its Constitutional Convention, submitted to the popular vote the question of adopting a provision prohibiting the manufacture, barter, sale, giving away or otherwise furnishing

intoxicating liquors in the State, and the result was the approval by the electors of a constitutional provision of that kind which has been in force since November 16, 1907; that pursuant to that constitutional provision the legislature of the State, on March 24, 1908, Okla. Laws, 1907–8, p. 594, passed a general statute, establishing a state agency and local agencies for the sale of intoxicating liquors for certain purposes and prohibiting the manufacture, sale, barter, giving away or otherwise furnishing intoxicating liquors, except as provided in the act; that by the terms of said act (Art. 3, § 2) it was provided that "the payment of the special tax required of liquor dealers by the United States by any person within this State, except the local agents of said State by said act, should constitute *prima facie* evidence of an intention to violate the provisions of said act;" and that the defendants, each and all of them, had due notice in writing from the State, by its constituted authorities, of the provisions of the act of Congress, and of the constitution and laws of Oklahoma, referred to herein.

It should be here stated that the above Oklahoma statute of March 24, 1908, prescribed various penalties of fine and imprisonment for violations of its provisions.

The bill finally alleges that the State of Oklahoma gave to each of the defendants due notice that it would hold all shipments made by each of them "whereby either of them undertook to receive at points without the State of Oklahoma intoxicating liquors of any kind, and to transport, carry or otherwise convey such liquors or compounds to or to the order of any of the persons, companies, corporations, firms or associations named in said list, as illegal, contrary to good morals, against the public policy and in direct violation of the positive laws of the State of Oklahoma; that the importation of any prohibited intoxicating liquors to or to the order of any of said persons by either or any of said defendants was and is a public nui-

sance within the State of Oklahoma, and were not importations in good faith, intended for the use of the importer and consignee, and not for sale within the State; that all shipments or deliveries made by defendants by interstate shipment to any or all of the persons named in said list were intended for and were for the violation of the laws of the State of Oklahoma and to commit a public nuisance in said State; that the State of Oklahoma thereby was not undertaking to object or restrict the defendants in the importation of intoxicating liquors, by interstate shipment to any person in said State outside of what was formerly the Indian Territory, the Osage Indian Reservation and an Indian Reservation, January 1, 1906, intending it for his own use and not for sale in said State, but that under the law of said State each and all of said persons intended to use all the liquor in their possession to sell the same in said State in violation of its laws, and that any delivery of prohibited intoxicating liquors to any of said persons would have the necessary effect of aiding such consignee to violate the laws of the State of Oklahoma and would be a public nuisance and injury to the said State."

That in addition thereto under the terms of said Chapter 69 of the Session Laws of 1907–1908, of Oklahoma, as therein provided, the State of Oklahoma, for the benefit of its citizens, undertook to furnish intoxicating liquor to all persons in said State wherever a sale of the same was by the law authorized, for reason of necessary use of the same for preservation, or health, or like purposes, and that under the laws of the State of Oklahoma, the State of Oklahoma was the sole and only person authorized to sell liquors in said State; that the State is pecuniarily interested in the sale of said liquors and irreparably injured by said importation by defendants to the persons named in said list who had paid the special tax required by the United States of liquor dealers, in that the said importa-

tion to the said persons named on said list, being for the purpose of a resale of such importations in said State, operated to the injury to the exclusive right to the sale of intoxicating liquors in said State claimed and exercised by the State of Oklahoma.

That since the sixteenth of November, 1907, after the said notices were received by the said defendants and up to this time, the said defendants have continuously and continually, each and all of them, imported to and to the order of each firm and all of the persons named in said list as having paid a special tax as required by the United States of liquor dealers. And the said persons named in said lists have continued continuously to resell said intoxicating liquors so imported by the defendants; that the said resale has at all times been in violation of the laws of the State of Oklahoma and has been a cause of enormous expense and irreparable injury to the State of Oklahoma and the inhabitants thereof, and each and all of the counties and other municipalities therein, in that the enenforcement of the laws against the sale of intoxicating liquors is extremely difficult, expensive and exhaustive, and that the importation and furnishing to said persons named in said list by said defendants of such intoxicating liquors with the intent that the same shall be used for resale in the said State has caused a large imposition of expenses upon said State and a violation of its laws and a constant source of friction and corruption in its government and is against the peace and dignity of the government of said State, and totally against the public policy thereof and good morals therein, and is a public nuisance in said State; that the defendants in violation of law and in injury to the rights of the State and inhabitants thereof, have openly, persistently and continuously imported intoxicating liquors, whose manufacture, sale, barter, or furnishing is prohibited by the laws of the State of Oklahoma to each and all of the persons named in said list by

furnishing, carrying and conveying the same to and to the order of each and all of the said persons named in said list on divers and sundry occasions continuously, and that defendants threaten to continue in the said violation unless restrained, and in continuing so to do said defendants, and each of them, have committed acts which amount to a surrender and an abandonment of their corporate right to do business in interstate commerce in the carriage of intoxicating liquors, and for the same the plaintiff has no adequate remedy according to the course of the common law for the reason that said shipments originate outside of the State."

The relief asked is that the defendants be severally enjoined and restrained from further introducing, conveying and furnishing intoxicating liquors, including ale, wine and beer *in any form, at any place, at any time, and in any manner* in the State within the limits of what was formerly the Indian Territory, including the Osage Reservation, and other parts of the State that existed as Indian reservations on the first day of January, 1900; that the several defendants be further enjoined from carrying, conveying, delivering, and furnishing intoxicating liquors, including ale, wine and beer, in any form and in any place, at any time or in any manner, in the State to any or all of the persons named in the above list as being persons who have paid the special tax required by the United States of liquor dealers; and that in default of obedience to the order of injunction prayed for the corporate rights of the defendants to do a business in interstate commerce with persons in Oklahoma be forfeited.

Such is the case made by the bill, and we come now to consider the controlling questions presented by it.

It is manifest that the object of this suit by the State, is, by means of an injunction issued by this court, to prevent the defendant companies from violating the penal or criminal laws of Oklahoma. It is, therefore, in its essence

a suit to enforce those laws. But of such a suit this court cannot take original cognizance, although the suit is in form of a civil nature. The Constitution after enumerating, in the first clause of § 2 of Art. III, the cases, in law and equity, as well as the controversies, to which the judicial power of the United States shall extend, provides that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction"—in all the other cases enumerated in the Article, the court to have appellate jurisdiction, both as to law and facts, with such exceptions, and under such regulations as Congress shall make.

The words "in which a State shall be party," literally construed, would embrace original suits of a civil nature brought by a State in this court to enforce a judgment rendered for a violation of its penal or criminal laws. But it has been adjudged, upon full consideration, that that result was inadmissible under the Constitution. This will appear from an examination of the opinion and judgment in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 267, 290, 293. That was an original action brought in this court by the State of Wisconsin against the Pelican Insurance Company of Louisiana to recover the amount of a judgment rendered in a Wisconsin court against that company for certain penalties incurred by it for violating the laws of that State relating to the business of fire insurance companies. The question was distinctly presented whether the *State* could invoke the original jurisdiction of this court, to enforce the collection of such judgment. It was argued in that case that the suit was simply an action of debt, founded upon a contract of record, to wit, a judgment, and was, therefore, to be regarded only as a civil suit, as distinguished from a criminal prosecution. But that view was overruled. The court said that notwithstanding the comprehensive words of

the Constitution, "the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens." After an examination of the authorities it was further said, the court, speaking by Mr. Justice Gray: "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and *to all judgments for such penalties.* If this were not so all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment, Wharton's Conflict of Laws, § 833; Westlake's International Law, 1st ed., § 388; Piggott on Foreign Judgments, 209, 210." Further: "From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a State and citizens of another State, or of a foreign country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. . . . The real nature of the case is not affected by the form provided by the law of the State for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense. This court, therefore, cannot entertain an original action to compel the defendant to pay to the State of Wisconsin a sum of money in satisfac-

tion of the judgment for that fine. The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if, indeed, it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution." The principles announced in *Wisconsin* v. *Pelican Ins. Co., supra,* have been recognized in many subsequent cases. *Postal Tel. Cable Co.* v. *Alabama,* 155 U. S. 482, 487; *California* v. *Southern Pacific Co.,* 157 U. S. 229, 259; *Missouri* v. *Ill. & Chic. Dist.,* 180 U. S. 208, 232; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 234, 235; *Kansas* v. *Colorado,* 206 U. S. 46, 83.

Those principles must, in our opinion, determine the present case adversely to the State. Although the State does not ask for judgment against the defendant railroad company for the penalties prescribed by the Oklahoma statutes for violations of its provisions, she yet seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare. The statute viewed as a whole is to be deemed a penal statute. The present suit, although in form one of a civil nature, is, in its essential character, one to enforce by injunction regulations prescribed by a State for violations of one of its penal statutes and is, therefore, one of which this court cannot take original cognizance at the instance of the State.

But there is another ground which is equally fatal to the

claim that this court may give the relief asked by an original suit brought by the State. In the provisions of the Constitution relating to the judicial power of the courts of the United States it is provided, as we have seen, that "in all cases affecting ambassadors and other public ministers and consuls, and in those in which a State shall be party, the Supreme Court shall have original jurisdiction." In *Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Company, ante*, p. 277, it was held that a *State* could not invoke the original jurisdiction of the court, by suit on its behalf, where the primary purpose of the suit was to protect its citizens, *generally*, against the violation of its laws by the corporations or persons sued; that the above words, "those in which a State shall be party," were not to be so interpreted as to embrace suits of that kind. We need not repeat what was said in the other case. Without stopping to consider other questions discussed by learned counsel, we hold, for the reasons stated in the opinion in that case, as well as because this suit is, in its essence and mainly, one to enforce a penal statute of a State, that the bill must be dismissed for want of jurisdiction in this court.

It is so ordered.

STATE OF OKLAHOMA ON THE RELATION OF WEST, ATTORNEY GENERAL, *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 96. Argued March 13, 1911.—Decided April 3, 1911.

Oklahoma v. *Atchison, Topeka & Santa Fe Railway Co., ante,* p. 277, followed to effect that an act of Congress granting rights of way to a railroad company through a Territory and reserving the right to regulate charges until organization of a state government, which should then be authorized to fix and regulate charges, ceased to be operative when the State was organized.

The operative effect of the act of Congress of March 2, 1887, c. 319, 24 Stat. 446, regulating charges of a railway in Oklahoma Territory having ceased by its own terms on Oklahoma becoming a State, the question of what rights the State had in that respect under the Enabling Act is merely an abstract one.

Whether rates of a railway within the territory of a new State are illegal depends upon the law of the State, subject to the constitutional protection of the railway company against undue exactions without due process of law, and not upon acts of Congress affecting such rates passed prior to the formation of the State and which by their own terms expressly cease to be operative after the formation of the State.

THIS action was brought by the Territory of Oklahoma in one of its courts against the Chicago, Rock Island and Pacific Railway Company, for the purpose of obtaining an injunction restraining the railway company from making certain charges against the inhabitants of the Territory for the transportation of freight.

The petition showed that, by the act of Congress of March 2, 1887, c. 319, 24 Stat. 446; a right of way through

the Territory was granted to the Chicago, Kansas and Nebraska Railway Company upon certain conditions, one of which was that the company should not charge the "inhabitants of the Territory" a greater rate of freight than that authorized by the State of Kansas for transportation service of the same kind; that under the authority of the act of Congress of June 27, 1890, c. 633, 26 Stat. 1811; the Chicago, Rock Island and Pacific Railway Company, a state corporation, the defendant herein, acquired all the rights, privileges and franchises granted to and became subject to all the burdens imposed upon the original grantee company, and that the defendant occupied and used said right of way; but in violation of the act of Congress and of the rights of the inhabitants of the Territory, it daily charged shippers of wheat a greater rate for shipping than was authorized by the laws of Kansas. The relief asked by the Territory was an injunction restraining the railway company from demanding, collecting, receiving or charging, directly or indirectly, greater rates for the transportation of freight and goods, according to local distance, than those named in the petition, which, it is alleged, are in accordance with the conditions upon which Congress granted the right of way through the Territory of Oklahoma.

The railway company, by its answer, denied the allegations of the petition, and, in addition, alleged that the court was without jurisdiction of the subject-matter of the action, and that jurisdiction was vested exclusively in the Interstate Commerce Commission and the Circuit Court of the United States. The Territory filed a reply and the court granted a temporary injunction restraining the railway company, until the further order of the court, from demanding, collecting, receiving or charging for the transportation of freight greater rates than those named in the order of injunction.

From the order of injunction the case was taken on ap-

peal to the Supreme Court of the Territory, and was afterwards "transferred to the Supreme Court of the State under the terms of the Enabling Act and the Schedule to the constitution." It is so stated in the opinion of the Supreme Court of the State. By the Enabling Act of June 16, 1906, it was provided that "all cases pending in the supreme court of said Territory and in the United States court of appeals in the Indian Territory not transferred to the United States circuit and district courts in said State of Oklahoma shall be proceeded with, held, and determined by the supreme or other final appellate court of such State as the successor of said Territorial supreme court and appellate court, subject to the same right to review upon appeal or error to the Supreme Court of the United States now allowed from the supreme or appellate courts of a State under existing laws. Jurisdiction of all cases pending in the courts of original jurisdiction in said Territories not transferred to the United States circuit and district courts shall devolve upon and be exercised by the courts of original jurisdiction created by said State. That the supreme court or other court of last resort of said State shall be deemed to be the successor of said Territorial appellate courts and shall take and possess any and all jurisdiction as such, not herein otherwise specifically provided for, and shall receive and retain the custody of all books, dockets, records, and files not transferred to other courts, as herein provided, subject to the duty to furnish transcripts of all book entries in any specific case transferred to complete the record thereof." 26 Stat. 267, 276, c. 3335, § 17.

Upon the authority of one of its former cases, *Chicago, R. I. & P. Ry. Co.* v. *Territory*, 21 Oklahoma, 329, the Supreme Court of the State dismissed the present case, "for the reason that the change from a territorial form of government to Statehood so changed conditions that the questions involved, while they may have been vital

enough at the time the cases were appealed to the Supreme Court of the Territory, are now merely abstract, hypothetical questions, from the determination of which no practical relief can follow." Thereupon the State sued out the present writ of error.

Mr. Charles West, Attorney General of the State of Oklahoma, for plaintiff in error.

Mr. M. A. Low for defendant in error.

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

The State contends that this court has authority, under § 709 of the Revised Statutes of the United States, to review the final judgment of the Supreme Court of Oklahoma, and that the dismissal of the case without giving the State the relief asked was a denial of its right, based on the Enabling Act of Congress, to have the railway company restrained from charging the people of the State, doing business with it, with greater rates of freight than were allowed by Kansas for like services.

We concur with the Supreme Court of the State in the view that this question, raised by the original petition, has become and is wholly abstract.

The Chicago, Rock Island and Pacific Railway Company is the successor in interest, subject to all the burdens imposed and having all the rights granted by the act of Congress of March 2d, 1887, 24 Stat. 446. The Chicago, Kansas and Nebraska Railway Company, the predecessor in interest of the present defendant, was, as we have seen, authorized to locate and maintain a railway through the Indian Territory, charging the inhabitants of said Territory no greater rate of freight than the rate authorized by the laws of Kansas for services or transportation of the

same kind. But by the same act Congress reserved "the right to regulate the charges for freight and passengers on said railway *until* a State government shall exist in said Territory within the limits of which said railway or a part thereof shall be located; and *then* such State government or governments shall be authorized to fix and regulate the transportation of persons and freights within their respective limits by said railway." The same provision was in the act of July 4, 1884, granting a right of way through the Indian Territory to the Southern Kansas Railway Company.

In No. 13 Original, just decided, *ante*, p. 277, the provision in the act prohibiting the inhabitants of the Territory from being charged greater rates than those allowed in Kansas was held not to be binding when the state government was established, in Oklahoma, after which the whole subject of rates passed under the control of the State. Whatever may have been the rights of the inhabitants of the Territory and of the railway company, under the act of 1887, the State cannot insist that under the authority of the United States and after Oklahoma became a State, that the railway company was bound to accept, in the matter of rates for domestic business, the test furnished by the laws of Kansas. Whether any particular rates charged by the railroad company after Oklahoma became a State were illegal, as being unreasonable and purely arbitrary, depended upon the laws of that State touching the matter or upon the provision of the Federal Constitution, protecting property against undue exactions without due process of law.

Passing by other questions, the determination of which cannot affect the result, we hold, for the reasons stated by it, that the judgment of the state court was right, and its judgment must be affirmed.

It is so ordered.

ENRIQUEZ *v.* GO-TIONGCO.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 95. Argued March 13, 1911.—Decided April 3, 1911.

The Supreme Court of the Philippine Islands having held that on the death of the wife the husband, if surviving, is entitled to settle the affairs of the community, and on his subsequent death his executor is the proper administrator of the same; and on the facts as found by both courts below, *held* that in this case the community estate is liable for services rendered with knowledge and consent of all parties in interest in connection with sale of property belonging to it after both husband and wife had died, and that the proper method of collection was by suit against the husband's representative in his capacities of executor and administrator.

THE facts are stated in the opinion.

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

Mr. Aldis B. Browne, with whom *Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment of the Supreme Court of the Philippine Islands, affirming the judgment of the Court of First Instance for the city of Manila, which dismissed this suit. The action was brought to set aside a judgment sale of land in Manila, known as the Old Theatre, formerly the community property of Antonio Enriquez and his wife, Ciriaca Villanueva. The plaintiffs

and appellants are the administrators of the estate of Antonio, including the interest of Ciriaca Villanueva, and all of the heirs of the two, except Francisco Enriquez, one of the defendants. The other defendants now before the court are the purchaser at the sale and a subsequent purchaser from him.

Ciriaca Villanueva died intestate in 1882. Thereafter her husband administered the community property until his death in 1884. By a codicil to his will, as stated by the Supreme Court, he provided "that the inventory, valuation and partition of this estate be made extrajudicially, and by virtue of the power which the law grants him he forbids any judicial interference in the settlement thereof, conferring upon his executors the necessary authority therefor, without any restriction whatever, and extending their term of office for such period as may be required for this purpose." The defendant Francisco Enriquez was the executor, and in April, 1886, was appointed the general administrator of the estate, including the interest of Ciriaca Villanueva, with directions to proceed in accordance with the codicil, which he did until March, 1901, except for a short time in May, 1900. There were no testamentary or other proceedings in court, and could not be, by Spanish law, in view of the codicil, but it lay with Francisco Enriquez to carry out the trust. There were differences among the heirs, and they made an agreement in August, 1897, for an extrajudicial partition, subject to the provisions of the will, in which Jose Moreno Lacalle was to act as an arbitrator. The partition fell through, but Lacalle rendered services to the two estates, as both courts have found, and on October 23, 1897, it was agreed by Francisco Enriquez, the defendant, and Rafael Enriquez, on behalf of the plaintiffs, that the land in question should be sold, for the purpose, among others, of paying Lacalle. No sale was made, however, and in 1898 Lacalle sued Francisco Enriquez as executor and ad-

ministrator, as aforesaid. The defendant admitted the debt, stated that he had no money, and pointed out this land for execution. On September 10, 1899, the land was sold for more than the appraised value to the defendant Go-Tiongco, who bought in good faith, and without notice of any claim unless notice is implied by law.

There is no question that every consideration of justice is in favor of the defendants, from whom the plaintiffs are endeavoring to get back the land without restitution of the purchase price and after the last purchaser has made costly improvements. The owners of the land agreed to the rendering of the services, but they attempt to avoid the payment on technical grounds. They say that the debt having been incurred after the death of the husband and wife, did not bind their estates, that if the claim had been good against the estate of the husband the suit should have been brought against his heirs, and finally, that the judgment against Francisco Enriquez could not bind the estate of Ciriaca, so that the sale must be void, at least in part. But in our opinion these objections ought not to prevail, on the facts as stated by both courts below and the law as it was administered in the Philippines at the time of the acts.

It seems to have been understood by everybody that Francisco Enriquez was administering both estates in fact, and to have been intended by his appointment in April, 1886, that he should do so by authority of law. The decree under which the plaintiff Rafael Enriquez now is administrator of the estate of both parents, on the face gives him the same authority that Francisco had had before. The Supreme Court holds in this case that on the death of the wife the husband, if surviving, is entitled to settle the affairs of the community and that on his death his executor is the proper administrator of the same. See *Alfonso* v. *Natividad*, 6 Phil. Rep. 240. *Prado* v. *Lagera*, 7 Phil. Rep. 395. *Johnston* v. *San Francisco Sav-*

ings Union, 75 California, 134. *Moody* v. *Smoot*, 78 Texas, 119. *Succession of Lamm*, 40 La. Ann. 312. *Crary* v. *Field*, 9 N. Mex. 222, 229; *S. C.*, 10 N. Mex. 257. We should be slow to disturb their decision, even if we did not believe it to be right, as we do. But when without dispute Antonio was acting, there seems to be no necessity for inquiring whether the appointment could have been avoided if the attempt had been made. The contract with Lacalle, if made by Francisco Enriquez, as seems to have been assumed below, was made as we have said by the wish of all. The services were rendered in aid of winding up the community business and were a proper charge upon the estate. See Civil Code of 1889, Art. 1064. *Sy Chung-Quiong* v. *Sy-Tiong Tay*, 10 Phil. Rep. 141. Francisco Enriquez was the only representative of the estate. The only practicable means of collecting the debt was by suit against him. The record of the suit that was brought most frequently refers to him as executor, but at times as executor and administrator, and the Supreme Court says that as matter of law the suit was directed against him in the latter as well as the former capacity. The judgment must be taken to have bound the community estate. *Carter* v. *Conner*, 60 Texas, 52. *Landreaux* v. *Louque*, 43 La. Ann. 234. Other matters would have to be discussed before we could reverse the judgment below, but we see no ground for doubting that it should be affirmed.

Judgment affirmed.

ARNETT *v.* READE.

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

No. 98. Argued March 14, 1911.—Decided April 3, 1911.

Under the law of New Mexico of 1901, providing that both husband and wife must join in conveyances of real estate acquired during coverture, a deed of the husband in which the wife does not join is ineffectual to convey community property even though acquired prior to the passage of the act.

THE facts are stated in the opinion.

Mr. N. C. Frenger and *Mr. Clifford S. Walton* for appellants:

As to community property, the husband and wife constitute a society, association, partnership or company. The husband is not the sole and absolute owner of community property. *Holyoke* v. *Jackson*, 3 Wash. Ter. 235.

In adopting the community system a State is bound by the principles thereof according to the established rules of the country or State from whence adopted. *Reymond* v. *Newcomb*, 10 N. Mex. 151; *Hill* v. *Young*, 7 Washington, 33; *Warburton* v. *White*, 176 U. S. 484; Ballinger on Comm. Prop., § 255; *Lichty* v. *Lewis*, 63 Fed. Rep. 535; *Mabie* v. *Whittaker*, 10 Washington, 656.

The husband cannot dispose of by will more than half of the community property. *Beard* v. *Knox*, 5 California, 252, 256; *In re Buchanan's Estate*, 8 California, 507; Walton's Civil Law, Art. 1414; *Thompson* v. *Cragg*, 24 Texas, 582; Schmidt's Civil Law of Spain and Mexico, Art. 52.

The law in vesting in the husband the absolute power of disposition of community property designed to facilitate *bona fide* alienation and to prevent clogs by claims of

wife. *Smith* v. *Smith,* 12 California, 217; *DeGodey* v. *DeGodey,* 39 California, 157.

Upon the dissolution of marriage by divorce the wife is entitled to half of the community property. Cases *supra* and *Galland* v. *Galland,* 38 California, 265; Schmidt's Civil Law, Art. 56.

The basis and essence of community property is that the industry and contributions of both spouses create the fund. Cases *supra* and *Meyer* v. *Kinzer,* 12 California, 248; Johnston's Civil Law of Spain, 67; McKay on Comm. Prop., § 168; also Ballinger on Comm. Prop., § 11.

The husband's power to dispose of community property is because he is the head of the community. As soon as he ceases to be the head, as in case of divorce, his power fails.

The term "a mere expectancy" is a term not to be taken literally. The wife's right of dower depends upon whether or not the wife survives the husband, but her right in community property does not. *Galland* v. *Galland,* 38 California, 265.

Under the French law until the marriage is dissolved or the community otherwise terminates, the wife has no right whatever; she has nothing but a mere expectancy. *Dixon* v. *Dixon's Executors, infra.*

The admission of counsel for appellee in *Garrozi* v. *Dastas,* 204 U. S. 81, as to a similarity of provisions of the Code Napoleon and the Spanish law prior to the civil code of 1889, as to community property, is apt to be misleading, if not in error.

But the law of community property as known in Spain was not derived from the French or from the Roman law, and under the Spanish law the rights of husband and wife in community property grow out of the marriage contract, and do not originate in its dissolution. Walton's Civil Law in Spain, 32, 42.

Upon the death of the wife her heirs inherit her share of

the community property. An inheritable interest passes. They could not inherit unless their ancestor was owner. *Dixon* v. *Dixon's Executors*, 4 La. 188; *Thompson* v. *Cragg*, 24 Texas, 582; *Crary* v. *Field*, 9 N. Mex. 222; Upton and Jennings' Civil Laws of La., Art. 2392; *Warburton* v. *White*, 176 U. S. 484; *Garrozi* v. *Dastas*, 204 U. S. 64; *Garosi* v. *Garosi*, 1 Porto Rico Fed. Rep. 230; *Aran y Aran* v. *Fritze*, 3 P. R. Fed. Rep. 509; *Martinez* v. *May*, 5 P. R. Fed. Rep. 582; *Scott* v. *Maynard*, Dallam's Decisions (Tex.), 548.

Upon desertion of the husband the wife may administer and sell community property. *Wright* v. *Hays*, 10 Texas, 130; Codigo Civil (Chihuahua), Art. 1903; Civil Code of Mex. Fed. Dist. and Territories, Art. 2031; Walton's Civil Law, Art. 1441; Schmidt's Civil Law, Art. 42; and see *Parker* v. *Chance*, 11 Texas, 513; *Cheek* v. *Bellows*, 17 Texas, 613; *Fullerton* v. *Doyle*, 18 Texas, 4; *Babb* v. *Carroll*, 21 Texas, 765; *Forbes* v. *Moore*, 32 Texas, 196; *Johnson* v. *Harrison*, 48 Texas, 257; *Verimendi* v. *Harrison*, 48 Texas, 531; *Zimpleman* v. *Robb*, 53 Texas, 274; *Caruth* v. *Grigsby*, 57 Texas, 265; *Slater* v. *Neal*, 64 Texas, 222; *Edwards* v. *Brown*, 68 Texas, 329; *Patty* v. *Middleton*, 82 Texas, 586.

The wife may by will dispose of her share of community property. Section 2030, New Mex. Comp. Laws (1897); Pedro Murillo Velarde's Practica de Testamentos; Schmidt's Civil Law, Art. 969; Upton and Jennings' Civil Law of La., Art. 133; Hall's Mexican Law, §§ 2707, 2669, 2671, 2677; Walton's Civil Law, Arts. 1392 *et seq.;* Arts. 1401, 1426, 1433, 1412 *et seq.*, 1435, 1436, 1441.

Not merely by way of analogy, but in fact, the community is a species of partnership. Walton's Civ. Law, Art. 1395; Schmidt's Civil Law, Arts. 43, 58, 728, 729; White's New Recopilacion, p. 60; Johnston's Civil Law of Spain, pp. 67, 69; Upton and Jennings' Civ. Law of La., Art. 2312; Ballinger on Community Property, §§ 5, 88.

Community may be dissolved by confiscation of share of either spouse, but the other spouse is not thereby interfered with in the rights to his or her share. The heirs of deceased spouse and surviving spouse may form a new community. The wife may renounce her community rights. Schmidt's Civil Law of Spain and Mexico.

Upon the death of the husband, the wife is entitled to half of community property not as heir nor through arbitrary divesting from husband, but by virtue of her community right. *Kircher* v. *Murray*, 54 Fed. Rep. 617 (Tex.); Pedro Murillo Velarde, as quoted in 9 N. Mex. 205.

If no issue, upon death of one spouse the other does not inherit, but share of deceased in community property escheats. *Babb* v. *Carroll*, 21 Texas, 765, citing Spanish authorities.

The wife loses her gains in community property if she commits adultery. Absolute ownership means the right to enjoy and dispose of property as one pleases (by testament or otherwise).

Mr. J. H. Paxton for appellee:

The Spanish-Mexican law as to community or acquest property became the law of the Territory of New Mexico from the time of the cession by Mexico, and is still in force in so far as the same has not been modified by statute. *Strong* v. *Eakin*, 11 N. Mex. 113; *Reade* v. *De Lea*, 95 Pac. Rep. 132.

The laws in force where a contract is made and where it is to be performed enter into it and form a part of it as if they were expressly referred to or incorporated in its terms, and this is true of a contract of marriage. *Von Hoffman* v. *Quincy*, 4 How. 535; *McCreary* v. *Davis*, 28 L. R. A. 658; *Gaines* v. *Gaines*, 9 B. Mon. (Ky.) 306; *Dixon* v. *Dixon's Executors*, 4 La. Ann. 188. No State shall pass any law impairing the obligation of contracts. Fed. Const., Art. I, § 10.

The extent of the impairment of the obligations of a contract is immaterial. Whatever legislation diminishes the efficacy impairs the obligation. *Ranger* v. *New Orleans*, 102 U. S. 206.

A vested right means the power to do certain actions or possess certain things according to the laws of the land. *Calder* v. *Bull*, 3 Dall. 394; *Bailey* v. *P. W. & B. R. R. Co.*, 4 Harr. (Del.) 389; *Chicago City Ry. Co.* v. *Chicago*, 142 Fed. Rep. 847; *Mandelbaum* v. *McDonnell*, 29 Michigan, 78.

Under the Spanish-Mexican community property law, in force in New Mexico when the marriage was celebrated and when the land in question in this suit was acquired, the husband acquired said land by an absolute and vested title, during the subsistence of the community, save only that he could not dispose of said land in fraud of his wife's expectancy; and the wife, during the subsistence of the community, acquired no vested interest or title in or to said land, but only a revocable and fictitious ownership or a mere expectancy. Escriche, Diccionario Razonada de Legislacion y Jurisprudencia, tom. II, p. 86 (Bienes Gananciales); Febrero, Bk. 1, chap. 4, paragraph 1, Nos. 29 and 30; Tapia on Febrero, vol. 1, chap. 8, §§ 17 and 20; Schmidt's Civil Law of Spain and Mexico, Art. 51 (quoted in Ball., Comm. Prop., p. 396); Ballinger on Community Property, §§ 5, 6; *Barnett* v. *Barnett*, 9 N. Mex. 213, 214; *Hagerty* v. *Harwell*, 16 Texas, 665, 666.

There is no restraint on the power of the husband to alienate a portion of the community property after suit for divorce begun unless such alienation is made with a fraudulent view of injuring the rights of the wife. *Meyer* v. *Kinzer*, 12 California, 247; and see *People* v. *Swalm*, 80 California, 46; *Greiner* v. *Greiner*, 58 California, 119; *Spreckels* v. *Spreckels*, 116 California, 339; *Guice* v. *Lawrence*, 2 La. Ann. 226.

The provisions of our Code on the same subject are the

embodiment of those of the Spanish law, without any change. The wife's interest is a mere expectancy, like the interest an heir possesses in the property of the ancestor. *Van Maren* v. *Johnson*, 15 California, 312; *Packard* v. *Arellanes*, 17 California, 539. Where the marriage is dissolved by the death of the wife her descendants succeed to the interest to which she would otherwise be entitled. They do not, however, succeed to such interest as a portion of her estate, but because it is vested in them by the statute. *Garrozi* v. *Dastas*, 204 U. S. 79; *Reade* v. *De Lea*, 95 Pac. Rep. 131.

Under the Spanish-Mexican law the wife is neither a necessary nor a proper party to a suit involving title to community property. Consequently she has no legal or equitable vested interest therein. The title must vest somewhere. Where but in the husband? *Althof* v. *Conheim*, 38 California, 230; *Jergens* v. *Schiele*, 61 Texas, 255; *Bofil* v. *Fisher*, 3 Rich. Eq. (S. Car.) 1. All persons immediately interested, or who may be benefited or injured by a decree, should be made parties to a suit. *Bent* v. *Maxwell L. G. & Ry. Co.*, 3 N. Mex. 244; *Mandelbaum* v. *McDonnell*, 29 Michigan, 78.

No State shall make or enforce any law which shall deprive any person of property without due process of law. Fed. Const., Amendment XIV.

The marriage having been contracted under the Spanish-Mexican law, the husband's right to dispose of the community property cannot be taken away or impaired, as to property already acquired, by a statute enacted subsequently to the acquisition of the property and the vesting of the right. *Spreckels* v. *Spreckels*, 116 California, 339; *Moreau* v. *Detchemendy*, 18 Missouri, 526; *Maynard* v. *Hill*, 125 U. S. 206; *Westervelt* v. *Gregg*, 12 N. Y. 205; *Sutton* v. *Askew*, 66 N. Car. 172; Cooley, Const. Lim., 7th ed., 513. The husband's tenancy by the curtesy initiate is a vested right, not subject to legislative

interference. *Rose* v. *Rose*, 104 Kentucky, 48; *Gladney* v. *Sydnor*, 172 Missouri, 318; *Huber* v. *Merkel*, 117 Wisconsin, 355.

As to the statutory doctrine of the State of Washington, see Hill's Wash. Stat., § 1402; Ballinger, Comm. Prop., 372, 373; and as to right of wife to hold property and maintain action, see Hill's Wash. Stat., §§ 1399, 1400; Ballinger, Comm. Prop., 371, 372; *Brotton* v. *Langert*, 1 Washington, 78, 82; *S. C.* 23 Pac. Rep. 688; *Littell* v. *Miller*, 3 Washington, 280; *Holyoke* v. *Jackson*, 3 Washington, 235; *Mabie* v. *Whittaker*, 39 Pac. Rep. 172; *Hill* v. *Young*, 7 Washington, 33, 34; *Warburton* v. *White*, 176 U. S. 484.

The wife's community property right is in effect a form of dower. *Beard* v. *Knox*, 5 California, 252. As to the wife's administration of community property during husband's absence, see *Cheek* v. *Bellows*, 17 Texas, 613; *Kelley* v. *Whitmore*, 41 Texas, 648; *Zimpleman* v. *Robb*, 63 Texas, 274; *Fullerton* v. *Doyle*, 18 Texas, 3; *Walker* v. *Stringfellow*, 30 Texas, 570; *Bennett* v. *Montgomery*, 22 S. W. Rep. 115; *Slater* v. *Neal*, 64 Texas, 224; *Heidenheimer* v. *Thomas*, 63 Texas, 287; *Lodge* v. *Leverton*, 42 Texas, 18; *Clements* v. *Ewing*, 71 Texas, 371; *Carothers* v. *McNeese*, 43 Texas, 224.

According to the Spanish law the husband was, at the time of the treaty of Guadalupe-Hidalgo and of the Gadsden purchase, in effect the absolute owner of the community property during the subsistence of the matrimony, but he could not defraud the wife of her expectancy. *Garrozi* v. *Dastas*, 204 U. S. 81; Schmidt, Laws of Spain and Mexico, 87, 98; and see as to general legislation of Spain, Fuero Juzgo (7th century); Fuero Real (1255); Siete Partidas (1348); Nueva Recopilacion (1547); Novisima Recopilacion (1805); and see also *Van Maren* v. *Johnson*, 15 California, 311; Justice Swayne, dissenting, in *United States* v. *Castillero*, 2 Black, 17; 1 White's New Recop., Tit. II, Cap. 1 (p. 85).

Statutes should not be allowed a retroactive operation, where this is not required by express command or by necessary and unavoidable implication. *Ingoldsby* v. *Juan*, 12 California, 577; *Nilson* v. *Sarment*, 153 California, 524; *Jordan* v. *Fay*, 98 California, 264; *Murray* v. *Gibson*, 15 How. 423; *Potter* v. *Rio Arriba L. & C. Co.*, 4 N. Mex. 661, 664.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to quiet title brought by the appellee against the widow of Adolpho Lea, for whom her heirs were substituted upon her decease. Adolpho Lea married in 1857. He bought the land in question in 1889 and 1893 and it became community property. In 1902 he sold it to the appellee, shortly before his death in the same year, his wife not joining in the conveyance. By the laws of New Mexico of 1901, c. 62, § 6, (a) "neither husband nor wife shall convey, mortgage, incumber or dispose of any real estate or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." The courts of New Mexico gave judgment for the plaintiff on the ground that the husband had vested rights that would be taken away if the statute were allowed to apply to land previously acquired; citing *Guice* v. *Lawrence*, 2 La. Ann. 226, *Spreckels* v. *Spreckels*, 116 California, 339, etc. The defendants appealed to this court.

There was some suggestion at the argument that the husband acquired from his marriage rights by contract that could not be impaired, but of course there is nothing in that, even if it appeared, as it does not, that the parties were married in New Mexico, then being domiciled there. *Maynard* v. *Hill*, 125 U. S. 190, 210 *et seq.*; *Baker* v. *Kilgore*, 145 U. S. 487, 490, 491. The Supreme Court does not put its decision upon that ground, but upon the notion

that during the joint lives the husband was in substance the owner, the wife having a mere expectancy, and that the old saying was true that community is a partnership which begins only at its end. We do not perceive how this statement of the wife's position can be reconciled with the old law of New Mexico embraced in §§ 2030, 2031 of the Compiled Laws, 1897, referred to in the dissenting opinion of Abbott, A. J., that after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property, and subject to the payment of the debts of the decedent, the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution, and in the absence of a will shall descend, one-fourth to the surviving husband, etc. For if the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half would not descend from her, but merely would continue his. The statement also directly contradicts the conception of the community system expressed in *Warburton* v. *White*, 176 U. S. 484, 494, that the control was given to the husband, "not because he was the exclusive owner, but because by law he was created the agent of community." And notwithstanding the citation in *Garrozi* v. *Dastas*, 204 U. S. 64, of some of the passages and dicta from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from *Warburton* v. *White*. See *Garrozi* v. *Dastas*, 204 U. S. 78. Los bienes que han marido y muger que son de ambos por medio. Novisima Recopilacion, Book 10, Title 4, Law 4.

It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French

customs. 2 Brissaud, Hist. du Droit Franç. 1699, n. 1. The notion may have been helped by the subjection of the woman to marital power; 6 Laferrière, Hist. du Droit Franç. 365; Schmidt, Civil Law of Spain and Mexico, Arts. 40, 51; and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like *dominio*. See *United States* v. *Castillero*, 2 Black, 1, 227. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. Novisima Recopilacion, Book 10, Title 4, Law 5. Schmidt, Civil Law of Spain and Mexico, Art. 51. *Garrozi* v. *Dastas*, 204 U. S. 64, 78. We should require more than a reference to *Randall* v. *Krieger*, 23 Wall. 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States. But whether it could or not, it has not tried to destroy it, but, on the contrary, to protect it. And as she was protected against fraud already, we can conceive no reason why the legislation could not make that protection more effectual by requiring her concurrence in her husband's deed of the land.

Judgment reversed.

Mr. Justice McKenna, dissenting.

I dissent from the opinion and judgment of the court for the reasons set forth in the opinion of the Supreme Court of New Mexico. See also *Spreckels* v. *Spreckels*, 116 California, 339.

UNITED STATES *v.* O'BRIEN, INDIVIDUALLY AND AS A MEMBER OF THE FIRM OF PERKINS & O'BRIEN.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 108. Argued March 17, 1911.—Decided April 3, 1911.

The word "annul" as used in the contract involved in this case construed as refusing to perform further, not to rescind or avoid.

A government contract which makes the right of the contractor to continue work under the contract depend upon the approval of the engineer in charge will not in the absence of express terms be construed as making the dissatisfaction of such engineer with progress of the work conclusive of a breach.

Where, except for the prohibition of the United States to allow the contractor to proceed, the work might have been finished within the specified period, the United States cannot claim a breach entitling it to annul the contract and hold the contractor responsible for difference in cost of completion.

163 Fed. Rep. 1022, affirmed.

THE facts are stated in the opinion.

The Solicitor General, with whom *Mr. Assistant Attorney General Denison* was on the brief, for the United States:

The "annulment" of the contract by the engineer was valid. It was made in good faith; it was not premature; and it was duly sanctioned by the chief of engineers.

By the contract the "judgment" of the engineer in charge was made the test of the right to annul. Where, then, he acted upon his "judgment," and not upon any malicious or fraudulent motive, his decision is final, as this and other courts have repeatedly held. *Kihlberg* v. *United States,* 97 U. S. 398; *United States* v. *Gleason,* 175 U. S. 588; *Martinsburg &c. Co.* v. *March,* 114 U. S. 549, 553; *Sweeny* v. *United States,* 109 U. S. 618; *Newman* v. *United States,* 81 Fed. Rep. 122, 126; *Pauly &c. Co.* v.

Hemphill County, 62 Fed. Rep. 698, 704; *Crane Elevator Co.* v. *Clark*, 80 Fed. Rep. 705, 708; *Kennedy* v. *United States*, 24 C. Cl. 122, 141; *Pearce* v. *McIntyre*, 29 Missouri, 423; *Davenport* v. *Fulkerson*, 70 Missouri, 417; *Allen* v. *Milner*, 2 Car. and J. 47; *Whitehead* v. *Tattersall*, 1 Ad. and El. 491.

The so-called "annulment" referred to in the contract does not mean a rescission *ab initio*, but is merely intended to effectuate the termination of the work under the contract on a breach. The use of this word was not intended to renounce the right of the Government to damages. *United States* v. *Maloney*, 4 App. D. C. 505; *United States* v. *Stone, Sand and Gravel Co.*, 177 Fed. Rep. 321; *Kennedy* v. *United States*, 24 C. Cl. 123.

The abandonment was not technically a rescission of the contract, but merely an acceptance of the situation which the wrongdoing of the other party has brought about. *McElwee* v. *Bridgeport Co.*, 54 Fed. Rep. 627; *Vickers* v. *Electrozone Co.*, 67 N. J. L. 665, 671; *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. 127, 148; *Berthold* v. *St. Louis Co.*, 165 Missouri, 280, 304, 305; *Baldwin* v. *Marqueeze*, 91 Georgia, 404; *Wiel* v. *American Metal Co.*, 182 Illinois, 128; Williston's Wald's Pollock on Contracts, 350, 351; *Daley* v. *People's Building Assn.*, 178 Massachusetts, 13, 18; *Hayes* v. *City of Nashville*, 80 Fed. Rep. 641; *Cherry Valley Iron Works* v. *Florence Iron Works*, 64 Fed. Rep. 569, 573; *Hubbartston Co.* v. *Bates*, 31 Michigan, 158; *Mayor &c.* v. *New York &c. Co.*, 146 N. Y. 210; *Hinsdale* v. *White*, 6 Hill, 507; *McKeon* v. *Whitney*, 3 Denio, 452, 453; *Marshal* v. *Mackintosh*, Q. B. D., 1898; *S. C.* 46 W. R. 580; *S. C.* 78 Law Times Reports, 750.

There were four distinct breaches of the contract by the defendants in their failure to prosecute the work diligently; in their becoming financially and otherwise unable to complete the work; concerning obstruction of navigation and in their failure to complete.

Breach of contract in advance of the time set for per-

formance may be found in various forms; it may be by verbal repudiation through announcement of non-intention to perform. *Hochster* v. *Delatour*, 2 El. and Bl. 678; *Roehm* v. *Horst*, 178 U. S. 1; *United States* v. *Behan*, 110 U. S. 338; *Bank* v. *Hagner*, 1 Pet. 455, 467; *El Paso Cattle Co.* v. *Stafford*, 176 Fed. Rep. 41, 47; *Weber* v. *Grand Lodge*, 169 Fed. Rep. 522, 533; *Michigan Yacht Co.* v. *Busch*, 143 Fed. Rep. 929; *M'Bath* v. *Jones Cotton Co.*, 149 Fed. Rep. 383, 387; *Edward Hines Lumber Co.* v. *Alley*, 73 Fed. Rep. 603; *Bloch* v. *Mayor*, 169 Fed. Rep. 516, 522; *Marks* v. *Van Eeghen*, 85 Fed. Rep. 853; *Hancock* v. *N. Y. Life Ins. Co.*, 11 Fed. Cas. 402; *Grau* v. *McVicker*, 8 Biss. 1; *Ballou* v. *Billings*, 136 Massachusetts, 307, 308.

Or upon the same principle the breach may be found in the inability of the party to perform. *Lovell* v. *Insurance Co.*, 111 U. S. 264; *Louisville Ry. Co.* v. *Pope*, 80 Fed. Rep. 745; *Dougherty* v. *Central National Bank*, 93 Pa. St. 227; *Diem* v. *Koblitz*, 49 Ohio St. 41; *Pratt* v. *Freeman*, 115 Wisconsin, 648; *Stanton* v. *N. Y. & E. R. R. Co.*, 49 Connecticut, 272; *Lockport* v. *Shields*, 87 Ill. App. 150; *Robertson* v. *Davenport*, 29 Alabama, 574; *Holt* v. *United Ins. & Trust Co.*, 76 N. J. L. 585. See also cases of anticipatory breach because of inability shown by bankruptcy. *Carr* v. *Hamilton*, 129 U. S. 252; *Re Neff*, 157 Fed. Rep. 57; *Re Swift*, 112 Fed. Rep. 315; *Re Pettingill Co.*, 137 Fed. Rep. 143, 147; *Ex parte Pollard*, 2 Lowell Dec. 411; *Re Inman Co.*, 171 Fed. Rep. 185; *Lennox* v. *Murphy*, 171 Massachusetts, 370, 373; *Pardee* v. *Kanaday*, 100 N. Y. 121; *New York Phonograph Co.* v. *Davega*, 127 App. Div. (N. Y.) 222; *Woolner* v. *Hill*, 93 N. Y. 576; *Chemical National Bank* v. *World's Columbian Exposition*, 170 Illinois, 82; *Lancaster County National Bank* v. *Huver*, 114 Pa. St. 216; *Ætna Indemnity Co.* v. *Fuller*, 111 Maryland, 321; *Hoyle* v. *Scudder*, 32 Mo. App. 372; *Laclede Power Co.* v. *Stillwell*, 97 Mo. App. 258; *Kalkhoff* v. *Nelson*, 60 Minnesota, 284; *Rappleye* v. *Racine Seeder*

Co., 79 Iowa, 220; *Bank Commissioners* v. *N. H. Trust Co.*, 69 N. H. 621; *Stokes* v. *Baars*, 18 Florida, 656.

Or by disposal, in advance, of the subject-matter of the contract, as in *McGregor* v. *Union Life Ins. Co.*, 121 Fed. Rep. 493; *Camden* v. *Jarrett*, 154 Fed. Rep. 788; *Lowe* v. *Harwood*, 139 Massachusetts, 133; *Hopkins* v. *Young*, 11 Massachusetts, 302; *Canada* v. *Canada*, 60 Massachusetts, 15; *Easton* v. *Jones*, 193 Pa. St. 147; *Bagley* v. *Cohen*, 121 California, 604; *Wolf* v. *Marsh*, 54 California, 228; *Murphy* v. *Dernberg*, 84 App. Div. (N. Y.) 101; *Crist* v. *Armour*, 34 Barb. (N. Y.) 378; *Bolles* v. *Sachs*, 37 Minnesota, 315; *Smith* v. *Jordan*, 13 Minnesota, 264; *Lovering* v. *Lovering*, 13 N. H. 513; *Hunter* v. *Wenatchee Land Co.*, 50 Washington, 438; *Palmer* v. *Clark*, 52 Washington, 345; *White* v. *Lumiere N. A. Co.*, 79 Vermont, 206; *Smith* v. *Carter*, 136 Mo. App. 529; *Southern Texas Tel. Co.* v. *Huntington*, 121 S. W. Rep. 242; *Guthiel* v. *Gilmer*, 27 Utah, 496; *Teachenor* v. *Tibbals*, 31 Utah, 10.

The provision for "forfeiture" of the retained percentages and moneys due is a provision not for liquidated damages, but for security on account of the actual damages; this is shown by numerous considerations, including conclusively the reference to Rev. Stat., § 3709.

Mr. Frederic J. Swift and *Mr. George A. King*, with whom *Mr. William R. Conklin* was on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the United States to recover the extra expense incurred to complete some dredging in Rhode Island, by reason of the failure of the defendants Perkins and O'Brien diligently and faithfully to prosecute the work. The complaint was dismissed by the Circuit Court in accordance with the decision of the Circuit Court of Appeals upon a previous trial, 159 Fed. Rep.

671; 86 C. C. A. 539, and the judgment was affirmed by the Circuit Court of Appeals. 163 Fed. Rep. 1022; 89 C. C. A. 664.

Perkins and O'Brien made a contract with the United States to do the dredging required in improving Providence River and Narragansett Bay between certain points, to begin work on or before March 1, 1899, and to complete it on or before July 1, 1902. One term of the contract was that if they should fail to begin on time or should, "in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect, . . . and, upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in § 3709 of the Revised Statutes of the United States:" with a proviso that if the contractors should be prevented by violence of the elements from beginning or completing the work as agreed such additional time might be allowed them as in the judgment of the party of the first part should be just.

Toward the end of the contract, four paragraphs further on than the last, was the further agreement: "In case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United

States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

The work was begun but did not go on satisfactorily. On December 4, 1900, the major of engineers in charge wrote from Newport to the contractors and their surety, now represented by the other defendant, "that from present appearances it does not seem to be possible for the contractors to put on other dredges than the one now supposed to be at work," stating what had been done and what would have to be done before the time allowed expired, and that to do the work, it would need three dredges upon it continuously. The letter proceeded to give the authorized warning that "unless the contractors have on work by January 1st, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month the contract will be annulled." On December 13 the contractors answered from New York, stating that they expected to make an arrangement to put on two more dredges within a few days. On December 29, 1900, the contractors telegraphed that their representative would call upon the major in charge on Tuesday morning, *i. e.*, January 1. On December 31 he replied that the representative could accomplish nothing by coming, and on the same day wrote to the defendants informing them that the contract was annulled. The work afterwards was finished by other parties, at much increased cost. There was no substantial ground in the evidence to attribute the Government's course to anything but the fault of the contractors, which was very plain, and the only question is what liability they incurred.

The sole material express promise of the contractors was to complete the work by July 1, 1902. If the work was done at that date that promise was performed, no matter how irregularly or with what delays in the earlier months. Under its terms the United States was not concerned with the stages of performance, but only with the completed result. See *Bacon* v. *Parker*, 137 Massachusetts, 309, 311. Its interest in the result, however, made it reasonable to reserve the right to employ some one else if, when time enough had gone by to show what was likely to happen, it saw that it probably would not get what it bargained for from the present hands. But it would be a very severe construction of the contract, a contract, too, framed by the United States, to read the reservation of a right to annul, for want of a diligence not otherwise promised, as importing a promise to use such diligence as should satisfy the judgment of the engineer in charge. It is one thing to make the right to continue work under the contract depend upon his approval, another to make his dissatisfaction with progress conclusive of a breach. In this case it was admitted that there was time enough left to finish the work under the contract when the defendants were turned off. It would be a very harsh measure to pronounce the contract broken when but for the prohibition of the United States the defendants might have done the work in time. The right to terminate the employment of the defendants coupled with a provision for monthly payments based upon the amount of material removed, and therefore of course giving little pay for little work, is the protection expressly stipulated by the United States.

Again, the later paragraph that we have quoted, giving the right to recover expense of completing the work in excess of the original price, gives that right only "in case of failure . . . to complete this contract as specified and agreed upon." On their face these words mean failure

to complete by July 1, 1902, not failure to complete because turned off by the engineer in charge, a year and six months before that time arrived, when competent persons still might do the job. The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due. It is true that the expression of the right to proceed to provide for the completion of the contract and the reference to Rev. Stat., § 3709, hardly belong in that part of the contract unless the defendants are liable for the expense, but the contract does not show technical accuracy enough to give this consideration great weight. If the United States wants more it must say so in plainer words.

If the proviso for annulment be not construed to import a promise on the defendants' part, we are of opinion that there is no ground to charge them with a breach of contract. There were suggestions on the Government's part of anticipatory breach, etc., that do not seem to us to need discussion.

We may add one further observation, although it hardly is material, in the view that we take. The ill chosen word 'annul' in the contract, repeated in the notice to the contractors and in the complaint, cannot be taken literally in any of them. It means refuse to perform further, not rescind or avoid. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard,* 13 How. 307, 340. For, if the contract were made naught by the Government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall arise upon annulment, which but for this provision in the contract the Government would not have. The suit is upon the contract, but the United States asks more than in our opinion the contract gives.

Judgment affirmed.

HILLS & COMPANY, LIMITED, *v.* HOOVER.

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

No. 101. Argued March 15, 16, 1911.—Decided April 3, 1911.

The copyright statutes of the United States afford all the relief to which a party is entitled, and no action outside of those provided therein will lie. *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356.

Section 914, Rev. Stat., was not intended to require the adoption of the state practice where it would be inconsistent with the terms or defeat the purposes of the legislation of Congress, and state statutes which defeat or encumber the administration of the law under Federal statutes are not required to be followed in the Federal courts. *Mexican Central R. R. Co.* v. *Pinkney*, 149 U. S. 207.

Questions of the character prepounded in this case must be answered in reference to the actual case. *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266.

In a Circuit Court of the United States within the State of Pennsylvania the owner of a copyright for an engraving is restricted to a single action to find and seize the copies alleged to infringe and likewise to recover the money penalty therefor.

In a Circuit Court of the United States within the State of Pennsylvania the institution by the owner of a copyright for engravings of an action for replevin for recovery of the copies alleged to infringe, not prosecuted to judgment, precludes such copyright owner from subsequently bringing and maintaining an action of assumpsit to recover the pecuniary penalty for the copies found and seized under the writ of replevin, and which were delivered to plaintiff.

THE facts, which involve the construction of the Federal copyright statutes, are stated in the opinion.

Mr. Benno Loewy and *Mr. Hector T. Fenton*, for plaintiff in error.

Mr. William A. Carr for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes here upon certificate from the Circuit

Court of Appeals for the Third Circuit. Hills & Company, Limited, a corporation of Great Britain, brought an action of assumpsit for its own use and that of the United States against Joseph and Henry L. Hoover, citizens of Pennsylvania, partners as Joseph Hoover & Son, to recover under § 4965, ch. 3, p. 959 of the Revised Statutes of the United States for a forfeiture of money to the amount of $4,763 alleged to be due the plaintiff as the owner of the copyright of certain engravings, 4,763 of which were found in the defendant's possession, which, at the statutory sum of one dollar each, make up the amount sued for.

In the Circuit Court a verdict for that amount was rendered for the plaintiff, subject to the reserved question whether there was any evidence to go to the jury in support of the plaintiff's claim. Upon this question the Circuit Court subsequently entered judgment in favor of the defendant, and the plaintiff took the case to the Circuit Court of Appeals.

The certificate states the following facts:

"The plaintiff owned copyrights of certain engravings which the defendants wrongfully reproduced, sold some of the reproduced copies and on December 10, 1902, still had a number thereof remaining in their possession when the plaintiff's agent went to the defendants' printing establishment with a deputy marshal who was serving a writ of replevin the plaintiff had had issued in the Circuit Court against the defendants for infringing copies. The agent there found in the possession of the defendants forty-seven hundred and sixty-three infringing copies. These the deputy marshal then and there took and delivered to the plaintiff's agent who still retains them. Subsequently, on June 18, 1903, the plaintiff brought the present action of assumpsit against the defendant infringers to recover the one dollar forfeit to the plaintiff for each of the forty-seven hundred and sixty-three in-

fringing sheets of the copyrighted engravings which on December 10, 1902, its agent had found in and taken from the defendants' possession. To this action the defendants appeared and pleaded *non assumpsit* and in it a verdict was had for the plaintiff as above noted. The action of replevin was no further proceeded in."

The questions propounded by the Circuit Court of Appeals under the act of March 3, 1891, are as follows:

"1. In a Circuit Court of the United States within the State of Pennsylvania is the owner of a copyright for engravings restricted to a single action to find and seize the copies alleged to infringe and likewise to recover the money penalty therefor?

"2. In a Circuit Court of the United States within the State of Pennsylvania does the institution by the owner of a copyright for engravings of an action of replevin for recovery of the copies alleged to infringe, not prosecuted to judgment, preclude such copyright owner from subsequently bringing and maintaining an action of assumpsit to recover the pecuniary penalty for the copies found and seized under the writ of replevin?"

As a question of this character must be answered in reference to the actual case (*Columbus Watch Co.* v. *Robbins*, 148 U. S. 266), the second question must be answered in view of the facts stated, having in mind that the copies had been seized in the replevin suit and delivered to the plaintiff's agent.

An answer to these questions requires the construction of § 4965 of the Revised Statutes of the United States. That section declares that any person offending against its provisions "shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale, . . . one-half thereof to the

proprietor and the other half to the use of the United States."

This section has been, in varying forms, a part of the copyright law of the United States for many years prior to the enactment, since this suit, of the present law of July, 1909, which has superseded former statutes upon the subject of copyright. It has been the subject of frequent and not always harmonious construction in the Federal courts. See *Bolles* v. *Outing Company*, 175 U. S. 262, 267.

It was before this court in the case of *Thornton* v. *Schreiber*, 124 U. S. 612. In that case an action was brought by Schreiber against Thornton to recover the penalties for the unlawful reproduction of a certain copyrighted photograph. The infringing copies were found in the store of Sharpless & Sons in Philadelphia, where they were being used as labels on parcels of goods. Thornton was a manager in the employ of Sharpless & Sons, and had ordered 1,500 of the photographs, which were delivered to the firm, who paid for them. It was held that Thornton was not liable as he had not the possession of the infringing prints within the meaning of the act, and that the proper parties defendant, against whom an action of replevin might have been sustained, was the firm of Sharpless & Sons, and not their agent. All that was necessary for the decision of the case was the holding that the prints were not found in the possession of Thornton within the meaning of the act. In the course of the opinion Mr. Justice Miller said:

"Counsel for defendants in error, Schreiber & Sons, insist that the words 'found in his possession' are to be construed as referring to the finding of the jury; that the expression means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit one dollar for each sheet so ascertained to have been in his possession. We, how-

ever, think that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant."

The question whether more than one suit could be maintained under § 4965, or whether it was necessary to find the infringing sheets by means of some action or process before beginning an action for the penalty, was not before the court in that case and was in no way decided. The expression of Mr. Justice Miller, that the word "found" meant that there must be a time before the cause of action accrues at which the infringing matter is found in the possession of the defendant, has been differently interpreted in the courts of the United States.

In *Falk* v. *Curtis Publishing Company*, 107 Fed. Rep. 126, *Thornton* v. *Schreiber* was interpreted to mean that before the action for the penalty would lie there must be a finding of articles in the possession of the defendant by means of a proceeding instituted for the express purpose of seizure, and that consequently an action of assumpsit, brought prior to the seizure, as an independent proceeding was premature and could not be maintained.

In *Bolles* v. *The Outing Company*, 77 Fed. Rep. 966, the case of *Thornton* v. *Schreiber* was held to mean only that the infringing articles must be found in the possession of the defendant before the penalty could be imposed, and that the section contemplated a single suit to enforce both remedies—the money recovery and the forfeiture of the offending sheets, etc. That case was a suit by Bolles against The Outing Company, seeking to recover not only the penalty for one copy of Outing which was found in the defendant's possession, but also for all the copies which had been within the defendant's possession within any time two years previous to the commencement of the suit. The Circuit Court limited the recovery to one dollar as penalty for the copy purchased by an agent of the plaintiff from the company, and the court

refused to permit recovery for the copies printed and delivered to The Outing Company within two years of the commencement of the suit, but not found in the defendant's possession. The case came here, and the judgment of the Circuit Court of Appeals was affirmed. *Bolles* v. *Outing Co.*, 175 U. S. 262, *supra*. In that case this court approved the judgment of the Circuit Court of Appeals of the Second Circuit, and quoted with approval the following language from that court: "The remedy by forfeiture and condemnation is only appropriate in a case where the property can be seized upon process, and where, as here, the forfeiture declared is against property of the 'offender' is only appropriate when it can be seized in his hands." In the same case Mr. Justice Brown, speaking for this court, said:

"No remedy is provided by the act, although by § 4970 a bill in equity will lie for an injunction, but the provision for the forfeiture of the plates and of the copies seems to contemplate an action in the nature of replevin for their seizure, and, in addition to the confiscation of the copies, for a recovery of one dollar for every copy so seized or found in the possession of the defendant."

With a difference of opinion, as we have stated, in two Circuit Courts of Appeal as to the proper construction of the act there came before this court two cases, *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, and *Werckmeister* v. *American Tobacco Company*, 207 U. S. 375. In the first of the cases Werckmeister, the owner of a copyrighted painting, recovered in an action in the nature of replevin 1,196 sheets containing a copy of the copyrighted picture belonging to him. In the second case the action was brought to recover $10 each as penalty for the sheets seized in the former suit. In that case the question was distinctly made whether, under § 4965 of the Revised Statutes, two actions could be brought, one for the seizure of the sheets forfeited under the act

and another for the penalty of one dollar for every sheet found in the defendant's possession. Upon consideration this court held that the statute contemplated but a single action, in which the offender should be brought into court, the plates and sheets seized and adjudicated to the owner of the copyright, and the penalty, provided for by the statute, recovered. It was held that only a single action was within the scope of the statute, and that to construe it so as to require two actions would be to extend it beyond its terms.

The second Werckmeister case was decided while the case now before us was pending in the Circuit Court of Appeals, and shortly before argument in that court. The Circuit Court of Appeals thereupon certified to this court the two questions, as hereinbefore stated. In the *Werckmeister Case* the matter was fully considered, and we find no occasion to depart from the construction which was given the statute in that case.

It is to be noted that both questions propounded by the Circuit Court of Appeals relate to actions in the Circuit Courts of the United States within the State of Pennsylvania, and it is insisted by the counsel for Hills & Company that in the State of Pennsylvania there is no form of action in which the double remedy can be enforced, and that the effect of the decision in the *Werckmeister Case* should be limited to those States wherein the practice permits the remedies given to the copyright proprietor to be enforced in one action. This argument proceeds upon the theory that the state practice can alone be resorted to for remedies in the Federal courts under the copyright law of the United States.

Section 914, Revised Statutes, provides: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes

of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

This section is intended to secure on the law side of the Federal courts the practice which prevails in like causes in courts of the States. Its requirement is that such proceeding shall conform "as near as may be" to that prevailing in the state courts "in like cases." This section was not intended to require the adoption of the state practice where it would be inconsistent with the terms or defeat the purposes of the legislation of Congress. *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 338; *Chappell* v. *United States*, 160 U. S. 499, 512.

In fact, the language of the statute is itself an indication that the state practice cannot be at all times and under all circumstances complied with. It is enough if the Federal courts in adjudicating the rights of parties comply with the state practice "as near as may be." State statutes which defeat or encumber the administration of the law under Federal statutes are not required to be followed in the Federal courts. *Mexican Cen. R. R. Co.* v. *Pinkney*, 149 U. S. 207.

It follows that where the state statute, or practice, is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the Federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the Federal law.

We think this power is not wanting in the present case. Section 716, Rev. Stat., confers broad powers upon the courts of the United States. That section provides:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary

for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

At an early day it was held that under this section the courts of the United States are not restricted to the kind of processes used in the state courts, or bound to conform themselves thereto in all respects, but have the authority to alter the process in such manner as may be deemed expedient, and to so adapt it that its effect and operation may be effectual. *U. S. Bank* v. *Halstead,* 10 Wheat. 51.

There is no difficulty in issuing a writ in the nature of a writ of replevin in an action such as is authorized by § 4965, requiring the marshal to seize the alleged forfeited plates and copies, and asking in the same suit to recover the penalty for those found in the defendant's possession. The alleged infringing matter will be brought into court to abide its order and judgment, and at the same time, in the same action, a recovery may be had for the penalty awarded.

This was the view of the statute suggested in *Bolles* v. *Outing Co., supra.* It was also asserted in *American Tobacco Co.* v. *Werckmeister, supra,* affirmed in this court in *Werckmeister* v. *American Tobacco Company,* 207 U. S. 375, *supra.*

It is true that in the first Werckmeister case the plaintiff recovered a judgment for the forfeiture of the infringing sheets, but the question made and decided in the second case involved the construction of the statute upon the question whether one or two actions was authorized; and it was held that the statute provided for one action in which all the relief authorized by the statute could be obtained.

The copyright statutes of the United States afford all the relief to which a party is entitled, and no action outside of those provided therein will lie. *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356. It therefore follows that Hills & Company having brought an action for the re-

covery of the infringing matter, and having conducted it so far as to have the goods seized and turned over to them, can have no other remedy under the statute which provides for all relief in a single action.

It is stated in the certificate that the replevin suit originally begun is still pending. Such being the fact we do not wish to intimate, by anything herein decided, that the authority to amend pleadings and process in the Federal courts may not justify an amendment in that case so as to embrace the entire relief which could have been obtained in a single action under § 4965 of the Revised Statutes of the United States, as we have stated. That question will arise if an application shall be made to the Circuit Court of the United States in that view.

Holding that the remedy under the copyright statute embraces but one action, as was held in the *Werckmeister Case*, and that the local statutes of the State as to replevin, or other remedies, will not prevent the Federal court from framing its process and writs, so as to give full relief in one action, we answer both of the questions certified in the affirmative.

It is so ordered.

GAVIERES *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 102. Submitted March 13, 1911.—Decided April 3, 1911.

Protection against double jeopardy was by § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691, carried to the Philippine Islands in the sense and in the meaning which it had obtained under the Constitution and laws of the United States. *Kepner* v. *United States*, 195 U. S. 100.

The protection intended and specifically given is against second jeopardy for the same offense, and where separate offenses arise from the same transaction the protection does not apply.

A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution or conviction under the other. *Carter* v. *McClaughry*, 183 U. S. 367.

In this case *held* that one convicted and punished under an ordinance prohibiting drunkenness and rude and boisterous language was not put in second jeopardy by being subsequently tried under another ordinance for insulting a public officer although the latter charge was based on the same conduct and language as the former. They were separate offenses and required separate proof to convict. *Grafton* v. *United States*, 206 U. S. 333, distinguished.

THE facts, which involve the construction of the provisions in the Philippine Island act of July 1, 1902, as to second jeopardy, are stated in the opinion.

Vicente G. Gavieres, plaintiff in error, *pro se:*

The Supreme Court of the Philippine Islands erred in holding that the fact that the plaintiff in error was twice placed in jeopardy by the second indictment was not clearly proven, and it also erred in holding that the plaintiff in error had committed an offense against two government entities and therefore the prosecution by one was not a bar to the prosecution by the other. See *Grafton* v. *United States*, 206 U. S. 333.

The court below also erred in holding that the offenses charged in the two complaints were essentially different in their nature, that they were separate and entirely distinct offenses, and that the same act may constitute a crime against the State and also against the municipality, so that each may punish a person for an infraction of both laws by a single act and that punishment by either does not preclude punishment by the other. *Chan Cun Chay*, 5 Phil. Rep. 385; *Flemister Case*, 5 Phil. Rep. 650.

If these Islands had ceded to the United States certain rights then undoubtedly they might have retained the right to punish all crimes against law regardless of whether

or not the Government of the United States did so or not, but the situation is reversed. These Islands by an act of Congress are protected by the Philippine Bill, which gave certain rights and imposed certain restrictions on the power of the courts, including the prohibition against a man being placed twice in jeopardy for the same offense.

Under this provision there must be two offenses essentially different in their nature in order that two punishments may be inflicted.

Mr. Assistant Attorney General Harr for the United States:

The two offenses of which plaintiff in error was convicted are like those considered in *Flemister* v. *United States*, 207 U. S. 372.

The nature of the offenses must, of course, be determined from the complaints filed against the plaintiff in error, *Burton* v. *United States*, 202 U. S. 380, considered in the light of the statutes under which they were drawn.

The requirement of proof of an additional fact makes the offense distinctive, and precludes a plea of *autrefois convict*. *Morey* v. *Commonwealth*, 108 Massachusetts, 433; *Carter* v. *McClaughry*, 183 U. S. 367, 395.

The decisions of other courts are to the same effect. *McIntosh* v. *State*, 116 Georgia, 543; *State* v. *Taylor*, 133 N. Car. 755. See also *Veazy* v. *State*, 4 Ga. App. 845; *Blair* v. *State*, 81 Georgia, 628, 629; *United States* v. *Hood*, 26 Fed. Cas. No. 15,385; *State* v. *Innes*, 53 Maine, 536; *People* v. *Warren*, 1 Parker, Crim. Rep. N. Y. 338; *State* v. *Stewart*, 11 Oregon, 52; *State* v. *Magone*, 33 Oregon, 570; *Grafton* v. *United States*, 206 U. S. 333, distinguished.

Mr. Justice Day delivered the opinion of the court.

This case presents the single question whether the plaintiff in error, by reason of the proceedings, herein-

after stated, has been twice in jeopardy for the same offense.

Gavieres, plaintiff in error, was charged, convicted and sentenced in the Court of First Instance of the city of Manila, Philippine Islands, of a violation of Article 257 of the penal code of the Philippine Islands, which provides:

"The penalty of arresto mayor shall also be imposed on those who outrage, insult, or threaten, by deed or word, public officials or agents of the authorities, in their presence, or in a writing addressed to them."

Gavieres was charged under this article with the crime of calumniating, outraging and insulting a public official in the exercise of his office by word of mouth and in his presence. Upon conviction he was sentenced to four months of arresto mayor and to pay the cost of the prosecution. He had been previously convicted, because of the same words and conduct, under Art. 28, § 2, of the ordinance of the city of Manila, which provides:

"No person shall be drunk or intoxicated or behave in a drunken, boisterous, rude, or indecent manner in any public place open to public view; or be drunk or intoxicated or behave in a drunken, boisterous, rude, or indecent manner in any place or premises to the annoyance of another person."

Section 5 of the act of Congress of July 1, 1902, 32 Stat., c. 1369, 691, provides: "No person, for the same offense, shall be twice put in jeopardy of punishment."

This statute was before this court in the case of *Kepner* v. *United States*, 195 U. S. 100, and it was there held that the protection against double jeopardy therein provided had, by means of this statute, been carried to the Philippine Islands in the sense and in the meaning which it had obtained under the Constitution and laws of the United States.

It is to be observed that the protection intended and specifically given is against second jeopardy for the *same*

offense. The question, therefore, is, Are the offenses charged, and of which a conviction has been had in the municipal court and in the Court of First Instance, identical. An examination of the ordinance shows that the gist of the offense under it was behaving in an indecent manner in a public place, open to public view. It was not necessary to charge or prove under the municipal ordinance any outrage, insult or threat to a public official or agent of the authorities. The charge contained in the record shows that under the municipal ordinance the plaintiff in error was charged with willfully and unlawfully, in a public street car and in the presence of numerous persons, including ladies, conducting himself in a reckless, indecent and discourteous manner.

It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different. This was the view taken in *Morey* v. *Commonwealth,* 108 Massachusetts, 433, in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

This case was cited with approval in *Carter* v. *McClaughry*, 183 U. S. 367, 395. In the *Carter Case*, speaking of the identity of offenses charged, this court said:

"The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged 'a conspiracy to defraud,' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference."

In *Burton* v. *United States*, 202 U. S. 344, 381, Bishop's Criminal Law, vol. 1, § 1051, was quoted with approval to the effect "jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both." In that case this court said, speaking of a plea of *autrefois acquit*, "It must appear that the offense charged, using the words of Chief Justice Shaw, 'was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*'"

Applying these principles, it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence or in a writing addressed to him. Without such charge and proof there could have been no conviction in the second case. The requirement of *insult to a public official* was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the offense was committed in a public place open to public view; the insult to a public official need only be in his

presence or addressed to him in writing. Each offense required proof of a fact, which the other did not. Consequently a conviction of one would not bar a prosecution for the other.

A minority of the Supreme Court of the Philippine Islands was of opinion that there was double jeopardy in the case at bar upon the authority of the case of *Grafton* v. *United States*, 206 U. S. 333. In that case the Supreme Court of the Philippine Islands held that a soldier of the United States Army might be prosecuted for homicide before a military court-martial and also before a civil court exercising authority in the islands. That judgment was reversed and the conviction before the military court-martial held to bar a prosecution for the same homicide in the civil courts of the Philippine Islands. It appeared that Grafton had been acquitted of the unlawful homicide of a Filipino by a duly convened court-martial having jurisdiction of the offense. After acquittal he was charged in the Court of First Instance of the Province of Iloilo with the crime of assassination in committing the same homicide. He was convicted, notwithstanding his plea of former jeopardy, of infraction of article 404 of the penal code, of the crime of homicide in killing the Filipino.

This court held that the court-martial had full jurisdiction to try the accused for the offense; that it derived its authority from the same governmental power as did the civil court in the Philippine Islands, and that if the conviction in the civil court were allowed to stand the accused would be for the second time in jeopardy for the same homicide. Mr. Justice Harlan, delivering the opinion of the court, said:

"But passing by all other questions discussed by counsel or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902 and for the reasons stated, the plaintiff in error, a soldier

in the army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that territory."

In the case at bar the offense of insult to a public official, covered by the section of the Philippine code, was not within the terms of the offense or prosecution under the ordinance. While it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other.

The judgment of the Supreme Court of the Philippine Islands is affirmed.

Affirmed.

Dissenting, MR. JUSTICE HARLAN.

VILAS *v.* CITY OF MANILA.

TRIGAS *v.* SAME.

AGUADO *v.* SAME.

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

Nos. 53, 54, 207. Argued February 24, 27, 1911.—Decided April 3, 1911.

Even if there is no remedy adequate to the collection of a claim against a governmental subdivision when reduced to judgment, a plaintiff having a valid claim is entitled to maintain an action thereon and reduce it to judgment.

Where the case turned below on the consequence of a change in sovereignty by reason of the cession of the Philippine Islands, the construction of the treaty with Spain of 1898 is involved, and this court has jurisdiction of an appeal from the Supreme Court of the Philip-

pine Islands under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 691, 695.

While military occupation or territorial cession may work a suspension of the governmental functions of municipal corporations, such occupation or cession does not result in their dissolution.

While there is a total abrogation of the former political relations of inhabitants of ceded territory, and an abrogation of laws in conflict with the political character of the substituted sovereign, the great body of municipal law regulating private and domestic rights continues in force until abrogated or changed by the new ruler.

Although the United States might have extinguished every municipality in the territory ceded by Spain under the treaty of 1898, it will not, in view of the practice of nations to the contrary, be presumed to have done so.

The legal entity of the city of Manila survived both its military occupation by, and its cession to, the United States; and, as in law, the present city as the successor of the former city, is entitled to the property rights of its predecessor, it is also subject to its liabilities.

The cession in the treaty of 1898 of all the public property of Spain in the Philippine Islands did not include property belonging to municipalities, and the agreement against impairment of property and private property rights in that treaty applied to the property of municipalities and claims against municipalities.

One supplying goods to a municipality does so, in the absence of specific provision, on its general faith and credit, and not as against special funds in its possession; and even if such goods are supplied for a purpose for which the special funds are held no specific lien is created thereon.

THE facts, which involve the liability of the present city of Manila in the Philippine Islands for claims against the city of Manila as it existed prior to the cession under the treaty of 1898, are stated in the opinion.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury*, with whom *Mr. Paul Fuller* and *Mr. Harry Weston Van Dyke* were on the brief, for plaintiff in error and appellants:

The outstanding obligations of the city of Manila were not impaired by the change of sovereignty, but were pre-

served by the treaty and expressly recognized by the United States Government.

A municipal corporation is not only a governmental subdivision but also an association of the members of a particular community for the administration of their local business and affairs in matters largely outside of the sphere of government as such.

As to the distinction between sovereign rights of government and corporate capacity, see *South Carolina* v. *United States*, 199 U. S. 437, 462; *Lloyd* v. *Mayor*, 5 N. Y. 369, 374; *Western Fund Society* v. *Philadelphia*, 31 Pa. St. 175.

A municipality is not a sovereignty. *Metropolitan Ry. Co.* v. *District of Columbia*, 132 U. S. 1, 9; Merryweather Claim, Magoon on the Law of Civil Government under Military Occupation, 407, 414; see also Magoon on Civil Government, 457–460; 22 Ops. Att. Gen. 526.

After the cession of California it was held by this court that the Pueblo of San Francisco which had existed as a municipal organization prior to the cession, continued to exist as such corporation in spite of the change of sovereignty and that such change of sovereignty left its property rights and obligations unimpaired. See *Townsend* v. *Greeley*, 5 Wall. 326; *Merryman* v. *Bourne*, 9 Wall. 592; *Moore* v. *Steinbach*, 127 U. S. 70; *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217; *Smith* v. *Morse*, 2 California, 524; *Cohas* v. *Raisin*, 3 California, 443; *Hart* v. *Burnett*, 15 California, 530; and as to effect of Civil War, see *New Orleans* v. *Steamship Co.*, 20 Wall. 387.

The city of Manila, as at present constituted, is the successor of the city of Manila as existing under Spanish sovereignty, in respect to both its rights and obligations, and is therefore liable for the debts of the municipality which were outstanding at the time of the cession. *Mobile* v. *Watson*, 116 U. S. 289; *Shapleigh* v. *San Angelo*, 167 U. S. 646; and see *Broughton* v. *Pensacola*, 93 U. S. 266;

Mt. Pleasant v. *Beckwith*, 100 U. S. 514; *Mobile* v. *Watson*, 116 U. S. 289; *Comanche County* v. *Lewis*, 133 U. S. 198; *Van Hoffman* v. *City of Quincy*, 4 Wall. 535; *Girard* v. *Philadelphia*, 7 Wall. 1; *Barnes* v. *District of Columbia*, 91 U. S. 540; *New Orleans* v. *Clark*, 95 U. S. 644; *Meriwether* v. *Garrett*, 102 U. S. 472; *New Orleans* v. *Morris*, 105 U. S. 600; *Amy* v. *Watertown*, 130 U. S. 301; *Metropolitan Ry. Co.* v. *District of Columbia*, 132 U. S. 1; *District of Columbia* v. *Woodbury*, 136 U. S. 450.

The municipality of Manila did not disappear as a municipal government entity upon the capture of the city, but continued to exist and was recognized as so continuing by the capitulation, the general orders of the military authorities, the treaty and the President's instructions to the commission. Gen. Orders No. 4 of August 15, 1898. The protocols of the treaty show that the distinction between sovereign indebtedness and local obligations was recognized throughout the negotiations. Sen. Doc. 62, 55th Cong., 3d Sess., p. 261.

The claims of its own citizens or subjects which each Government relinquished, were those "against the other Government." Treaty, Art. VIII; 23 Op. Atty. Gen. 181, 190; Taylor's Int. Pub. Law, §§ 165, 168.

Plaintiff's claims are "property" within the meaning of the treaty. *Soulard* v. *United States*, 4 Pet. 511; *United States* v. *Reynes*, 9 How. 127; *O'Reilly* v. *Brooke*, 209 U. S. 45, distinguished.

The juristic personality of municipal corporations and their liability to suit were recognized and established by the Roman law and the Spanish law, both ancient and modern. See Digest of Justinian, Lib. III, Tit. IV, 1, 7; Ulpian on the Edict, 10; *Ibid.*, 1; 8 Javolenus, extracts from Cassius, 15; Monro's Translations, Vol. 1, p. 174; Savigny on Jural Relations, translated by Rattigan, §§ 86 *et seq.* The same doctrine is declared in the early Spanish codes. Partida Third, Title II, Law XIII; No-

visima Recopilacion, Book VII, Title XX, Law II; Laws of the Indies, Book IV, Title XI, Law 1; Spanish Laws Codified in 1877, Arts. 1, 30; Alcubilla's Diccionario de la Administracion Española, Vol. 1, pp. 839–863, sub. tit. Ayuntamientos; Alcubilla, Vol. 1, p. 872; Vol. 3, pp. 1036–1038.

The plaintiffs are entitled to the remedies of judgment and execution for the enforcement of their claims. *New Orleans* v. *Morris*, 105 U. S. 600; *Seibert* v. *Lewis*, 122 U. S. 284; *Memphis* v. *United States*, 97 U. S. 293; *Riggs* v. *Johnson County*, 6 Wall. 193; *Knox County* v. *Aspinwall*, 24 How. 376; *Workman* v. *New York*, 179 U. S. 552, 565.

The city of Manila holds the Carriedo Fund as a trustee and such fund is liable for obligations incurred in the administration of the Carriedo Water Works. Rep. of Phil. Com. for 1900, Vol. 3, p. 49; 1 Ops. Atty. Gen. P. I. 319, 323, 450, 452, 543; Dillon's Mun. Corp., 4th ed., §§ 19–21; *Vidal* v. *Girard*, 2 How. 127; *Girard* v. *Philadelphia*, 7 Wall. 1; *United States* v. *Railroad Co.*, 17 Wall. 322; *Commissioners* v. *Lucas*, 93 U. S. 108, 115; *Hunter* v. *Pittsburgh*, 207 U. S. 161, 179; *Philadelphia* v. *Fox*, 64 Pa. St. 169, 182; *People* v. *Hurlbut*, 9 Am. Rep. 108.

A trustee may incur liabilities or make expenditures for the protection of the trust estate, and, *a fortiori*, for the performance of the trust itself, and he may indemnify himself by recourse to the trust property, upon which he has a lien for this purpose. *New* v. *Nicoll*, 73 N. Y. 127; *Noyes* v. *Blakeman*, 6 N. Y. 567, 580, and cases cited; *Van Slyke* v. *Bush*, 123 N. Y. 47.

Mr. Paul Charlton, with whom *Mr. Isaac Adams* was on the brief, for defendant in error and appellees:

As to what constitutes "property," as that word was used in Art. VIII of the treaty of Paris, see *O'Reilly* v. *Brooke*, 209 U. S. 45.

A contract for furnishing coal, or for collecting taxes

for one year, or for furnishing material or performing labor, all of which would be concluded, and all rights thereunder extinguished, by payment or by lapse of time, were clearly not such "property" as was in the mind of the commissioners who concluded the treaty of Paris. The treaty, especially as illuminated by the protocols, makes clear distinction between the relation which the United States was willing to assume toward the island of Cuba and its affairs, and that which it was willing to assume toward the Philippine Islands and their affairs.

The words "property" and "rights" there guaranteed were, specifically, those which related to the peaceful possession of property of all kinds.

The United States has scrupulously fulfilled the obligation it assumed in Arts. I and VII of the treaty with relation to its responsibility for obligations incurred during its occupation of Cuba, and in the settlement and adjudication of claims of its citizens for damages specified in said Art. VII. The Spanish Treaty Claims Commission was organized, has performed the functions of its creation, and has been dissolved; no claim which could rightfully arise under the obligation assumed in those articles of the treaty remains undetermined.

The city of Manila, as at present constituted, is not the successor of the city of Manila as existing under Spanish sovereignty in respect to both its rights and obligations, and is not liable for the debts of the municipality which were outstanding at the time of the cession.

At the time of the acquisition of sovereignty by the United States over the Philippine Islands, the inhabitants thereof had only such rights as were granted by the grace of the United States, and later, such as were secured to them under the treaty of Paris, and the Organic Act of July 1, 1902, and its amendments.

The juristic personality of municipal corporations and their liability to suit was not, as claimed by plaintiff,

recognized and established by the Roman law and the Spanish law, both ancient and modern. See Dictionary of Alcubilla, supplement of 1894.

The plaintiffs are not entitled to the remedies of judgment and execution for the enforcement of their claims. *Hoey* v. *Baldwin,* 1 Phil. Rep. 551.

A municipality has only such implied powers as are necessary to effectuate the specific grants of its charter, and as the charter of the city of Manila neither contains any authority to assume the obligations of the Ayuntamiento of Manila, nor any words which, by necessary legal implication, could be held to include such authority or obligation, no right existed in favor of plaintiffs in error which the city of Manila had either authority or obligation to satisfy.

The city of Manila does not hold the Carriedo Fund as a trustee and such fund is liable for obligations incurred in the administration of the Carriedo Water Works.

Under the facts in this case and as it is impossible to separate the moneys or property captured into classes referable to their sources, there can be no specific responsive liability to the claims of plaintiffs.

Mr. Justice Lurton delivered the opinion of the court.

The plaintiffs in error, who were plaintiffs below, are creditors of the city of Manila as it existed before the cession of the Philippine Islands to the United States by the treaty of Paris, December 10, 1898. Upon the theory that the city under its present charter from the government of the Philippine Islands is the same juristic person and liable upon the obligations of the old city, these actions were brought against it. The Supreme Court of the Philippine Islands denied relief, holding that the present municipality is a totally different corporate entity, and in no way liable for the debts of the Spanish municipality.

The fundamental question is whether, notwithstanding the cession of the Philippine Islands to the United States, followed by a reincorporation of the city, the present municipality is liable for the obligations of the city incurred prior to the cession to the United States.

We shall confine ourselves to the question whether the plaintiffs in error are entitled to judgments against the city upon their several claims. Whether there is a remedy adequate to the collection when reduced to judgment is not presented by the record. But whether there is or is not a remedy, affords no reason why the plaintiffs in error may not reduce their claims to judgment. *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 530. The city confessedly may be sued under its existing charter, and that implies at least a right to judgment if they establish their demands.

The city as now incorporated has succeeded to all of the property rights of the old city and to the right to enforce all of its causes of action. There is identity of purpose between the Spanish and American charters and substantial identity of municipal powers. The area and the inhabitants incorporated are substantially the same. But for the change of sovereignty which has occurred under the treaty of Paris, the question of the liability of the city under its new charter for the debts of the old city would seem to be of easy solution. The principal question would therefore seem to be the legal consequence of the cession referred to upon the property rights and civil obligations of the city incurred before the cession. And so the question was made to turn in the court below upon the consequence of a change in sovereignty and a reincorporation of the city by the substituted sovereignty.

This disposes of the question of the jurisdiction of this court grounded upon the absence from the petition of the plaintiffs of any distinct claim under the treaty of Paris, since under § 10 of the Philippine Organic Act

of July 1, 1902, this court is given jurisdiction to review any final decree or judgment of the Supreme Court of the Philippine Islands where any treaty of the United States "is involved." That treaty was necessarily "involved," since neither the court below nor this court can determine the continuity of the municipality nor the liability of the city as it now exists for the obligation of the old city, without considering the effect of the change of sovereignty resulting from that treaty. See *Reavis* v. *Fianza*, 215 U. S. 16, 22.

The historical continuity of a municipality embracing the inhabitants of the territory now occupied by the city of Manila is impressive. Before the conquest of the Philippine Islands by Spain, Manila existed. The Spaniards found on the spot now occupied a populous and fortified community of Moros. In 1571 they occupied what was then and is now known as Manila, and established it as a municipal corporation. In 1574 there was conferred upon it the title of "Illustrious and ever loyal city of Manila." From time to time there occurred amendments, and, on January 19, 1894, there was a reorganization of the city government under a royal decree of that date. Under that charter there was power to incur debts for municipal purposes and power to sue and be sued. The obligations here in suit were incurred under the charter referred to, and are obviously obligations strictly within the provision of the municipal power. To pay judgments upon such debts it was the duty of the Ayuntamiento of Manila, which was the corporate name of the old city, to make provision in its budget.

The contention that the liability of the city upon such obligations was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force, and, if true, must result from settled principles of rigid law. While the contracts from which the claims in suit resulted were in progress, war between the United

States and Spain ensued. On August 13, 1898, the city was occupied by the forces of this Government and its affairs conducted by military authority. On July 31, 1901, the present incorporating act was passed, and the city since that time has been an autonomous municipality. The charter in force is act 183 of the Philippine Commission and now may be found as chapters 68 to 75 of the Compiled Acts of the Philippine Commission. The first section of the charter of 1901 reads as follows:

"The inhabitants of the city of Manila, residing within the territory described in section 2 of this act, are hereby constituted a municipality, which shall be known as the city of Manila and by that name shall have perpetual succession, and shall possess all the rights of property herein granted or heretofore enjoyed and possessed by the city of Manila as organized under Spanish sovereignty."

The boundaries described in § 2 include substantially the area and inhabitants which had theretofore constituted the old city.

By § 4 of the same act the government of the city was invested in a municipal board.

Section 16 grants certain legislative powers to the board, and provides that it shall "take possession of all lands, buildings, offices, books, papers, records, moneys, credits, securities, assets, accounts, or other property or rights belonging to the former city of Manila or pertaining to the business or interests thereof, and, subject to the provisions herein set forth, shall have control of all its property except the building known as the Ayuntamiento, provision for the occupation and control of which is made in § 15 of this act; shall collect taxes and other revenues, and apply the same in accordance with appropriations, as hereinbefore provided, to the payment of the municipal expenses; shall supervise and control the discharge of official duties by subordinates; shall institute judicial proceedings to recover property and

funds of the city wherever found or otherwise to protect the interests of the city, and shall defend all suits against the city," etc.

Section 69 of the charter expressly preserved "all city ordinances and orders in force at the time of the passage of this act and not inconsistent herewith," until modified or repealed by ordinances passed under this act.

Section 72 is the repealing clause, and provides for the repeal of "all acts, orders and regulations" which are inconsistent with the provisions of the act.

The charter contains no reference to the obligations or contracts of the old city.

If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the Ayuntamiento of Manila, was a corporate entity created by the Spanish government, when the sovereignty of Spain in the islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1908, the municipality *ipso facto* disappeared for all purposes. This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. So complete is the supposed death and annihilation of a municipal entity by extinction of sovereignty of the creating State that it was said in one of the opinions below that all of the public property of Manila passed to the United States, "for a consideration, which was paid," and that the United States was therefore justified in creating an absolutely new municipality and endowing it with all of the assets of the defunct city, free from any obligation to the creditors of that city. And so the matter was dismissed in the *Trigas Case* by the Court of First Instance, by the suggestion that "the plaintiff may have a claim against the crown of Spain, which has received from the United States payment for that done by the plaintiff."

We are unable to agree with the argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred.

The distinction is observed in *South Carolina* v. *United States*, 199 U. S. 437, 461, where *Lloyd* v. *Mayor of New York*, 5 N. Y. 369, 374, and *Western Savings Society* v. *Philadelphia*, 31 Pa. St. 175, are cited and approved. In *Lloyd* v. *Mayor of New York*, *supra*, it is said:

"The corporation of the city of New York possesses two kinds of power, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty, the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate legal individual."

See also Dillon Mun. Corp. 66, 4th ed.; *City of Petersburg* v. *Applegarth's Administrator*, 26 Gratt. 321, 343; and *Oliver* v. *Worcester*, 102 Massachusetts, 489.

In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession. The suspension of such governmental functions as are obviously incompatible with the new political relations thus brought about may be presumed.

But no such implication may be reasonably indulged beyond that result.

Such a conclusion is in harmony with the settled principles of public law as declared by this and other courts and expounded by the text books upon the laws of war and international law. Taylor International Public Law, § 578.

That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain. *Alvarez* v. *United States*, 216 U. S. 167. But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler. In *Chicago, Rock Island & Pacific Railway Co.* v. *McGlinn*, 114 U. S. 542, 546, it was said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the

press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

The above language was quoted with approval in *Downes* v. *Bidwell*, 182 U. S. 244, 298.

That the United States might, by virtue of its situation under a treaty ceding full title, have utterly extinguished every municipality which it found in existence in the Philippine Islands may be conceded. That it did so in view of the practice of nations to the contrary is not to be presumed and can only be established by cogent evidence.

That during military occupation the affairs of the city were in a large part administered by officials put in place by military order did not operate to dissolve the corporation or relieve it from liability upon obligations incurred before the occupation nor those created for municipal purposes by the administrators of its affairs while its old officials were displaced. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 394. During that occupation and military administration the business of the city was carried on as usual. Taxes were assessed and taxes collected and expended for local purposes, and many of the officials carrying on the government were those found in office when the city was occupied. The continuity of the corporate city was not inconsistent with military occupation or the constitution or institutions of the occupying power. This

is made evident by the occurrences at the time of capitulation. Thus the articles of capitulation concluded in these words: "This city, its inhabitants . . . and its private property of all descriptions are placed under the special safeguard of the faith and honor of the American Army." This was quoted in President McKinley's instructions of April 7, 1900, to the Philippine Commission, and touching this he said: "I believe that this pledge has been faithfully kept." And the commission was directed to labor for the full performance of this obligation. This instruction was in line with and in fulfillment of the eighth article of the treaty of Paris of December 10, 1898. Under the third article of that treaty the archipelago known as the Philippine Islands was ceded to the United States, the latter agreeing to pay to Spain the sum of twenty million dollars. Under the first paragraph of the eighth article Spain relinquished to the United States "all buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the crown of Spain." It is under this clause, in connection with the clause agreeing to pay to Spain twenty million dollars for the cession of the Philippine group, that the contention that all of the public rights of the city of Manila were acquired by the United States, which country was therefore justified, as absolute owner, in granting the property rights so acquired to what is called the "absolutely new corporation," created thereafter. But the qualifying words touching property rights relinquished by Spain limit the relinquishment to "property which, in conformity with law, belongs to the public domain, and *as such belongs to the crown of Spain.*" It did not affect property which did not, in "conformity with law, belong to the crown of Spain." That it was not intended to apply to property which, "in conformity with law," belonged to the city of Manila as a municipal cor-

poration is clear. This is demonstrated by the second paragraph of the same article, which reads: And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments. . . . having legal capacity to acquire and possess property in the aforesaid territory renounced or ceded, or of private individuals. . . ." Thus the property and property rights of municipal corporations were protected and safeguarded precisely as were the property and property rights of individuals.

That the cession did not operate as an extinction or dissolution of corporations is herein recognized, for the stipulation against impairment of their property rights has this plain significance.

The conclusion we reach that the legal entity survived both the military occupation and the cession which followed finds support in the cases which hold that the Pueblos of San Francisco and Los Angeles, which existed as municipal organizations prior to the cession of California by Mexico, continued to exist with their community and property rights intact. *Cohas* v. *Raisin*, 3 California, 443; *Hart* v. *Burnett*, 15 California, 530; *Townsend* v. *Greeley*, 5 Wall. 326; *Merryman* v. *Bourne*, 9 Wall. 592, 602; *More* v. *Steinbach*, 127 U. S. 70; *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217.

Was corporate identity and corporate liability extinguished as a necessary legal result of the new charter granted in 1901 by the Philippine Commission? The inhabitants of the old city are the incorporators of the new. There is substantially identity of area. There are some changes in the form of government and some changes in corporate powers and methods of administration. The new corporation is endowed with all of the property and

property rights of the old. It has the same power to sue and be sued which the former corporation had. There is not the slightest suggestion that the new corporation shall not succeed to the contracts and obligations of the old corporation. Laying out of view any question of the constitutional guarantee against impairment of the obligation of contracts, there is, in the absence of express legislative declaration of a contrary purpose, no reason for supposing that the reincorporation of an old municipality is intended to permit an escape from the obligations of the old, to whose property and rights it has succeeded. The juristic identity of the corporation has been in no wise affected, and, in law, the present city is in every legal sense the successor of the old. As such it is entitled to the property and property rights of the predecessor corporation, and is, in law, subject to all of its liabilities. *Broughton* v. *Pensacola*, 93 U. S. 266; *Mount Pleasant* v. *Beckwith*, 100 U. S. 520; *Mobile* v. *Watson*, 116 U. S. 289; *Shapleigh* v. *San Angelo*, 167 U. S. 646, 655; *O'Connor* v. *Memphis*, 6 Lea, 730; *Colchester* v. *Seaber*, 3 Burrows, 1866, 1870, in which case, when a municipality became disabled to act and obtained a new charter, in an action upon an obligation of the old corporation, there was judgment for the creditor, Lord Mansfield saying:

"Many corporations, for want of legal magistrates, have lost their activity, and obtained new charters. Maidstone, Radnor, Carmartben, and many more are in the same case with Colchester. And yet it has never been disputed but that the new charters revive and give activity to the old corporation; except, perhaps, in that case in Levinz, where the corporation had a new name; and even there the court made no doubt. Where the question has arisen upon any remarkable metamorphosis, it has always been determined that they remain the same, as to debts and 'rights.'"

Morris & Cummings v. *State*, 63 Texas, 728, 730.

In *Shapleigh* v. *San Angelo, supra,* this court said in a similar case:

"The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities."

The cases of *Trigas* and *Vilas* went off upon demurrers, and no question of remedy arises here.

The appeal of Aguado is from a decree upon a final hearing denying him all relief.

That all three of the plaintiffs in error are entitled to proceed to judgment when they shall establish their several claims is obvious from what we have said. But in the *Aguado case* it is sought to establish his claim as a charge against certain property and funds held by the city as trustee, known as the Carriedo fund. In 1734 one Don Francisco Carriedo y Perodo bequeathed to the city a fund for the establishment of waterworks, to be kept as a separate fund and devoted to the erection and maintenance of the works. This fund was loyally kept and greatly increased and was enlarged by a special tax upon meat, devoted to that purpose, The works were finally completed in 1878, and have been since operated by the city, the income and special tax going to maintenance. Certain securities belonging to the fund are now held by the city, the income being applied to the operation of the works. Aguado took a contract to supply coal for the use of the

Carriedo works and made a deposit to guarantee the contract. When the city was occupied by the American army it was indebted to him for coal so supplied, as well as for the deposit so made. That the coal was bought for and used in the operation of the Carriedo works is not denied. But there is no evidence that the credit was given to the Carriedo Fund so held in trust under the will of Carriedo. The contract was made with the Ayuntamiento of Manila, just as all other contracts for city supplies or works were made. The contract not having been made with special reference to the liability of the fund held in trust by the city, but apparently upon the general credit of the city, we are not disposed to reverse the judgment of the court below, holding that the claim of Aguado did not constitute a charge upon the Carriedo fund.

Aguado is, nevertheless, entitled to a judgment. The designation of the city in the petition as trustee may be regarded as descriptive. The debt having been incurred by the city, it must be regarded as a city liability. *Taylor* v. *Davis*, 110 U. S. 330, 336.

Our conclusion is that the decree in the *Aguado case* must be reversed and the case remanded, with direction to render judgment and such other relief as may seem in conformity with law. The judgments in the *Trigas* and *Vilas cases* will be reversed and the cases remanded with direction to overrule the respective demurrers, and for such other action as may be consistent with law, and consistent with this opinion.

WESTERN UNION TELEGRAPH COMPANY *v.* CROVO.

ERROR TO THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, STATE OF VIRGINIA, AND THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Nos. 81, 87. Argued March 6, 7, 1911.—Decided April 3, 1911.

Where the highest court of the State has refused a writ of error because it thought the judgment of the court below was right, the writ of error from this court lies to the highest state court to which the case could be carried.

Telegraph companies whose lines extend from one State to another are engaged in interstate commerce, and messages passing from one State to another constitute such commerce, and companies and messages both fall under the regulating power of Congress.

While a state statute which amounts to a regulation of interstate commerce is void, one which simply imposes a penalty on a telegraph company for failure to perform a clear common-law duty, such as transmitting messages without unreasonable delay, is, in the absence of legislation by Congress on that subject, a valid exercise of the power of the State, if it relates to delay within the State even though the message be to a point without the State. Such a statute is neither a regulation of, nor hindrance to, interstate commerce, but is in aid thereof; and so *held* as to the statute of Virginia to that effect.

THE facts, which involve the constitutionality, under the commerce clause, of a statute of Virginia requiring prompt transmission of messages by telegraph companies, are stated in the opinion.

Mr. Francis Raymond Stark, with whom *Mr. George H. Fearons*, *Mr. Rush Taggart* and *Mr. Henry D. Estabrook* were on the brief, for plaintiff in error:

The State cannot impose a penalty for failure to transmit a message "as promptly as practicable" over a direct

wire from a point within to a point without the State. *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347.

If one State may lawfully insist that messages shall be transmitted in order of priority, other intervening States have an equal right to prescribe a different order, *e. g.* that messages relating to sickness and death shall be preferred to other private messages, etc. See Title 65, U. S. Rev. Stat., §§ 5263 *et seq.;* Md. Pub. L., 1904, § 328; N. Y. Cons. L., 1909, c. 63, § 103; Brightley's Purdon's Dig., 1895, 2001; California Civil Code of 1897, § 2207; South Dakota Civil Code, § 1604.

Under the statute in question the place of the default is immaterial, for there could be no recovery even if such default had been in Virginia. There is no competent evidence of any default in Virginia.

Mr. J. Kent Rawley for defendants in error:

The Virginia statute requires that the message shall be transmitted as promptly as practicable, which is the plain duty of the company under the general law of the land, and is in aid of rather than a burden upon or an obstruction of commerce. *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, distinguished. The provision in the Indiana statute is mandatory, and may affect the order of sending of interstate messages while the Virginia statute does not require the telegraph company to give preference over any class of messages, but is permissive only. See *The Brig James Gray*, 21 How. 184; *Railroad Company* v. *Fuller*, 17 Wall. 560. This case is controlled by *Western Union Tel. Co.* v. *James*, 162 U. S. 650, which has been often followed and approved. See *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y. & N. H. R. R. Co.* v. *New York*, 165 U. S. 628; *Chicago, M. &c. Ry. Co.* v. *Sloan*, 169 U. S. 133; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Western Union Tel. Co.* v. *Wilson*, 213 U. S. 52; *Nashville* v. *Alabama*, 128 U. S. 96; *Smith* v. *Alabama*, 124 U. S.

465; *Commonwealth* v. *Alger*, 7 Cush. 53; *Lake Shore Ry. Co.* v. *Ohio &c.*, 173 U. S. 285; *Missouri Pacific Ry. Co.* v. *Larabee*, 211 U. S. 621; *Arkansas Ry. Co.* v. *German Nat. Bank*, 77 Arkansas, 489; *U. S. Express Co.* v. *State*, 164 Indiana, 204; *Western Union Tel. Co.* v. *Hughes*, 104 Virginia, 241; *Postal Telegraph Co.* v. *Umstader*, 103 Virginia, 744; *Atlantic Coast Line R. R. Co.* v. *Commonwealth*, 102 Virginia, 599, 616; *Western Union Tel. Co.* v. *Powell*, 94 Virginia, 268.

MR. JUSTICE LURTON delivered the opinion of the court.

Action to recover statutory penalty for the negligent failure to promptly transmit a prepaid message accepted at the Richmond office of the telegraph company, addressed to a business correspondent at Brockton, New York. The declaration averred that the negligence occurred in the office at Richmond.

There was issue joined and a jury. The defendant demurred to the evidence. This was overruled because the court was of opinion that from the facts and circumstances the jury might find that the negligence in transmission occurred in the sending office at Richmond. There was a verdict and judgment for the plaintiff.

A writ of error was denied by the Supreme Court of Appeals, under local practice, because the court thought "the judgment was plainly right."

The plaintiff in error has sued out two writs of error, one to the law and equity court of the city of Richmond, the trial court, and another to the Supreme Court of Appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the law and equity court was the highest court of the State to which the case could be carried, and a writ will therefore lie to that court if a Federal question is properly saved.

The statute which it is claimed operates as a regulation

of interstate commerce, and under which the action was brought, is set out in the margin.[1]

It makes it the duty of every telegraph company doing business in the State to receive and transmit prepaid messages "faithfully, impartially, with substantial accuracy, as promptly as practicable." But the standard of duty under the statute is precisely that imposed at common law upon such a common carrier. The imposition of a penalty for the purpose of enforcing the statute was plainly within the legislative power of the State, if the act was otherwise valid. *Ling Su Fan* v. *United States*, 218 U. S. 302, 306.

But it is said the act requires that messages shall be transmitted in the order received, though preference *may* be given to business of the United States, the State and the public press, and that this is a regulation which may conflict with a different rule prescribed by other States

[1] It shall be the duty of every telegraph company doing business in this State to receive and transmit dispatches from and for other telegraph or telephone companies or lines, and from and for any person, upon the payment of the usual charges therefor, if such payment is demanded; to transmit the same faithfully, impartially, with substantial accuracy, as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch faithfully, impartially, with substantial accuracy, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or offering to send such dispatch, or to the person to whom it was addressed: Provided, however, that not more than one recovery shall be had on one dispatch, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order." Section 5, ch. 8 of Public Service Corporation Act, January 18, 1904.

and may constitute a hindrance and impediment to interstate commerce.

It is not clear that such result may follow if the act be regarded as applying only to dispatches received within the State, although destined to persons beyond the State. The act, unlike the Indiana statute involved in the *Pendleton Case*, 122 U. S. 347, neither regulates delivery in nor out of the State and prescribes no preference in transmission. The company is permitted to give certain preferences named, but is not required to do so.

But we are not called upon to consider whether that particular requirement, one separable from all the others, is valid or not. The single ground of action stated in the plaintiff's declaration was that his prepaid message had not been transmitted "as promptly as practicable," and that this was due to negligence within the State.

The duty of transmitting without unreasonable delay was, as already stated, the clear common-law duty of the company, a duty to which the statute adds only the imposition of a penalty for default. The issue of fact in the state court was whether the delay, however caused, occurred within the limits of the State. Stated more definitely, it was whether the fault was that of the Richmond office, which accepted the message, or that of the New York office, where it is said the message must be relayed over another wire to reach either Brockton or Brooklyn in the State of New York. The indisputable fact was that a message addressed to Brockton, New York, was sent to Brooklyn, New York. Somebody somewhere made a blunder, by which there occurred delay in the proper transmission of the message. Now, if that mistake was made at Richmond, the negligence occurred within the limits of the State. If it was correctly sent to the relay point and the mistake occurred in relaying, the negligence occurred beyond the limits of the State, and the failure to

transmit "as promptly as practicable" did not occur within the state limits.

This issue of fact has been found against the plaintiff in error. Nine hours after the message was accepted the plaintiff received a written notice in these words:

"THE WESTERN UNION TELEGRAPH COMPANY,
"(Incorporated.)
"Richmond, Va., Sept. 25, 1907.

"M. CROVO AND CRENSHAW:

"Your dispatch dated to-day to S. P. Morse & Sons Brooklyn New York is undelivered.

"Reason: Unable to locate party. Give better address.

"A. C. STEVENTON,
"*Per C.*,
"Manager, Richmond, Va., office."

The manager of the company's office at Richmond testified that the notice above set out, "sent to the plaintiff in the usual and ordinary course of business, meant that the message was sent from Richmond, Virginia, to Brooklyn, New York, and not to Brockton, New York."

The only question for decision is whether a statute of the State of Virginia which imposes a penalty for the failure to transmit a dispatch received at an office of the company in the State for transmission to a person in another State is a valid exercise of the power of the State, the delay occurring in the State.

That companies engaged in the telegraph business, whose lines extend from one State to another, are engaged in interstate commerce, and that messages passing from one State to another constitute such commerce, is indisputable. Such companies and such messages come, therefore, under the regulating power of Congress. It follows then, that if this statute as applied in the state court is to be construed as a regulation of commerce between the States, it is in excess of the power of the State.

Western Union Tel. Co. v. *Texas*, 105 Texas, 460; *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *Western Union Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406, 416.

In the *Pendleton Case* a statute of Indiana which imposed a penalty for the failure to deliver by messenger a dispatch sent by the sender in Indiana to a person addressed at a station in Iowa was held an attempt to regulate the method of delivery outside of the State, and therefore an interference with and regulation of interstate commerce.

In the *James Case* a statute of Georgia which imposed a penalty for the failure to diligently deliver to the person addressed in Georgia an interstate message was upheld as a valid exercise of state power in the absence of legislation upon the subject by Congress. In that case the court, by Mr. Justice Peckham, distinguished the *Pendleton Case*, saying:

"Nor is the statute open to the same objections that were regarded as fatal in the *Pendleton Case*, 122 U. S. 347. No attempt is here made to enforce the provisions of the state statute beyond the limits of the State, and no other State could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the State of Georgia. No confusion, therefore, could be expected in carrying out within the limits of that State the provisions of the statute. It is true it provides a penalty for a violation of its terms and permits a recovery of the amount thereof irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it. We do not mean to be understood as holding that any state law on this subject would be valid, even in the

absence of Congressional legislation, if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legislation. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harass and to impede it. While the penalty in the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the State to enact.

"While it is vitally important that commerce between the States should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the State over the subject."

In *Western Union Tel. Co.* v. *Commercial Milling Co., supra*, a statute of Michigan which prohibited contractual limitation of the common-law liability due to the negligence of the company in transmission or delivery was upheld as applied to a message received at the company's office in Michigan for transmission to a person in another State. Distinguishing the *Pendleton Case*, Mr. Justice McKenna, for this court, said:

"But there is a manifest difference between the statute of Indiana and the statute of Michigan and of their purposes and effects. The former imposed affirmative duties and regulated the performance of the business of the telegraph company. It besides ignored the requirements or

regulations of another State, made its laws paramount to the laws of another State, gave an action for damages against the permission of such laws for acts done within their jurisdiction. Such a statute was plainly a regulation of interstate commerce, and exhibited in a conspicuous degree the evils of such interference by a State and the necessity of one uniform plan of regulation. The statute of Michigan has no such objectionable qualities. It imposes no additional duty. It gives sanction only to an inherent duty. It declares that in the performance of a service, public in its nature, it is a policy of the State that there shall be no contract against negligence. The prohibition of the statute, therefore, entails no burden. It permits no release from that duty in the public service which men in their intercourse must observe, the duty of observing the degree of care and vigilance which the circumstances justly demand, to avoid injury to another."

The requirement of the Virginia statute as here applied is a valid exercise of the power of the State in the absence of legislation by Congress. It is neither a regulation of nor a hindrance to interstate commerce, but is in aid of that commerce.

The case is clearly governed by *Western Union Tel. Co.* v. *James* and *Western Union Tel. Co.* v. *Commercial Milling Co.*, both above cited.

Judgment affirmed.

DR. MILES MEDICAL COMPANY *v.* JOHN D. PARK & SONS COMPANY.

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

No. 72. Argued January 4, 5, 1911.—Decided April 3, 1911.

An actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break the contract to the injury of the other, and in the absence of an adequate remedy at law equitable relief will be granted; but *held*, in this case, that plaintiffs were not entitled to relief as the contract under which they claimed was invalid.

A system of contracts between manufacturers and wholesale and retail merchants by which the manufacturers attempt to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to restraint of trade and is invalid both at common law, and, so far as it affects interstate commerce, under the Sherman Anti-trust Act of July 2, 1890; and so *held* as to the contracts involved in this case.

Such agreements are not excepted from the general rule and rendered valid because they relate to proprietary medicines manufactured under a secret process but not under letters patent; nor is a manufacturer entitled to control prices on all sales of his own products in restraint of trade.

The rights enjoyed by a patentee are derived from statutory grant under authority conferred by the Constitution, and are the reward received in exchange for advantages derived by the public after the period of protection has expired; and the rights of one not disclosing his secret process so as to secure a patent are outside of the policy of the patent laws, and must be determined by the legal principles applicable to the ownership of such process.

The protection of an unpatented process of manufacture does not necessarily apply to the sale of articles manufactured under the process.

A manufacturer of unpatented proprietary medicines stands on the same footing as to right to control the sale of his product as the manufacturers of other articles, and the fact that the article may

have curative properties does not justify restrictions which are unlawful as to articles designed for other purposes.

A manufacturer of unpatented articles cannot, by rule or notice, in absence of statutory right, fix prices for future sales, even though the restriction be known to purchasers. Whatever rights the manufacturer may have in that respect must be by agreements that are lawful.

Although the earlier common-law doctrine in regard to restraint of trade has been substantially modified, the public interest is still the first consideration; to sustain the restraint it must be reasonable as to the public and parties and limited to what is reasonably necessary, under the circumstances, for the covenantee; otherwise restraints are void as against public policy.

Agreements or combinations between dealers, having for their sole purpose the destruction of competition and fixing of prices, are injurious to the public interest and void; nor are they saved by advantages which the participants expect to derive from the enhanced price to the consumer.

164 Fed. Rep. 803, affirmed.

THIS is a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Sixth Circuit which affirmed a judgment of the Circuit Court dismissing, on demurrer, the bill of complaint for want of equity. 164 Fed. Rep. 803; 90 C. C. A. 579.

The complainant Dr. Miles Medical Company, an Indiana corporation, is engaged in the manufacture and sale of proprietary medicines, prepared by means of secret methods and formulas and identified by distinctive packages, labels and trade-marks. It has established an extensive trade throughout the United States and in certain foreign countries. It has been its practice to sell its medicines to jobbers and wholesale druggists who in turn sell to retail druggists for sale to the consumer. In the case of each remedy, it has fixed not only the price of its own sales to jobbers and wholesale dealers, but also the wholesale and retail prices. The bill alleged that most of its sales were made through retail druggists and that the demand for its remedies largely depended upon their

good will and commendation, and their ability to realize a fair profit; that certain retail establishments, particularly those known as department stores, had inaugurated a "cut-rate" or "cut-price" system which had caused "much confusion, trouble and damage" to the complainant's business and "injuriously affected the reputation" and "depleted the sales" of its remedies; that this injury resulted "from the fact that the majority of retail druggists as a rule cannot, or believe that they cannot realize sufficient profits" by the sale of the medicines "at the cut-prices announced by the cut-rate and department stores," and therefore are "unwilling to, and do not keep" the medicines "in stock" or "if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at 'cut' or 'reduced' price from the established price suffers loss of reputation and becomes of inferior value and demand."

It was further alleged that for the purpose of protecting "its trade sales and business" and of conserving "its good will and reputation" the complainant had established a method "of governing, regulating and controlling the sale and marketing "of its remedies, which is thus described in the bill:

"Contracts in writing were required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines and cures, of the following tenor and effect:

"*Consignment Contract—Wholesale.*

"The Dr. Miles Medical Company.

"This agreement made by and between The Dr. Miles Medical Company, a corporation, of Elkhart, Indiana, hereafter referred to as the Proprietor, and —— —— hereinafter referred to as the Consignee, Witnesseth:

"That the said Proprietor hereby appoints said Con-

signee one of its Wholesale Distributing Agents, and agrees to consign to such Consignee for sale for the account of said Proprietor such goods of its manufacture as the Proprietor may deem necessary, the title thereto and property therein to be and remain in the Proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said Proprietor on demand and the cancellation of this agreement. Said goods to be invoiced to consignee at the following prices:

"Medicines, of which the retail price is $1.00; $8.00 per dozen.

"Medicines (if any) of which the retail price is 50 cents; $4.00 per dozen.

"Medicines, of which the retail price is 25 cents; $2.00 per dozen.

"Freight on all orders, the invoice price of which amounts to $100.00 or more, to be prepaid by the Proprietor; otherwise, freight to be paid by Consignee.

"Said Consignee agrees to confine the sale of all goods and products of the said Proprietor strictly to and to sell only to the designated Retail Agents of said Proprietor as specified in lists of such Retail Agents furnished by said Proprietor and alterable at the will of said Proprietor, and to faithfully and promptly account and pay to the Proprietor the proceeds of all sales, after deducting as full compensation for all services, charges and disbursements a commission of ten per cent of the invoice value, and a further commission of five per cent on the net amount of each consignment, after deducting the said ten per cent commission, on all advances on account remitted within ten days from date of any consignment, it being agreed between the parties hereto that such advances shall in no manner affect the title to such goods, which title shall remain in the Proprietor as if no such advances had been made; provided that such advances

shall be repaid to said Consignee should the said Proprietor terminate this agreement and the return of any unsold goods on which advances have been made. Said Consignee guarantees the payment for all goods sold under this agreement and agrees to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding. Failure to make such accounting and remittance within ten days from the first of each month shall render the whole account payable and subject to draft, but the proceeds of such draft shall not affect the title of any unsold goods, which shall remain in the Proprietor until actually sold, as herein provided.

"It is further agreed that the Consignee shall furnish the Proprietor from time to time upon demand full statements of the stock of goods of the Proprietor on hand on any date specified and that a failure to furnish such statements within ten days from date of such demand shall be a sufficient cause for the cancellation of this agreement, and a demand for the return of the consigned goods.

"It is further agreed that the Proprietor will cause each retail package of its goods to be identified by a number and said Consignee hereby agrees to furnish the said Proprietor full reports upon proper cards or blanks furnished by said Proprietor of the disposition of each dozen or fraction of such goods by means of the identifying numbers, specifying the names and addresses of the Retail Agents to whom such goods have been delivered and the dates of such delivery, and to send such reports to said Proprietor at least semi-monthly, and at any other time on the request of said Proprietor.

"It is understood and agreed between the parties hereto that the commissions herein specified shall not be considered as earned by said Consignee upon any goods of said Proprietor which shall have been delivered to dealers not authorized agents of said Proprietor, as per list of

such agents, or upon any goods whose disposition by said Consignee shall not have been properly reported as herein provided, or sold at prices less than the prices authorized, and that said Consignee shall not credit any such commissions when making remittances on consignment account provided notice has been given by said Proprietor that such commissions are unearned; and that if such unearned commissions have been deducted by said Consignee in making advance payments or monthly remittances on account they shall be charged back to said Consignee and credited and paid to said Proprietor. It is understood that violation or nonobservance of any provision hereof by the Consignee shall make this agreement terminable and all unsold goods returnable at the option of the Proprietor.

"It is agreed that the goods of said Proprietor shall be sold by said Consignee only to the said Retail or Wholesale Agents of said Proprietor, as per list furnished, at not less than the following prices, to-wit:

"Medicines, of which the retail price is $1.00; $8.00 per dozen.

"Medicines (if any) of which the retail price is 50 cents; $4.00 per dozen.

"Medicines, of which the retail price is 25 cents; $2.00 per dozen.

"Provided, that said Consignee may allow a cash discount not exceeding one per cent, if paid within ten days from date of invoice, and that when sales at one time and at one invoice, amount to $15.00 or more, the said Consignee may allow three per cent trade discount, and if said purchase amounts to $50.00 or more, five per cent trade discount, all without cost to the Proprietor, and if such $50.00 quantity shall be shipped direct to the retail purchaser from the laboratory of said Proprietor, on the order from said Wholesale Distributing Agent, freight will be prepaid by the Proprietor, but not otherwise.

"This contract will take effect when the original, duly signed by the Consignee, has been received and accepted by The Dr. Miles Medical Company, at Elkhart, Indiana.

"Done under our hands —— —, A. D. 1907.

"Fill in date on above line.

"THE DR. MILES MEDICAL COMPANY.

"—— ——, *Wholesale Dealer.*

"Sign your name on above line.

"Original. Return in Enclosed Envelope."

"And written contracts were required with all retailers of your orator's said proprietary remedies, medicines and cures, as follows:

"*Retail Agency Contract.*

"The Dr. Miles Medical Company.

"This agreement between The Dr. Miles Medical Company of Elkhart, Indiana, and —— ——, of —— ——

"Retailer's Name on above line. Town. State.

"hereinafter referred to as Retail Agent, witnesseth:

"*Appointed Agent.*

"The said Dr. Miles Medical Company hereby appoints said Retail Dealer as one of the retail distributing agents of its Proprietary Medicines and agrees that said Retail Agent may purchase the Proprietary Medicines manufactured by said Dr. Miles Medical Company (each retail package of which the said Company will cause to be identified by a number) at the following prices, to wit:

"*Wholesale Prices.*

"Medicines, of which the retail price is $1.00; $8.00 per dozen.

"Medicines, of which the retail price is 50 cents; $4.00 per dozen.

"Medicines, of which the retail price is 25 cents; $2.00 per dozen.

"*Quantity Discount.*

"Provided that when purchases at one time and on one invoice amount to $15.00 (or more), Wholesale Dis-

tributing Agents are authorized to allow 3 per cent trade discount; if such purchase amounts to $50.00 (or more) 5 per cent trade discount will be allowed, and if such $50.00 quantity be shipped direct to the purchaser from the laboratory of said Dr. Miles Medical Company for the account of such Wholesale Agent, freight will be prepaid, but not otherwise.

"*Full Price.*

"In consideration whereof said Retail Agent agrees in no case to sell or furnish the said Proprietary Medicines to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said Retail Agent further agrees not to sell the said Proprietary Medicines at any price to Wholesale or Retail dealers not accredited agents of the Dr. Miles Medical Company.

"*Violation.*

"It is further agreed between the parties hereto that the giving of any article of value, or the making of any concession by means of trading stamps, cash register coupons, or otherwise, for the purpose of reducing the price above agreed upon shall be considered a violation of this agreement, and further it is agreed between the parties hereto that the Dr. Miles Medical Company will sustain damage in the sum of twenty-five dollars ($25.00) for each violation of any provision of this agreement, it being otherwise impossible to fix the measure of damage.

"This contract will take effect when a duplicate thereof, duly signed by the Retail Agent, has been received and approved by The Dr. Miles Company, at its office at Elkhart, Indiana.

"Done under our hands ——— —, A. D. 1907.

"Fill in date on above line.

"The Dr. Miles Medical Company.

"———— ————, *Retail Dealer.*

"Sign your name on above line in ink.

"To Retail Dealer:

"Paste printed label, giving name and address, that your name may be correctly listed.

"Duplicate. Keep for reference."

As an aid to the maintenance of the prices thus fixed the company devised a system for tracing and identifying, through serial numbers and cards, each wholesale and retail package of its products.

It was alleged that all wholesale and retail druggists, "and all dealers in proprietary medicines," had been given full opportunity, without discrimination, to sign contracts in the form stated, and that such contracts were in force between the complainant "and over four hundred jobbers and wholesalers and twenty-five thousand retail dealers in proprietary medicines in the United States."

The defendant is a Kentucky corporation conducting a wholesale drug business. The bill alleged that the defendant had formerly dealt with the complainant and had full knowledge of all the facts relating to the trade in its medicines; that it had been requested, and refused, to enter into the wholesale contract required by the complainant; that in the city of Cincinnati, Ohio, where the defendant conducted a wholesale drug store, there were a large number of wholesale and retail druggists who had made contracts, of the sort described, with the complainant, and kept its medicines on sale pursuant to the agreed terms and conditions. It was charged that the defendant, "in combination and conspiracy with a number of wholesale and retail dealers in drugs and proprietary medicines, who have not entered into said wholesale and retail contracts" required by the complainant's system and solely for the purpose of selling the remedies to dealers "to be advertised, sold and marketed at cut-rates," and "to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit" from the

sales of the remedies, had unlawfully and fraudulently procured them from the complainant's "wholesale and retail agents" by means "of false and fraudulent representations and statements, and by surreptitious and dishonest methods, and by persuading and inducing, directly and indirectly," a violation of their contracts.

It is further charged that the defendant, having procured the remedies in this manner, had advertised and sold them at less than the jobbing and retail prices established by the complainant; and that for the purpose of concealing the source of supply the identifying serial numbers, which had been stamped upon the labels and cartons, had been obliterated by the defendant or by those acting in collusion with the defendant, and the labels and cartons had been mutilated thus rendering the list of ailments and directions for use illegible, and that the remedies in this condition were sold both to the wholesale and retail dealers and ultimately to buyers for use at cut rates.

The bill prayed for an injunction restraining the defendant from inducing or attempting to induce any party to any of the said "wholesale or retail agency contracts" to "violate or break the same, or to sell or deliver to the defendant, or to any person for it" the complainant's remedies; from procuring or attempting to procure in any way any of these remedies from wholesale or retail dealers who had executed the contracts; from advertising, selling or offering for sale the remedies obtained by any of the described means at less "than the established retail price thereof" or to dealers who had not entered into contract with the complainant; from in any way obliterating, mutilating, removing or covering up the labels and cartons upon the bottles containing the remedies and from making sales without such labels and cartons, and the letter press and numerals thereon, being intact. There was also a prayer for an accounting.

The defendant demurred to the bill generally for want of equity and also specially to that portion of the bill which related to the mutilation and destruction of the identifying numbers and labels.

The Circuit Court sustained the demurrers and dismissed the bill and its judgment was affirmed by the Circuit Court of Appeals.

Mr. Frank F. Reed, with whom *Mr. Edward S. Rogers* was on the brief, for petitioner:

The wholesale contracts are agency contracts and not contracts of sale.

Under each contract between petitioner and wholesale dealers the remedies are in terms and in fact consigned to such wholesaler as a distributing agent. The wholesaler is designated as, and is actually made, an agent. Hence, each sale to a retailer is a sale by petitioner through its agent. The arrangement between petitioner and each wholesaler is clearly one of bailment and not of sale or conditional sale. *Milburn Co.* v. *Peak,* 89 Texas, 209; 34 S. W. Rep. 102; *Willcox & Gibbs Co.* v. *Ewing,* 141 U. S. 627; *York Mfg. Co.* v. *Cassell,* 201 U. S. 344; *Metropolitan Bank* v. *Benedict Co.,* 74 Fed. Rep. 182; *Atlas Glass Co.* v. *Ball Bros. Co.,* 87 Fed. Rep. 418; *Re Galt,* 120 Fed. Rep. 64; *Re Flanders,* 134 Fed. Rep. 560; *Briggs* v. *Foster,* 137 Fed. Rep. 773; *In re Fabian,* 151 Fed. Rep. 949; *In re McGehee,* 166 Fed. Rep. 928; *Franklin* v. *Stoughton Wagon Co.,* 168 Fed. Rep. 857; *Corbitt Buggy Co.* v. *Ricaud,* 169 Fed. Rep. 935; *Walter A. Wood Co.* v. *Vanstory,* 171 Fed. Rep. 375; *Butler Bros. Co.* v. *Rubber Co.,* 156 Fed. Rep. 1; *McCullough* v. *Porter,* 4 W. & S. (Pa.), 177; *Watch Case Co.* v. *Fourth St. Bank,* 194 Pa. St. 535; *Cannon Coal Co.* v. *Taggart,* 1 Colo. App. 60; *First National Bank* v. *Schween, Exr.,* 127 Illinois, 573; *Hunter* v. *Gordon,* 33 Ill. App. 464; *Lenz* v. *Harrison,* 148 Illinois, 598; *Bayliss* v. *Davis,* 47 Iowa, 340; *Norton* v. *Melick,* 97 Iowa, 564;

66 N. W. Rep. 780; *Eldridge* v. *Benson*, 61 Massachusetts, 483; *Hatch* v. *McBrien*, 83 Michigan, 159; 47 N. W. Rep. 214; *Olney* v. *Van Housen*, 3 Thomp. & C. 313; *Elwell* v. *Coon* (N. J.), 46 Atl. Rep. 580; *Lambeth Rope Co.* v. *Brigham*, 170 Massachusetts, 518; *Monitor Mfg. Co.* v. *Jones*, 96 Wisconsin, 619; *Reaper Co.* v. *Raynor*, 38 Wisconsin, 119; *Burton* v. *Goodspeed*, 69 Illinois, 237; *Walker* v. *Butterick*, 105 Massachusetts, 237; *Cordage Co.* v. *Sims*, 44 Nebraska, 148; 62 N. W. Rep. 514; *Sturm* v. *Boker*, 150 U. S. 312; *Balderston* v. *National Rubber Co.*, 18 R. I. 338; 27 Atl. Rep. 507; *Barnes Safe Co.* v. *Tobacco Co.*, 38 W. Va. 158; 18 S. E. Rep. 482; *National Bank* v. *Goodyear*, 90 Georgia, 711; 16 S. E. Rep. 962; *Moline Plow Co.* v. *Rodgers*, 53 Kansas, 743; 37 Pac. Rep. 111; *Fleet* v. *Hertz*, 201 Illinois, 594; *Re Columbus Buggy Co.*, 143 Fed. Rep. 859; *Re Smith & Nixon Piano Co.*, 149 Fed. Rep. 111. *Hartman* v. *J. D. Park Co.*, 145 Fed. Rep. 358; 153 Fed. Rep. 24; *Wells* v. *Abraham*, 146 Fed. Rep. 190; *Dr. Miles M. Co.* v. *Jayne Drug Co.*, 149 Fed. Rep. 838, were sales to jobbers and resale by the jobber to the retailer and distinguished from this case.

Petitioner may lawfully, through wholesale agents, impose terms and conditions upon retail buyers as to price and sale. There is no restraint of trade in agency contracts, whatever restrictions may be imposed upon the agent.

The principal controls the agent. *Rice* v. *Brook*, 20 Fed. Rep. 611, 613; *Weed* v. *Adams*, 37 Connecticut, 378, 380; *Barksdale* v. *Brown*, 1 Nott & McC. 517, 519; *Scott* v. *Rogers*, Abb. Dec. 157, 159; *Field* v. *Farrington*, 10 Wall. 141, 149; *Brown* v. *McGran*, 14 Pet. 479; *Cotton* v. *Hiller*, 52 Mississippi, 7, 13; *Union Hardware Co.* v. *Plume & Atwood Co.*, 58 Connecticut, 219; *Welsh* v. *Wind Mill Co.*, 89 Texas, 653; *Weiboldt* v. *Standard Fashion Co.*, 80 Ill. App. 67; *W. A. Wood Co.* v. *Greenwood Hardware Co.*, 75 S. Car. 378; *Keith* v. *Optical Co.*, 48 Arkansas,

138; *Roller* v. *Ott*, 14 Kansas, 609; *Newell* v. *Meyendorff*, 9 Montana, 254; *Payne* v. *Railway Co.*, 81 Tennessee, 507; *Whitwell* v. *Tobacco Co.*, 125 Fed. Rep. 454, 461; *Arkansas Brokerage Co.* v. *Dunn & Powell Co.*, 173 Fed. Rep. 899; *Robison* v. *Texas Pine Land Assn.*, 40 S. W. Rep. 843; *Hunt* v. *Simonds*, 19 Missouri, 583, 586; *Butterick Co.* v. *Rose*, 141 Wisconsin, 533; 124 N. W. Rep. 647; *Butterick Co.* v. *Fisher*, 203 Massachusetts, 122; 89 N. E. Rep. 189.

Any manufacturer or dealer may sell or refuse to sell at pleasure, and may fix prices, terms and conditions arbitrarily, either personally, or through an agent, when a sale is made; and provisions of the wholesale contract forbidding sales except to accredited retail dealers and except at fixed prices are no more in restraint of trade than the refusal of any trader to deal with anyone except on his own terms would be, or the refusal to sell except at his own price or to deal with persons who, for any reason or for no reason, may be objectionable. *Payne* v. *Railway Co.*, 81 Tennessee, 507; *Whitwell* v. *Tobacco Co.*, 125 Fed. Rep. 454; *C., C., C. & St. L. Ry. Co.* v. *Jenkins*, 174 Illinois, 398; *Live Stock Com. Co.* v. *Live Stock Exchange*, 143 Illinois, 210; *Tanenbaum* v. *N. Y. Fire Ins. Exch.*, 68 N. Y. Supp. 342; *Collins* v. *Am. News Co.*, 69 N. Y. Supp. 638; *Hunt* v. *Simons*, 19 Missouri, 583, 586; *Schulten* v. *Bavarian Brewing Co.*, 96 Kentucky, 224; *Baker* v. *Ins. Co.* (Ky.), 64 S. W. Rep. 913; *McCune* v. *Norwich Gas Co.*, 30 Connecticut, 521, 524; *N. Y. C. & St. L. Ry. Co.* v. *Schaffer*, 65 Oh. St. 414; *Brewster* v. *Miller*, 101 Kentucky, 368; *Anderson* v. *United States*, 171 U. S. 604; *Matthews* v. *Associated Press*, 136 N. Y. 333; 32 N. E. Rep. 981; *Star Publishing Co.* v. *Associated Press*, 159 Missouri, 410; *People* v. *Klaw*, 106 N. Y. Supp. 341, 347; *Union Pacific Coal Co.* v. *United States*, 173 Fed. Rep. 737.

Petitioner's system is legal, and not in restraint of

trade. Petitioner manufactures medicines under secret formulas which are its exclusive property. The medicines themselves embody trade secrets.

Contracts giving the exclusive right to sell the product of a maker in a certain territory are valid. Cases *supra* and *Roller* v. *Ott*, 14 Kansas, 609; *Newell* v. *Myendorff*, 9 Montana, 254; 23 Pac. Rep. 333; *Olmstead* v. *Distilling Co.*, 77 Fed. Rep. 265; *In re Greene*, 52 Fed. 104; *Ferris* v. *American Brew. Co.*, 155 Indiana, 539; 58 N. E. Rep. 701; *Woods* v. *Hart*, 50 Nebraska, 497; *Ward* v. *Hogan*, 11 Abb. N. S. 478; *Palmer* v. *Stebbins*, 3 Pick. 188; *Anheuser-Busch Assn.* v. *Houck*, 27 S. W. Rep. 692; *Fuqua* v. *Pabst Brew. Co.*, 36 S. W. Rep. 479; *Houck* v. *Wright*, 77 Mississippi, 476; *Vandeweghe* v. *American Brew. Co.*, 61 S. W. Rep. 526; *Gates* v. *Hooper*, 90 Texas, 563; *Norton* v. *Thomas*, 99 Texas, 578; *Clark* v. *Wire Fence Co.*, 22 Tex. Civ. App. 41.

Contracts for exclusive dealing in articles are valid. *Cable News Co.* v. *Stone*, 15 N. Y. Supp. 2; *Whitwell* v. *Continental Tob. Co.*, 125 Fed. Rep. 454; *Brown* v. *Rounsavell*, 78 Illinois, 589; *Clark* v. *Crosby*, 37 Vermont, 188; *Shade Roller Co.* v. *Cushman*, 143 Massachusetts, 353; *Blauner* v. *Williams Co.*, 36 Mississippi, 173; *Photographic Co.* v. *Grocery Co.*, 108 S. W. Rep. 768.

Contracts restricting the distribution or use of property are legal. *Phillips* v. *Iola Cement Co.*, 125 Fed. Rep. 593; *Meyer* v. *Estes*, 164 Massachusetts, 457; *Crystal Ice Co.* v. *Brewing Assn.*, 8 Tex. Civ. App. 1; *Bancroft* v. *Embossing Co.*, 72 N. H. 402; *Twomey* v. *People's Ice Co.*, 66 California, 233; *Schwalen* v. *Holmes*, 49 California, 665; *Hodge* v. *Sloan*, 107 N. Y. 244; *Kellogg* v. *Larkin*, 3 Chandler (Wis.), 133; *Lanyon* v. *Garden City Sand Co.*, 223 Illinois, 616; *Leslie* v. *Lorillard*, 110 N. Y. 519.

Contracts for the entire output of a plant are valid. *Carter-Crume Co.* v. *Peurrung*, 86 Fed. Rep. 439; *Heimbuecher* v. *Goff Co.*, 119 Ill. App. 373; *Over* v. *Foundry Co.*,

37 Ind. App. 452; *Van Marter* v. *Babcock*, 23 Barb. 633; *Hadden* v. *Dimmick*, 31 How. Pr. 196.

Restrictions on prices are valid. *Clark* v. *Frank*, 17 Mo. App. 602; *Commonwealth* v. *Grinstead*, 111 Kentucky, 203; *Elliman* v. *Carrington* (1901), 2 Ch. 275; 84 L. T. (N. S.) 858; *Walsh* v. *Dwight*, 58 N. Y. Supp. 91; *Rakemann* v. *Riverbank Imp. Co.*, 167 Massachusetts, 1; *Weiboldt* v. *Standard Fashion Co.*, 80 Ill. App. 67.

Trade secrets and articles embodying them are property monopolies and contracts relating thereto not within the restraint of trade rule.

This absolute dominion over and monopoly in inventions, discoveries and writings is the foundation of the patent and copyright laws and has been so declared in a long series of cases. *Press Publishing Co.* v. *Monroe*, 73 Fed. Rep. 196; *Holmes* v. *Hurst*, 174 U. S. 82; *Millar* v. *Taylor*, 4 Burr. 2303; *Jeffreys* v. *Boosey*, 4 H. L. C. 920; *Duke of Queensbury* v. *Shebbare*, 2 Eden, 329; *Prince Albert* v. *Strange*, 1 MacN. & G. 25; *S. C.*, 18 L. J. Ch. 120; *Bartlette* v. *Crittenden*, 4 McLean, 300; *Abernethy* v. *Hutchinson*, 3 L. J. (O. S.) 209; *Donaldson* v. *Beckett*, 2 Br. Par. Cas. 129; *Pope* v. *Curl*, 2 Atk. 342; *Caird* v. *Sime*, L. R. 12 App. C. 326; *Palmer* v. *DeWitt*, 47 N. Y. 532; *Thompkins* v. *Halleck*, 133 Massachusetts, 32.

To control the sale and prices of his own product by a manufacturer is valid and lawful when the article is made and sold under letters patent or copyright. *Patent cases: Bement* v. *National Harrow Co.*, 186 U. S. 70; *National Phonograph Co., Ltd.*, v. *Edison Bell Co.* (1907), L. R. 1 Ch. 335; 98 L. T. R. 291; *Consolidated Seeded Raisin Co.* v. *Griffin*, 126 Fed. Rep. 364; *Button Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288; *Phonograph Co.* v. *Kaufmann*, 105 Fed. Rep. 960; *Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863; *Cortelyou* v. *Lowe*, 111 Fed. Rep. 1005; *Dickerson* v. *Matheson*, 57 Fed. Rep. 524; *Bonsack Machine Co.* v. *Smith*, 70 Fed. Rep. 383; *Bowling* v. *Taylor*, 40

Fed. Rep. 404; *Dickerson* v. *Tinling*, 84 Fed. Rep. 192; *Butterick Co.* v. *Rose*, 141 Wisconsin, 533; *Shade Roller Co.* v. *Cushman*, 143 Massachusetts, 353; 9 N. E. Rep. 629; *Glue Co.* v. *Russia Cement Co.*, 154 Massachusetts, 92; *Good* v. *Cordage Co.*, 121 N. Y. 1; *Machine Co.* v. *Morse*, 103 Massachusetts, 73; *Cortelyou* v. *Johnson*, 138 Fed. Rep. 110; *Bancroft* v. *Union Embossing Co.*, 72 N. H. 402; *Hulse* v. *Bonsack Machine Co.*, 65 Fed. Rep. 864; *Victor Co.* v. *The Fair*, 123 Fed. Rep. 424; *Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *Whitson* v. *Columbia Co.*, 18 App. D. C. 525; *Rubber Tire Co.* v. *Rubber Works*, 142 Fed. Rep. 531; 154 Fed. Rep. 358; *Indiana Mfg. Co.* v. *Case Co.*, 154 Fed. Rep. 365. *Copyright cases: Straus* v. *Am. Pub. Assn.*, 177 N. Y. 473; *Murphy* v. *Press Assn.*, 56 N. Y. Supp. 597; *Newspaper Assn.* v. *O'Gorman Co.*, 147 Fed. Rep. 616; *Straus* v. *Am. Pub. Assn.*, 194 N. Y. 538.

The methods of manufacture and the articles made under trade secrets, when the article, as here, is itself a secret article with its ingredients and their proportions unknown and undisclosed by the article as sold and inspection thereof, are both property and legal monopolies. Until either voluntary disclosure to, or lawful discovery by, the public of the secret or process they are and continue to be protected as monopolies. *Powell* v. *Vinegar Co.*, 13 R. P. C. 235; 66 L. J., Ch. Div. 763; (1896) 2 Ch. 69; 14 R. P. C. 720, 728; (1897) A. C. 710; *Peabody* v. *Norfolk*, 98 Massachusetts, 452; *Stewart* v. *Hook*, 118 Georgia, 445; *Tabor* v. *Hoffman*, 118 N. Y. 30; *Eastman Co.* v. *Reichenbach*, 20 N. Y. Supp. 110; *Simmons Co.* v. *Waibel*, 1 So. Dak. 488; *National Tube Co.* v. *Eastern Tube Co.*, 13 O. Cir. Dec. 469, 471; *Board of Trade* v. *Christie Co.*, 198 U. S. 236; *Board of Trade* v. *Cella*, 145 Fed. Rep. 28; *Stone* v. *Goss* (N. J.), 55 Atl. Rep. 736; *Thum* v. *Tloczynski*, 114 Michigan, 149; *Westervelt* v. *National Paper Co.*, 154 Indiana, 673; *Salomon* v.

Hertz, 40 N. J. Eq. 400; *S. C.*, 2 Atl. Rep. 379; *Grand Rapids Wood Co.* v. *Hatt*, 152 Michigan, 132; *Extracting Co.* v. *Keystone Co.*, 176 Fed. Rep. 830; *Sanitas Nut Food Co.* v. *Cemer*, 134 Michigan, 370; *Detinning Co.* v. *Am. Can Co.*, 67 N. J. Eq. 243; *Taylor Iron & Steel Co.* v. *Nichols*, 70 N. J. Eq. 541; *National Gum Co.* v. *Braendly*, 51 N. Y. Supp. 93; *Harvey Co.* v. *Drug Co.*, 77 N. Y. Supp. 674; *Pressed Steel Car Co.* v. *Standard Steel Car Co.*, 210 Pa. St. 464; *Eastern Extracting Co.* v. *Greater N. Y. Ex. Co.*, 110 N. Y. Supp. 738; *Union Switch & Signal Co.* v. *Sperry*, 169 Fed. Rep. 926; *Wiggins Sons Co.* v. *Cott-A-Lap Co.*, 169 Fed. Rep. 150.

Mr. Alton B. Parker, with whom *Mr. William J. Shroder* was on the brief, for respondent:

The legal effect of the contracts between petitioner and wholesale drug dealers and jobbers is that of a contract of sale. *The Peoria Mfg. Co.* v. *Lyons*, 153 Illinois, 427; *Howell Son & Co.* v. *Boudor, Tr. et al.*, 95 Virginia, 815; *Conn* v. *Chambers*, 123 App. Div. (N. Y.) 298, aff'd, 195 N. Y. 538; *Yoder* v. *Howarth*, 57 Nebraska, 150; *Mack* v. *Tobacco Co.*, 48 Nebraska, 397; *Powder Co.* v. *Hilderbrand*, 137 Indiana, 462; *Gendre & Co.* v. *Kean*, 28 N. Y. Supp. 7; *Arbuckle Bros.* v. *Kirkpatrick & Co.*, 98 Tennessee, 221; *Arbuckle Bros.* v. *Gates & Brown*, 95 Virginia, 802; *Williams* v. *Tobacco Co.*, 21 Tex. Civ. App. 635; *Snelling* v. *Arbuckle Bros.*, 104 Georgia, 362; *Norwegian Plow Co.* v. *Clark*, 102 Iowa, 31; *De Kruif* v. *Flieman*, 130 Michigan, 12.

The contract is not one of agency. The petitioner has no peculiar, special or exclusive right in the articles manufactured by it, warranting it to carry out, with reference to their sale, a plan or scheme which would otherwise be invalid and illegal. *Mercantile Agency* v. *Jewelers' Pub. Co.*, 155 N. Y. 241; *Larrowe* v. *O'Loughlin*, 88 Fed. Rep. 896.

The attempt of the petitioner in this case is manifestly not only to acquire, without taking out a patent, rights which are only given under the patent and copyright laws, but to do that without complying with the condition on which alone such right can be obtained under such laws, to-wit: the abandonment of the right after a fixed period of time. It is an attempt to maintain a scheme to give it for an unlimited period of time, or for all time to come, a right which the courts have uniformly held can only be obtained for a limited period of time under the patent and copyright laws. Such a scheme is, in the absence of special right, illegal and unlawful. *Wheaton* v. *Peters*, 8 Pet. 591; *Bement* v. *Harrow Company*, 186 U. S. 70; *Edison* v. *Kaufman*, 105 Fed. Rep. 960; *Edison* v. *Pike*, 116 Fed. Rep. 863; *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 424; *Park* v. *N. W. D. A.*, 175 N. Y. 1; *Strauss* v. *Am. Publishers' Assn.*, 177 N. Y. 473; *Gamewell* v. *Crane*, 160 Massachusetts, 50; *Vulcan Powder Co.* v. *Hercules Powder Co.*, 96 California, 510; *Tecktonius* v. *Scott*, 110 Wisconsin, 441; *Pasteur Vaccine Co.* v. *Burkey*, 22 Tex. Civ. Apps. 231; *Fox Pressed Steel Co.* v. *Schoen*, 77 Fed. Rep. 29; *Walsh* v. *Dwight*, 40 App. Div. 513; *Elliman* v. *Carrington* (1901), 2 Chan. 275; *Heaton &c. Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288.

That a patentee may make a contract which is lawful at common law does not warrant the converse of the proposition, *i. e.*, that persons having only common-law rights can make a contract warrantable only under the patent and copyright laws.

The control which the petitioner is attempting to maintain over the subsequent trade, by its vendees, in the goods manufactured by it, is in general restraint of trade and is therefore unlawful at common law.

A restraint of trade may affect the public directly, or the interests of the parties to the contract or agreement directly, and the public only indirectly. 2 Parsons on

Contracts, 7th ed., 887; *Alger* v. *Thatcher*, 19 Pick. 51; *Fowle* v. *Park*, 131 U. S. 88; *Central Transp. Co.* v. *Pullman Car Co.*, 139 U. S. 24, 53; *Vickery* v. *Welch*, 19 Pick. 523; *United States* v. *Addyston &c. Co.*, 85 Fed. Rep. 271.

The system established and maintained by the petitioner controls the entire trade in the articles manufactured by it and is necessarily a general restraint of the trade in the articles in question.

In *Oliver* v. *Gilmore*, 52 Fed. Rep. 562; *Dolph* v. *Troy*, 28 Fed. Rep. 523; *In re Greene*, 52 Rep. Fed. 104; *United States* v. *Nelson*, 52 Fed. Rep. 646; *Dueber Watch Co.* v. *Howard*, 55 Fed. Rep. 851; *Olmstead* v. *Distilling Co.*, 77 Fed. Rep. 265; *Phillips* v. *Iola Cement Co.*, 125 Fed. Rep. 593; *Knapp* v. *Jarvis*, 135 Fed. Rep. 1008; *Grogan* v. *Chaffee*, 156 California, 611; *Walsh* v. *Dwight*, 40 App. Div. 513, *Garst* v. *Harris*, 177 Massachusetts, 72; and *Garst* v. *Charles*, 187 Massachusetts, 144, the courts held the contracts not unlawful because the arrangement did not affect the entire commodity or the right of others to engage in the same business and hence affected in no way the general trade in the articles; and see also *Whitwell* v. *Tobacco Co.*, 125 Fed. Rep. 454; *Commonwealth* v. *Strauss*, 188 Massachusetts, 229; *United States* v. *Jellico &c. Co.*, 46 Fed. Rep. 432; *United States* v. *Coal Dealers' Assn. of Cal.*, 85 Fed. Rep. 252; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 610; *United States* v. *Addyston &c. Co.*, 85 Fed. Rep. 271; aff'd 175 U. S. 211.

For contracts held illegal as constituting or tending to create a monopoly, because their effect was to control and regulate all or such a large proportion of the entire trade in an article of commerce as to affect injuriously the public interests, see *Cravens* v. *Carter*, 92 Fed. Rep. 479; *Montague* v. *Lowry*, 115 Fed. Rep. 27; *S. C.*, 193 U. S. 38; *Gibbs* v. *McNeeley*, 118 Fed. Rep. 120; *Swift & Co.* v. *United States*, 196 U. S. 375; *Getz* v. *Federal Salt Co.*, 147 California, 115; *Hunt* v. *Riverside Club*, 12 Det. Leg. N. 264; *Owen*

v. *Bryan*, 77 N. E. Rep. 302; *Clancy* v. *Onondaga &c. Co.*, 62 Barb. 395; *Dewitt Wire Cloth Co.* v. *N. J. Wire Cloth Co.*, 16 Daly, 529; *People* v. *Duke*, 19 Misc. (N. Y.) 292; *Tuscaloosa Ice Co.* v. *Williams*, 127 Alabama, 110; *Finch* v. *Granite Co.*, 187 Missouri, 244; *Charleston Co.* v. *Kanawha Co.*, 50 S. Car. 876; *Lowry* v. *Tile, Mantel & Grate Assn.*, 106 Fed. Rep. 38; *Ellis* v. *Inman*, 131 Fed. Rep. 182; *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 401, 404; *Cohen* v. *Envelope Co.*, 166 N. Y. 292; *Salt Co.* v. *Guthrie*, 35 Oh. St. 666; *Distilling Co.* v. *Moloney*, 156 Illinois, 448; *State* v. *Standard Oil Co.*, 49 Oh. St. 137; *People* v. *North River Sugar Co.*, 54 Hun, 345; aff'd 123 N. Y. 587; *Bishop* v. *Preservers' Co.*, 157 Illinois, 284; *Harding* v. *Glucose Co.*, 182 Illinois, 551; *Chicago &c. Coal Co.* v. *People*, 214 Illinois, 421; *Texas Standard Oil Co.* v. *Adone*, 83 Texas, 650; *State* v. *Armour Co.*, 173 Missouri, 356; *Santa Clara* v. *Hayes*, 76 California, 287; *Pacific Factor Co.* v. *Adler*, 90 California, 110; *Cleland* v. *Anderson*, 66 Nebraska, 252; *Brown* v. *Jacobs*, 115 Georgia, 429.

The restraint petitioner is attempting to maintain is, even if partial, unreasonable and therefore unlawful. *Parks & Sons* v. *Hartman*, 153 Fed. Rep. 24, 41.

The control the petitioner is attempting to maintain over the entire trade, in the goods manufactured by it, and the system of contracts by which it is attempting to carry out that purpose, are illegal, under the provisions of the Sherman Anti-trust Act.

Its goods are sold to the wholesale and jobbing druggists throughout nearly all of the States of the United States. This is interstate commerce. *Addyston* v. *United States*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; and see *Lowe* v. *Lawlor*, 208 U. S. 274, 293.

The necessary effect of granting the relief would be to

create by judicial sanction a right which can only arise from statute.

The relief should not be granted because its effect would be to aid the petitioner in carrying out that which is unlawful. *Central Transp. Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24; *Gibbs* v. *Gas Co.*, 130 U. S. 396; *Texas & P. Ry. Co.* v. *Southern Pac. Ry. Co.*, 41 La. Ann. 970; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Hooker* v. *Vandewater*, 4 Denio, 349; *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 401; *Emery* v. *Ohio Candle Co.*, 47 Oh. St. 320; 2 High on Injunctions, 3d ed., § 1106; 1 Pomeroy's Eq. Jurisp., §§ 402 *et seq.*

The bill does not set forth facts entitling the petitioner to relief against the respondent.

The mere allegation of knowledge on the part of the respondent of the petitioner's method of business, is not sufficient to warrant the relief restraining it from purchasing the goods. *Apollinaris Co.* v. *Scherer*, 27 Fed. Rep. 18, 21; *Sperry* v. *Hertzberg*, 60 Atl. Rep. 368; *Taddy* v. *Sterious* (1904), 1 Ch. Div. 254; *McGruther* v. *Pitcher* (1904), 2 Ch. Div. 306; *Garst* v. *Hall*, 179 Massachusetts, 588.

The mere inducement is not sufficient, it must be an unlawful inducement, or an inducement by misrepresentation and fraudulent and wrongful means. *National Phonograph Co.* v. *Edison-Bell Co.*, L. R. (1908) 1 Ch. Div. 335, 362, 371; *Benton* v. *Pratt*, 2 Wend. 385; *Rice* v. *Manley*, 66 N. Y. 82; *Angle* v. *Chicago &c. Ry. Co.*, 151 U. S. 1; *Garst* v. *Hall*, 179 Massachusetts, 588, *supra.*

The facts constituting such fraud, wrongful inducement and unlawful means, must be averred. *Setzar* v. *Wilson*, 4 Ired. (N. C.) 501; *McHenry* v. *Hazard*, 45 Barb. 657; *Hanson* v. *Langan*, 30 N. Y. St. Rep. 828; *Butler* v. *Viele*, 44 Barb. 166; *Reed* v. *Guano Co.*, 47 Hun, 410; *Bank* v. *Rochester*, 41 Barb. 341; *Hilson* v. *Libby*, 44 N. Y. Superior Ct. 12; *Benedict* v. *Dake*, 6 How. 352, 353; *Davenport* v.

Taussig, 31 Hun, 563; *Hazard* v. *Griswold*, 21 Fed. Rep. 178; *Savings Bank* v. *Supervisors*, 22 Fed. Rep. 580.

Petitioner has no cause of complaint because the respondent defaces and mutilates the labels or printed matter upon the packages which it purchases and owns.

MR. JUSTICE HUGHES, after making the above statement, delivered the opinion of the court.

The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the States respectively. To accomplish this result it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract known as "*Consignment Contract—Wholesale*," has been made with over four hundred jobbers and wholesale dealers, and the other, described as "*Retail Agency Contract*," with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract to the injury of the other and that, in the absence of an ade-

quate remedy at law, equitable relief will be granted. *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U. S. 1; *Bitterman* v. *Louisville & Nashville Railroad*, 207 U. S. 205.

The principal question is as to the validity of the restrictive agreements.

Preliminarily there are opposing contentions as to the construction of the agreements, or at least of that made with jobbers and wholesale dealers. The complainant insists that the "consignment contract" contemplates a true consignment for sale for account of the complainant, and that those who make sales under it are the complainant's agents and not its vendees. The court below did not so construe the agreement and considered it an effort "to disguise the wholesale dealers in the mask of agency upon the theory that in that character one link in the system for the suppression of the 'cut rate' business might be regarded as valid," and that under this agreement "the jobber must be regarded as the general owner and engaged in selling for himself and not as a mere agent of another." 164 Fed. Rep. 805.

There are certain allegations in the bill which do not accord with the complainant's argument. Thus it is alleged that it "has been and is the uniform custom" of the complainant "to sell said medicines, remedies and cures to jobbers and wholesale druggists, who in turn sell and dispose of the same to retail druggists for sale and distribution to the ultimate purchaser or consumer." And in setting forth the form of the agreement in question it is alleged that it was "required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines and cures." It is further stated that as a means of maintaining "said list of prices," cards bearing serial identifying numbers are placed in each package of remedies "sold to jobbers and wholesale druggists." But it is also alleged in the bill that under the provisions

of the contract the title to the medicines remained in the complainant "until actual sale in good faith to retail dealers, as therein provided."

Turning to the agreement itself, we find that it purports to appoint the party with whom it is made one of the complainant's "Wholesale Distributing Agents," and it is agreed that the complainant, as proprietor, shall consign to the agent "for sale for the account of said Proprietor" such goods as it may deem necessary, "the title thereto and property therein to be and remain in the Proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said Proprietor on demand and the cancellation of this agreement." The goods are to be invoiced to the consignee at stated prices, which are the same as the minimum prices at which the consignee is allowed to sell. It is also agreed that the consignee shall "faithfully and promptly account and pay to the Proprietor the proceeds of all sales, after deducting as full compensation . . . a commission of ten per cent of the invoice value, and a further commission of five per cent on the net amount of each consignment, after deducting the said ten per cent commission, on all advances on account remitted within ten days from the date of any consignment," such advances, however, not to affect the title to the goods and to be repaid should the agreement be terminated and unsold goods, on which advances had been made, be returned. The consignee guarantees payment for all goods sold and promises "to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding."

The consignee agrees "to sell only to the designated Retail Agents of said Proprietor as specified in lists of such Retail Agents furnished by said Proprietor and alterable at the will of said Proprietor." A further provision permits sales "only to the said Retail or Wholesale Agents

of said Proprietor, as per list furnished." No time is fixed for the duration of the agreement.

It is urged that the additional commission of five per cent is to induce, through the guise of "advances," payment for the goods before sales are made, and that unsold goods are to be returned only on the complainant's demand and the cancellation of the agreement. But the consignee is not bound to make these "advances" and it is distinctly provided that he shall not acquire title by making them. It is also said that the consignee may sell at prices higher than those listed, but he is bound by the agreement to account for "the proceeds of all sales" less the stipulated commissions. Nor is the provision as to the time for accounting and remittance of net proceeds to be regarded as inconsistent with agency, in the absence of a showing that in the actual transactions and accounts the consignee was treated as selling on his own behalf and paying as purchaser.

If, however, we consider the "consignment contract" as one which in legal effect provides for consignments of goods to be sold by an agent for his principal's account, and that the tenor of the agreement as set forth must be taken to override the inconsistent general allegations to which we have referred, this alone would not be sufficient to support the bill.

The bill charges that the defendant has unlawfully and fraudulently procured the proprietary medicines from the complainant's "wholesale and retail agents" in violation of their contracts. But it does not allege that the goods procured by the defendant from "wholesale agents" were goods consigned to the latter for sale. The description "wholesale agent" refers to those who have signed the "consignment contract." This contract, however, permits one "wholesale agent" to sell to another "wholesale agent." For all that appears, the goods procured by the defendant may have been purchased by the defendant's

vendors from other wholesale agents. The bill avers that prior to the introduction of the described system the defendant, a wholesale house, had dealt in the remedies and had purchased them from the complainant and from "wholesale druggists and jobbers." There is nothing in the bill which is inconsistent with such an actual course of dealing, permitted by the agreement itself, with respect to the wholesale dealers who have signed it. But the goods which one wholesale agent purchased from another wholesale agent would not be held for sale as consigned goods belonging to the complainant and to be accounted for as such; and their sale by the wholesale dealer, who had acquired title, would be made for his own account and not for that of the complainant. The allegations of the bill and the plain purpose of the system of contracts do not permit the conclusion that it was intended that wholesale dealers purchasing goods in this way should be free to sell to any one at any price. Evidently it was not contemplated that the restrictions of the system should be escaped in such a simple manner. But if the restrictions of the "consignment contract," as to prices and vendees, are to be deemed to apply to the sale of goods which one wholesale dealer has purchased from another, it is evident that the validity of the restrictions in this aspect must be supported on some other ground than that such sale is made by the wholesale dealer as the agent of the complainant. The case presented by the bill cannot properly be regarded as one for inducing breach of trust by an agent.

The other form of contract, adopted by the complainant, while described as a "retail agency contract," is clearly an agreement looking to sale and not to agency. The so-called "retail agents" are not agents at all, either of the complainant or of its consignees, but are contemplated purchasers who buy to sell again, that is, retail dealers. It is agreed that they may purchase the medicines manu-

factured by the complainant at stated prices. There follows this stipulation:

"In consideration whereof said Retail Agent agrees in no case to sell or furnish the said Proprietary Medicines to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said Retail Agent further agrees not to sell the said Proprietary Medicines at any price to Wholesale or Retail dealers not accredited agents of the Dr. Miles Medical Company."

It will be noticed that the "retail agents" are not forbidden to sell either to wholesale or retail dealers if these are "accredited agents" of the complainant, that is if the dealers have signed either of the two contracts the complainant requires. But the restriction is intended to apply whether the retail dealers have bought the goods from those who held under consignment or from other dealers, wholesale or retail, who had purchased them. And in which way the "retail agents" who supplied the medicines to the defendant, had bought them is not shown.

The bill asserts complainant's "right to maintain and preserve the aforesaid system and method of contracts and sales adopted and established by it." It is, as we have seen, a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. The essential features of such a system are thus described by Mr. Justice Lurton (then Circuit Judge), in the opinion of the Circuit Court of Appeals in the case of *John D. Park & Sons Company* v. *Samuel B. Hartman*, 153 Fed. Rep. 24, 42: "The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell

below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about."

That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists and a majority of the retail druggists of the country" and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Bement* v. *National Harrow Co.*, 186 U. S. p. 92; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375.

But it is insisted that the restrictions are not invalid either at common law or under the act of Congress of July 2, 1890, c. 647, 26 Stat. 209, upon the following grounds, which may be taken to embrace the fundamental contentions for the complainant: (1) That the restrictions are valid because they relate to proprietary medicines manufactured under a secret process; and (2) that, apart from this, a manufacturer is entitled to control the prices on all sales of his own products.

First. The first inquiry is whether there is any dis-

tinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to rights secured by letters patent. *Bement* v. *National Harrow Company*, 186 U. S. 70. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent with stipulations as to the prices at which the licensee should sell. The court said, referring to the act of July 2, 1890 (pp. 92, 93): "But that statute clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use and sale. As was said by Chief Justice Marshall in *Grant* v. *Raymond*, 6 Pet. 241–243: "It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. . . . The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. . . . The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the com-

pensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use and sell, the things discovered for a limited time."

The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute and thus to secure the privileges it confers. Its case lies outside the policy of the patent law, and the extent of the right which that law secures is not here involved or determined.

The complainant relies upon the ownership of its secret process and its rights are to be determined accordingly. Any one may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract. *Tabor* v. *Hoffman*, 118 N. Y. 36; *Chadwick* v. *Covell*, 151 Massachusetts, 190. The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. *Fowle* v. *Park*, 131 U. S. 88. A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236.

Here, however, the question concerns not the process of manufacture, but the manufactured product, an article of commerce. The complainant has not communicated its process in trust, or under contract, or executed a license for the use of the process with restrictions as to the manufacture and sale by the licensee to whom the communication is made. The complainant has retained its secret which apparently it believes to be undiscoverable. Whether its remedies are sold or unsold, whether the restrictions as to future sales are valid or invalid, the complainant's secret remains intact. That the complainant may rightfully ob-

ject to attempts to discover it by fraudulent means, or to a breach of trust or contract relating to the process, does not require the conclusion that it is entitled to establish restrictions with respect to future sales by those who purchase its manufactured product. It is said that the remedies "embody" the secret. It would be more correct to say that they are manufactured according to the secret process and do not constitute a communication of it. It is also urged that as the process is secret no one else can manufacture the article. But this argument rests on monopoly of production and not on the secrecy of the process or the particular fact that may confer that monopoly. It implies that, if for any reason monopoly of production exists, it carries with it the right to control the entire trade of the produced article and to prevent any competition that otherwise might arise between wholesale and retail dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by any one who secured control of the source of supply of a necessary raw material or ingredient. But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title. Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership and his dominion does not depend upon whether the process of manufacture is known or unknown, or upon any special advantage he may possess by reason of location, materials or efficiency. The fact that the market may not be supplied with the particular article, unless he produces it, is a practical consequence which does not enlarge his right of property in what he does produce.

If a manufacturer, in the absence of statutory privilege, has the control over the sales of the manufactured article,

for which the complainant here contends, it is not because the process of manufacture is kept secret. In this respect, the maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers. The fact that the article is represented to be curative in its properties does not justify a restriction of trade which would be unlawful as to compositions designed for other purposes.

Second. We come, then, to the second question, whether the complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture.

The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer.

But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, section 360, 'be possessed of a horse or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath

no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.'" *Park* v. *Hartman, supra.* See also Gray on Restraints on Alienation, §§ 27, 28.

Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. It has been held by this court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production. *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339. There the court said (p. 351): "The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." It will hardly be contended, with respect to such a matter, that the manufacturer of an article of commerce, not protected by any statutory grant, is in any better case. See *Taddy & Co.* v. *Sterious & Co.* (1904), 1 Ch. 354; *McGruther* v. *Pitcher* (1904), 2 Ch. 306; *Garst* v. *Hall & Lyon Co.,* 179 Massachusetts, 588. Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement.

With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. p. 409, "The decision in *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *S. C.*, Smith's Leading Cases, 407, 7th Eng. ed.; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345."

"The true view at the present time," said Lord Macnaghten in *Nordenfelt* v. *Maxim-Nordenfelt &c. Co.*, 1904, A. C. p. 565, "I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special

circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they

sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. *People* v. *Sheldon*, 139 N. Y. 251; *Judd* v. *Harrington*, 139 N. Y. 105; *People* v. *Milk Exchange*, 145 N. Y. 267; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271; on app. 175 U. S. 211; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Chapin* v. *Brown*, 83 Iowa, 156; *Craft* v. *McConoughy*, 79 Illinois, 346; *W. H. Hill Co.* v. *Gray & Worcester*, 127 N. W. Rep. (Mich.) 803.

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one,

or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

The questions involved were carefully considered and the decisions reviewed by Judge Lurton in delivering the opinion of the Circuit Court of Appeals in *Park* v. *Hartman, supra*, and, in following that case, it was concluded below that the restrictions sought to be enforced by the bill were invalid both at common law and under the act of Congress of July 2, 1890. We think that the court was right.

The allegations of the bill as to the labels and cartons used by the complainant are evidently incidental to the main charge as to the procurement of violation of the restrictions as to prices and vendees contained in the agreement; and failing as to this no case is made for relief with respect to the trade-marks, which are not shown to have been infringed.

Judgment affirmed.

MR. JUSTICE LURTON took no part in the consideration and decision of this case.

MR. JUSTICE HOLMES, dissenting.

This is a bill to restrain the defendant from inducing, by corruption and fraud, agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price. There are two contracts concerned. The first is that of the jobber or wholesale agent to whom the plaintiff consigns its goods, and I will say a few words about that, although it is not this branch of the case that induces me to speak. That they are agents and not buyers I understand to be conceded, and I do not see how it

can be denied. We have nothing before us but the form and the alleged effect of the written instrument, and they both are express that the title to the goods is to remain in the plaintiff until actual sale as permitted by the contract. So far as this contract limits the authority of the agents as agents I do not understand its validity to be disputed. But it is construed also to permit the purchase of medicine by consignees from other consignees, and to make the specification of prices applicable to goods so purchased as well as to goods consigned. Hence when the bill alleges that the defendant has obtained medicine from these agents by inducing them to break their contracts, the allegation does not require proof of breach of trust by an agent, but would be satisfied by proving a breach of promise in respect of goods that the consignee had bought and owned. This reasoning would have been conclusive in the days of Saunders if the construction of the contract is right, as I suppose that it is. But the contract as to goods purchased is at least in the background and obscure; it is not the main undertaking that the instrument is intended to express. I should have thought that the bill ought to be read as charging the defendant with inducing a breach of the ordinary duty of consignees as such (*Swift & Co.* v. *United States*, 196 U. S. 375, 395), and, therefore, as entitling the plaintiff to relief. *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1.

The second contract is that of the retail agents, so called, being really the first purchasers, fixing the price below which they will not sell to the public. There is no attempt to attach a contract or condition to the goods, as in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, or in any way to restrict dealings with them after they leave the hands of the retail men. The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids a purchaser to contract with his vendor that he will not sell

below a certain price. This is the important question in this case. I suppose that in the case of a single object such as a painting or a statue the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. In the first place by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack. If it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

But I go farther. There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What then is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than

are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter it seems to me that the point of most profitable returns marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

The conduct of the defendant falls within a general prohibition of the law. It is fraudulent and has no merits of its own to recommend it to the favor of the court. An injunction against a defendant's dealing in non-transferable round-trip reduced rate tickets has been granted to a railroad company upon the general principles of the law protecting contracts, and the demoralization of rates has

been referred to as a special circumstance in addition to the general grounds. *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205, 222, 223, 224. The general and special considerations equally apply here, and we ought not to disregard them, unless the evil effect of the contract is very plain. The analogy relied upon to establish that evil effect is that of combinations in restraint of trade. I believe that we have some superstitions on that head, as I have said; but those combinations are entered into with intent to exclude others from a business naturally open to them, and we unhappily have become familiar with the methods by which they are carried out. I venture to say that there is no likeness between them and this case. *Jayne* v. *Loder*, 149 Fed. Rep. 21, 27; and I think that my view prevails in England. *Elliman, Sons & Co.* v. *Carrington & Son, Limited* [1901], 2 Ch. 275. See *Garst* v. *Harris*, 177 Massachusetts, 72; *Garst* v. *Charles*, 187 Massachusetts, 144. I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my view in this dissent.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY *v.* WILLARD.

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

No. 105. Submitted March 17, 1911.—Decided April 10, 1911.

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 below. This question must be asked and answered by the court itself, even when not otherwise suggested and without respect to the relation of the parties to it. *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379.

Consent of parties can never confer jurisdiction upon a Federal court,

and this court can of its own motion prevent the Circuit Court from exercising jurisdiction not conferred upon it by statute. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48.

In the absence of express exemptions in the statute, a statutory permission to a railroad to lease its road does not relieve the lessor from its charter obligations.

Where, as in Illinois, the lessor railroad company remains liable with the lessee company for torts arising from operation, a plaintiff sustaining injuries may bring an action either separately or against both jointly and in the latter case neither defendant can remove on the ground of diverse citizenship if either is a resident of the plaintiff's State.

A defendant cannot say that an action shall be several if the plaintiff has a right, and so declares, to make it joint; and to make it joint is not fraudulent if the right to do so exists, even if plaintiff does so to prevent removal.

Removability of an action depends upon the state of the pleadings and the record at the time of the application.

THE facts, which involve the jurisdiction of the Circuit Court, and the right of a defendant to remove a case thereto from the state court on the ground of separable controversy, are stated in the opinion.

Mr. Albert J. Hopkins and *Mr. Chester M. Dawes* for petitioner:

The Circuit Court of the United States for the Northern District of Illinois had full and complete jurisdiction of said cause, and the Circuit Court of Appeals erred in holding that said court did not acquire jurisdiction, in reversing the judgment of the trial court, and in not affirming the judgment of the trial court. *Hatchen* v. *T. W. & W. Ry. Co.*, 62 Illinois, 477; *Atlantic Railroad R. Co.* v. *Southern Ry. Co.*, 153 Fed. Rep. 122; *Kelly* v. *C. & A. Ry. Co.*, 122 Fed. Rep. 286; *Ross* v. *Erie R. R. Co.*, 120 Fed. Rep. 703; *Durkee* v. *Illinois Central R. R. Co.*, 81 Fed. Rep. 1; *Dishon* v. *C., N. O. & T. P. Ry. Co.*, 133 Fed. Rep. 471; *Kentucky* v. *Powers*, 201 U. S. 1, 34; *Dow* v. *Bradstreet Company*, 46 Fed. Rep. 824; *Kelly* v. *Chicago &c.*

Railway Co., 122 Fed. Rep. 286; *Weaver* v. *Northern Pacific Railway Co.*, 125 Fed. Rep. 155; *Railway Co.* v. *Ramsey*, 22 Wall. 322.

The jurisdiction of the Federal court in this case attached to this cause by reason of the course of the plaintiff. It is a question, not of enlarging the jurisdiction of the Federal courts, but whether or not the plaintiff did not concede, by his course, the jurisdiction of the Federal court. *Davies* v. *Lathrop*, 15 Fed. Rep. 565; *Railway Co.* v. *Ramson*, 22 Wall. 322; *Carrington* v. *Florida R. R. Co.*, 9 Blatchf. 467; *Edgerton* v. *Gilpin*, 3 Woods, 277; *Baggs* v. *Martin*, 179 U. S. 206; *In re Moore*, 209 U. S. 490.

Mr. Arthur J. Eddy, *Mr. Emil C. Wetten* and *Mr. P. C. Haley* for respondent:

In Illinois, when an injury results from the negligent operation of a railway, whether by the corporation to which the franchise is granted, or its lessee, both the lessor and the lessee are liable. *Pennsylvania Co.* v. *Ellett*, 132 Illinois, 654; *C. & E. I. Ry. Co.* v. *Meech*, 163 Illinois, 305; *West Chicago St. Ry. Co.* v. *Horne*, 197 Illinois, 250; *C. & W. I. R. R. Co.* v. *Newell*, 212 Illinois, 336.

An action of tort, which might have been brought against many persons or against one or more of them, and which is brought in a state court against all jointly, contains no separable controversy which will authorize its removal by some of the defendants to the Federal Circuit Court, even if they file separate answers and set up different defenses from the other defendants and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one. *Alabama G. S. R. Co.* v. *Thompson*, 200 U. S. 206; *Powers* v. *Chesapeake &c. R. R. Co.*, 169 U. S. 97; *Louisville &c. Ry. Co.* v. *Wangelin*, 132 U. S. 601; *Plymouth Gold Mining Co.* v. *Amadore &c. Canal Co.*, 118 U. S. 264; *Pirie* v. *Tvedt*, 115 U. S. 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Lyttle* v. *Giles*,

118 U. S. 596; *Torrence* v. *Shed*, 144 U. S. 530; *Connell* v. *Smiley*, 156 U. S. 340; *Hyde* v. *Rubel*, 104 U. S. 407; *Ayres* v. *Wiswall*, 112 U. S. 192; *Warax* v. *Cincinnati &c. R. Co.*, 72 Fed. Rep. 640; *Ill. Cent. R. R. Co.* v. *LeBlanc*, 74 Mississippi, 626.

A defendant has no right to say that an action shall be separate, which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. *Pirie* v. *Tvedt*, 115 U. S. 43.

The question whether there is a separable controversy, warranting a removal, must be determined by the state of the pleadings and the record of the case at the time of the application for removal. *Wilson* v. *Oswego Twp.*, 151 U. S. 65; *Merchants' Cotton Co.* v. *Ins. Co.*, 151 U. S. 384.

In determining whether there is a separable controversy, the cause of action is for all the purposes of the suit whatever the plaintiff declares it to be in its pleadings and the allegations of the plaintiff must be accepted as true. Cases *supra* and *Louisville &c. R. R. Co.* v. *Ide*, 114 U. S. 52; *Deere* v. *Chicago &c. R. R. Co.*, 85 Fed. Rep. 881; *Offner Case*, 148 Fed. Rep. 201.

Where the pleadings do not on their face show a separable controversy, its existence must be averred in the petition for removal by the statement of the *facts* from which the conclusion arises. *Anderson* v. *Bowers*, 40 Fed. Rep. 708.

Mr. Justice Harlan delivered the opinion of the court.

This suit originated in one of the courts of Illinois. It is a *joint* action against two railroad corporations—the Chicago, Burlington and Quincy Rail*way* Company of Iowa, and the Chicago, Burlington and Quincy Rail*road* Company of Illinois—to recover damages alleged to have

been caused by the negligence, carelessness and improper conduct of the defendants by their agents and servants, whereby one Harold R. Wellman, the intestate of the plaintiff, was killed. The particular railroad, from the operation of which the injuries in question arose, is located wholly in Illinois and the plaintiff Willard is a citizen of that State. The case involves a question, to be presently mentioned, of the jurisdiction of the Circuit Court. It also involves a question as to the power and duty of an appellate Federal court, where it appears, *from the record,* that a subordinate court has disposed of a case of which it could not properly take cognizance, but in respect to which the parties are silent.

The facts are: The defendant, the Iowa corporation, filed its petition for the removal of this cause to the Circuit Court of the United States. It appears that in November, 1901, the Chicago, Burlington and Quincy Rail*road* Company of Illinois leased, for a period of ninety-nine years from September 30, 1901, to the Chicago, Burlington and Quincy Rail*way* Company of Iowa its line of railway and the rights, privileges, franchises, rights of way, yards, stations, tracks and all appliances thereunto belonging, including in the lease that part of the road in Illinois described in the declaration; that the lessor company also assigned to the lessee company all other real and personal property not above mentioned, and all the rights, privileges, immunities and franchises of the lessor company, except its franchise to be a corporation; that after December 21, 1901, as well as on the day of the alleged injury and death of Wellman, the Iowa company operated and was then operating, controlling and managing the railway lines of the Illinois company. At the time of the injuries complained of neither the Illinois company nor any of its servants controlled, used or operated the railroad engine or cars with which the deceased came into contact and was killed, but that the management, custody,

control and operation of the leased road and property was with the Iowa corporation exclusively; and that there was, it is alleged, a separable controversy between the Iowa company and the plaintiff, citizen of Illinois, which entitled that corporation to have the cause transferred for trial into the Federal court. It was further alleged that as the plaintiff was a citizen of Illinois, the two corporations were *fraudulently and improperly joined* as co-defendants *for the purpose of defeating the removal of the case to the Federal court.*

The state court made an order recognizing the right of the Iowa corporation to have the cause removed to the Federal court. Subsequently, in the Circuit Court of the United States, the plaintiff moved to remand the case to the state court; but a few days thereafter he was given leave to withdraw that motion and to amend his declaration. He did not renew the motion to remand, but was given leave to amend his declaration, under which privilege he made extended amendments. But we do not perceive that those amendments affect the conclusion which, in our judgment, must be reached in the determination of the cause. The case remained throughout as a *joint* action against two companies, one of which was a corporation of the State of which the plaintiff was a citizen. What would have been the effect of any amendment made by the plaintiff, in the Circuit Court, eliminating or dismissing the lessor company, the Illinois corporation, altogether as a party defendant—thus leaving the case as presenting issues between citizens of different States only—we have no occasion now to determine. A trial was had in the Circuit Court, between the plaintiff and the two corporations, without objection as to the jurisdiction of that court, and at the conclusion of the evidence the jury, by direction of the court, returned a verdict for the defendants, and a judgment was accordingly rendered for them. The case went to the Circuit Court of Appeals, where that

court, being of opinion that the record disclosed a want of jurisdiction in the Circuit Court of the United States, the judgment was reversed, with directions to remand to the state court. That action was taken by the Circuit Court of Appeals upon its own inspection of the record, and without any suggestion by either party, as to a want of jurisdiction in the Circuit Court. The case is now here upon certiorari.

Had the Circuit Court jurisdiction of this case? As the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the Federal court without objection, was the Circuit Court of Appeals, or is this court, precluded from considering the question of jurisdiction? These questions can have but one answer. It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of original jurisdiction could take cognizance of the case. The leading authority on the subject is *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court, "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." This rule was said to be inflexible and without exception, and has been uniformly sustained by this court. In *Ayers* v. *Watson*, 113 U. S. 594, 598, Mr. Justice Bradley, speaking for the court, and referring to the second section (the removal section) of

the act of 1875, said: "In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield & Coldwater Railway Co.* v. *Swan*, 111 U. S. 379." In *Cameron* v. *Hodges*, 127 U. S. 322, 326, it was held to be an express requirement of the statute that the Circuit Court shall remand a case to the court from which it was removed whenever it appears that it is not one of which the Federal court can properly take cognizance. In *Martin* v. *Baltimore & Ohio R. R.*, 151 U. S. 673, 689, after referring to the judiciary act of 1875, Mr. Justice Gray, speaking for the court, said: "Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed." In *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62, 63, in which both parties insisted upon the jurisdiction of the Circuit Court, the court said: "Consent of [the] parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute." In *Thomas* v. *Board of Trustees*, 195 U. S. 207, 211: "It is equally well established that when jurisdiction depends upon diverse citizenship the absence of sufficient averments or of facts in the record showing such required diversity of citizen-

ship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived." In *Kentucky* v. *Powers*, 201 U. S. 1, 35, it was said that this court "must see to it that they [the subordinate courts of the United States] do not usurp authority not affirmatively given to them by acts of Congress"—citing *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382. In *Perez* v. *Fernandez*, 202 U. S. 80, 100, which came to this court from the District Court of the United States for the District of Porto Rico—this court upon the authority of the *Swan* and other cases cited—held that "where the jurisdiction fails the objection can be raised in this court; if not by the parties, then by the court itself." There are many other authorities to the same effect, but we cite a few of the additional cases: *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237; *Peper* v. *Fordyce*, *Ib.* 469; *Blacklock* v. *Small*, 127 U. S. 96, 103, 105; *Metcalf* v. *Watertown*, 128 U. S. 586, 587; *Crehore* v. *Ohio &c. Railway Co.*, 131 U. S. 240, 242; *Graves* v. *Corbin*, 132 U. S. 571, 589; *Neel* v. *Pennsylvania Co.*, 157 U. S. 153; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119, 120.

We now come to the question of jurisdiction upon its merits. If, under the statutes relating to the jurisdiction of the Federal courts, and upon the facts as disclosed by the record and litigated, the Circuit Court could not have taken cognizance of the case, then, according to the authorities above cited, it was the duty of the Circuit Court of Appeals, upon its own motion and without regard to the wishes of the parties or of either of them, to reverse the judgment of the trial court, with directions to remand the case to the state court.

We are of opinion that the Circuit Court could not properly take cognizance of this case. The action was brought by a citizen of Illinois against two companies—one a corporation of Iowa and the other a corporation of

Illinois. It is said that as, long before the injury complained of, the Illinois corporation, the legal owner of the railroad in question, had leased to the Iowa company its road, with its property, rights, privileges, yards, stations, etc., appertaining thereto (excepting only the lessor company's franchise to be a corporation), and was in nowise, by its agents or servants, in the control of the road or of its operations at the time the plaintiff's intestate was killed, the making of that corporation a party defendant in order to defeat the removal of the case to the Federal court was fraudulent and improper. A complete answer to this suggestion is that by the settled law of Illinois at the time the injury in question was received the lessor company of Illinois, although it had ceased to operate the road, was liable with the lessee company in such an action as this. The cause of action arose in Illinois, and it was entirely competent for that State in the exercise of its governmental powers to say that one of its own corporations, operating a railroad within its limits, by its authority, shall not, by leasing its road and property, be freed from liability for damages for which it would have been legally liable under its charter had it not made such lease.

In *C. & G. T. Ry. Co.* v. *Hart*, 209 Illinois, 414, the Supreme Court of Illinois, after referring to Elliott on Railroads, in which it is admitted that the weight of authority was that the lessor company, unless expressly exempted by statute, was liable for injuries caused by the negligence of the lessee company, its agents and servants, said: "We think this court is committed to the view held by the current of authorities on the question, and, moreover, that, in sound reason and as the better public policy, the doctrine should be maintained that the lessor company shall be required to answer for the consequences of the negligence of the lessee company in the operation of the road, not only to the public, but also to servants of the lessee company who have been injured by actionable

negligence of the lessee company. The charter of the lessor company empowered it to construct this line of railroad and operate trains thereon. It became its duty to exercise those chartered powers, otherwise they would become lost by non-user. The statute authorized it to discharge that duty through a lessee, and it adopted that means of performing the duty which the State had created it to perform. The statute which authorized it to operate its road by means of a lessee did not, however, purport to relieve it of the obligation to serve the public by operating the road, nor of any of the consequences or liabilities which would attach to it if it operated the road itself. (3 Starr & Cur. Stat. 1896, p. 3247.) Statutory permission to lease its road does not relieve a railroad company from the obligations cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. (*Balsley* v. *St. Louis, Alton and Terre Haute Railroad Co.*, 119 Illinois, 68.) While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employés of the lessee companies to whom is entrusted the operation of their roads are competent and that they perform the duties devolving upon them with ordinary care and skill, for upon the character and condition of safety of such engines and cars and on the competency and care of such employés depend the lives and property of the general public. As a matter of public policy such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands. The General Assembly of this State, though willing to permit railroad companies to operate their lines of road by lessees, refrained from re-

lieving the lessor companies from any of their obligations, duties or liabilities. Therefore it is that though a railroad company may, by lease or otherwise, entrust the execution of its chartered powers and duties to a lessee company, this court has expressed the view [that] the lessee company, while engaged in exercising such chartered privileges or chartered powers of the railroad company, is to be regarded as the servant or agent of the lessor company."

In *West Chicago Street R. R. Co.* v. *Horne*, 197 Illinois, 250, 251, the state Supreme Court said that "the law is well settled that when an injury results from the negligence or unlawful operation of a railway, whether by the corporation to which the franchise is granted or by another corporation which the proprietary company authorizes or permits to use its tracks, both the lessor and the lessee are liable to respond in damages to the party injured"—citing *Pennsylvania Co.* v. *Ellett*, 132 Illinois, 654; *Chicago and Erie Railroad Co.* v. *Meech*, 163 Illinois, 305. In the *Ellett Case*, the language of the court was: "The law has become settled in this State, by an unbroken line of decisions, that the grant of a franchise, giving the right to build, own and operate a railway, carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." Many cases in Illinois were cited by the state court in support of its view.

It is thus made clear that if the plaintiff had any cause of action on account of the injury in question he could bring a joint action in an Illinois court against the lessor and lessee companies. Whatever liability was incurred

on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action. In *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 96, 97, which was an action against a railroad company and several of its servants for negligence resulting in an injury alleged to have been caused by the joint negligence or carelessness of all the defendants, the court, speaking by Mr. Justice Gray, said: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.' A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings"—citing *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340.

In the case of *Alabama Great Southern Ry.* v. *Thompson*, 200 U. S. 206, 216, 218, after referring to *L. & N. R. R. Co.* v. *Ide*, 114 U. S. 52, in which Chief Justice Waite said that a defendant had no right to say that an action shall be several which a plaintiff elects to make joint, this court,

speaking by Mr. Justice Day said: "The language is used of an action begun in the state court, and it is recognized that the plaintiff may select his own manner of bringing his action and must stand or fall by his election. If he has improperly joined causes of action he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal, *Wilson* v. *Oswego Township*, 151 U. S. 56, 66, and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal," citing the above cases, and in addition *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *Graves* v. *Corbin*, 132 U. S. 571; *East Tennessee, V. & G. R. R.* v. *Grayson*, 119 U. S. 240; *Chesapeake & Ohio R. R.* v. *Dixon*, 179 U. S. 131; *Southern Ry.* v. *Carson*, 194 U. S. 136. Again, in the same case: "Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly

between citizens of different States. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal court."

It results that upon the face of the record the action throughout was proceeded in as a joint action, and that there was no separable controversy, in such an action, entitling the Iowa corporation, as matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a co-defendant with the Iowa corporation when such a charge is negatived, as matter of law, by the fact that the plaintiff was, as we have seen, entitled under the laws of Illinois, where the cause of action originated and within which the road in question was located, to bring a joint action against the Illinois and Iowa companies. *Ill. Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316. He may have preferred to have the case tried in the state court, just as the Iowa corporation preferred the Federal court. But these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and lessee companies and to carry it on in that form to a conclusion. The silence of the parties, at the trial, or in the appellate court, on the question of jurisdiction could not, in disregard of the judiciary act, confer authority on the Circuit Court to try the case. The Circuit Court of Appeals, therefore, properly, of its own motion, reversed the judgment of the trial court and sent the case back to the Circuit Court, with instructions to remand it to the state court. Restricting this opinion to the case made by the record before us, and as litigated, and without imagining cases in which the rules herein announced might be difficult to apply, the judgment is

Affirmed.

DIAMOND RUBBER COMPANY OF NEW YORK *v.* CONSOLIDATED RUBBER TIRE COMPANY.

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

No. 36. Argued February 28, March 1, 1911.—Decided April 10, 1911.

Where a device possesses such amount of change from the prior art as to receive approval of the Patent Office, it is entitled to the presumption of invention which attaches to a patent.

An inventor is entitled to all that his patent fairly covers, even though its complete capacity is not recited in the specifications and was unknown to the inventor prior to the patent issuing.

The law regards a change as a novelty, and the acceptance and utility of the change as further evidence, even as a demonstration, of novelty.

The rubber carriage tire involved in this case and patented to Grant attained a degree of utility not reached by any prior patent, and, although only a step beyond the prior art, is entitled to be patented as an invention.

Utility of a device may be attested by litigation over it showing and measuring the existence of public demand for its use.

While extensive use of an article beyond that of its rivals may be induced by advertising, where the use becomes practically exclusive a presumption of law will attribute that result to its essential excellence and its superiority over other forms in use.

Elements of a combination may all be old, for in making a combination the inventor has the whole field of mechanics to draw from. *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. p. 318.

On the evidence this court finds that the improvement on rubber tires involved in this case possesses the power ascribed to it by the inventor and denied by those using it without authority, and holds that this power was not the result of chance but was achieved by careful study of scientific and mechanical problems necessary to overcome defects in all other existing articles of that class.

In the courts below defendants relied on invalidity of complainant's patent, and did not press the defense of non-infringement, and also conceded that infringement existed in prior litigation, and this court holds that infringement exists.

Quære whether under *Kessler* v. *Eldred*, 206 U. S. 285, the injunction can extend to sale of articles in other circuits in which complainant's patent has been held invalid.

157 Fed. Rep. 677, and 162 Fed. Rep. 892, affirming 147 Fed. Rep. 739, affirmed.

THE facts, which involve the validity of certain letters patent for improvement in rubber tires, are stated in the opinion.

Mr. Charles K. Offield for petitioner.

Mr. Frederick P. Fish, with whom *Mr. C. W. Stapleton* and *Mr. J. L. Stackpole* were on the brief, for respondents.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit sustaining a patent for an improvement in rubber tires issued to Arthur W. Grant, February 18, 1896. The patent, and those which it is contended anticipate it, have received full exposition in the opinion of that court. 157 Fed. Rep. 677, and 162 Fed. Rep. 892, affirming 147 Fed. Rep. 739. It and they were also passed upon and the patent sustained in *Rubber Tire Wheel Co.* v. *Columbia Pneumatic Wagon Wheel Co.*, 91 Fed. Rep. 978, and in *Consolidated Rubber Tire Co.* v. *Finlay Rubber Tire Co.*, 116 Fed. Rep. 629; *Consolidated Rubber Tire Co.* v. *Firestone Tire and Rubber Co.*, 151 Fed. Rep. 237. See also *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works*, 142 Fed. Rep. 531, 533, and the same case, 154 Fed. Rep. 358, 362. It was held invalid in *Goodyear Tire & Rubber Co. et al.* v. *Rubber Tire Wheel Co.* (C. C. App. Sixth Circuit), 116 Fed. Rep. 363, reversing the Circuit Court, Judge Wing presiding. It was also declared invalid in *Rubber Tire Wheel Co.* v. *Victor Rubber Tire Co.*, 123 Fed. Rep. 85, following 116 Fed. Rep. 363, *supra*.

A further display of the patent and of its alleged anticipating devices would seem to be unnecessary, and that we might immediately take up a review of the divergent decisions. There is a controversy as to whether they are divergent and irreconcilable in fundamental conceptions of the patent as well as in result.

We may say at the outset of this asserted conflict between the cases that the Court of Appeals for the Second Circuit considered that there was no antagonism between its decision and that of the Court of Appeals for the Sixth Circuit. It proceeded, as it in effect said, upon "new facts and features which have been added to or developed from the records in the earlier cases." However, something more is required of us than the reconciliation of other cases, some consideration of the patent and the state of the art prior to it.

The patent was issued to Arthur W. Grant, February 18, 1896, and he declares in the specification he has invented "certain new and useful improvements in rubber tire wheels . . . designed for use on ordinary vehicles, such as wagons, buggies, and carriages, . . . and consist in the construction of parts hereinafter described and set forth in the claim." The claims are as follows:

"1. A vehicle-wheel having a metallic rim with angularly-projecting flanges to form a channel or groove with tapered or inclined sides, a rubber tire, the inner portion of which is adapted to fit in said groove or channel and the outer portion having sides at an angle to the inner portion, the angle or corner between the outer and inner portions being located within the outer periphery of the flanges, and independent retaining-wires passing entirely through the inner portions of said tire and also within the outer peripheries of the flanges, substantially as described.

"2. A vehicle-wheel having a metallic rim with outwardly-projecting flanges at an angle to the plane of said

wheel so as to form a channel or groove having tapered or inclined sides, a rubber tire, the inner portion of which is adapted to fit in said tapered groove or channel, and the outer or exposed portions formed at an angle thereto, the angle or corner between the said portions being placed within the outer periphery of said flanges, openings extending entirely through the unexposed portion of said tire, and independent retaining-wires in said openings, and a reinforcing-strip of fibrous material placed at the bottom of said tire and wholly within said flanges, substantially as specified."

It will be observed that the tire is composed of three elements: First, the channel or groove with tapered or inclined sides; second, the rubber tire adapted to fit into the channel or groove, and shaped as described; third, the fastening device, that is, the independent retaining wires located as indicated.

The shape and relation of the parts are illustrated in the following figures (see p. 432) taken from the patent:

Fig. 1

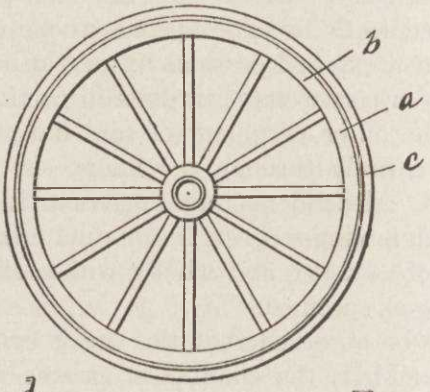


Fig. 1c

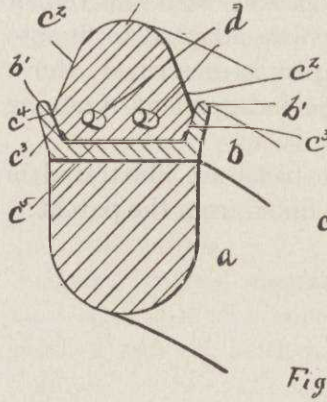


Fig. 4.

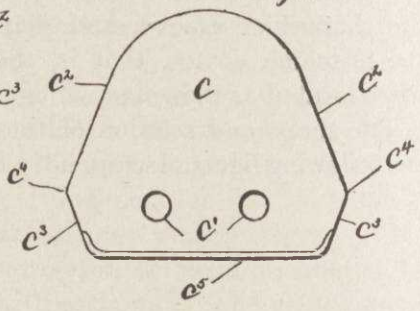
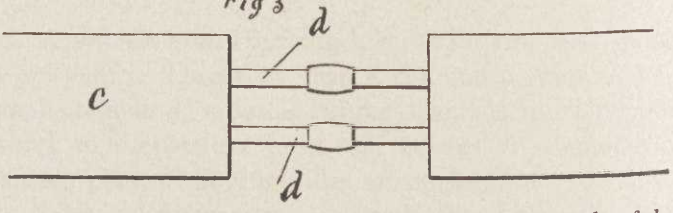


Fig. 3



These figures explain themselves, but we copy the following from the specifications:

"In the accompanying drawings, Fig. 1 is a side elevation of a wheel embodying my invention. Fig. 2 is a sectional elevation of the wheel-rim, shown partly in perspective. Fig. 3 is a partial longitudinal section through the tire, showing the openings for the retaining wires.

Fig. 4 is a transverse sectional view of the rubber tire in detail."

It is conceded that the claims are narrow, counsel saying that they are "limited closely to the specific construction of the Grant tire as it is actually shown and described in the patent." And a right to equivalents is disclaimed. Indeed, a certain merit is made of this as exhibiting at once the simplicity and perfection of the invention and the tribute paid to its excellence by respondent by exactly imitating it, instead of attempting to evade it. It is pointed out that the co-action of the parts is so dependent upon their shape and relation that any alteration destroys their coöperation and the utility of the tire. There is strength in the contention, as we shall presently see.

Anticipating somewhat, we may say that the tire has utility is not disputed; to what its utility is to be attributed is in controversy. The respondents, the Tire Company, contend that the tire is at once firm and mobile in its channel, "creeps" (moves slowly around the edge of the rim), and will yield laterally, and thus the lateral blows against it will be cushioned. It is further contended that if the tire be "tipped from its seat in the channel by a side blow" it "automatically restores itself to normal position when the side pressure is released." In other words, and in the language of one of the expert witnesses, the tire has the capacity to rise and fall and reseat itself under lateral strain, that is, to rise slightly from the rim on one side, independently of the other, when subjected to very great strain, and immediately reseat itself when such strain is removed. "It must be borne in mind," counsel say, "that the Grant tire is not cemented into the channel. This is an essential and important point. Any tire that is cemented in its channel is rigid and cannot 'creep' or yield to lateral blows. It is, therefore, easily and quickly destroyed. The absence of cement in the Grant tire is a vital characteristic." And, further, that Grant,

"by omitting the cement and by permitting the tire to tip, to creep and to move in its channel, obtained a radically new and useful result." And it is insisted that this results because the tire is a new and patentable combination of parts co-acting in the manner of a true combination to produce a new and useful result, and is not an aggregation of old elements or parts each performing its own function and nothing more. These propositions are combated by the Rubber Company, and it is insisted that the testimony is "conclusive and uncontradicted that the Grant tire, clamped to the tire or rim by the straining tension of the two wires," has not the capacity attributed to it, "and never could have." And it is said that "it is manifest that this question can be easily determined as a question of fact," and that the testimony "proves such asserted movement a myth and a fallacy." And, it is urged, that such capacity in the tire is not recited in the specifications of the patent, and was unknown to Grant.

This tipping capacity is made the pivot of the controversy. It was as to that that the Courts of Appeals for the Sixth and Second Circuits disagreed either upon the difference of the testimony in the cases, or more deeply, on principle. The controversy and Grant's alleged ignorance of the tipping characteristic of the tire really present some anomaly. The tire has utility, a utility that has secured an almost universal acceptance and employment of it, as will subsequently appear. It was certainly not an exact repetition of the prior art. It attained an end not attained by anything in the prior art, and has been accepted as the termination of the struggle for a completely successful tire. It possesses such amount of change from the prior art as to have received the approval of the Patent Office, and is entitled to the presumption of invention which attaches to a patent. Its simplicity should not blind us as to its character. Many things,

and the patent law abounds in illustrations, seem obvious after they have been done, and, "in the light of the accomplished result," it is often a matter of wonder how they so long "eluded the search of the discoverer and set at defiance the speculations of inventive genius." *Pearl* v. *Ocean Mills*, 11 Off. Gaz. 2. Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration. And it recognizes degrees of change, dividing inventions into primary and secondary, and as they are, one or the other, gives a proportionate dominion to its patent grant. In other words, the invention may be broadly new, subjecting all that comes after it to tribute (*Railway Co.* v. *Sayles*, 97 U. S. 554, 556); it may be the successor, in a sense, of all that went before, a step only in the march of improvement, and limited, therefore, to its precise form and elements, as the patent in suit is conceded to be. In its narrow and humble form it may not excite our wonder as may the broader or pretentious form, but it has as firm a right to protection. Nor does it detract from its merit that it is the result of experiment, and not the instant and perfect product of inventive power. A patentee may be baldly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities he is entitled to the rank and protection of an inventor. And how can it take from his merit that he may not know all of the forces which he has brought into operation? It is certainly

not necessary that he understand or be able to state the scientific principles underlying his invention, and it is immaterial whether he can stand a successful examination as to the speculative ideas involved. *Andrew* v. *Croos*, 8 Fed. Rep. 269; *Eames* v. *Andrews*, 122 U. S. 40, 55; *St. Louis Stamping Co.* v. *Quinby*, 16 Off. Gaz. 135; *Dixon Wood Co.* v. *Pfeifer*, 55 Fed. Rep. 390; *Cleveland Foundry Co.* v. *Detroit Vapor Stove Co.* (C. C. A. Sixth Circuit), 131 Fed. Rep. 853; *Van Epps* v. *United Box Co.* (C. C. A. Second Circuit), 143 Fed. Rep. 869; *Westmoreland Specialty Co.* v. *Hogan* (C. C. A. Third Circuit), 167 Fed. Rep. 327. He must, indeed, make such disclosure and description of his invention that it may be put into practice. In this he must be clear. He must not put forth a puzzle for invention or experiment to solve but the description is sufficient if those skilled in the art can understand it. This satisfies the law, which only requires as a condition of its protection that the world be given something new and that the world be taught how to use it. It is no concern of the world whether the principle upon which the new construction acts be obvious or obscure, so that it inheres in the new construction.

This discussion may be broader than the contention of the Rubber Company requires; indeed, may imply a misunderstanding of it. The contention may only mean that Grant did not discern the manner of the operation of the elements which he combined, and therefore did not really invent any thing, only assembled old elements, changing their relations somewhat and retaining their essential character and effect. We should be slow to infer such ignorance. It is difficult to suppose that the contriver of a successful device did not understand how it operated; that he saw nothing in it and committed it to the world without seeing anything in it, but a composition of wood, rubber and iron in certain relations without understanding or attempting to discover the law and principle of its or-

ganization and efficiency. Grant's situation demanded caution and knowledge. He was confronted by what has been termed a "crowded" prior art; he might expect to encounter litigation, and, even before litigation, he would have to satisfy the Patent Office of the novelty and utility of his device, and it is hard to believe that he did not know the coöperating law of the elements which he had combined and only unconsciously made use of it. We find the contention difficult to handle. When a person produces a useful instrument, to say that he did not know what he was about is at least confusing. To take from him the advantage of it upon nice speculation as to whether it was an ignorant guess or confident knowledge and adaptation, might do him great injustice. His success is his title to consideration.

In our decision thus far we have assumed that the Grant tire is an invention, but as that is disputed we must examine its right to such distinction. The Rubber Company denies invention to it, and, considering that its pretension to such quality depends upon the possession of tipping power (including in this reseating power), contests the existence of such power; and, even granting its existence, it is yet contended that anticipation may be demonstrated. In other words, it is insisted that if tipping power exist in the Grant patent it existed in prior patents, and that "the old art was crowded with numerous prototypes and predecessors of this Grant tire, with every thought and suggestion of novelty and utility that can be found in drawings and specifications of the Grant patent, or in the idealized contentions as to the patent by the visions and dreams of the experts and counsel for the patent."

Two patents are selected to sustain the contention, out of what are said to be a large number of United States and foreign patents, with the comment that "if they do not show anticipation none of the others will show it, and if they do anticipate the Grant patent, it is entirely im-

material whether the others do or not." They are both English patents issued to Frank Stanley Willoughby. We copy from the Rubber Company's brief the figures of the patent 5924.

FIG. 3

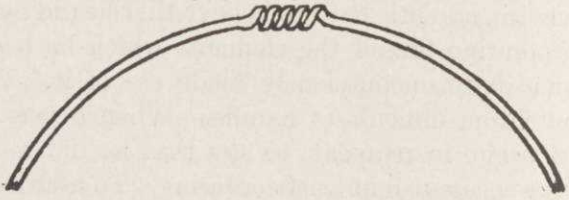


FIG. 6.

FIG. 7a.

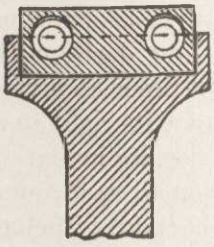


FIG. 8.

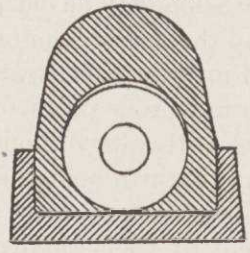
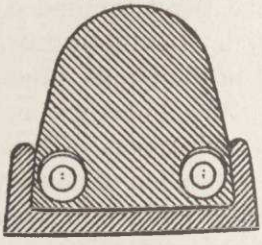


FIG. 8a.



The following is the explanation given by counsel of the figures:

"The drawings of the Willoughby patent of March 26, 1892, No. 5,924, as to the flanged channel, show the flanges in three different positions as to the solid rubber tire. Fig. 8 shows the flange at right angles of the rim; Fig. 8[a]

shows the flanges somewhat inwardly inclined with the two retaining wires, and Fig. 7[a] shows the flanges vertical with two retaining wires, the retaining wires in Fig. 8[a] being below the outer periphery of the flanges, and the two retaining wires of Fig. 7[a] being centrally located, as to their openings, with the periphery of the flanges. In Fig. 6, however, which is a pneumatic tire (a tire when highly inflated is as solid as a rubber tire) the flanges are outwardly flaring and the two retaining wires are substantially below the periphery of the flanges."

There are resemblances and differences in the figures to those of the Grant patent and we have let the Rubber Company set forth the resemblances. The differences are substantial. To represent them we cannot do better than to quote the description given of them by Judge Thomas, 91 Fed. Rep. 988, as follows:

"The Willoughby patent, No. 5,924, Fig. 8[a], shows in combination wire connections, also described in the specification, very similar, save in location, to those used by Grant, and the figure shows also a very slight angle located slightly within the flanges. The rim, however, is of the clinger variety; that is, the flanges incline inwardly, and bind the rubber on each side. Such a tire thwarts the lateral play otherwise permitted to the rubber by the wires, and, although almost imperceptible angles appear, made by the sides of the rubber, they are not sufficient to give the immunity resulting from a well-defined angle whose vertex is within the flaring rim. Figures 5[a] and 5[c] show rims shaped like the segment of a circle, in which are seated spherical rubbers held in place by a single wire. The rim is described in the specifications as U or V-shaped. A V-shaped rim must have flaring flanges, but the rim is quite unlike that employed by Grant, and in the entire absence of the angle the functions attributed to the Grant tire seem to be absent. Indeed, the freedom of action permitted by the wire in the rim used by Grant seems to

be denied the tire, for the reason that the rubber is confined by the V-shaped channel.

"The Willoughby patent, No. 18,030, shows wire connection, flaring flanges and angle, (see Figs. 26, 30, 31,) and in mere coincidence of parts seems to be the nearest approach to the Grant tire. But look at these figures, and all possible conception of coincidence of function is dissipated at once. There is the flaring rim, in which is seated a rubber upon which is placed a steel outer tire, through which pass the openings and wires. The angle is far without the upper edges of the rim, and it appears that neither function ascribed to the Grant tire is obtained."

Willoughby patent No. 18,030, has no relevancy whatever. It is true it has flanges upon the rim, flaring and at right angles, and it is illustrated by figures showing what may be called retaining wires, to quote from the brief of counsel, "above the periphery of the flanges, another substantially on a line with the periphery of the flanges, and three of the figures showing the retaining wires substantially below the periphery of the respective flanges." It is manifest that the relation of the retaining wires to the periphery of the flanges is absolutely unimportant in the tire. Willoughby, describing his invention, says: "The object of my present invention is as in my previous one to provide a metallic outer tyre or armour to rubber which is of itself flexible." The retaining wires hold the metallic exterior to the rubber bed.

The utility of the Grant patent, therefore, was not attained in the Willoughby patent. The Rubber Company's conduct is confirmation of this. It uses the Grant tire, as we shall presently see, not the Willoughby tires. Let it be granted that they afforded suggestions to Grant, and that he has gone but one step beyond them. It is conceded, as we have said, that his invention is a narrow one—a step beyond the prior art—built upon it, it may

be, and only an improvement upon it. Its legal evasion may be the easier, (*Railway Co.* v. *Sayles, supra*), and hence we see the strength of the concession to its advance beyond the prior art and of its novelty and utility by the Rubber Company's imitation of it. The prior art was open to the Rubber Company. That "art was crowded," it says, "with numerous prototypes and predecessors" of the Grant tire, and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the Rubber Company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation as others have done. And yet the narrowness of the claims seemed to make legal evasion easy. Why, then, was there not evasion by a variation of the details of the patented arrangement? Business interests urged to it as much as to infringement. We can find no answer except that given by the Tire Company: "The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary."

That the tire is an invention is fortified by all of the presumptions, the presumption of the patent by that arising from the utility of the tire. And we have said that the utility of a device may be attested by the litigation over it, as litigation "shows and measures the existence of the public demand for its use." *Eames* v. *Andrews, supra.* We have shown the litigation to which the Grant tire has been subjected.

We have taken for granted in our discussion that the Grant tire immediately established and has ever since maintained its supremacy over all other rubber tires and has been commercially successful while they have been failures. The assumption is justified by the concession of counsel. They do not deny the fact, but attribute it to "three subsequent discoveries and conditions" since the

Grant patent, these being—(1) "that the tire can be held in place and fixed upon its base by straining the wires to a clamping point; (2) the production, by mechanical means, cheaply and expeditiously as a commercial product, of the channel rim in straight lengths to be applied to the wheel; and (3) the improvement of the rubber itself; the demand of the public for a solid rubber tire, and the wealth of the complainant, advertising in the market, and pushing and exploiting the tire."

The first ground is a somewhat distant assertion that the tire does not involve invention, but as to that we have sufficiently expressed opinion. The second ground is an inversion of cause and effect, and there is an obvious answer to the third ground. Without suitable rubber, there could have been no rubber tires, and the desire for them necessarily induced their manufacture, and Grant exercised invention to produce an efficient one. We can understand that some advertising was necessary to bring it into notice, and give it a certain use, but the extensive use which it attained, and more certainly the exclusive use which it attained, could only have been the result of its essential excellence, indeed, its pronounced superiority over all other forms. Here, again, in our discussion a comparison is suggested between it and other tires, and the inquiry occurs why capital has selected it to invest in and advertise and not one of the tires of the prior art if it be not better than they? But the effect of advertising is mere speculation; to the utility and use of an article the law assigns a definite presumption of its character, as we have seen, and which we are impelled by the facts of this record to follow.

To what quality the utility of the tire may be due will bear further consideration, if for no other reason than the earnest contentions of counsel. Aside from those contentions and the ability by which they are supported, we might point to what it does as a demonstration of its dif-

ference from all that preceded it, that there is something in it, attribute or force, which did not exist before—something which is the law of its organization and function, and raises it above a mere aggregation of elements to a patentable combination. And we may say in passing the elements of a combination may be all old. In making a combination the inventor has the whole field of mechanics to draw from. *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U. S. at page 318.

The Tire Company gives a definition of the "something" as tipping and reseating power. The Rubber Company earnestly denies the existence of the power, and, as we have seen, the Courts of Appeals for the Sixth and Second Circuits divided in opinion on its existence. We think such power is possessed by the tire. This is shown by the evidence, and was shown at the oral argument. And it is the result of something more than each element acting separately. It is not the result alone of the iron channel with diverging sides, nor alone of the retaining bands or the rubber. They each have uses and perform them to an end different from the effect of either, and they must have been designed to such end, contrived to exactly produce it. There can be no other deduction from their careful relation. The adaptation of the rubber to the flaring channel, the shape of that permitting lateral movement and compression, the retaining band, holding and yielding, placed in such precise adjustment and correlation with the other parts, producing a tire that "when compressed and bent sidewise shall not escape from the channel and shall not be cut on the flange of the channel," and yet shall "be mobile in the channel." We agree with the Court of Appeals that "this was not the result of chance or the haphazard selection of parts; his (Grant's) success could only have been achieved by a careful study of the scientific and mechanical problems necessary to overcome the defects which rendered the then existing tires

ineffective and useless." This conclusion is not shaken by the testimony and argument urged against it.

The contention of non-infringement is very hesitatingly advanced, suggested rather than urged. It is conceded that infringement existed in the prior litigations, but it is said that if under the closer analysis of the Grant patent "as here presented, and as considered as contended for, if to be confined to exact angles and relations of angles and precise configuration of parts"—the Rubber Company's device does not infringe. And this is attempted to be supported by the testimony of a witness who found, he said, in the Rubber Company's tire "the three fundamental mechanical elements" of the Grant patent in suit which, he interjected, were borrowed by Grant, "both individually and in combination, from the prior art long antedating his alleged invention," and then proceeded to declare a difference between the "angles and relations of angles and precise configuration of parts," to use counsel's language, of the two tires and briefly summarizing his conclusion, said that he did not "find the alleged invention, combinations and devices of either of the claims of the Grant patent in suit embodied in or contained in either of the exhibits introduced in evidence professing to represent the defendant's tire." We are unable to concur in the conclusion. The exhibits demonstrate the contrary. And we are fortified in this by the conduct of the Rubber Company in the Circuit Court. The defense of non-infringement was not there seriously urged. After considering to what extent the case, as presented, differed from the prior litigation, Judge Holt said: "Of course, if your defense was that this defendant does not infringe, that would be an entirely different question, but the only question argued here is as to the validity of the patent." In the opinion of the Court of Appeals non-infringement received no attention, presumably because that defense was not pressed upon it.

The final contention of the Rubber Company is that the Grant patent having been declared invalid by the Circuit Court of Appeals for the Sixth Circuit and by the Circuit Court for the District of Indiana in the Seventh Circuit, the Rubber Company should not have been enjoined from the handling or sale of tires manufactured in the Sixth and Seventh Circuits, and cites *Kessler* v. *Eldred*, 206 U. S. 285.

The Court of Appeals practically reserved the question. It modified the decree of the Circuit Court so far as it prevented the handling, using or selling tires and rims authorized by any judicial decree, recognizing, as it said, the applicability of *Kessler* v. *Eldred*. But it further said:

"Whether it should be given a broader interpretation is a question upon which we express no opinion, deeming it more prudent to wait until the facts are fully developed.

"There is no occasion for attempting at this time to anticipate the future and to provide for a contingency which may not arise. . . . To provide in a decree that the defendant is not enjoined from making, using and selling devices which do not infringe or which have been licensed, seems unnecessary. The doctrine of Eldred and Kessler, if carried to the extent contended for by the defendant, will introduce radical and far-reaching limitations upon the rights of patentees. These questions may not arise in the case at bar, but if they should, the court should have the facts, and all the facts, before attempting to decide them."

We concur in these remarks.

Decree affirmed.

MR. JUSTICE DAY and MR. JUSTICE LURTON took no part in the decision.

STANDARD PAINT COMPANY *v.* TRINIDAD ASPHALT MANUFACTURING COMPANY.

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

No. 106. Argued March 16, 1911.—Decided April 10, 1911.

No sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal right for the same purpose. *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665.

A trade-mark must be distinctive in its original signification pointing to the origin of the article or it must become so by association. *Canal Co.* v. *Clark*, 13 Wall. 311.

"Rubberoid" being a descriptive word, meaning like rubber, the word "Ruberoid" is also descriptive, and, even though mispelled, cannot be appropriated as a trade-mark.

While the Circuit Court cannot take cognizance of the question of unfair competition by use of plaintiff's trade-name where diverse citizenship does not exist, and in a case where jurisdiction is based on trade-mark alone the judgment of that court is final, if diverse citizenship does exist and the requisite amount is in controversy, the judgment can be reviewed in this court on the question of unfair competition independently of the questions involving validity of the trade-mark.

The essence of unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and this cannot be predicated solely on the use of a trade-name similar to that used by plaintiff if such trade-name is invalid as a trade-mark. To do so would be to give the plaintiff's trade-name the full effect of a trade-mark notwithstanding its invalidity as such.

THE facts, which involve the validity of a trade-mark and the jurisdiction of this court on appeal from the Circuit Court of Appeals in a case involving validity of a trade-mark and also unfair trade where diverse citizenship exists, are stated in the opinion.

Mr. John F. Green, with whom *Mr. Frederick N. Judson* was on the brief, for appellant:

Under the Federal statutes, in force when complainant's trade-mark was registered, and when this action was instituted, this court, upon this appeal, has jurisdiction of the entire case and should decide all the questions arising upon the record, because the bill of complaint presents a claim arising under a Federal statute, in addition to alleging the diverse citizenship of the litigants. *Henningsen* v. *Fidelity Company*, 208 U. S. 404; *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526; *Pennsylvania Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Northern Pacific Railroad* v. *Amato*, 144 U. S. 465; *Warner* v. *Searl & Hereth Co.*, 191 U. S. 195; § 6 of the Judiciary Act of March 3, 1891; *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665. This case is unlike that of *Hutchinson* v. *Loewy*, 217 U. S. 457.

The jurisdiction of this court, on this appeal, extends not merely to the determination of the question of a valid trade-mark in the word "Ruberoid," but it extends also to the determination of the question of whether complainant is not entitled to relief on the distinct ground of unfair trade and competition, irrespective of any question of a valid trade-mark registered under the Federal statues. Therefore, even if this court should hold that complainant has no valid trade-mark in the word "Ruberoid" it must also determine whether complainant is not entitled to the relief prayed for upon the ground of unfair trade. Cases *supra*, and *William Holder* v. *Aultman, Miller & Co.*, 169 U. S. 81.

This case is also unlike those of *Leschen Rope Co.* v. *Broderick Rope Co.*, 201 U. S. 166, and *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665.

The word "Ruberoid," as used by complainant to designate its roofing product, is a valid and proper trade-mark and trade-name. *Menendez* v. *Holt*, 128 U. S. 514; *Keasley* v. *Brooklyn Chemical Works*, 142 N. Y. 467; *Re Eastman Co.*, 15 R. P. C. 476, *"Solio" case.*

The word "Ruberoid" is suggestive merely, and not descriptive, as those terms have been defined in the law of trade-marks. If we assume that it is derived from the word "rubber," as held in the majority opinion of the Circuit Court of Appeals, and that with the suffix "oid" added thereto, it means like rubber, still this derivation and meaning would not render it so descriptive as to be incapable of appropriation as a trade-name, because there is in fact no rubber used in its composition, and its only resemblance to rubber is in respect of its flexibility and its being waterproof. It has not any of the most distinctive properties of rubber, such as elasticity or resiliency. Therefore, it is suggestive and not descriptive, in any view which may be taken of its origin and derivation. Cases *supra* and *Menendez* v. *Holt*, 128 U. S. 514; see also *"Pepto-Mangan" Case*, 131 Fed. Rep. 160; *"Elastic" Book Case*, 121 Fed. Rep. 185; *"Eureka" Rubber Case*, 60 Atl. Rep. 561; *"Club" Whiskey Case*, 125 Fed. Rep. 782; *"Uneeda" Biscuit Case*, 95 Fed. Rep. 135; *"Anti-Washboard" Soap Case*, 26 Fed. Rep. 576; *"Swan-Down" Complexion Powder Case*, 85 Fed. Rep. 774; *"Bovril" Beef Extract Case*, 2 L. R. Ch. Div. 1898, 600; *"Camel's Hair" Belting Case*, 13 R. P. C. 218.

Wholly irrespective of the question of complainant's right to appropriate this word as a trade-name in the first instance, it is entitled to the relief prayed for on the distinct ground of unfair trade and competition. *Coates* v. *Merrick Thread Co.*, 149 U. S. 562; *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 Fed. Rep. 73; *Elgin Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665; *Wolff Bros.* v. *Hamilton Brown Shoe Co.*, 165 Fed. Rep. 413; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep. 431; *Pillsbury Mills Co.* v. *Eagle*, 86 Fed. Rep. 608.

The evidence clearly indicates that defendant adopted and has used the word "RubberO" only because of its similarity to the word "Ruberoid," in order to enable it to

obtain the benefit of the advertising done by complainant in its territory and to sell its product to purchasers under the belief on their part that they are purchasing the product of complainant. Such conduct is unfair and fraudulent and should be enjoined. *Bates Mfg. Co.* v. *Bates Machine Co.*, 172 Fed. Rep. 892; *American Pencil Co.* v. *Gottlieb & Sons*, 181 Fed. Rep. 178.

Even if the evidence did not indicate such fraudulent purpose on the part of the defendant in adopting the trade name of "RubberO," complainant would still be entitled to the relief prayed for, irrespective of any fraudulent intention on the part of the defendant, because there is sufficient similarity between the words "Ruberoid" and "RubberO" to mislead the ordinary purchaser. *Saxlehner* v. *Eisner & Mendelsohn*, 179 U. S. 19; *Eagle White Lead Co.* v. *Pfleugh*, 180 Fed. Rep. 579; *Saxlehner* v. *Siegel, Cooper & Co.*, 179 U. S. 41; *Elgin Co.* v. *Illinois Co.*, 179 U. S. 655; *Reddaway* v. *Benthan*, 9 R. P. C. 503.

The word "Ruberoid" had been so long used, and so exclusively appropriated, by complainant as a name for its roofing material that it had come to signify to the roofing trade the product of complainant exclusively; that is, the word "Ruberoid" had acquired a "secondary" meaning and therefore, on this ground also, complainant was entitled to the relief prayed for. *Elgin Watch Co.* v. *Watch Case Co.*, 179 U. S. 665; *Lowe Bros. Co.* v. *Toledo Varnish Co.*, 168 Fed. Rep. 627; *American Pencil Co.* v. *Gottlieb*, 181 Fed. Rep. 178; *Gustaviano Co.* v. *Comerma*, 180 Fed. Rep. 920.

Mr. William B. Homer and *Mr. R. M. Homer* for appellee, submitted:

The decision of the Circuit Court of Appeals in this cause was final, and this court will not take jurisdiction thereof. *Warner* v. *Searle & Hereth Co.*, 191 U. S. 195, 206; *Ryder* v. *Holt*, 128 U. S. 525; *Leschen Rope Co.* v. *Brod-*

erick, 201 U. S. 166; *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665; *Trade-mark Cases*, 100 U. S. 82; *Wrisley Co.* v. *Rouse Soap Co.*, 90 Fed. Rep. 5, *Illinois Watch Co.* v. *Elgin Watch Co.*, 94 Fed. Rep. 667, 671.

Complainant's trade-mark is descriptive of the article upon which it is used, of its qualities, ingredients and characteristics, and is therefore void.

This appears from the description of the trade-mark and the material upon which it is used, as contained in the statement filed in the Patent Office, also from the complainant's own statement in its advertising matter, as well as in the testimony of its own witness. *Canal Co.* v. *Clark*, 13 Wall. 311, 323; *Goodyear Manufacturing Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Brown Chemical Co.* v. *Meyer*, 31 Fed. Rep. 433, aff'd 139 U. S. 540; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Bickmore Co.* v. *Manufacturing Co.*, 134 Fed. Rep. 833; *Marvel Co.* v. *Pearl*, 133 Fed. Rep. 160; *Scale Co.* v. *Scale Co.*, 118 Fed. Rep. 965; *Brennan* v. *Dry Goods Co.*, 108 Fed. Rep. 624; *S. C.*, 99 Fed. Rep. 971; *Washboard Co.* v. *Manufacturing Co.*, 103 Fed. Rep. 281; *Bennett* v. *McKinley*, 65 Fed. Rep. 505; *Rumford Chemical Works* v. *Muth*, 35 Fed. Rep. 524; *Fibre Co.* v. *Amoskeag Co.*, 37 Fed. Rep. 695; *Harris Drug Co.* v. *Stucky*, 46 Fed. Rep. 624; *Jaros Co.* v. *Fleece Co.*, 65 Fed. Rep. 424; *Leonard* v. *Wells*, 53 L. J. Ch. 233; *Re Roach*, 10 Pat. Off. Gaz. 333; *Re Goodyear Rubber Co.*, 11 Pat. Off. Gaz. 1062; *Ex parte Pikling*, 24 Pat. Off. Gaz. 899; *Scott* v. *Standard Oil Co.*, 106 Alabama, 475; *Burke* v. *Cassin*, 45 California, 467; *Larrabee* v. *Lewis*, 67 Georgia, 561; *Gilman* v. *Hunnewell*, 122 Massachusetts, 139; *Trask* v. *Wooster*, 28 Mo. App. 408; *Van Beil* v. *Prescott*, 82 N. Y. 630; *Town* v. *Stetson*, 3 Daly (N. Y.), 53; *Gessler* v. *Grieb*, 80 Wisconsin 21; *Alff* v. *Radam*, 77 Texas, 630; *Newcomer* v. *Scriven Co.*, 94 C. C. A. 77; *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625; *Asbestos Mfg. Co.* v. *Asbestos Co.*, 9 Fed. Rep. 85; and see 62 N. Y. Supp. 339; *Green* v. *Mfrs. Belt Hook*

Co., 158 Fed. Rep. 640; *Scriven* v. *North*, 134 Fed. Rep. 366; *Wrisley Co.* v. *Soap Co.*, 87 Fed. Rep. 589; *Pratt* v. *Astral Refining Co.*, 27 Fed. Rep. 492; *Knitting Co.* v. *Knitting Co.*, 160 Fed. Rep. 1013; *Florence Mfg. Co.* v. *Dowd*, 178 Fed. Rep. 73; *Chance* v. *Gulden*, 165 Fed. Rep. 624; *Wolf* v. *Hamilton*, 165 Fed. Rep. 413; *Dry Goods Co.* v. *Scriven Co.*, 165 Fed. Rep. 639; *Searle & Hereth Co.* v. *Warner*, 112 Fed. Rep. 674; *S. C.*, 191 U. S. 195; *Leclanche Battery Co.* v. *Western Electric Co.*, 23 Fed. Rep. 276; *Caswell* v. *Davis*, 58 N. Y. 223; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandford, 599.

The word used as a trade-mark had, when adopted by complainant, and long before its registration, become a word in general use. It had been used as a trade-mark by others, and had found a place in the dictionaries as a word describing substances which resemble rubber, without being rubber; that is, it was a word made up by adding the common suffix "oid," meaning "like," to the word rubber. *Dadirrian* v. *Yacubian*, 98 Fed. Rep. 872; *Goodyear Rubber Co.* v. *Rubber Co.*, 128 U. S. 594, 604.

There was no infringement of the complainant's trade-mark by the defendant. Cases *supra*, and *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 467; *Kann* v. *Diamond Steel Co.*, 89 Fed. Rep. 706; *Dunlap* v. *Surgical Co.*, 151 Fed. Rep. 223, 233; *Match Co.* v. *Match Co.*, 142 Fed. Rep. 727; *Marvel Co.* v. *Pearl*, 133 Fed. Rep. 160; *Elgin Watch Co.* v. *Ill. Nat. Watch Co.*, 179 U. S. 665, 694; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140; *Searle & Hereth Co.* v. *Warner*, 112 Fed. Rep. 674; *S. C.*, 191 U. S. 195.

Mr. Justice McKenna delivered the opinion of the court.

The Standard Paint Company, which we shall call the

Paint Company, a West Virginia corporation and a citizen of that State, brought this suit against the Trinidad Asphalt Manufacturing Company, herein referred to as the Asphalt Company, a Missouri corporation, having its principal office in the city of St. Louis, Missouri, in the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, to restrain the infringement of a duly registered trade-mark for the word "Ruberoid" to designate a certain kind of roofing materials for covering houses and other buildings. The Paint Company alleges in its bill that it has used the trade-mark for more than twelve years, and has advertised the roofing very extensively under the name "Ruberoid" roofing, and has built up a large and valuable trade therein in all parts of the United States and in foreign countries.

The roofing is manufactured in three different thicknesses, respectively called one, two and three-ply, and is then made up into rolls, the strips in each roll being about three feet in width and about seventy feet long. The rolls are covered with paper wrappers, on which are printed, in large type, the words "Ruberoid Roofing," and enclosed in the rolls are directions for handling and laying the same and the name of the Paint Company as manufacturer. The roofing contains no rubber.

The Asphalt Company also makes a roofing, not, however, of the same material as that of the Paint Company, but of the same thickness as the latter, and cut in the similar widths and lengths, and sells it under the name of "Rubbero" roofing.

Two contentions are made by the Paint Company: (1) That its trade-mark is a valid one and has been infringed by the Asphalt Company. (2) That the latter has been guilty of unfair competition. The Court of Appeals decided adversely to both contentions. 163 Fed. Rep. 977. Of the first contention the court said it was clear that the Paint Company "sought to appropriate the exclusive

use of the term rubberoid," and that its rights were to be adjudged accordingly, and that as the latter, being a common descriptive word, could not be appropriated as a trade-mark, the one selected by the Paint Company could not be appropriated. The court said: "A public right in rubberoid and a private monopoly of rubberoid cannot coexist." The court expressed the determined and settled rule to be "that no one can appropriate as a trade-mark a generic name or one descriptive of an article of trade, its qualities, ingredients or characteristics, or any sign, word or symbol which from the nature of the fact it is used to signify others may employ with equal truth." For this cases were cited and many illustrations were given which we need not repeat. The definition of a trade-mark has been given by this court and the extent of its use described. It was said by the Chief Justice, speaking for the court, that " the term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendable commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose." *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 673. There is no doubt, therefore, of the rule. There is something more of precision given to it in *Canal Company* v. *Clark*, 13 Wall. 311, 323, where it is said that the essence of the wrong for the violation of a trade-mark "consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly

or indirectly made that the party who appeals to a court of equity can have relief." A trade-mark, it was hence concluded, "must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association." But two qualifying rules were expressed, as follows: "No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection." And, citing *Amoskeag Manufacturing Company* v. *Spear*, 2 Sandford's Supreme Court, 599, it was further said there can be "'no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or qualities.'"

Does the trade-mark of the Paint Company come within the broad rule or within the qualifying ones? In other words, does it have relation to the origin or ownership of the roofing or is it merely descriptive of the roofing? It is conceded that there is no rubber used in the preparation of the roofing. It is put forth as being in the "Nature of Soft, Flexible Rubber." It is described in the certificate of registration as follows: "The class of merchandise to which this trade-mark is appropriated is solid substance in the nature of soft, flexible rubber in the form of flexible roofing, flooring, siding, sheathing, etc., and the particular class of goods upon which the said trade-mark is used is solid substance in the nature of flexible rubber." And it is said that the "trade-mark consists in the arbitrary word 'Ruberoid.'" Rubberoid is defined in the Century

Dictionary as a trade name for an imitation of hard rubber. It is a compound of the word "rubber" and the suffix "oid," and "oid" is defined in the same dictionary as meaning "having the form or resemblance of the thing indicated, 'like,' as in *anthropoid*, like man; *crystalloid*, like crystal; *hydroid*,, like water, etc. It is much used as an English formative, chiefly in scientific words." Rubberoid, therefore, is a descriptive word, meaning like rubber, but the Paint Company insists "Ruberoid" is suggestive merely, not descriptive, "because there is in fact no rubber used in its composition, and its only resemblance to rubber is in respect to its flexibility and its being waterproof." But this contention makes likeness and resemblance the same as identity. If the roofing of the Paint Company was identical with rubber it would be rubber and not as it is represented to be, as we have seen, "in the nature of soft, flexible rubber." It may rightly be called rubberoid, and so may be roofing made by others than the Paint Company having the same rubber-like qualities, flexibility and not pervious to water. The word, therefore, is descriptive, not indicative of the origin or the ownership of the goods; and, being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning, as different, to bring the example to the present case, as the character of an article is from its origin or ownership.

We content ourselves with applying the principle of the cases which we have cited and will not review the many cases in which it has been considered determinative or otherwise. These cases are collected in the opinion of the Circuit Court of Appeals and need not be repeated.

The second contention of the Paint Company is that the Asphalt Company has been guilty of unfair trade and

competition. The latter company urges that we are without jurisdiction to consider the contention and cites *Leschen Rope Co.* v. *Broderick*, 201 U. S. 166, in which a claim to a trade-mark for a distinctively colored streak applied to or woven in a wire rope was declared invalid. The bill, in addition to the infringement of the trade-mark, alleged unfair competition. The defendant in the case demurred on the ground that the trade-mark set up in the bill was not a lawful and valid trade-mark. The demurrer was sustained and the bill dismissed and the decree of the Circuit Court was affirmed by the Circuit Court of Appeals. The case was appealed to this court and we affirmed the decree holding that the trade-mark was invalid. Excluding a right to take jurisdiction because the bill set forth unfair competition, we said: "Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the act of Congress. . . ."

The parties in that case were citizens of the same State, and the jurisdiction of the Circuit Court depended entirely upon the trade-mark statute. In the case at bar there is diversity of citizenship as a ground of jurisdiction as well as the assertion of a valid trade-mark. It is therefore contended that *Leschen Rope Co.* v. *Broderick* is not applicable, because, as there was no valid trade-mark under the Federal statute, it necessarily followed that the Circuit Court was wholly without jurisdiction to try the case in the first instance, the parties being citizens of the same State; and, as the Circuit Court was without jurisdiction to try the issue of unfair trade, the Circuit Court of Appeals was also without jurisdiction, and that this court, on appeal, could not decide that issue. In the case at bar, however, it is urged there is a diversity of citizenship

as well as the assertion of a right under the Federal statute, and that the Circuit Court and the Circuit Court of Appeals both had jurisdiction on that ground as well as on the other, and the case, therefore, it is contended, falls under *Henningsen* v. *United States Fidelity and Guaranty Co.*, 208 U. S. 404; *Northern Pac. Ry. Co.* v. *Soderberg*, 188 U. S. 526; *Penn. Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Northern Pac. Rd. Co.* v. *Amato*, 144 U. S. 465; *Warner* v. *Searle & Hereth Co.*, 191 U. S. 195; *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665.

Passing the last two cases for the moment, we may say of the others that while there was diversity of citizenship, and that would have given jurisdiction to the Circuit Court independently of any Federal question, statutory or constitutional, a consideration of a statute or the Constitution of the United States entered into the merits. Such is not the condition in the case at bar as to the issue of unfair trade. The asserted trade-mark as such is not an element. The issue is made independently of it, and under the assumption of its invalidity. If the trade-mark were valid, the issue of unfair trade would be unnecessary to decide. Such an issue between citizens of different States, even if there were no technical trade-mark, a Circuit Court would have jurisdiction to try, and the Circuit Court of Appeals would have jurisdiction to review, but the judgment of the latter court would be final.

Warner v. *Searle & Hereth Co.* and *Elgin Watch Co.* v. *Illinois Watch Co.* require special notice. In the latter case there was not diversity of citizenship, but there was the assertion of a trade-mark in the word "Elgin." The Circuit Court sustained it; the Circuit Court of Appeals held it invalid and reversed the decree of the Circuit Court and ordered a dismissal of the bill. This court affirmed the action of the Circuit Court of Appeals. It was held that the word was geographically descriptive and not subject to be registered as a trade-mark. It was contended,

however, that the word had acquired a secondary signification, and should not therefore be considered as merely a geographical name. It was conceded, in answer to the contention, that words could acquire a secondary signification, and their use in that sense be protected. But the concession and the discussion were for no other purpose than to bring out clearly, in opposition to the contention based on the secondary signification of a word, that it could be, though a generic and descriptive name, "lawfully withdrawn from common use" by being registered as a trade-mark. And the court was careful to observe that the question considered was not "whether the record made out a case of false representation or perfidious dealing, or unfair competition, but whether appellant had the exclusive right to use the word 'Elgin' as against all of the world." The question was asked, "Was it a lawful registered trade-mark?" If so, the answer was, "Then the Circuit Court had jurisdiction, under the statute, to award relief for infringement; but if it were not a lawful registered trade-mark, then the Circuit Court of Appeals correctly held that jurisdiction could not be maintained." The case may be said to be only of negative value. Unfair trade, we have seen, was referred to, and it was discussed also by the Circuit Court of Appeals, but it put it aside as an element of decision, because the court was, as it said, "without jurisdiction to grant relief," as the right of the Elgin Watch Company arose under the act of Congress, and was limited by the act to recovery of damages for the wrongful use of a trade-mark, or to a remedy according to the course of equity, "'to enjoin the wrongful use of said trade-mark used in foreign commerce or commerce with the Indian tribes.'" The remedy in equity for fraud, it was said, existed before the statute and was not given by it, and that the Federal court would have no jurisdiction of it except between citizens of different States. 94 Fed. Rep. 665, 671.

Warner v. *Searle & Hereth Company* was a suit between citizens of different States. The bill alleged the infringement of a trade-mark for the word "Pancreopepsine." Unfair competition was also alleged. The Circuit Court found that there was no proof of the latter but held that the complainant had a valid trade-mark and enjoined the defendant from its use. The Circuit Court of Appeals concurred in the finding as to unfair competition, but decided against the validity of the trade-mark and reversed the decree of the Circuit Court and ordered the bill to be dismissed. We affirmed the decree of the Circuit Court of Appeals and said that the courts of the United States cannot take cognizance of an action on the case or a suit in equity between citizens of the same State, "'unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe.'" But we also said that "where diverse citizenship exists, and the statutory amount is in controversy, the courts of the United States have jurisdiction, but where those conditions do not exist, jurisdiction can only be maintained where there is interference with commerce with foreign nations or Indian tribes, . . ." It was held, besides, that as diverse citizenship existed the Circuit Court had jurisdiction, and in answer to the contention that as jurisdiction depended entirely on diversity of citizenship the decree of the Circuit Court of Appeals was final, this was said: "We think, however, that as infringement of a trade-mark registered under the act was charged, the averments of the bill, though quite defective, were sufficient to invoke the jurisdiction also on the ground that the case arose under the law of the United States, and will not, therefore, dismiss the bill."

No notice was given to the charge of unfair competition, and yet, if the contention of the Paint Company in the case at bar be sound, we should have decided that question because it was decided in the courts below, for, we have

seen, it is the contention of the Paint Company in this case that the lower courts having jurisdiction to decide the question of unfair competition, this court also has jurisdiction. But, as we have seen in *Warner* v. *Searle & Hereth Co.*, we did not pass on the question of unfair competition, though the same conditions of jurisdiction existed which exist in this case. *Warner* v. *Searle & Hereth Co.* has in it, therefore, an element of uncertainty, but the statute must be considered. It makes the judgment of the Circuit Court of Appeals "final in all cases in which the jurisdiction [the jurisdiction of the Circuit Court is meant] is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under criminal laws, and in admiralty laws." In all other cases there is a right of review by this court if there is the statutory amount involved. The case at bar is within the letter of the statute. The opposite parties to the suit are citizens of different States, and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition. If the latter had stood alone its decision would have been final in the Court of Appeals, and this court would have had no jurisdiction to review its decision, and there is some objection on principle, notwithstanding the union of the charge of unfair competition with the claim of a trade-mark, to our taking jurisdiction, but such, we think, is the effect of the statute. *Macfadden* v. *United States*, 213 U. S. 288; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

We come, therefore, to a consideration of the question of unfair competition. The Circuit Court of Appeals decided the question against the Paint Company. The views

of the Circuit Court may be open to dispute. The majority of the Court of Appeals was of opinion that, aside from the use of the word "rubbero," there was no imitation by the Asphalt Company of the Paint Company's roofing, indeed, that the "arrangement, color, design or general appearance of the wrappers and markings on the packages" were in such "marked contrast as to repel all suggestion of design on the part of the former to misrepresent the origin or ownership of its product." The Circuit Court expressed itself as follows: "It is true that there is no imitation in the arrangement, color or general appearance of the labels, as such, aside from the similarity of the names, but I think the use of names so similar on rolls of similar size and shape both containing roofing material is calculated, whether intentionally or unintentionally, to confuse and deceive the public." Circuit Judge Sanborn, dissenting from the opinion and judgment of the Court of Appeals, was of the opinion that the Circuit Court found that the Asphalt Company was guilty of unfair competition; and he concurred in the finding, thus giving the weight of his judgment to its support.

We think the evidence supports the conclusion of the Circuit Court of Appeals. The only imitation by the Asphalt Company of the roofing of the Paint Company is that which exists in the use of the word "rubbero," and this only by its asserted resemblance to the word "ruberoid." To preclude its use because of such resemblance would be to give to the word "ruberoid" the full effect of a trade-mark, while denying its validity as such. It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. *Elgin National Watch Co.* v. *Illinois Watch Co., supra.* Such a wrong is not established against the

Asphalt Company. It does not use the word "rubbero" in such a way as to amount to a fraud on the public.

Decree affirmed.

MR. JUSTICE HUGHES concurs in the result.

SHAWNEE SEWERAGE AND DRAINAGE COMPANY *v.* STEARNS, AS MAYOR OF THE CITY OF SHAWNEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 109. Submitted March 14, 1911.—Decided April 10, 1911.

A simple breach of a contract by a municipality does not amount to an act impairing the obligation of the contract.

A statute authorizing the issuing of bonds for the purpose of constructing a public utility cannot impair the obligation of a contract made subsequent to the enactment of such statute.

The breach of a contract is neither confiscation of property nor the taking of property without due process of law. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 145.

Where diversity of citizenship does not exist and plaintiff's claim is based on a simple breach of contract by a municipality, the case is not one arising under the contract or due process clause of the Constitution, and the Circuit Court has not jurisdiction.

Where the Circuit Court dismisses a bill on the merits, but it appears that jurisdiction did not exist, the decree must be reversed and the cause remanded with instructions to dismiss for want of jurisdiction. *McGilvra* v. *Ross*, 215 U. S. 70.

THE facts, which involve the jurisdiction of the Circuit Court of cases arising under the Constitution and laws of the United States, are stated in the opinion.

Mr. B. B. Blakeney and *Mr. James H. Maxey* for appellant.

Mr. J. H. Everest, Mr. J. H. Woods and *Mr. W. M. Engart* for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

It is contended that this case involves the construction or application of the Constitution of the United States, and that therefore the appeal has been taken directly to this court from the Circuit Court.

The appellant, we shall call it the Drainage Company, is a corporation organized under the laws of Oklahoma; the appellees are the mayor, clerk and the members of the city council of the city of Shawnee, a municipal corporation. The Walter Newman Plumbing Company and Walter Newman are also appellees.

A summary of the facts as presented by the bill is as follows: The city of Shawnee, a city of the first class under the laws of the Territory of Oklahoma, granted by an ordinance (No. 228) to De Bruler-Newman & Company, their successors and assigns, the right, for the period of fifty years, to build and maintain a system of sewerage, with the necessary branches and appurtenances essential to the same, "along certain lines" in the city. It was provided that the city should have the right to purchase the system at the expiration of a period of fifteen years, at the exact cost of its construction. And further, that if the city did not desire to make the purchase the ordinance should run for fifty years. There was a time fixed for the commencement and completion of the system.

The ordinance was amended by a subsequent ordinance (No. 241) by making the term of the right twenty-one years and ratifying all the other provisions of the first ordinance.

On the first of February, 1902, De Bruler-Newman & Company assigned their rights under the ordinance to the

Drainage Company. The assignment was ratified by the city by an ordinance (No. 242) passed February 26, 1902, and the Drainage Company authorized to mortgage the rights and properties in a sum not exceeding $25,000.00. The ordinance also provided that the city should have the right to purchase the system at the exact cost of its construction or any extension of it after the expiration of fifteen years.

De Bruler-Newman & Company commenced and continued the construction of the system until the assignment to the Drainage Company as above stated, and after the assignment the Drainage Company conducted its construction "and extended its mains and laterals over and throughout the limits" of the city and expended and invested therein $40,000.00, and issued its bonds and notes in pursuance of ordinance No. 242 and secured the sum by a mortgage on the property and franchises. The company performed its duties to the city, met all of the demands for sewerage purposes, and carried out the terms and conditions of the ordinance until the twenty-second of December, 1906, at which time it sold and transferred its main line to the city. The company is the owner of the rest of the property which is of the value of $30,000.00 and which is regularly assessed and pays to the city its just property taxes.

On the first of December, 1901, the city passed an ordinance providing that wherever the system was extended "all over ground closets should be declared a public nuisance," but after the company had extended the system the ordinance was repealed, and the city has habitually and systematically discouraged, and by divers means has attempted, to impair the investment of the company.

On the sixth of November, 1906, after certain proceedings had, a question was submitted to the voters of the city whether bonds should be issued in the sum $165,000.00 for the construction of a sewer system, which was duly

carried. The Drainage Company then commenced a suit in the District Court of the county to enjoin the city from constructing and maintaining a sewer system in the city without having purchased the company's system or compensated it therefor, which suit was regularly tried and a decree rendered that the company had a legal and valid franchise, and that it "was authorized by such franchise to carry on the business of operating the said system of sewerage," and that the construction and operation of a sewer system by the city in the immediate vicinity of the company's system would confiscate its property and depreciate the value of the bonds thereon. The city was enjoined from constructing its system until the company's main sewer should be condemned or purchased by it, and, in the event that it should condemn or purchase the main sewer, the mayor and councilmen were enjoined from preventing the company "from connecting with any main sewer of the said defendant (the city) free of charge and to use the same by such connection with the district sewers and laterals" belonging to the company in operation at the date of the rendition of the decree.

The legality of the election at which bonds were authorized to be issued by the city to the amount of $165,000.00 was adjudged.

Subsequent to this decree, to-wit, on the third of March, 1907, the company and the city entered into a contract, Exhibit E, by which the company sold to the city all of its main line of sewer for the consideration of $6,900.00, it being provided that the city would recognize the company's rights to the laterals which were then laid in the city, and which were of the value of $30,000.00.

It was further provided that at such time as the city should be divided into sewer districts for the purpose of laying and constructing laterals in the districts, the city would cause the property of the company to be appraised by a commission, in case agreement could not be had as to

the price thereof. The price being fixed, the city was to "use all lawful means to tax up said laterals, at the price agreed upon to the abutting property, and deliver the tax warrants to the" company, which should "be in full payment for such laterals, in so far as the abutting property" was concerned. It was provided that the city should not be liable for the payment of the warrants, and that it did "not attempt to bind itself any further than warranted and permitted by law."

On the first day of June, 1908, the company, in order to comply with the contract above referred to, submitted to the city a proposition offering to relay and lower all of the laterals owned by it, to the depth required by the plans and specifications and under the directions of the city engineer and at his estimated cost, if any of the same were not of such depth, which offer was refused. The city, in disregard of the judgment in favor of the company and of the contract with it above referred to, entered into a contract with the Newman Plumbing Company (one of the appellees), by which the latter was granted a contract to lay the laterals necessary and desired by the city, "and in the vicinity and in the same streets and alleys which are now occupied by the laterals" of the company, and, unless enjoined, will proceed with the performance of the contract, and if it be performed the city will cause its citizens to connect with the laterals, because it must tax to build and maintain them, "and no other or further consideration would be required," and the citizens whose property is connected with the company's system would be taxed to maintain the system, whether connected with it or not, and its property, which is now of the value of $30,000.00, being wholly underground, would be worthless. The company is ready and willing to carry out its contract above referred to, (Exhibit E), and the citizens of the several sewer districts, are willing that their property be taxed as provided, but that the city, in disregard of the

contract, allowed the Newman Plumbing Company to build new, separate and independent laterals in the sewer districts.

The contract of March 3, 1907, between the company and the city was made in consideration of the city recognizing the rights of the company and the performance by the city of the matters agreed to be performed by it, which it has not done, "but for the purpose of confiscating" the company's "property and rendering it worthless and valueless, and in total disregard of its contract," has let the contract, as above mentioned, to the Newman Plumbing Company, although the laterals of the company "were, on the third day of March, 1907, adequate to accommodate connection" with the city's main sewer, and if the same are inadequate the company has offered and offers to make them adequate.

The city has refused to carry out the contract for the purpose of confiscating the company's property and of appropriating the same without due process of law, and that the contract with the Newman Company is void, as it impairs the obligation of the contract of the city with the company and is a confiscation of the company's property.

The city has attempted to assess the cost of the laterals laid by it upon the abutting property owners and the property of the company for the purpose of damaging the company and for no other purpose.

The contract (Exhibit E) was made by the city under the authority of an act of Congress, being the same under which the bonds for $165,000, above referred to, were issued, and its contract was in all respects legal and valid, and the company is entitled to have it enforced and the defendants (appellees) enjoined from violating it.

The company has no adequate remedy at law and is entitled to an injunction against violating the rights of the company, as set forth in the bill, and to have a mandatory

injunction, requiring the city "to conform to said contract and said decree." The prayer of the bill is that the city be enjoined from constructing laterals where the company's laterals "are situated and were situated on the third of March, 1907, and from doing or performing anything that tends to appropriate the property" of the company "without due compensation, or does impair the obligations of the contract of the parties, or deprive" the company "of its property without due process of law." General relief is also prayed.

There was a plea to the jurisdiction, stating as ground thereof, among others, that the allegations of the bill did not present a case of the violation of the Constitution of the United States. A demurrer to the bill was also filed, repeating the ground stated in the plea and setting forth the further ground that the Drainage Company had "a full, complete and adequate remedy at law." The bill was subsequently amended by alleging specifically that the amount involved was more than $2,000; and a temporary injunction was granted.

A general demurrer was filed to the amended bill for want of equity, which was sustained, and the temporary injunction dissolved and the bill dismissed.

No opinion was filed in the case, and the grounds upon which the demurrer was sustained we can only collect from the order allowing an appeal directly to this court and from the assignments of error. By the latter the action of the court is attacked as deciding that the ordinance of the city granting the right to the Drainage Company to occupy the streets of the city "with its laterals, mains and connections," the decree of the District Court mentioned in the bill and the subsequent contract between the company and the city did not impair the obligations of the contract with the company, in violation of the provisions of the Constitution of the United States, and that the action of the city in tearing up the mains and

laterals of the company was not a confiscation of its property without due process of law.

These assignments, therefore, present the question for our decision, and it is these that counsel have discussed in their briefs. Appellant refers to the plea filed to the jurisdiction of the Circuit Court as follows: "The respondent (appellee) presented a plea to the jurisdiction of the court, . . . which plea was by the court duly overruled, but which question will probably be presented in this court."

To sustain the jurisdiction appellant advances the propositions, (1) that the city had the power to pass the ordinance by which it granted to appellant's predecessor and to appellant the franchise to construct a sewer system; (2) that the original franchise constituted a contract between the company and the city, and that this contract had been construed and adjudicated by the District Court of the Territory of Oklahoma as being exclusive and as prohibiting the city from building and maintaining a public sewer; (3) that the subsequent contract with regard to laterals was a valid contract, and that the contract with the Newman Plumbing Company to build a public sewer, as set out in the bill, impaired its obligation and appropriated and deprived the company of its property without due process of law. All these propositions, it is said, present Federal questions.

It is manifest that the stress of the case is upon the contract mentioned in the third proposition. The rights conferred by the ordinance were exercised for four years, and no interference with them is asserted except by the bond election of November 6, 1906. The purpose of the suit in the District Court of the Territory was to restrain the issue of the bonds on the ground that two-thirds of the voters had not voted for the same, and that the building of a public sewer system would affect and impair the rights of the company, much in the same way as detailed in the

bill in this case. There was no allegation of the impairment of the contract constituted by the ordinance. But it was alleged that the bond election was illegal and that under the laws of the Territory and the act of Congress applicable thereto the city had no power to construct a sewer system of its own under the circumstances detailed, and no authority under the law to in any manner destroy value of the company's property, or to confiscate the same, and to deprive the company of its vested rights and interests by virtue of the ordinance without just compensation.

It was prayed that the city be enjoined from issuing the bonds or causing a levy to be made upon the property of the company, or from doing anything which would tend to depreciate the property of the company.

It was decreed, as we have seen, that the Drainage Company had a legal franchise to build a sewer system, and that the construction by the city of a system in the immediate vicinity of the company's would confiscate its property and depreciate the value of the bonds thereof. But the bond election was declared legal, and that under the act of Congress of March 4, 1898, the city ought to issue the bonds as directed for the construction of sewers, among other purposes. The city, however, was enjoined from building or providing a sewerage system in the vicinity of that of the company until after it should purchase or condemn such system. It was further adjudged that in the event the city should condemn or purchase the main sewer of the company, it be enjoined from preventing the company from connecting with the main sewer free of charge, and to use the same by such connections for all district sewers and laterals belonging to the company in operation at the date of the rendition of the decree.

The rights of the parties as fixed by this litigation are clear. The company was adjudged to have a franchise to operate a sewer system and that under the franchise the company, "among other things, constructed a main

sewer" from and to certain points, "together with certain manholes, connections and bulkheads." It was valued at $6,900.00. The city's right to build a system was adjudged, but it was enjoined from building in the vicinity of that of the company. Its right to purchase or condemn the latter was recognized, but it was decreed that until such right should be exercised the city was enjoined from preventing the company from connecting all of its district sewers and laterals with the main sewer.

The rights of the parties thus being fixed by the decree, they entered into a contract in March, 1907, by which the city purchased the main sewer of the company and agreed to take over the laterals of the company in the way we have pointed out, to be paid by tax warrants, the city not binding itself for the payment in any way.

The city, it is alleged, has not attempted to comply with the contract, but, on the contrary, has made a contract with the Newman Plumbing Company to lay the laterals it desires. A simple breach of contract is, therefore, alleged on the part of the city. We are pointed to no law impairing the obligation of the contract. The statute under which the bonds were authorized to be issued is not such a law. It was passed before the contract was made. The breach of a contract is neither a confiscation of property nor a taking of property without due process of law. The case, therefore, comes within the principles announced in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 145.

It is clear, therefore, that on the face of the bill the Circuit Court had no jurisdiction of the suit, there being no diversity of citizenship, and no real and substantial question arising under the Constitution of the United States being presented by the bill.

The bill was dismissed by the Circuit Court apparently on the merits. It should have been dismissed for want of jurisdiction. The decree, therefore, must be reversed

and the cause remanded to the Circuit Court with directions to sustain the demurrer for want of jurisdiction, and on that ground dismiss the bill. *McGilvra* v. *Ross*, 215 U. S. 70, 80.

So ordered.

J. W. PERRY COMPANY *v.* CITY OF NORFOLK.

H. WHITE *v.* CITY OF NORFOLK.

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

Nos. 103, 104. Argued March 16, 1911.—Decided April 17, 1911.

Whether a municipality may list and tax its own property is a matter of state practice and, except as it may affect a right previously acquired and protected by the Federal Constitution, presents no Federal question.

This court in order to determine whether a contract has been impaired within the meaning of the Federal Constitution has power to decide for itself what the true construction of the contract is.

A contract of exemption may be impaired by wrongful construction as well as by an unconstitutional statute attempting a direct repeal.

A lease of property belonging to a municipality in which the lessees have expressly agreed to pay taxes due the state or Federal Government is not impaired by an assessment made by the municipality under power to tax acquired subsequent to the making of the lease.

Parties to a lease by a municipality not then possessing taxing powers are chargeable with notice that the power to tax may be subsequently conferred, and the conferring of such power does not impair the contract in the lease if there is no exemption expressly contained therein.

Doubts and ambiguities as to exemptions from taxation are resolved in favor of the public. *St. Louis* v. *United Railways*, 210 U. S. 273.

108 Virginia, 28, affirmed.

FROM the bill in 103, to enjoin the collection of city taxes, it appears that prior to 1792 the borough of Norfolk, Virginia, existed as a municipality of limited power. It

had a mayor and a council, but no power to tax. The town owned the Fort land, and appointed commissioners to subdivide the tract and let out the lots at public outcry. Thereupon the borough "demised, leased and to farm let lot No. 10 to Richard Evers Lee, his executors, administrators and assigns, from August 26, 1792, for and during the term of ninety-nine years, and after that time renewable for the further term of ninety-nine years, and so on forever," he and they to pay yearly the rent of £6.6 and "the public taxes which shall become due on said land." It was provided that if there should be arrears for three years in paying rent or taxes, the town should advertise and lease out the lots and improvements for the remainder of the term of ninety-nine years, said Lee and his assigns to make good the deficiency, if any, between the first and last prices, together with all arrears of rent and taxes, the overplus, if any, to be paid over to said Lee or his assigns. If the rent and taxes were paid as stipulated the borough and its successors were to renew the lease for the further term of ninety-nine years, and so on forever. The leases were renewed in 1892 on practically identical terms. Subsequently, the eastern portion of lot 10 was assigned to John L. Roper and the western portion to the J. W. Perry Company, who, "relying on the stipulations and agreements therein, purchased the lease, and, at great expense erected costly improvements on the land." The bill charged that "it was the intention of all the parties, in both the original and renewal leases, that the stipulation as to the payment of public taxes applied solely to such taxes as might be imposed by Virginia and the United States, and neither the borough nor the city of Norfolk had ever attempted to impose any municipal tax upon the property. But "though the city owns the fee, it has for the year 1906 caused the lot to be assessed in the name of it, the said city of Norfolk, at a valuation of $21,000, and intends to collect the tax of $346 from the lessees of lot 10."

The bill also charged that the buildings, on being attached to the land, became the property of the city as landlord, and likewise free and clear from the payment of city taxes, notwithstanding which it had assessed the improvement to the lessee at a value of $6,500 and demanded the tax thereon.

Lot 9 was held by White on substantially identical terms, except that the renewal lease made in 1892 provided that the lessee should "pay all rent and all state and national taxes." The city contended that this change was without consideration and did not modify the rights or liabilities of either party, because from the instrument as a whole it appeared that there was no intention to change, but only to renew and continue in force the original lease of 1792.

In each case it was alleged that the assessment and collection of taxes for city purposes impaired the obligation of the lease contract.

The trial judge granted perpetual injunctions. Those rulings were reversed by the Court of Appeals of Virginia (108 Virginia, 28), and plaintiffs brought the cases here, assigning as error that the collection of taxes by the city of Norfolk, in pursuance of authority conferred subsequent to the leases, impaired the obligations of the contracts.

Mr. Tazewell Taylor and *Mr. Walter H. Taylor*, with whom *Mr. William Leigh Williams* was on the brief, for plaintiffs in error:

As to the authority and duty of this court, see *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Huntington* v. *Attrill*, 146 U. S. 657; *Bryan* v. *Board of Education*, 151 U. S. 639; *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 495.

The contract is a lease. *State* v. *Mississippi Bridge Co.*, 134 Missouri, 321; *Wilgus* v. *Commonwealth* (Ky.), 9 Bush, 556; *Taylor* v. *Taylor*, 47 Maryland, 295; *Thruston*

v. *Mustin*, Fed. Cases No. 14,013; *Goodwin* v. *Goodwin*, 33 Connecticut, 314; *Moss Point Lumber Co.* v. *Supervisors* (Miss.), 42 So. Rep. 298; *Ware* v. *Washington*, 6 Smedes & M. 741; *Dillingham* v. *Jenkins*, 7 Smedes & M. 479; *James* v. *Kibler*, 94 Virginia, 173; *Wells* v. *Savannah*, 181 U. S. 531.

In the absence of contract stipulations to the contrary, the obligation rests upon the lessor to pay taxes on his interest. Taylor on Landlord and Tenant (4th ed.), § 341; Wood on Landlord and Tenant (2d ed.), § 414.

The contract in this case imposes no obligation on the lessee to pay the city taxes on the fee simple estate belonging to the city of Norfolk. Public taxes are not city taxes in this case. *Morgan* v. *Cree*, 46 Vermont, 773.

The court should put itself in the place of the parties making the contract. *Pressed Steel Car Co.* v. *Eastern Ry. Co.*, 121 Fed. Rep. 611; 13 Henning's Statutes at Large, 112, 241, 336; *Black* v. *Sherwood*, 84 Virginia, 906; *Love* v. *Howard*, 6 R. I. 116; *Woodruff* v. *Oswego Starch Co.* (N. Y.), 68 N. E. Rep. 994; *Brown* v. *Wagner*, 1 Pears. (Pa.) 254; *Bolling* v. *Stokes*, 2 Leigh (Va.), 178.

The city of Norfolk is assessing itself on its own property and endeavoring to make the lessees pay the same. *Trammel* v. *Faught*, 74 Texas, 557; 12 S. W. Rep. 317; 2 Cooley on Taxation, 822; Clark on Contracts, 9; *Byrne* v. *Byrne*, 94 California, 576; *Galveston Wharf Co.* v. *City of Galveston*, 63 Texas, 14; *Lowe* v. *Lewis*, 46 California, 549; *New Orleans* v. *Commissioners*, 12 La. Ann. 240; *Penick* v. *Foster* (Ga.), 58 S. E. Rep. 773; 12 L. R. A. (N. S.) 1163; *Clark* v. *Coolidge*, 8 Kansas, 195; *Scott* v. *Society &c.*, 59 Nebraska, 571; 81 N. W. Rep. 624; *Herriott* v. *Potter* (Ia.), 89 N. W. Rep. 92; *Soulard* v. *Peck*, 49 Missouri, 478; 2 Underhill on Landlord & Tenant, §§ 605–607; *Phila., W. & B. Ry. Co.* v. *Appeal Tax Court*, 50 Maryland, 397; *Jetton* v. *University of the South*, 208 U. S. 489.

Covenants in deed against incumbrances apply only to

those of third persons. *Horrigan* v. *Rice*, 39 Minnesota, 49; 38 N. W. Rep. 765.

The law of principal and surety is applicable. *Hardaway* v. *National Surety Co.*, 211 U. S. 552; *United States* v. *Burbank*, 4 Wall. 186.

The parties bear the same relation with reference to the improvements. *Kutter* v. *Smith*, 2 Wall. 491; *Bass* v. *Metropolitan Westside Ry. Co.*, 82 Fed. Rep. 857; *Fraer* v. *Washington*, 125 Fed. Rep. 280; *People* v. *Barker*, 153 N. Y. 98; *Madigan* v. *McCarthy*, 108 Massachusetts, 376; *West Shore Ry. Co.* v. *Wenner*, 75 N. J. L. 494; §§ 465, 466, Code of Virginia (1904).

The leasehold can and should protect lessees' contract. See act of March 14, 1906, granting charter to city of Norfolk; ordinance of the city of Norfolk imposing taxes for the year 1906; and as to allegations of contract see *Murray* v. *Charleston*, 96 U. S. 432; *Northern Pac. R. Co.* v. *Minnesota*, 208 U. S. 583, 591; see also *New York* v. *State Tax Commissioners*, 199 U. S. 1; *Chicago* v. *Sheldon*, 9 Wall. 50.

Mr. Nathaniel T. Green for defendant in error:

The judgment of the Supreme Court of Appeals of Virginia should be affirmed because it proceeds on non-federal grounds sufficient to sustain the same. *Northern Missouri Company* v. *McGuire*, 20 Wall. 46; *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679; *Berea College* v. *Kentucky*, 211 U. S. 45.

There is in truth no contract of exemption from city taxation in this case and therefore no impairment of the obligation of a contract. *Home Telephone Company* v. *Los Angeles*, 211 U. S. 265, 273; *St. Louis* v. *United Railways Co.*, 120 U. S. 266, 273; *Metropolitan Street Railway Co.* v. *New York*, 199 U. S. 1.

Not only is this true, but the ordinary meaning of the word "public" embraces the taxes involved in this suit. *City Cemetery* v. *Buffalo*, 46 N. Y. 506, 510.

The conclusion is that in this case there is absolutely no contract exempting plaintiffs in error from liability for these taxes, and it is only by the exercise of the utmost ingenuity that even a claim for such exemption can be produced. *North Missouri Ry. Co.* v. *McGuire*, 20 Wall. 46.

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

In 1792, at a time when it had no right to tax, the municipality of Norfolk, Virginia, leased to Lee and others several lots of land for ninety-nine years, renewable forever, the lessees and their assigns to pay the annual rent and "the public taxes which shall become due on said land." Subsequently the city was given the power of taxation, but made no effort to assess these lots until 1906. The lessees then sought to enjoin their collection on the ground that the "public taxes," they had assumed, were those which might be due to the State and to the United States. They contended that for Norfolk to assess land belonging to Norfolk for taxes payable to Norfolk constituted an invalid charge, and was not a lawful public tax of the kind which the lessees had agreed to pay, and that if such a tax could be assessed it was by virtue of statutes passed since the contract was made, and for the city to exert this new statutory power against them would impair the obligation of their contract.

In support of their claim that the city as lessor could not tax its own property, so as to make it a valid public tax payable by the lessee, they rely on the general rule that taxes are assessed to the owner, and as the landlord receives the rent he ought to bear the burdens imposed upon the property. On the authority of *State* v. *Mississippi Bridge Co.*, 134 Missouri, 321; *Thruston* v. *Mustin*, Fed. Cases, 14,013, and like cases, they insist that this is a liability arising out of the relation of landlord and tenant,

and is not limited to short term leases, but applicable to those for ninety-nine years, renewable forever.

It is true that in the present case the indenture uses apt words to create a lease, and the Virginia court held that it was technically such. But there are other and controlling features which show that, even if the legal title is in the city, the lessees have rights different from those usual in a mere leasehold estate.

On condition broken, they do not *ipso facto* lose all interest in the property and its proceeds. The contract does not contain the common stipulation that the tenant shall be compensated for his permanent improvements. On the tenant's default the city cannot at once enter into possession, but "the lot and improvements shall be leased out at public outcry for the remainder of the term," and after deducting unpaid rent and taxes the overplus, if any, shall be paid to the lessees. This overplus would represent, in part, the value of permanent improvements and also of the unexpired term. Selling the city's property to pay rent due the city is not at all consistent with the idea of a mere lease. It indicated rather that the tenant had a substantial interest in the property which was security for the payment of whatever he owed the city. The contract creates an estate somewhat like the perpetual lease of the civil law, where the tenant was for many purposes treated as owner, and liable for taxes. Merlin Rep., vol. 10, p. 232; Cooper's Inst. 277, 278; Sohmn's Inst., 3d ed., 346. It was also similar in its nature to ground rent, where an annual rental and public taxes are perpetually charged on the land, instead of a gross sum being paid or secured. There the grantor is treated as having a fee in the rent reserved, and the grantee a fee in the land, subject, among other things, to the payment of public taxes. Duane on Landlord & Tenant, 96; Cadwallader on Ground Rent, 101; *Robinson* v. *County of Allegheny*, 7 Pa. St. 161.

The Court of Appeals held that in Virginia the general

rule that the landlord is responsible for the taxes "has no application to the case of a perpetual leaseholder where the tenant is in effect the virtual owner of the property and entitled to its use forever. For the purposes of taxation the mere legal title remaining in the landlord will be disregarded." It adopted that part of the language in *Wells* v. *Savannah*, 87 Georgia, 397, affirmed in 181 U. S. 531, where, in speaking of the liability of one who had a perpetual lease and a right to convert it at will into a fee, Judge Bleckley said: "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being." *Crowe* v. *Wilson*, 65 Maryland, 479; *Brainard* v. *Mayor of Colchester*, 31 Connecticut, 407.

Ordinarily it would be a useless thing for a city to tax its own property. But this can be done under Virginia practice, and is not a vain thing if thereby property of the city, subject to taxation, is listed in its name as holder of the legal title, so as to fix the amount of the tax on the property which the tenant may have agreed to pay. Cooley on Taxation (3d ed.), 263. This ruling of the Virginia court presents no Federal question, but does establish that the tax was not illegal, as claimed, but was based on an assessment valid under the laws of the State.

Whether it is a "public tax" contemplated by the contract, or whether forcing the lessees to pay it impairs that contract, is a matter we must consider; for a valid contract of exemption from taxation may be impaired by wrongful construction as well as by an unconstitutional statute attempting a direct repeal. This court, therefore, "has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is." *Huntington* v. *Attrill*, 146 U. S. 657; *Bryan* v. *Board of Education*, 151 U. S. 639; *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 495; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 446.

It is admitted that the lessees have expressly agreed to pay taxes due Virginia or the Federal Government, regardless of the character of the estate created. And, while it is true that when the lease was made the borough had no authority to tax, both parties were charged with notice that such power might, and probably would, be conferred when increase of population made it necessary. Even if the borough could have made a valid contract of exemption in 1792, there is nothing to show that it did so. On the contrary, the provision that the lessee was to "pay public taxes" was sufficiently comprehensive to embrace municipal taxes whenever they could thereafter be lawfully assessed on land or the improvements which were a part of the land. Where one relies upon an exemption from taxation, both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public. *St. Louis* v. *United Railways*, 210 U. S. 273. Here there is not only no language of exemption, but a positive agreement on the part of the lessees to pay public taxes on the land. In compelling them to do so the contract is enforced instead of impaired. The judgment of the Supreme Court of Appeals of Virginia is therefore

Affirmed.

SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA *v.* SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLAHOMA, AND THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 614. Argued December 14, 15, 1910.—Decided April 24, 1911.

The provision in the act of August 30, 1852, c. 103, § 3, 10 Stat. 41, 56, forbidding payment of Indian annuities to any attorney or agent and requiring the same to be paid to the Indians or to the tribe did not give any vested rights to the Indians but was a direction to agents of the United States.

In the Indian treaties under consideration in this case the Government dealt with the tribes and not with individuals, and the treaties gave rights only to the tribes and not to the members.

Under the act of Mar. 1, 1907, c. 2290, 34 Stat. 1055, authorizing this suit, the action is analogous to one at law to recover money paid under mistake of law or fact, rather than one in equity, and this court follows the rule not to go behind the findings of the Court of Claims. *United States* v. *Old Settlers*, 148 U. S. 427, distinguished.

45 Ct. Cl. 287, affirmed.

THE facts, which involve the determination of the status of Sac and Fox Indians under certain treaties and statutes, are stated in the opinion.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler*, *Mr. George R. Struble*, *Mr. H. F. Stiger* and *Mr. William O. Belt* were on the brief, for appellants.

Mr. Barry Mohun, with whom *Mr. A. R. Serven* and *Mr. R. W. Joyce* were on the brief, for appellee Indians.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. George M. Anderson* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the judgment of the court.

This is a suit brought by the Sac and Fox Indians of the Mississippi in Iowa against the Sacs and Foxes in Oklahoma and against the United States, under the act of March 1, 1907, c. 2290, 34 Stat. 1055. That statute gave "full legal and equitable jurisdiction, without regard to lapse of time," to the Court of Claims to hear and determine "as justice and equity may require, with right of appeal" to this court, all claims of the plaintiffs against the defendants for their alleged "proportionate shares, according to their numbers," not already paid to or for them, of appropriations for fulfilling treaty stipulations, or arising from the disposal or sale of the tribes' lands, including certain claims to be stated. Reports of Departments printed as Congressional documents are made evidence, to "be given such weight as the court may determine for them." The claims made are (1) for annuities between 1855 and 1866, both inclusive; (2) for the difference between the sums paid and those alleged to have been due from 1867 to 1884; (3) for a similar difference from 1884 to date; (4) for a sum alleged to be due for pay of the plaintiffs' chiefs; (5) for the plaintiffs' share of the proceeds of tribal lands disposed of under a treaty of 1859. The case was heard on the evidence furnished by the above mentioned documents, the petition was dismissed, and the plaintiffs took this appeal. 45 Ct. Cl. 287.

The facts found by the Court of Claims, abridged, are as follows. Under the treaty of October 11, 1842, 7 Stat. 596, the tribes in question ceded the land then occupied by them in the Territory of Iowa, were assigned a tract in what now is Kansas, and removed thither in 1845, 1846; then numbering 2278, and, in 1851, 2660 persons. In 1855 and from 1862 to 1866 certain members, number unknown, without permission from the United States, re-

turned to what had been a part of the Iowa reservation. Their motives are immaterial. On July 15, 1856, the legislature of Iowa passed an act giving the consent of the State that the Indians (Sacs and Foxes) 'now residing' in Tama County, but none others, be permitted to remain there; providing for a census, and requesting the Governor to inform the Secretary of War and urge the payment to such Indians of their proportion of the annuities due or to become due to the tribe. The number of Indians embraced in the act does not appear. From 1855 to 1866 there was no agent of the United States with the Iowa band, although its existence was known. A special agent took a census on May 31, 1866, which gave the whole number as 264 and he spent on account of annuities for them $5,359.06. Except this sum, all the annuities and other monies of the tribe were paid out at the Sac and Fox agency, Kansas. Whether any Indians returned to Kansas and received payments there does not appear. At this time, up to 1867, annuities were paid subject to the act of August 30, 1852, c. 103, § 3, (10 Stat. 41, 56), which forbade payment to be made to any attorney or agent and required it to be made directly to the Indians themselves or to the tribe per capita, "unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President." The policy and practice of the Government were to pay no annuities to Indians absent from reservations without leave, as were the Iowa band, and nothing to the contrary is implied by the act of 1852.

We interrupt the recital of facts to dispose at this point of the first claim made by the plaintiffs. The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S.

379, 387. The Government did not deal with individuals but with tribes. *Blackfeather* v. *United States*, 190 U. S. 368, 377. See *Fleming* v. *McCurtain*, 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes. Treaties of November 3, 1804, 7 Stat. 84; October 21, 1837, 7 Stat. 540; October 11, 1842, 7 Stat. 596. See treaty of October 1, 1859, 15 Stat. 467. So the treaty of February 18, 1867, in article 21, speaks of "the funds arising from or due the nation under this or previous treaty stipulations," and of payments to bands. 15 Stat. 495, 504. Moreover, when the Government decided to pay only at the tribal agency, and then paid the whole amount due, we must presume, at this distance of time, that its decision was made under the direction of the President. The Court of Claims adds as yet a further reason for rejecting this claim that it does not appear how many of the Iowa Indians returned to Kansas to receive their annuities, but (therein varying from the statement of facts found), that it does appear that some of them did. The course of the Government is sanctioned in principle by the implication of the treaty of October 1, 1859, article 7, 15 Stat. 467, 469. That article recites the anxiety of the Sacs and Foxes that all members of the tribes should share the advantages of the treaty, invites non-resident members to come in and provides for notice to them, but adds the condition that those who do not rejoin and permanently reunite with the tribe within one year shall not have the benefit of any of the stipulations in the treaty contained.

On February 18, 1867, another treaty was made, amended September 2, 1868, proclaimed on October 14, 1868, 15 Stat. 495, by which the tribes sold their lands in Kansas to the United States and agreed to remove to a reservation in what now is the State of Oklahoma. Article 21 was like article 7 of the treaty of 1859, just mentioned, with a condition that no part of the funds

due to the nation under this or previous treaties should be paid to any bands or parts of bands not permanently residing on the reservation, except those residing in Iowa. 15 Stat. 504. The soon following Indian appropriation act of March 2, 1867, c. 173, 14 Stat. 492, 507, provided, as permitted by the treaty of 1859, art. 6, that the band of Sacs and Foxes "now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State." This is subject to the same comment as the act of 1852 when relied upon as a foundation for individual rights under it. From 1867 through 1884, the Iowa Indians were paid $11,174.66 as their proportion of the annuities, although they protested and for a time refused to receive the same. The matter was settled by a clause in the act of May 17, 1882, c. 163, 22 Stat. 78, "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them." This by implication ratified the previous estimates and leaves no more to be said as to the second claim—(for the time from 1867 to 1884). It is suggested to be sure that the act of 1882 was repealed by the act of 1884, but as will be seen directly it was not repealed so far as it affected this claim. After the act of 1882 the Iowa Indians consented to receive the apportioned sum. We may add that there is nothing to show that all the Indians that had the assent of the government of Iowa given by the act of 1856 to their residing there were not paid their full share.

By the act of July 4, 1884, c. 180, 23 Stat. 76, 85, after an appropriation for interest payable under the treaty of 1842, it was provided that thereafter the Iowa Sacs and Foxes should have apportioned to them, from treaty appropriations, "their per capita proportion of the amount

appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior." As to the word 'original' we may compare the proviso in the Act of March 2, 1867, stated above. The Secretary of the Interior ascertained the number to be 317 and the number on the Oklahoma reservation to be 505 in 1884 and 513 in 1887. He accordingly apportioned the proper fund in the proportion of 317 to 505 in 1885 and 1886, and afterwards, to 1907, in the proportion of 317 to 513. The plaintiffs attempt to go behind this ascertainment by the Secretary. But here for a third time we are dealing with a statute, not with a treaty. There is no intimation of an intent to change the terms of the treaties by which the contracts were made not with individuals but with the tribes. The statute neither changed nor conferred rights. It simply directed the Secretary of the Interior how the contracts of the United States should be performed. They were performed as directed, to the seeming satisfaction of the representatives of the contractees, and there is an end of the matter. Here again we may add that although it is argued that the evidence shows that the Secretary's estimate was too small for years after 1887, the evidence does not show that the additional Indians were or represented original Sacs and Foxes "now [i. e. on July 4, 1884,] in Iowa." This disposes of the third claim.

However, the Iowa Indians not being satisfied and having presented a memorial to Congress setting up their present claims except that for pay of their chiefs, the act of March 2, 1895, c. 188, 28 Stat. 876, 903, directed the Secretary of the Interior to ascertain whether under any treaties or acts of Congress any amount was justly due to them from the members of the tribe in Oklahoma by reason of any unequal distribution. The Secretary found

that a certain sum was due from the amount appropriated by act of April 10, 1869, c. 16, 16 Stat. 13, 35, in payment for the Kansas lands ceded by the treaty of 1867, but nothing more. This sum was paid. Act of June 10, 1896 c. 398, 29 Stat. 321, 331.

The fourth claim is based upon article 4 of the treaty of 1842, by which it was agreed that each of the principal chiefs should receive five hundred dollars annually, "out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent." This like the rest of the treaty was a promise not to the chiefs but to the tribe, gave the chiefs no vested rights and was subject to such qualification in its performance as to the parties might seem fit. Whether a payment to Iowa chiefs would have been performance may be doubted, and certainly if the parties saw fit to treat the chiefs on the reservation as the only ones to be paid, no one else has anything to say. The act of May 31, 1900, c. 598, 31 Stat. 221, 245, directed the Secretary of the Interior to pay a named Iowa head chief five hundred dollars a year, during the remainder of his life, beginning with and including the fiscal year 1900, in accordance with the terms of article 4 of the treaty of 1842, but that is not enough to establish that he had been guilty of mistake in not making the same payment before the time that he was ordered to begin.

The fifth and last claim is for a share in proceeds of land ceded by the treaty of 1859. As to this the Court of Claims finds it impossible to ascertain what sum if any is due or to whom it would be payable. We do not see how the claim can be supported when the treaty itself provided that to benefit by it members must rejoin the tribe, meaning the tribe in Kansas, within one year. It is suggested to be sure that the forfeiture as it is called, was dependent upon notice being given as agreed in article 7, and that there is some evidence that notice was not given. The

condition however was an absolute condition precedent to the acquisition, by persons not parties to the treaty, of any rights, if rights they can be called, notice or no notice; and furthermore if the question were open we should not be prepared to find that there was a failure in that respect. See *United States* v. *Crusell*, 14 Wall. 1; *United States* v. *Pugh*, 99 U. S. 265. *New York Indians* v. *United States*, 170 U. S. 1, has no bearing. There the question was whether grantees in fee simple by treaty had forfeited their rights.

The plaintiffs contend that, as the act authorizing the suit gave the Court of Claims full legal and equitable jurisdiction, the appeal opens the findings of fact for reconsideration, as was held in *United States* v. *Old Settlers*, 148 U. S. 427, 464, 465. That, however, was a suit in equity, whereas the present case is more analogous to an action at law, to recover a fund from parties to whom it was paid under mistake of law or fact, or from the original contractor by whom the payment was made. We should hesitate to depart from the ordinary rule that we do not go behind the findings of the Court of Claims, *The Sisseton & Wahpeton Indians*, 208 U. S. 561, 566, if, in our view, the question needed to be decided. It is true that the court below stated a principle of evidence that, if it is to be taken literally, cannot be sustained. It said that counsel could not bind the court to admit evidence not admissible by law, and partly on that ground seems to have declined to consider *ex parte* affidavits which the counsel for the Iowa and Oklahoma Indians agreed might be given the effect of depositions. The counsel for the United States refused to agree, and this was a further, and possibly adequate ground for the exclusion, as the agreement may have been understood to be conditional upon all parties joining. But of course evidence, hearsay or *ex parte*, for instance, may be admitted by consent, unless perhaps as against the United States, and then should be given

whatever weight it would have but for technical rules. Apart from agreement the depositions were not made evidence by the statute of 1907, as that only dealt with reports of Departments, not with every exhibit that such reports might contain.

The question remains whether the error, if error there was, did the plaintiffs any harm. The counsel for the plaintiffs treats the statute giving jurisdiction as intended to open the case from the beginning without regard to inconsistent statutes and to provide for an arbitration on the footing of what may seem fair. See *United States* v. *Old Settlers*, 148 U. S. 427, 428, 429, 473. *Phineas Pam-To-Pee* v. *United States*, 148 U. S. 691, 699. In view of the subject-matter an uneasy doubt is natural whether Congress did not mean rather more than it plainly said. But the jurisdiction given is 'legal and equitable' and the authority is to 'adjudicate as justice and equity shall require' claims for money alleged 'to be due to them as their proportionate shares' of appropriations to fulfill treaty obligations, etc. The statute creates no new right beyond excluding the effect of the lapse of time and, perhaps, the defence of *res judicata* and satisfaction under the acts of 1895 and 1896; it makes no admission, but simply provides for a trial on the merits. See *Stewart* v. *United States*, 206 U. S. 185, 194. A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right.

It is apparent from what we have said that no finding as to the number of Indians in Iowa in particular years, without more, could change the result to which the Court of Claims and this court have come. The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indians' wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and

to persons present there. The acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the acts of 1852 and 1867. It confined its benefits to "original Sacs and Foxes now in Iowa," and made the Secretary of the Interior the judge. There is no evidence to show that he was wrong as to the number of original Sacs and Foxes who had been in Iowa on July 4, 1884. Whether the plaintiffs might get an award in a free arbitration, irrespective of treaty and statute, we cannot say, but in our opinion they have failed to establish such rights as can be recognized by this court. The decision below was according to the long established construction and practice of the Department, a fact entitled to much weight in a case like this.

Judgment affirmed.

Mr. Justice McKenna, dissenting.

1. On the supposition that the findings of the Court of Claims are binding on this court, the case should be remanded to that court for further consideration because of its error in refusing to consider evidence made competent by the jurisdictional act and by the stipulation between the contending Indians.

2. If this court may go behind the findings, as I think it may on the authority of *United States* v. *Old Settlers*, 148 U. S. 464, and as it is conceded by the contending Indians that it may, in my opinion the Secretary of the Interior, in apportioning the annuities from 1885 to date, committed error in taking the fixed, unvarying sum of 317 for the Sacs and Foxes in Iowa, and 505 for those in Oklahoma, disregarding any increase or decrease of the respective divisions of the tribe. The tribal rights of the claimant Indians had been recognized, and the jurisdictional

act required that they should be given "their proportionate shares according to their numbers . . . of the appropriations made by Congress for fulfilling treaty stipulations with the confederated tribes. . . ."

I think, therefore, that a fixed, unvarying sum should not have been selected. Annual tests should have been made and the increase or decrease of the Indians ascertained by the Secretary of the Interior.

The Court of Claims found, it is true, that there was no competent evidence of the increase or decrease of the divisions of the tribe. But in so finding the court disregarded, as I have already said, evidence which the jurisdictional act and the stipulations of the contending Indians made competent, and such evidence, though not strong, established that the claimant Indians had increased. It is pointed out in the opinion that the Secretary of the Interior recognized a small increase of the defendant Indians in 1887.

RIPLEY *v.* UNITED STATES.
UNITED STATES *v.* RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 887, 888. Submitted March 10, 1911.—Decided April 24, 1911.

This court may not draw an inference of bad faith on the part of a government inspector unless the findings are so clear on the subject as to take the inference beyond controversy.

It is the duty of the Court of Claims in dealing with the question of bad faith on the part of a government inspector to explicitly find the facts in regard to that subject.

The Court of Claims should find as a fact whether or not complaints were made to the proper officers as to improper conduct on the part of subordinates, and if made, when and what action was taken thereon.

Where proper findings are not made by the Court of Claims on specific matters to enable this court to properly review the judgment, the record will be remanded to that court for additional findings as to such matters, *United States* v. *Adams*, 9 Wall. 661; and so ordered in this case, with instructions to return to this court with all convenient speed.

45 C. Cl. 621, remanded with instructions.

THE facts, which involve the construction of a contract for public work with the United States and the validity of claims made by the contractor thereunder, are stated in the opinion.

Mr. William H. Robeson, *Mr. Benjamin Carter* and *Mr. F. Carter Pope* were on the brief, for Ripley.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Philip M. Ashford*, Attorney, for the United States.

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

These are cross appeals from a judgment entered by the Court of Claims against the United States and in favor of Henry C. Ripley. The claim of Ripley was based upon a written contract between himself and the United States, executed on April 6, 1903, containing numerous stipulations, by which in substance Ripley agreed to furnish materials for and do certain jetty work at Aransas Pass, Texas, authorized by an act approved June 13, 1902 (32 Stat. 340).

In his amended petition Ripley set forth numerous items of damage, aggregating $45,930.00, which it was asserted resulted from violations by the United States of the terms of the contract. Judgment was entered against the United States for $14,732.05. 45 Ct. Cl. 621. Ripley prosecuted this appeal in order to obtain an increased allowance,

while the United States by its cross appeal seeks a reversal of the judgment.

Among other things it was provided in paragraph 61 of the specifications as follows:

"Between Stations 20 and 27 and from the vicinity of Station 55 seawards the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When in the judgment of the U. S. agent in charge this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest levelled with small riprap, generally one man stone. Large blocks shall then be bedded in crest of mound in two rows breaking joints with their longest dimensions parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap."

A large sum was demanded by Ripley upon the contention that the completion of the work was greatly delayed owing to the fact that "On the portion of the line where no foundation had previously been laid, and where petitioner therefore placed the foundation materials, said Captain Jadwin and the subordinate officers in charge forbade and restrained petitioner from imposing the cap blocks until long after the foundation, in their judgment and, in fact, had become sufficiently consolidated and they had caused the crest to be levelled." On this branch of the case the Court of Claims found as follows:

"VII.

"In the performance of said work it was advantageous to claimant to have his employees operate on the lee side of the structure where they could be protected from the action of the rough seas, and for this purpose it was desirable that he be allowed to impose the crest block on the top of the core as rapidly as possible, so that the waves

could not pass over it and interfere with the workmen, and thus prevent delay in the completion of the contract. The Aransas Pass Harbor Company had laid the foundation for the entire jetty and for 2800 feet, that is, between Stations 27 and 55, the entire core of the structure had been built up, and between Stations 27 and 40 the crest blocks had been laid. The foundation and the core thus previously constructed were fully consolidated when the contract with claimant was let.

"When claimant had completed from 100 to 200 feet of the core he requested from the inspector in charge permission to begin to lay crest blocks which was refused on the ground that the core had not consolidated. By the end of December, 1903, claimant had completed 400 to 500 feet of the core and again he requested permission to impose the crest blocks. Said inspector refused and continued to refuse permission to lay said crest blocks until May, 1904, at which time between 1400 and 1500 feet of the core had been repaired and completed. Commencing in October, 1903, when about 300 feet of the core had been built up to the required elevation, slope stones were laid on the jetty which afforded some protection from the action of the waves to the rip-rap already constructed, but not as much protection as the crest blocks would have afforded. When claimant was thus laying the slope stones, and throughout December, 1903, and January, February, March, and April, 1904, it was manifest that large parts of the work done by him had fully settled and consolidated. If claimant had been permitted to lay the crest blocks from that time on as the work progressed there would have resulted an additional protection which would have enabled him to work 60 days more than he did between that time and May 7, 1904, date the first crest blocks were laid. When claimant was seeking permission to lay the crest blocks as aforesaid the inspector, in refusing same, alleged as a reason that the jetty had not had sufficient time to

consolidate, and it does not appear that any other reason was at any time given by said inspector for so refusing."

In the brief of counsel for Ripley it is said:

"This court will perceive that, with the exception of *two matters* of minor importance to which we will hereafter briefly refer, the main complaint involved in this appeal is the erroneous application of Finding VII to the judgment. The Court of Claims in Finding VII has found that as early as October, 1903, claimant was endeavoring to obtain permission to lay the crest blocks on the core of which 'it was *manifest* that large parts . . . had fully settled and consolidated.' 'Manifest,' according to all the dictionaries, means 'clear,' 'plain,' 'evident to the eye and understanding.' So that if it was 'manifest' that the core had fully settled and consolidated, it naturally follows that this was known to the inspector and that the denial of the permission to lay the crest blocks (which the claimant had the right to do upon the consolidation of the core) was such a fraud as entitles him to recover the damages he has thereby suffered. The claimant's right to recover could not be more complete had the Court of Claims found in so many words that the decisions of the Government's officer were grossly fraudulent and made in bad faith. Apparently the Court of Claims, with delicate consideration for the feelings of the engineer department, chose to employ different, though just as effective language. But for the denial of this permission to lay these crest blocks, they would have been laid and thus substantially all of the delay in the completion of the contract would have been avoided."

We are of opinion, however, that while it may be open to conjecture that the word "manifest" as used by the court in its finding is susceptible of the broad significance which the argument thus imputes to it, we do not think such meaning is so clear and free from doubt as to justify us in concluding that there was bad faith on the part of the Government inspector in charge of the work. We say

this because it is certain that we may not draw the inference of bad faith unless the findings are so clear on the subject as to cause such inference to be plain beyond controversy. It follows, therefore, that the finding below on the subject of the knowledge and good faith of the inspector is so incomplete and inconclusive as to render it impossible for us to decide the cause without grave risk of doing wrong to the plaintiff or serious injury to the Government. It was the clear duty of the court below, in dealing with the question of bad faith on the part of the Government inspector, not to leave that subject dependent upon an ambiguous expression susceptible of being construed one way or the other, but to explicitly find whether or not that which it states was manifest was or was not known to the inspector and whether that subordinate official acted in good or bad faith in the various refusals recited as having been made to the laying of the crest blocks and to the reasons assigned for those refusals. Further, the court should have found as a fact whether or not complaint was made by the claimant, either to the engineer officer in charge or to the chief of engineers, as to the action of the subordinate inspector in refusing the requested permission, and if complaint was made, when it was made and what action was taken thereon.

Following the approved practice (*United States* v. *Adams*, 9 Wall. 661), the following order will be made:

Ordered: That the record in this case be remanded to the Court of Claims, and that said court be instructed to find and certify to this court, as matters of fact, in addition to the facts found and certified in said record:

First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March and April, 1904, as recited in Finding VII, the inspector in charge knew "that large parts of the work done by the claimant had fully settled and consolidated."

Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

Third. Whether at any time the claimant notified the engineer officer in charge or the chief of engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer.

And it is further ordered that the said record, with the said additional findings of fact, be returned to this court with all convenient speed.

SENA *v.* AMERICAN TURQUOISE COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 73. Argued April 18, 1911.—Decided May 1, 1911.

In an action of ejectment in New Mexico, the trial court was of opinion that the boundaries under which plaintiff claimed did not include the land in dispute, and the Supreme Court of the Territory affirmed on the ground of defect in plaintiff's grant and that the evidence as to possession was too vague to raise a presumption in place of proof; and this court affirms the judgment.

Where both parties move for a ruling, and there is no question of fact sufficient to prevent a ruling being made, the motions together amount to a request that the court find any facts necessary to make the ruling; and, if the court directs a verdict, both parties are concluded as to the facts found, and unless the ruling is wrong as matter of law the judgment must stand. *Beuttell* v. *Magone*, 157 U. S. 154.

THE facts are stated in the opinion.

Mr. Frank W. Clancy, with whom *Mr. Harry S. Clancy* was on the brief, for plaintiff in error.

Mr. Matt G. Reynolds, with whom *Mr. Thos. B. Harlan* and *Mr. Stephen B. Davis, Jr.* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

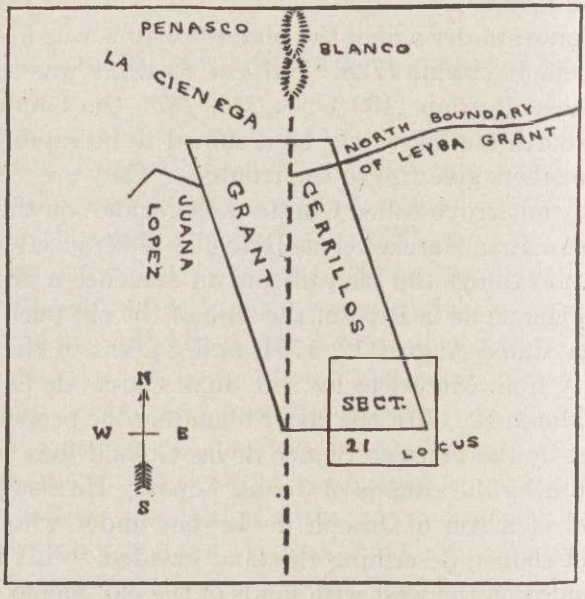
This is an action of ejectment for about fifty acres in Section 21, Township 15 north, Range 8 east in the County of Santa Fe, New Mexico, which the defendant holds under mining claims dating from 1885 to 1892, and located under the laws of the United States. It was brought after the plaintiff's failure to establish title, under a Mexican grant, to a large tract of which this land is alleged to be a part, in the Court of Private Land Claims and in this court on appeal. *Sena* v. *United States*, 189 U. S. 233. *Ibid.* 504. The decree left open the question whether the plaintiff had a perfect or imperfect title and was without prejudice to further proceedings, as in case of a perfect title the statute establishing the Court of Private Land Claims did not require a confirmation by that court. Act of March 3, 1891, c. 539, § 8. 26 Stat. 854, 857. *Richardson* v. *Ainsa*, 218 U. S. 289. The former decision was put on the ground of laches, but in the present suit the plaintiff offered some little additional evidence of acts indicative of possession later than any proved before. Both parties, however, moved that the court should direct a verdict. *Beuttell* v. *Magone*, 157 U. S. 154. *Empire State Cattle Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1. The court of first instance was of opinion that the boundaries of the grant under which the plaintiff claims were not proved to include the land in dispute and directed a verdict for the defendant. The judgment was affirmed by the Supreme Court of the Territory on the ground that the

grant did not appear to have been confirmed as required by a Spanish ordinance of October 15, 1752, 2 White's New Recop. 62, 63, [*51], and that the evidence of possession, &c., was too vague to raise a presumption in place of proof. The plaintiff took a writ of error and brings the case here.

The grant under which the plaintiff claims was made to Joseph de Leyba in 1728. Subject to what was said in the former decision (189 U. S. 233, 237), the boundaries on the north and east may be assumed to be established, but the others give rise to the trouble. They are "on the south by an arroyo called Cuesta del Oregano; on the west by land of Juan Garcia del las Rivas." To translate these words into things the plaintiff put in evidence a grant to Miguel Garzia de la Riba of the sitio of the old pueblo the Cienega, dated August 12, 1701, and a grant of the same property from Miguel to his son, Juan Garcia de la Riba, dated March 12, 1704, the latter bounding the property on the east by the Penasco Blanco de las Golondrinas and on the south by the canada of Juana Lopez. He also put in the will of a son of Joseph de Leyba, under whom the plaintiff claims, describing the land granted to his father as bounded on the west with lands of the old pueblo of the Cienega. The Penasco Blanco was shown to be a known natural object. It lies to the north of the north boundary of the Leyba grant, but the plaintiff says that it is to be presumed that the eastern boundary of the Riba grant, and therefore the western boundary of the Leyba grant, was a north and south straight line passing through the Penasco Blanco, and that such a line would include the land in dispute.

But there are great difficulties in the way of this conclusion. It appears that in 1788 a grant was made of land in or known as Los Cerrillos, title under which was confirmed by the Court of Private Land Claims. This tract extends to the east of the line drawn by the plaintiff

through the Penasco Blanco, the eastern boundary extending southeast and northwest from a point north of the northerly boundary of the Leyba grant to near the eastern boundary of section 21 containing the lands in dispute, as is indicated by the diagram below. There is nothing



adequate to contradict the presumption in favor of this grant, and it at once makes impossible the hypothesis that the Cienega, the land of Juan Garcia given as the western boundary of the Leyba grant extended to a straight line running south from the Penasco Blanco through the Cerrillos grant to the west of section 21. Furthermore the southern boundary of the Cienega was the canada of Juana Lopez. This seems to have been to the west of Los Cerrillos, and again to exclude the supposed straight line. The southern boundary of Leyba depended on contradictory testimony as to the existence of an arroyo of the Cuesta del Oregans in the neighborhood and was thought by the trial judge not to be made out. With regard to the pre-

sumption as to boundaries it is to be observed that the northern boundary is supposed to be a more or less irregular road, that the eastern is another road running irregularly northeast and southwest and the southern as contended for continues the same line in a somewhat more northerly direction, so that the outline of the supposed grant resembles the peninsula of Hindostan.

There are other serious questions that would have to be answered before the plaintiff could recover, adverted to in the former decision of this court and in the opinions of the two courts below in the present case. But as it is desirable not to draw into doubt any claim that the plaintiff may have to other land not now in suit, we confine ourselves to the ground taken by the trial court. It seems to us impossible to say that the plaintiff produced evidence sufficient to disturb the defendants' mining claim and the possession that it has held so long under the laws of the United States. As both parties moved for a ruling, and as there was nothing more, according to *Beuttell* v. *Magone*, 157 U. S. 154, it stood admitted that there was no question of fact sufficient to prevent a ruling being made, and the motions together amounted to a request that the court should find any facts necessary to make it; so that unless the ruling was wrong as matter of law the judgment must stand. But it hardly is necessary to invoke that principle in this case.

Judgment affirmed.

SPERRY AND HUTCHINSON COMPANY *v.* RHODES.

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

No. 128. Argued April 19, 20, 1911, for plaintiff in error. The court declined to hear further argument.—Decided May 1, 1911.

The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between rights of an earlier and later time.

In a statute relating to the use of photographs, the fact that it applies only to those taken after the enactment does not render it unconstitutional as denying the equal protection of the law because it does not relate to those taken prior to such enactment.

Where property is not brought into existence until after a statute is passed, the owner is not deprived of his property without due process of law on account of limitations thereon imposed by such statute.

The Court of Appeals of that State having construed the statute of New York of 1903 limiting the use of photographs of persons to photographs taken after the statute went into effect, the statute is not unconstitutional as denying one owning photographs taken thereafter of his property without due process of law, or as denying equal protection of the law.

Judgment entered on authority of 193 N. Y. 223, affirmed.

THE facts are stated in the opinion.

Mr. John Hall Jones for plaintiff in error:

As to the law in New York before the enactment, see *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, holding there was no right at common law to prevent a company from distributing flour bags upon which was a lithograph picture of the plaintiff.

Under that decision no person in New York has any property right in his own features, nor in the photographs of them, and any person could take a photograph of another and use it as he chose; and see *Atkinson* v. *Doherty*, 121 Michigan, 372.

The statute in this case was enacted soon after Chief Judge Parker's decision in the *Roberson case*. It must be noted that this statute does not in terms affect the property right of a photographer in his work. It merely says that one who uses the photograph of a living person for purposes of trade or advertising without that person's prior written consent is guilty of a crime. In other words, the statute restricts and limits the property right in such a way as to destroy much of the value of the photograph.

It is an unnecessary deprivation of property; nor can the law be defended or the rule of "Sic utere tuo ut alienum non laedas," for the "other" has no legal right which you are bound to respect. The law takes no account of "that liberty of action which is necessary in the conduct of modern business affairs in a great city," *Grossman* v. *Caminez*, 79 App. Div. N. Y. 15, but makes even the oral use of a person's name a crime.

The individual must admit certain rights by the public in his name and appearance, and must trust to advancing standards of propriety to prevent annoyance from their exercise. *Forster* v. *Scott*, 136 N. Y. 577, 584.

Unconstitutionality does not depend upon what has been done under a particular statute but what may be done. *Fisher Co.* v. *Woods*, 187 N. Y. 90, 95; *Dexter* v. *Boston*, 176 Massachusetts, 247, 251; *Railroad Cases*, 116 U. S. 307, 331; *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, 86; *Van Zandt* v. *Waddell*, 2 Yerger, 260, 270; *Livestock Assn.* v. *Crescent City Co.*, 1 Abbott, C. C. 388, 398; *Powell* v. *Pennsylvania*, 127 U. S. 678, 692; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Wright* v. *Hart*, 182 N. Y. 330; *Collins* v. *New Hampshire*, 171 U. S. 30; *Matter of Jacobs*, 98 N. Y. 98; *Wynehamer* v. *People*, 13 N. Y. 378, 398; *St. Louis* v. *Dorr*, 41 S. W. Rep. 1094.

The statute has no reasonable or proper relation to the public health, safety or morals. *Peck* v. *Chicago Sunday Tribune*, 214 U. S. 185. The statute does prevent a per-

son from using his own property in carrying on a lawful business, and unless such prevention is reasonably necessary the act violates the Fourteenth Amendment. *Edison* v. *Lubin*, 122 Fed. Rep. 240; *American Mutoscope Co.* v. *Edison Mfg. Co.*, 137 Fed. Rep. 262.

This statute can only be sustained if it is a valid exercise of the police power of the State. While the limits of this power can never be accurately defined, it is submitted that it extends only to such subjects as promote or guard the public health, the public safety or the public morals. *O'Keefe* v. *Somerville*, 190 Massachusetts, 110; *Young* v. *Commonwealth*, 101 Virginia, 853, 863; *People* v. *Gillson*, 109 N. Y. 389; *People* v. *Zimmerman*, 102 App. Div. 103; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *Toledo Railway Co.* v. *Jacksonville*, 67 Illinois, 37, 40; *State* v. *Loomis*, 115 Missouri, 307, 313; *Ex parte Drexel*, 147 California, 763; *State* v. *Dalton*, 22 R. I. 77, 80; *Fisher* v. *Woods*, 187 N. Y. 90.

For decisions and comments subsequent to the decision of the Court of Appeals of New York in this case, see *Ellis* v. *Hurst*, 121 N. Y. Supp. 438; *S. C.*, N. Y. Law Journal, Dec. 27, 1910; *Eliot* v. *Circle Publishing Co.*, 120 N. Y. Supp. 989; *Cundy* v. *Leverill*, referred to in N. Y. Law Journal, June 10, 1908; *Binns* v. *Vitagraph Co. of America*, 67 Misc. Rep. 327; *Jeffries* v. *N. Y. Evening Journal Publishing Co.*, 124 N. Y. Supp. 780; *Moser* v. *Press Pub. Co.*, 109 N. Y. Supp. 963; *Riddle* v. *McFadden*, 130 App. Div. (N. Y.) 898; *Corelli* v. *Wall*, 22 T. L. R. 532 (Eng. Ch. D., May 10, 1906); *Dockrell* v. *Dougall*, 78 L. T. 840; *Wyatt* v. *James McCreery & Co.*, 126 App. Div. (N. Y.) 650.

The court declined to hear further argument, but *Mr. Thomas E. O'Brien* filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the defendant in error for

using her photographed portrait for advertising purposes without her written consent first obtained. The facts were found against the defendant (the plaintiff in error), an injunction was issued and damages were awarded; 120 App. Div. 467; the judgment was affirmed by the Court of Appeals, 193 N. Y. 223, and thereupon final judgment was entered in the Supreme Court. The suit was based upon Chapter 132 of the New York Statutes of 1903, which makes such use of the name, portrait or picture of any living person a misdemeanor and gives this action. The case comes here on the single question of the constitutionality of the act. It is argued that as before the statute a person could not prevent the use of her portrait by one who took and owned it, *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, to deny that use now is to deprive the owner of his property without due process of law.

The Court of Appeals held that the statute applied only to photographs taken after it went into effect, as was the photograph of the plaintiff that the defendant used. The property was brought into existence under a law that limited the uses to be made of it, and, if otherwise there could have been any question, in such a case there is none. Some comment was made in argument on the distinction between photographs taken before and after the date in 1903 as inconsistent with the Fourteenth Amendment. But the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time.

Judgment affirmed.

UNITED STATES *v.* GRIMAUD.

SAME *v.* INDA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Nos. 241, 242. Argued February 28, 1910; affirmed by divided court March 14, 1910; restored to docket for reargument April 18, 1910; reargued March 3, 1911.—Decided May 3, 1911.

Under the acts establishing forest reservations, their use for grazing or other lawful purposes is subject to rules and regulations established by the Secretary of Agriculture, and it being impracticable for Congress to provide general regulations, that body acted within its constitutional power in conferring power on the Secretary to establish such rules; the power so conferred being administrative and not legislative, is not an unconstitutional delegation.

While it is difficult to define the line which separates legislative power to make laws and administrative authority to make regulations, Congress may delegate power to fill up details where it has indicated its will in the statute, and it may make violations of such regulations punishable as indicated in the statute; and so *held*, that regulations made by the Secretary of Agriculture as to grazing sheep on forest reserves have the force of law and that violations thereof are punishable, under act of June 4, 1897, c. 2, 30 Stat. 35, as prescribed in § 5388, Rev. Stat.

Congress cannot delegate legislative power, *Field* v. *Clark*, 143 U. S. 692, but the authority to make administrative rules is not a delegation of legislative power, and such rules do not become legislation because violations thereof are punished as public offenses.

Even if there is no express act of Congress making it unlawful to graze sheep or cattle on a forest reserve, when Congress expressly provides that such reserves can only be used for lawful purposes subject to regulations and makes a violation of such regulations an offense, any existing implied license to graze is curtailed and qualified by Congress; and one violating the regulations when promulgated makes an unlawful use of the Government's property and becomes subject to the penalty imposed.

A provision in an act of Congress as to the use made of moneys received from government property clearly indicates an authority to the executive officer authorized by statute to make regulations regarding the property to impose a charge for its use.

Where the penalty for violations of regulations to be made by an executive officer is prescribed by statute, the violation is not made a crime by such officer but by Congress, and Congress and not such officer fixes the penalty, nor is the offense against such officer but against the United States.

170 Fed. Rep. 205, reversed.

By the act of March 3, 1891, c. 561 (26 Stat. 1103), the President was authorized, from time to time, to set apart and reserve, in any State or Territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations. And by the act of June 4, 1897, c. 2 (30 Stat. 35), the purposes of these reservations were declared to be "to improve and protect the forest within the reservation, and to secure favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." . . . "All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." (30 Stat. 36.)

It is also provided that nothing in the act should "be construed as prohibiting the egress and ingress of actual settlers residing within the boundaries of such reservations, . . . nor shall anything herein . . . prohibit any person from entering upon such forest reservation for all proper and lawful purposes, . . . provided that such persons comply with the rules and regulations covering such forest reservation."

There were special provisions as to the sale of timber from any reserve (except those in the State of California, 30 Stat. 35, c. 2; 31 Stat. 661, c. 804), and a requirement

that the proceeds thereof and from any other forest source should be covered into the Treasury, the act of February 1, 1905, 33 Stat. 628, c. 288, providing that "all money received from the sale of any products or the use of any land or resources of said forest reserve shall be covered into the Treasury of the United States for a period of five years from the passage of this act, and shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement and extension of Federal Forest Reserves."

The act of 1905 as to receipts arising from the sale of any products or the use of any land was, in some respects, modified by the act of March 4, 1907, c. 2907, 34 Stat. 1256, 1270. It provided that all moneys received after July 1, 1907, by or on account of forest service timber; or from any other source of forest reservation revenue, shall be covered into the Treasury, "provided that ten per cent of all money received from each forest reserve during any fiscal year, including the year ending June 30, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads in the county or counties in which the forest reserve is situated."

The jurisdiction, both civil and criminal, over persons within such reservation was not to be affected by the establishment thereof "except so far as the punishment of offenses against the United States therein is concerned; the intent being that the State shall not by reason of the establishment of the reserve lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duty as citizens of the State."

The original act provided that the management and regulation of these reserves should be by the Secretary

of the Interior, but in 1905 that power was conferred upon the Secretary of Agriculture, (33 Stat. L. 628), and by virtue of those various statutes he was authorized to "make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . ; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as prescribed in Rev. Stat., § 5388," which, as amended, provides for a fine of not more than five hundred dollars and imprisonment for not more than twelve months or both, at the discretion of the court. 26 Stat., 1103, c. 561; 30 Stat. 34; c. 235; 31 Stat. 661, c. 804; 33 Stat. 36; 7 Fed. Stat. Anno. §§ 310–317, 296, Supp. 1909, p. 634.

Under these acts the Secretary of Agriculture, on June 12, 1906, promulgated and established certain rules for the purpose of regulating the use and occupancy of the public forest reservations and preserving the forests thereon from destruction, and among those established was the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers and milch or work animals, not exceeding a total of six head, owned by *bona fide* settlers residing in or near a forest reserve, which are excepted and require no permit."

The defendants were charged with driving and grazing sheep on a reserve, without a permit. The grand jury in the District Court for the Southern District of California, at the November term, 1907, indicted Pierre Grimaud and J. P. Carajous, charging that on April 26, 1907, after the Sierra Forest Reserve had been estab-

lished, and after regulation 45 had been promulgated, "they did knowingly, wilfully and unlawfully pasture and graze and cause and procure to be pastured and grazed certain sheep (the exact number being to the grand jurors unknown) upon certain land within the limits of and a part of said Sierra Forest Reserve, without having theretofore or at any time secured or obtained a permit or any permission for said pasturing or grazing of said sheep or any part of them, as required by the said rules and regulations of the Secretary of Agriculture," the said sheep not being within any of the excepted classes. The indictment concluded, "contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States."

The defendants demurred, upon the ground (1) that the facts stated did not constitute a public offense, or a public offense against the United States, and (2) that the acts of Congress making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional, in that they are an attempt by Congress to delegate its legislative power to an administrative officer." The court sustained the demurrers, (170 Fed. Rep. 205), and made a like ruling on the similar indictment in *United States* v. *Inda*, 216 U. S. 614. Both judgments were affirmed by a divided court. Afterwards petitions for rehearing were granted.

Mr. Assistant Attorney General Fowler, with whom *Mr. Loring C. Christie* was on the brief, for the United States. *Mr. Solicitor General Bowers* on the original argument:

Congress has power to enact legislation for the protection of its public lands, and, if it deems advisable, to enact criminal laws to prevent trespasses thereon. *Camfield* v. *United States*, 167 U. S. 518, 525.

A violation of the regulations prescribed by the Secretary of Agriculture upon which, and the statute authorizing them, this indictment is based, constitutes an offense, and renders the offender liable to punishment in accordance with the terms of the statute. *United States* v. *Bailey*, 9 Pet. 238, 252, 254, 256.

A certain act upon the part of a person becomes a criminal offense in consequence and by virtue of a regulation adopted by the executive officer where such officer's action in adopting such regulation is essential to the existence of the offense. *Caha* v. *United States*, 152 U. S. 211, 218; *United States* v. *Eaton*, 144 U. S. 677, distinguished; and see *In re Kollock*, 165 U. S. 526; *United States* v. *Breen*, 40 Fed. Rep. 402; *St. Louis & Iron Mt. Ry. Co.* v. *Taylor*, 210 U. S. 281.

The act of Congress under which the Secretary of Agriculture promulgated the regulation in question did not involve an improper attempt to delegate legislative power to an administrative officer. *Brown* v. *Turner*, 70 N. Car. 93, 102; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 382; *Dastervignes Case*, 122 Fed. Rep. 30, 34; *West* v. *Hitchcock*, 205 U. S. 80; *Interstate Com. Comm.* v. *Chi., R. I. & P. R. R. Co.*, 218 U. S. 88; *Tilley* v. *Savannah &c. Ry. Co.*, 5 Fed. Rep. 641; *Chicago &c. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866; *Interstate Com. Comm.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452; Willoughby on the Constitution, § 781.

The act was unlawful irrespective entirely of regulation 45 or of any other rule of the Department. It was an entry and trespass on the lands of the United States. *Camfield* v. *United States, supra; Buford* v. *Houtz*, 133 U. S. 320, 326, distinguished, and see *Wilcox* v. *McConnel*, 13 Pet. 496, 512. The Secretary did not attempt to make unlawful that which, but for such rules, would have been lawful, as in *United States* v. *Moody*, 164 Fed. Rep. 269.

Congress has a much more exclusive control over pub-

lic forest lands and reservations, and a much wider range of means in exercising it, than it has in respect to its more general functions under the Constitution. See as to other similar powers, *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320; *Ex parte Reed*, 100 U. S. 13; *Smith* v. *Whitney*, 116 U. S. 167; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 309; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 125.

The general theory of government that there should be no union between the several departments does not apply any more than it did in *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Oceanic Nav. Co.* v. *Stranahan*, *supra*.

The fact that the Secretary has the power to change the regulations in question, and has from time to time had in force regulations different in some respects to the present one, does not render the act of Congress invalid.

The Government's contention is sustained by the weight of authority among the lower United States courts. As to the validity of the Secretary's regulation for civil purposes see, *United States* v. *Shannon*, 151 Fed. Rep. 863; *S. C.*, 160 Fed. Rep. 870; *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *United States* v. *Dastervignes*, 118 Fed. Rep. 199. The following have held indictment for violation of the regulation supportable: *United States* v. *Deguirro*, 152 Fed. Rep. 568; *United States* v. *Domingo*, 152 Fed. Rep. 566; *United States* v. *Bale*, 156 Fed. Rep. 687. On the other hand, the following held such an indictment bad: *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Bale*, 156 Fed. Rep. 687; *United States* v. *Rizzinelli*, 182 Fed. Rep. 675; *Dent* v. *United States*, 8 Arizona, 413; *United States* v. *Reder*, 69 Fed. Rep. 965; *United States* v. *Williams*, 6 Montana, 379; *United States* v. *Trading Company*, 109 Fed. Rep. 239; *United States* v. *Ormsbee*, 74 Fed. Rep. 207; *United States* v. *Moody*, 164 Fed. Rep. 269; *Van Lear* v. *Eisle*, 126 Fed.

Rep. 823; *United States* v. *Slater*, 123 Fed. Rep. 115; *Stratton* v. *Oceanic Steamship Co.*, 140 Fed. Rep. 829.

As to other instances in which Congress has conferred upon executive officers equally broad powers to be exercised in administering the laws relating to public lands, see act of June 3, 1878, c. 150, 20 Stat. 88; act of June 3, 1878, c. 151, 20 Stat. 89; act of March 3, 1891, c. 561, as amended by the act of March 3, 1891, c. 559, 26 Stat. 1093; act of October 1, 1890, c. 1263, 26 Stat. 650; act of February 28, 1899, c. 221, 30 Stat. 908; § 2478, Rev. Stat.

A criminal indictment lies for transgression of the department regulation concerning stock grazing upon a forest reservation, 22 Ops. Atty. Gen. 266.

Mr. J. M. Hodgson, with whom *Mr. W. W. Kaye* and *Mr. Robert P. Stewart* were on the brief, for defendants in error:

The law is unconstitutional, as it does not sufficiently define, or define at all, what acts done or omitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States. *State* v. *Mann*, 2 Oregon, 238, 241; *State* v. *Smith*, 30 La. Ann. 846; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Grimaud*, 170 Fed. Rep. 206; *Cook* v. *State* (Ind.), 59 N. E. Rep. 489; *United States* v. *Reese*, 92 U. S. 214, 256; *Sarlls* v. *United States*, 152 U. S. 571; *Todd* v. *United States*, 158 U. S. 278; *Augustine* v. *State* (Tex.), 52 S. W. Rep. 80; *State* v. *Partlow*, 91 N. Car. 550; *McGuire* v. *Dist. of Col.*, 65 L. R. A. 430; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Louisville & Nash. R. R. Co.* v. *Commonwealth* (Ky.), 33 L. R. A. 209; *Drake* v. *Drake*, 4 Dev. 110; *Commonwealth* v. *Bank*, 3 Watts & S. 173; 4 Blackstone's Comm. 5; 12 Cyc. 129; *Ex parte McNulty*, 77 California, 164; *Peters* v. *United States*, 36 C. C. A. 105.

The law under which the indictments were found is

unconstitutional, as it is not within the power of Congress to delegate to the Secretary of the Interior or the Secretary of Agriculture or any other person, authority or power to determine what acts shall be criminal; and the act in question is a delegation of legislative power to an executive officer to define and establish what shall constitute the essential elements of a crime against the United States. *United States* v. *Matthews*, 146 Rep. Fed. 306; *United States* v. *Maid*, 166 Fed. Rep. 650; *United States* v. *Blasingame*, 166 Fed. Rep. 654; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Bridge Co.*, 45 Fed. Rep. 178; *United States* v. *Rider*, 50 Fed. Rep. 106; *O'Neil* v. *Am. Fire Ins. Co.*, 166 Pa. St. 72; *Adams* v. *Burdge*, 95 Wisconsin, 390; *Dowling* v. *Lancashire Ins. Co.*, 92 Wisconsin, 63; *Anderson* v. *Manchester Fire Ins. Co.*, 59 Minnesota, 182; *Ex parte Cox*, 63 California, 21; *Harbor Com'r* v. *Excelsior Redwood Co.*, 88 California, 491; *Schaezlein* v. *Cabaniss*, 135 California, 466; *Kilbourn* v. *Thompson*, 103 U. S. 168, 191; *United States* v. *Wiltberger*, 5 Wheat. 85.

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

The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the Forest Reserve Act of 1891 was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations and made a violation thereof a penal offense. Their several demurrers were sustained. The Government brought the case here under that clause of the Criminal Appeals Act, (March 2, 1907, c. 2564, 34 Stat. 1246,), which allows a writ of error where the "decision complained of was based upon the invalidity of the statute."

The Federal courts have been divided on the question as to whether violations of those regulations of the Secretary of Agriculture constitute a crime. The rules were held to be valid for civil purposes in *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *United States* v. *Dastervignes*, 118 Fed. Rep. 199; *United States* v. *Shannon*, 151 Fed. Rep. 863; *S. C.*, 160 Fed. Rep. 870. They were also sustained in criminal prosecutions in *United States* v. *Deguirro*, 152 Fed. Rep. 568; *United States* v. *Domingo*, 152 Fed. Rep. 566; *United States* v. *Bale*, 156 Fed. Rep. 687; *United States* v. *Rizzinelli*, 182 Fed. Rep. 675. But the regulations were held to be invalid in *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Matthews*, 146 Fed. Rep. 306; *Dent* v. *United States*, 8 Arizona, 138.

From the various acts relating to the establishment and management of forest reservations it appears that they were intended "to improve and protect the forest and to secure favorable conditions of water flows." It was declared that the acts should not be "construed to prohibit the egress and ingress of actual settlers" residing therein nor "to prohibit any person from entering the reservation for all proper and lawful purposes, including that of prospecting, and locating and developing mineral resources; provided that such persons comply with the rules and regulations covering such forest reservation." (Act of 1897, c. 2, 30 Stat. 36.) It was also declared that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished*" as is provided in § 5388, c. 3, p. 1044 of the Revised Statutes, as amended.

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be

subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor.

By whatever name they are called they refer to matters of local management and local police. *Brodbine* v. *Revere*, 182 Massachusetts, 598. They are "not of legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature [authorities] the determination of minor matters." *Butte City Water Co.* v. *Baker*, 196 U. S. 126.

It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 1, 42, where he was considering the authority of courts to make rules. He there said: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." What were these non-legislative powers which Congress *could* exercise but which might also be delegated to others was not determined, for he said: "The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452;

Int. Com. Comm. v. *Chicago, Rock Island &c. R. R.*, 218 U. S. 88. Congress provided that after a given date only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. *St. Louis & Iron Mountain R. R.* v. *Taylor*, 210 U. S. 281, 287. In *Union Bridge Co.* v. *United States*, 204 U. S. 364; *In re Kollock*, 165 U. S. 526; *Buttfield* v. *Stranahan*, 192 U. S. 470, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

The defendants rely on *United States* v. *Eaton*, 144 U. S. 677, where the act authorized the Commissioner to make rules for carrying the statute into effect, but imposed no penalty for failing to observe his regulations. Another section (5) required that the dealer should keep books showing certain facts, and providing that he should conduct his business under such surveillance of officers as the Commissioner might by regulation require. Another section declared that if any dealer should knowingly omit to do any of the things "required by law" he should pay a penalty of a thousand dollars. Eaton failed to keep the

books required by the regulations. But there was no charge that he omitted "anything required by law," unless it could be held that the books called for by the regulations were "required by law." The court construed the act as a whole and proceeded on the theory that while a violation of the regulations might have been punished as an offense if Congress had so enacted, it had, in fact, made no such provision so far as concerned the particular charge then under consideration. Congress required the dealer to keep books rendering return of materials and products, but imposed no penalty for failing so to do. The Commissioner went much further and required the dealer to keep books showing oleomargarine received, from whom received and to whom the same was sold. It was sought to punish the defendant for failing to keep the books required by the regulations. Manifestly this was putting the regulations above the statute. The court showed that when Congress enacted that a certain sort of book should be kept, the Commissioner could not go further and require additional books; or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished. It said that, "if Congress intended to make it an offense for wholesale dealers to omit to keep books and render returns required by regulations of the Commissioner, it would have done so distinctly"—implying that if it had done so distinctly the violation of the regulations would have been an offense.

But the very thing which was omitted in the Oleomargarine Act has been distinctly done in the Forest Reserve Act, which, in terms, provides that "any violation of the provisions of this act or such rules and regulations of the Secretary shall be punished as prescribed in section 5388 of the Revised Statutes as amended."

In *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386, Mr. Justice Harlan, speaking for the court, said:

"By the statute in question Congress declared in effect

that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

And again he said in *Field* v. *Clark*, 143 U. S. 649, 694:

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." See also *Caha* v. *United States*, 152 U. S. 211; *United States* v. *Bailey*, 9 Pet. 238; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 309; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 333; *Roughton* v. *Knight*, 219 U. S. 537 (Decided this Term); *Smith* v. *Whitney*, 116 U. S. 167; *Ex parte Reed*, 100 U. S. 22; *Gratiot* v. *United States*, 4 How. 81.

In *Brodbine* v. *Revere*, 182 Massachusetts, 598, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act that breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while

the substantive legislation was in the statute which provided that they should be punished as breaches of the peace.

That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U. S. 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering such forest reservation." The same act makes it an offense to violate those regulations, that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in *Buford* v. *Houtz*, 133 U. S. 326, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. *Wilcox* v. *Jackson*, 13 Pet. 498, 513.

If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.

It was argued that, even if the Secretary could establish regulations under which a permit was required, there was

nothing in the act to indicate that Congress had intended or authorized him to charge for the privilege of grazing sheep on the reserve. These fees were fixed to prevent excessive grazing and thereby protect the young growth, and native grasses, from destruction, and to make a slight income with which to meet the expenses of management. In addition to the general power in the act of 1897, already quoted, the act of February 1, 1905, c. 288, p. 628, clearly indicates that the Secretary was authorized to make charges out of which a revenue from forest resources was expected to arise. For it declares that "all money received from the sale of any products or the use of any land or resources of said forest reserve" shall be covered into the Treasury and be applied toward the payment of forest expenses. This act was passed before the promulgation of regulation 45, set out in the indictment.

Subsequent acts also provide that money received from "any source of forest reservation revenue" should be covered into the Treasury, and a part thereof was to be turned over to the treasurers of the respective States to be expended for the benefit of the public schools and public roads in the counties in which the forest reserves are situated. (C. 2907, 34 Stat. 684, 1270.)

The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson* v. *United States*, 207 U. S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

The indictment charges, and the demurrer admits that Rule 45 was promulgated for the purpose of regulating the occupancy and use of the public forest reservation and preserving the forest. The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, "contrary to the laws of the United States and the peace and dignity thereof." The demurrers should have been overruled. The affirmances by a divided court heretofore entered are set aside and the judgments in both cases

Reversed.

LIGHT *v.* UNITED STATES.

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

No. 360. Argued February 27, 28, 1911.—Decided May 1, 1911.

United States v. *Grimaud*, *ante*, p. 506, followed to effect that Congress may authorize an executive officer to make rules and regulations as to the use, occupancy and preservation of forests and that such authority so granted is not unconstitutional as a delegation of legislative power.

At common law the owner was responsible for damage done by his live stock on land of third parties, but the United States has tacitly suffered its public domain to be used for cattle so long as such tacit consent was not cancelled, but no vested rights have been conferred on any person, nor has the United States been deprived of the power of recalling such implied license.

While the full scope of § 3, Art. IV, of the Constitution has never been definitely settled it is primarily a grant of power to the United States of control over its property, *Kansas* v. *Colorado*, 206 U. S. 89; this control is exercised by Congress to the same extent that an individual can control his property.

It is for Congress and not for the courts to determine how the public lands shall be administered.

Congress has power to set apart portions of the public domain and establish them as forest reserves and to prohibit the grazing of cattle thereon or to permit it subject to rules and regulations.

Fence laws may condone trespasses by straying cattle where the laws have not been complied with, but they do not authorize wanton or willful trespass, nor do they afford immunity to those willfully turning cattle loose under circumstances showing that they were intended to graze upon the lands of another.

Where cattle are turned loose under circumstances showing that the owner expects and intends that they shall go upon a reserve to graze thereon, for which he has no permit and he declines to apply for one, and threatens to resist efforts to have the cattle removed and contends that he has a right to have his cattle go on the reservation, equity has jurisdiction, and such owner can be enjoined at the instance of the Government, whether the land has been fenced or not.

Quære, and not decided, whether the United States is required to fence property under laws of the State in which the property is located.

This court will, so far as it can, decide cases before it without reference to questions arising under the Federal Constitution. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175.

THE Holy Cross Forest Reserve was established under the provisions of the act of March 3, 1891. By that and subsequent statutes the Secretary of Agriculture was authorized to make provisions for the protection against destruction by fire and depredations of the public forest and forest reservations and "to make such rules and regulations and establish such service as would insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." 26 Stat. 1103, c. 563; 30 Stat. 35, c. 2; act of Congress February 1, 1905; 7 Fed. Stat. Ann. 310, 312, and Supp. for 1909, p. 663. In pursuance of these statutes regulations were adopted establishing grazing districts on which only a limited number of cattle were allowed. The regulations provided that a few head of cattle of prospectors, campers and not more than ten

belonging to a settler residing near the forest might be admitted without permit, but saving these exceptions the general rule was that "all persons must secure permits before grazing any stock in a national forest."

On April 7, 1908, the United States, through the district attorney, filed a bill in the Circuit Court for the District of Colorado reciting the matters above outlined, and alleging that the defendant Fred Light owned a herd of about 500 cattle and a ranch of 540 acres, located two and a half miles to the east and five miles to the north of the reservation. This herd was turned out to range during the spring and summer, and the ranch then used as a place on which to raise hay for their sustenance.

That between the ranch and the reservation, was other public and unoccupied land of the United States; but, owing to the fact that only a limited number of cattle were allowed on the reservation, the grazing there was better than on this public land. For this reason, and because of the superior water facilities and the tendency of the cattle to follow the trails and stream leading from the ranch to the reservation, they naturally went direct to the reservation. The bill charged that the defendant when turning them loose knew and expected that they would go upon the reservation, and took no action to prevent them from trespassing. That by thus knowingly and wrongfully permitting them to enter on the reservation he intentionally caused his cattle to make a trespass, in breach of the United States property and administrative rights, and has openly and privately stated his purpose to disregard the regulations, and without permit to allow and, in the manner stated, to cause his cattle to enter, feed and graze thereon.

The bill prayed for an injunction. The defendant's general demurrer was overruled.

His answer denied that the topography of the country around his ranch or the water and grazing conditions were

such as to cause his cattle to go on the reservation; he denied that many of them did go thereon, though admitting that some had grazed on the reservation. He admitted that he had liberated his cattle without having secured or intending to apply for a permit, but denied that he willfully or intentionally caused them to go on the reservation, submitting that he was not required to obtain any such permit. He admits that it is his intention hereafter, as heretofore, to turn his cattle out on the unreserved public land of the United States adjoining his ranch to the northeast thereof, without securing or applying for any permit for the cattle to graze upon the so-called Holy Cross Reserve; denies that any damage will be done if they do go upon the reserve; and contends that, if because of their straying proclivities, they shall go on the reserve, the complainant is without remedy against the defendant at law or in equity so long as complainant fails to fence the reserve as required by the laws of Colorado. He claims the benefit of the Colorado statute requiring the owner of land to erect and maintain a fence of given height and strength, in default of which the owner is not entitled to recover for damage occasioned by cattle or other animals going thereon.

Evidence was taken, and after hearing, the Circuit Court found for the Government and entered a decree enjoining the defendant from in any manner causing, or permitting, his stock to go, stray upon or remain within the said forest or any portion thereof.

The defendant appealed and assigned that the decree against him was erroneous; that the public lands are held in trust for the people of the several States, and the proclamation creating the reserve without the consent of the State of Colorado is contrary to and in violation of said trust; that the decree is void because it in effect holds that the United States is exempt from the municipal laws of the State of Colorado relating to fences; that the statute

conferring upon the said Secretary of Agriculture the power to make rules and regulations was an unconstitutional delegation of authority to him and the rules and regulations therefore void; and that the rules mentioned in the bill are unreasonable, do not tend to insure the object of forest reservation and constitute an unconstitutional interference by the Government of the United States with fence and other statutes of the State of Colorado, enacted through the exercise of the police power of the State.

Mr. James H. Teller, with whom *Mr. John T. Barnett*, Attorney General of Colorado, *Mr. Henry M. Teller*, *Mr. C. S. Thomas*, *Mr. E. C. Stimson*, *Mr. Milton Smith*, *Mr. H. A. Hicks* and *Mr. Ralph McCrillis* were on the brief, for appellant:

The jurisdiction of a State extends over all the territory within its boundaries. *New York* v. *Miln*, 11 Pet. 139; *Pennoyer* v. *Neff*, 95 U. S. 714; *Van Brocklin* v. *Anderson*, 117 U. S. 158; *Kansas* v. *Colorado*, 206 U. S. 93.

One who asserts the existence of any exemption from this jurisdiction must point out the act of cession, or the constitutional provision from which it arises. The Government holds title to public lands, not as a sovereign, but as a proprietor merely. This, of course, applies only to public lands properly so called, and not to lands used for governmental purposes. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Woodruff* v. *N. Bloomfield G. M. Co.*, 18 Fed. Rep. 772; *People* v. *Scherer*, 30 California, 658; *Camp* v. *Smith*, 2 Minnesota, 131; *Hendricks* v. *Johnson*, 6 Porter (Ala.), 472; *United States* v. *Bridge Co.*, 6 McLean, 517; *United States* v. *Chicago*, 7 How. 185; *United States* v. *Cornell*, 2 Mason, 60.

Sovereignty is not to be taken away by implication. *People* v. *Godfrey*, 17 Johns. 225. Section 8 of Article I of the Constitution, which gives the United States ex-

clusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, means that these are to be purchased with the consent of the legislature. Story on Const., 5th ed., § 1227; *Ft. Leavenworth Ry. Co.* v. *Lowe*, 114 U. S. 525; *Mobile* v. *Eslava*, 16 Pet. 277; *People* v. *Godfrey*, 17 Johns. 225.

A forest reserve, however beneficial, is not in fact an instrument of government and necessary to the exercise of national sovereignty.

Even in those cases in which there is a cession of jurisdiction by the State subsequent to the adoption of a fence law, the law prevails on such lands until repealed by the General Government. *C., R. I. & P. Ry. Co.* v. *McGlinn*, 114 U. S. 542.

If the fence law would thus apply on territory of which the jurisdiction had been ceded by a State, it certainly is not ousted by the mere act of reserving public lands for forestry purposes.

The ownership by the General Government of land within a State does not carry with it general rights of sovereignty over such lands.

If the Federal Government has jurisdiction over these reservations to the extent necessary to support this decree, the State is deprived of its police power over a large portion of its territory. The police power of a State extends over all of its territory and is exclusive. *Prigg* v. *Commonwealth*, 16 Pet. 639; *The Slaughter House Cases*, 16 Wall. 63; *In re Rahrer*, 140 U. S. 554; *United States* v. *Knight*, 156 U. S. 11; *L'Hote* v. *New Orleans*, 177 U. S. 597.

The court bases the right to prevent the fencing of public lands upon the fact that such fencing would retard the settlement of the lands, which is the purpose for which the Government holds them as a trustee.

The result of this decree, as before stated, is, that

state laws passed in the exercise of the police power are not operative on the public domain. See *Shannon* v. *United States*, 88 C. C. A. 52. That case, however, is not authority to the effect claimed.

Fences and the trespasses of live stock is a proper subject of legislation under the police power of the State. *Bacon* v. *Walker*, 204 U. S. 317; *Rideout* v. *Knox*, 148 Massachusetts, 368. This decree is contrary not only to the statutes of the State concerning fencing and live stock, but to the law as laid down by the state Supreme Court prior to the adoption of these laws. *Morris* v. *Fraker*, 5 Colorado, 425; *Richards* v. *Sanderson*, 39 Colorado, 278; *Buford* v. *Houtz*, 133 U. S. 320.

In 1885 a fence law was enacted, but it did no more than express in statutory form what was already the law of the State. See Session Laws, 1885, p. 220, §§ 2987 *et seq.*, Rev. Stat. Colo., 1908. The gist of the statute is that damages from trespass by animals are not recoverable unless the premises on which such trespass occurs are enclosed by a lawful fence as therein prescribed.

To limit the jurisdiction of States containing forest reserves is to deny to them that equality with other States to which they are entitled. *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Ward* v. *Race Horse*, 163 U. S. 504. This court will take judicial notice of the proclamations of the President which have set aside as forest reserves within the State of Colorado an area of 21,309 square miles, more than one-fifth of the area of the State; but see *Kansas* v. *Colorado*, to effect that the National Government cannot enter the territory of one of the newer States and legislate in respect to improving by irrigation or otherwise lands within their borders, unless it has the same power in the older States.

An act of Congress cannot restrict the sovereignty of a State except under express constitutional authority therefor. *Withers* v. *Buckley*, 20 How. 84. The equality

of the States under the Federal Constitution is fundamental—a part of the very structure of our system of government. It is guaranteed by statute and exists without statute. *Ward* v. *Race Horse, supra.*

The authority of Congress to dispose of and protect public lands is so limited as not to deprive one State of an attribute of sovereignty which is conceded to other States.

The lands described in the President's proclamation as constituting the Holy Cross Forest Reserve have not been legally set apart as permanent disposition thereof for the purposes in said proclamation mentioned.

The Government holds public land in trust for the people, to be disposed of so as to promote the settlement and ultimate prosperity of the States in which they are situated. This contradicts the withdrawal of lands for such purposes. *Newhall* v. *Sanger*, 92 U. S. 761; *Bardon* v. *N. P. R. R. Co.*, 145 U. S. 535; *Dobbins* v. *Commissioners*, 17 Pet. 435; *Weber* v. *Commonwealth*, 18 Wall. 57; *United States* v. *Beebee*, 127 U. S. 348; *Shively* v. *Bowlby*, 132 U. S. 49; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *Pollard's Lessee* v. *Hogan, supra.*

While national authority to reclaim arid lands may be sustained, on the broad ground that their reclamation is an aid in disposing of them, reservations, on the contrary, are in effect an abandonment of the purpose of disposing of the lands included therein. Although the power to establish these reserves may be highly desirable, and may be more effectually exercised by the Federal Government than by the States, that affords no ground for asserting the existence of the power.

The system of national forest reserves violates the trust concerning public land, and denies to the States in which such reserves are established the equality with other States to which they are entitled. Report of House Judiciary Committee, 60th Congress, 1541, denying the right of the

Government to purchase land for forest reserves; and see 30 Stat. 34.

This subject is not within the scope of the general welfare clause of the Constitution. Story on the Const., §§ 907, 908; Tucker's Const. of United States, § 222. If the power does exist it cannot be exercised without the consent of the States directly affected.

Mr. Ernest Knaebel for the United States:

Appellant has no standing to attack the reservation or the forest-reserve policy. He does not claim any right or interest in any of the lands reserved.

Before the reservation he doubtless enjoyed a license of pasturage there. This was a mere privilege, existing, which the Government could take away. *Shannon* v. *United States*, 160 Fed. Rep. 870, 873; *Frisbie* v. *Whitney*, 9 Wall. 187; *Yosemite Valley Case*, 15 Wall. 77. The constitutionality of the reservation is attacked solely upon the ground of its supposed invasion of the rights and prerogatives of the State. But the State is not here objecting, and its supposed injury is no concern of the appellant. *Bacon* v. *Walker*, 204 U. S. 311, 315; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Budzisz* v. *Illinois Steel Co.*, 170 U. S. 41; *Supervisors* v. *Stanley*, 105 U. S. 305, 311; *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Lampasas* v. *Bell*, 180 U. S. 276, 283, 284; *Cronin* v. *Adams*, 192 U. S. 108, 114.

The state fence law was not intended to apply to the United States. It confers no right whatever upon the cattle owner. It gives him no permission to place his cattle upon the land of another, whether fenced or unfenced. It merely vouchsafes him a reasonable assurance of immunity from what, under the common law, would be legal consequences of their trespassing, provided this

shall have resulted from their straying and not directly from any act and purpose of his own. *Buford* v. *Houtz*, 133 U. S. 320; *Lazarus* v. *Phelps*, 152 U. S. 81; *Sabine &c. Ry. Co.* v. *Johnson*, 65 Texas, 389, 393; *Delaney* v. *Erickson*, 11 Nebraska, 533, 534; *Otis* v. *Morgan*, 61 Iowa, 712; *Moore* v. *Cannon*, 24 Montana, 316, 324; *St. Louis Cattle Co.* v. *Vaught*, 1 Tex. Civ. App. 388; *Larkin* v. *Taylor*, 5 Kansas, 433, 446; *Union Pacific Ry. Co.* v. *Rollins*, 5 Kansas, 167, 176.

It has been held by the highest court in Colorado that the willful and deliberate driving of cattle upon the premises of another is actionable. *Nuckolls* v. *Gaut*, 12 Colorado, 361; *Norton* v. *Young*, 6 Colo. App. 187; *Fugate* v. *Smith*, 4 Colorado, 201; *Sweetman* v. *Cooper*, 20 Colorado, 5; *Richards* v. *Sanderson*, 39 Colorado, 278.

Even if the United States as a property owner is subject to the same control by the State as individuals are, to the mind of the state legislature the character and functions of the Nation are not lost in the general conception of ownership.

The regulations were a valid exercise of constitutional power. It was the duty of the individual to obey them and of the courts to enforce them without regard to state laws. The State has no beneficial right whatsoever in the land; there is neither community of ownership, nor relation of trustee and *cestui que trust*. While these lands are held by the United States in trust, the people of the United States—not particular States nor the people of particular States—are the beneficiaries. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *United States* v. *Gratiot*, 1 McLean, 454; *S. C.*, 26 Fed. Cas. 15,249; *Turner* v. *American Baptist Union*, 5 McLean, 344; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 159; Treat's National Land System (N. Y., Treat & Co., 1910). Like all other States carved out of the public domain, with very few exceptions, 117 U. S. 160, Colorado solemnly agreed never to tax or

lay claim to any of the lands of the United States. See 18 Stat. 474, § 5; 1 Mills' Ann. Stat. Colo., 111; 19 Stat. 665.

The ordinance, however, was not necessary to protect the United States from all claim of state interest in the lands. *Hartman* v. *Tresise*, 36 Colorado, 146. The Constitution by Art. IV, § 3, cl. 2, provides that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States, and the power being given without limitation, is absolute and exclusive of all state interference. *Wilcox* v. *Jackson*, 13 Pet. 498, 517; *United States* v. *Gratiot*, 14 Pet. 526; *Jourdan* v. *Barrett*, 4 How. 168, 184; *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *McCarthy* v. *Mann*, 19 Wall. 20; *United States* v. *Insley*, 130 U. S. 263; *Redfield* v. *Parks*, 132 U. S. 239; *Camfield* v. *United States*, 167 U. S. 518, 525; *Shively* v. *Bowlby*, 152 U. S. 1, 50, 52; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 283; *United States* v. *Rio Grande Dam Co.*, 174 U. S. 690, 703; *Gutierres* v. *Land & Irrigation Co.*, 188 U. S. 545, 555; *Kansas* v. *Colorado*, 206 U. S. 46, 89; *United States* v. *Cleveland & Colorado Cattle Co.*, 33 Fed. Rep. 323; and see also *Shannon* v. *United States*, 160 Fed. Rep. 870.

See also decisions of other courts to the same effect. *United States* v. *Gratiot*, 1 McLean, 454; *S. C.*, 26 Fed. Cas. 15,249; *Turner* v. *Am. Baptist Union* (1852), 5 McLean, 344; *S. C.*, 24 Fed. Cas. 14,251; *Seymour* v. *Sanders*, 3 Dillon, 437; *S. C.*, 21 Fed. Cas. 12,690; *Union Mill & M. Co.* v. *Ferris*, 2 Sawyer, 176; *United States* v. *Cleveland Cattle Co.*, 33 Fed. Rep. 323, 330; *Carroll* v. *Price*, 81 Fed. Rep. 137; *Heckman* v. *Sutter*, 119 Fed. Rep. 83; *S. C.*, 128 Fed. Rep. 393; *Shannon* v. *United States*, 160 Fed. Rep. 870; *People* v. *Folsom*, 5 California, 373, 378; *Doran* v. *Central Pacific*, 24 California, 246, 257; *Miller* v. *Little*, 47 California, 348; *Vansickle* v. *Haines*, 7 Nevada, 249, 262;

Fee v. *Brown*, 17 Colorado, 510, 519; *S. C.*, 162 U. S. 602; *Waters* v. *Bush*, 42 Iowa, 255; *David* v. *Rackabaugh*, 32 Iowa, 540; *Sorrels* v. *Self*, 43 Arkansas, 451, 452.

The real object of the clause was to make plain beyond a doubt that in respect of all the Federal property Congress is omnipotent. *Fee* v. *Brown*, 17 Colorado, 510, 519; *Wilcox* v. *Jackson*, *supra*.

As to the meaning of the words "dispose of" and what is within the power of Congress as to disposition other than sale, see *United States* v. *Gratiot*, 14 Pet. 526; 20 Stat. 88; 26 Stat. 1093; *Northern Pacific* v. *Lewis*, 162 U. S. 366; *United States* v. *United Verde Copper Co.*, 196 U. S. 207; *Kohl* v. *United States*, 91 U. S. 367; *Shively* v. *Bowlby*, 152 U. S. 1, 26; *Withers* v. *Buckley*, 20 How. 84; *United States* v. *Bridge Company*, 6 McLean, 517; *United States* v. *Chicago*, 7 How. 185.

The Nation cannot be subjected in its rights or remedies to the control of state laws.

The conservation and uses contemplated by the forest policy are natural, reasonable, and beneficent to the people of the entire country. Lands so held and administered are among the inviolable instrumentalities of the Government. *Van Brocklin* v. *Tennessee*, 117 U. S. 177.

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

The defendant was enjoined from pasturing his cattle on the Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture, under the authority conferred by the act of June 4, 1897, (30 Stat. 35), to make rules and regulations as to the use, occupancy and preservation of forests. The validity of the rule is attacked on the ground that Congress could not delegate to the Secretary legislative power. We need not discuss that question in view of the opinion in *United States* v. *Grimaud*, just decided, *ante*, p. 506.

The bill alleged, and there was evidence to support the finding, that the defendant, with the expectation and intention that they would do so, turned his cattle out at a time and place which made it certain that they would leave the open public lands and go at once to the Reserve, where there was good water and fine pasturage. When notified to remove the cattle, he declined to do so and threatened to resist if they should be driven off by a forest officer. He justified this position on the ground that the statute of Colorado provided that a landowner could not recover damages for trespass by animals unless the property was enclosed with a fence of designated size and material. Regardless of any conflict in the testimony, the defendant claims that unless the Government put a fence around the Reserve it had no remedy, either at law or in equity, nor could he be required to prevent his cattle straying upon the Reserve from the open public land on which he had a right to turn them loose.

At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those States where there were great plains and vast tracts of unenclosed land, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. *Buford* v. *Houtz*, 133 U. S. 326. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. *Steele* v. *United States*, 113 U. S. 130; *Wilcox* v. *Jackson*, 13 Pet. 513.

It is contended, however, that Congress cannot constitu-

tionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a Reserve is, in law, to be treated as open and unenclosed land, as to which there still exists the implied license that it may be used for grazing purposes. But "the Nation is an owner, and has made Congress the principal agent to dispose of its property." . . . "Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of." *Butte City Water Co.* v. *Baker*, 196 U. S. 126. "The Government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." *Camfield* v. *United States*, 167 U. S. 524. And if it may withhold from sale and settlement it may also as an owner object to its property being used for grazing purposes, for "the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation." *United States* v. *Beebee*, 127 U. S. 342.

The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely, *Stearns* v. *Minnesota*, 179 U. S. 243. It is true that the "United States do not and cannot hold property as a monarch may for private or personal purposes." *Van Brocklin* v. *Tennessee*, 117 U. S. 158. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, § 3, Art. IV, that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States." "The full scope of this

paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property." *Kansas* v. *Colorado*, 206 U. S. 89.

"All the public lands of the nation are held in trust for the people of the whole country." *United States* v. *Trinidad Coal Co.*, 137 U. S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against willful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been enclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. *Lazarus* v. *Phelps*, 152 U. S. 81; *Monroe* v. *Cannon*, 24 Montana, 316; *St. Louis Cattle Co.* v. *Vaught*, 1 Tex. App. 388; *The Union Pacific* v. *Rollins*, 5 Kansas, 165, 176.

Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another.

This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve. He could

have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist efforts to have his cattle removed from the Reserve, and in his answer he declares that he will continue to turn out his cattle, and contends that if they go upon the Reserve the Government has no remedy at law or in equity. This claim answers itself.

It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the Reserve to graze thereon. Under the facts the court properly granted an injunction. The judgment was right on the merits, wholly regardless of the question as to whether the Government had enclosed its property.

This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175 "where cases in this court can be decided without reference to questions arising under the Federal Constitution that course is usually pursued, and is not departed from without important reasons." The decree is therefore

Affirmed.

EX PARTE METROPOLITAN WATER COMPANY OF WEST VIRGINIA

No. 19, Original. Argued April 24, 1911.—Decided May 15, 1911.

The provisions of § 17 of the act of June 18, 1910, c. 309, 36 Stat. 557, in regard to interlocutory injunctions to restrain the enforcement of state statutes on the ground of unconstitutionality, relate to the hearing of the application, and a single judge has no jurisdiction to hear and deny such an application. He must, prior to the hearing, call to his assistance two other judges, as required by the act.

A single justice or judge who, without calling to his assistance two other judges as required by § 17 of the act of June 18, 1910, c. 309, 36 Stat. 557, denies an application for injunction in a case specified in said act, on the ground that the state statute involved is constitutional, acts without jurisdiction, and the order is void.

Where no appeal is given by statute, mandamus is the proper remedy, *Ex parte Harding*, 219 U. S. 363; and so held as to an order made by a single judge denying a motion for injunction in a case specified in § 17 of the act of June 18, 1910, c. 309, 36 Stat. 557, the statute only providing for appeals from orders made after hearing by three judges.

THE facts, which involve the construction of § 17 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 557, in regard to the practice to be pursued in courts of the United States in a case where an interlocutory injunction is applied for to restrain the enforcement, operation or execution of a state statute by restraining the action of any officer of the State, are stated in the opinion.

Mr. Willard P. Hall, with whom *Mr. C. F. Hutchings* and *Mr. O. L. Miller* were on the brief, for petitioner.

Mr. Lewis W. Keplinger, with whom *Mr. Charles W. Trickett* was on the brief, for respondents and Kaw Valley Drainage District.

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

This is a proceeding in mandamus, in which relief is sought against a district judge, acting in a certain cause as a circuit judge for the district of Kansas, and also against the Circuit Court of the United States for the district of Kansas. To a rule to show cause a return has been filed and the Kaw Valley Drainage District of Wyandotte County, Kansas, has also, by leave, answered the rule. The matter is now for decision upon a motion to make the rule absolute.

Summarily stated, the facts bearing upon the issue to be decided are as follows:

By § 17 of the act of June 18, 1910, ch. 309, 36 Stat. 539, 557, creating the Commerce Court and amending the act to regulate commerce, provision was made as to the practice to be pursued in courts of the United States in cases where an interlocutory injunction is applied for to restrain the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute.

While proceedings, originally instituted in a state court of Kansas to condemn lands of the Water Company and others for the purpose of widening the Kansas River, were pending on appeal in the Circuit Court of Appeals for the Eighth Circuit, the legislature of Kansas, on January 28, 1911, enacted a statute which, in effect, authorized a summary appropriation of the lands affected by the pending condemnation suits, and directed the bringing by the Attorney General of the State of an action, after such appropriation had been consummated, against the owners of the lands appropriated "to determine the ownership of the property and to assess the value thereof and other damages for the taking of such portions of it as may belong to parties other than the public." By § 6 it was provided,

among other things, that upon a failure to satisfy the judgment rendered "the rights of the State to such land shall be divested and the possession thereof shall revert to the former adjudicated owners, in which event compensation shall be awarded for any loss or damage occasioned by the temporary appropriation, and that the court shall render judgment therefor. . . ." A few days after the passage of this statute the petitioner, a West Virginia corporation, commenced a suit in the Circuit Court of the United States for the district of Kansas against the Kaw Valley Drainage District of Wyandotte County, Kansas, and the individuals composing the board of directors of said drainage district, all averred to be citizens and residents of the district where the suit was brought. The bill prayed relief by injunction, temporary and permanent, restraining the defendants from a threatened taking possession of the lands of the petitioner under the act of January 28, 1911, upon the ground that the statute was repugnant to the Constitution of the United States. Thereafter, on February 8, 1911, District Judge McPherson, acting as circuit judge, issued a restraining order in the cause. The attention of the judge was called by the defendants to the provisions of § 17 of the act of Congress heretofore referred to, and request was made that two other judges, one of whom should be a circuit judge or a justice of the Supreme Court, should be called to assist in the hearing and determination of an application which was pending for a temporary injunction. It was, however, ruled that the provisions of such section merely deprived a single judge of the power to grant a temporary injunction, and that a court might be held by one judge for the purpose of decreeing the assailed statute to be constitutional and refusing to enjoin its enforcement. The court then heard argument, Judge McPherson alone sitting, upon the constitutionality of the Kansas statute. At the close of the hearing, counsel for the Water Company made the objection theretofore

urged by opposing counsel that the matter could only be disposed of by a court consisting of three judges, constituted as provided in the statute. Judge McPherson adhered, however, to his former ruling, and on March 6, 1911, a decree was entered vacating the temporary restraining order and denying a temporary injunction. This application for a writ of mandamus was then made.

The right to relief is based upon the contention that by virtue of the act of Congress a single judge was without jurisdiction to hear and determine the application for a temporary injunction. The prayer is that an order or rule be issued commanding the annulment and setting aside of the order of March 6, 1911, vacating the restraining order and denying the application for an injunction, and directing that the application for a temporary injunction be heard anew before a court consisting of three judges, in conformity to the act of Congress.

The question for decision is whether, pursuant to the act of Congress referred to, the Circuit Court composed only of one judge had power to hear and determine the application for a temporary injunction in the cause pending in the Circuit Court of Kansas. The legislation to be considered is § 17 of the Act of June 18, 1910, ch. 309, 36 Stat. 539, 557, reading as follows:

"That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a Circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by

three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

In the opinion delivered by the court below in passing upon the question of the proper construction of the foregoing section the nature of the suit brought by

the Water Company was thus concisely and accurately stated:

"That these proceedings are for the purpose by injunction of restraining the enforcement of the state statute, I have no doubt. It is alleged that such state statute is absolutely void as being in conflict with both the state and National constitutions. The prayers are in effect that the statute be decreed void. Neither have I any doubt that the action is to restrain the action of an officer of the State of Kansas, namely, the Governor. This is so because the state statute in question provides that when the Governor issues his proclamation, which he has done, he shall at once take possession of the property either in person, or he may designate the officers of the drainage board to take such possession for him and in his name, but such officers of the drainage board to act as agents of the Governor. Therefore, I am of the opinion that the congressional statute is directly involved. And the question remains, shall this court now halt these proceedings, or shall other judges be called in to take control of the cases."

The suit being of the nature just stated, we are of opinion that the provisions of the act of Congress which are relied upon applied to the case, and that as a result of their application it imperatively follows that the hearing and determination of the request for a temporary injunction should have been had before a court consisting of three judges constituted in the mode specified in the statute.

We say the hearing should have been had as just stated because it results from the text of the applicable section of the act that limitations are unequivocally imposed upon the power of the single justice or judge to act in the character of case to which the provision refers. They are, *a*, to receive an application for an interlocutory injunction in the character of case stated in the section; *b*, within the period specified in the section to grant a temporary restraining order "if of opinion that irreparable loss or damage would

result to the complainant unless a temporary restraining order is granted;" and, *c*, to "immediately call to his assistance to hear and determine the application (for an interlocutory injunction) two other judges." It is to the hearing thus provided for that the notice must relate which is to be given to the Governor and to the Attorney General of the State and "such other persons as may be defendants in the suit." It is the hearing before the court thus constituted, also that is required to be expedited; and the appeal authorized by the section to be taken directly to this court "from the order granting or denying, after notice and hearing, an interlocutory injunction" is manifestly an appeal from the expedited hearing had before the court consisting of three judges. We find no expression of or implication anywhere in the section justifying the assumption that there was an intention on the part of Congress that the single justice or judge to whom the application for the interlocutory injunction should be presented need not call to his assistance two other judges to pass upon the application, in the event that he was of opinion that the claim of the unconstitutionality of the statute was untenable. On the contrary, the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious, as the appeal allowed to this court is from an order denying as well as from an order granting an injunction.

Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction. It follows, therefore, that in hearing and determining the application for the temporary injunction the single judge

acted without jurisdiction, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued and denying the application for an injunction was void. This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction, and a right of appeal is not otherwise given by statute. *Ex parte Harding*, 219 U. S. 363. While these considerations dispose of the case, we briefly advert to an insistence made in argument that we should now take jurisdiction of the merits of the case as made in the Circuit Court and determine whether or not the bill stated a case entitling to relief. Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and the petitioner being entitled as of right to have the controversy as to the constitutionality of the statute presented by its bill of complaint passed upon by a tribunal having such original jurisdiction, it follows that we do not possess a discretion to grant or refuse the writ, dependent upon our conception as to whether the Kansas statute is or is not constitutional.

The rule issued on April 10, 1911, must be made absolute, and an order will be entered that a writ of mandamus issue directing the Honorable Smith McPherson, as acting circuit judge of the United States for the District of Kansas, and the Circuit Court of the United States for the District of Kansas, to annul and set aside the order of March 6, 1911, vacating the restraining order theretofore issued on February 8, 1911, and denying the application for injunction, and that said judge or such other judge of the said Circuit Court as may hear and determine the application for an interlocutory injunction call to his assistance two other judges, as provided by § 17 of chapter 309 of the act of Congress approved June 18, 1910.

Rule to show cause made absolute.

UNITED STATES *v.* RIMER.

CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 158. Argued April 26, 1911.—Decided May 15, 1911.

When certiorari is granted on the basis that the decision below involved principles of far-reaching effect and overthrew settled administrative construction, and it appears on the argument that the decision does not deal with such principles or have such effect, and that the action of the court below was not, either as to its character or importance, within the scope of the grant of power given by the Judiciary Act of 1891 to review by certiorari, the writ will be dismissed.

THE facts, which involve the jurisdiction of this court in regard to the scope of the grant of power under the Judiciary Act of 1891 to review judgments of the Circuit Courts of Appeal, are stated in the opinion.

The Solicitor General for the United States.

There was no appearance or brief filed for the respondent.

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

The petition presented by the United States in this case for the allowance of a writ of certiorari, which was not opposed, proceeded upon the basis that the decision below involved a principle concerning the collection of internal revenue taxes of far-reaching importance, and which if thereafter applied in accordance with what it was urged was the rule established by the lower court would over-

throw practices prevailing as to the collection of internal revenue taxes for a long period of time, founded upon a well settled administrative construction, and thus produce at least great confusion.

As the record at least *prima facie* tended to sustain these contentions of the Government, the writ of certiorari was granted. With candor, in the argument at bar, while perspicuously discussing the legal propositions which it was deemed were involved when the certiorari was petitioned for, the Government conceded that a closer scrutiny of the record made it exceedingly doubtful whether the action of the court below, when accurately tested, dealt with the principle, which, it was deemed, rendered the granting of the writ necessary. Coming to consider the record, we conclude that it establishes that the doubt suggested by the Government is well founded, and, therefore, if we were to consider and decide the case we would but review the action of the court below in regard to a question as to which, under the Judiciary Act of 1891, the action of the court was final, and which, neither from its character or importance, was within the scope of the grant of power to review by certiorari.

After giving the matter most careful consideration because of the precedent as to future cases which must arise from the action we take in this, we have concluded that, under the conditions which we have stated, our duty is not to pass upon the merits of the case, but to dismiss the writ of certiorari. Our order will therefore be

Writ of certiorari dismissed.

WISE *v.* MILLS.

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

No. 963. Argued April 24, 25, 1911.—Decided May 15, 1911.

The fact that a question under the Constitution is involved in an order requiring production of books and papers, does not establish that a constitutional question is involved in the order committing for contempt for refusing to comply with the order to produce. *Nelson* v. *United States*, 201 U. S. 92, distinguished, and *Alexander* v. *United States*, 201 U. S. 117, followed.

This court has no jurisdiction to review a judgment of the Circuit Court committing for contempt for failure to produce simply because the interlocutory order which appellant refused to obey involved a constitutional question; and, where it does not appear that the order disobeyed was so far *dehors* the authority of the court as to be void, the appeal from the order of commitment will be dismissed.

On February 20, 1911, an inspector of customs, before a commissioner of a Circuit Court of the United States, charged Lawrence H. Mills, Charles G. Mourraille and Emil S. Duflot with conspiring to defraud the United States of a portion of the customs duties upon certain merchandise imported by said parties, who were engaged in business in the city of New York, under the firm name of Mills & Duflot. It was charged that the object of the conspiracy was to be accomplished by presenting to the Collector of the Port of New York false and fraudulent invoices, and the commission of a specific overt act was alleged. Upon this charge a warrant issued for the arrest of the accused. On the same day a deputy marshal with an agent of the Department of Justice proceeded to the place of business of the firm and executed the warrant by arrest-

ing the accused. At the time this was done the officers took possession of and carried away a large number of commercial books and papers which were found in the store or office of the accused. On the same day also the grand jury presented the accused for conspiracy to defraud the United States of its customs revenues and they were also arrested under a bench warrant issued upon this indictment, and were arraigned and admitted to bail.

On February 23, 1911, Mills, Mourraille and Duflot in a petition filed in the Circuit Court recited the taking possession and carrying away by the officers of the books and papers as heretofore stated, and alleged that such books and papers "constituted substantially all the books and papers with which they are and have been for several years doing business." It was averred upon information and belief that the books and papers in question had been turned over to the United States District Attorney to be placed at the disposal of the grand jury. Averring that the seizure was unlawful and without warrant of authority, it was prayed that the marshal and the district attorney be notified and after hearing they be commanded to return the books and papers. The district attorney quite elaborately answered the petition, admitting that the books and papers had been seized and carried away as alleged, traversing the averment that they were all the books, admitting that they were in his possession, that he had used and was intending to use them for the purpose of procuring indictments for violations of the customs laws and averring that reasonable access to the books and papers had been allowed the parties. The answer besides stated other matters which it was deemed sustained the seizure and the retention of the books and papers.

After hearing, the court ordered the return of the books and papers. The reasons for this course were stated in an opinion which substantially, on a review of the decisions of this court, especially *Boyd* v. *United States,* 116 U. S.

616, and *Hale* v. *Henkel*, 201 U. S. 43, held that the constitutional rights of the parties had been violated by the taking possession of the books and papers as alleged. 185 Fed. Rep. 318. Thereupon the district attorney, who is the plaintiff in error, refused to obey the order of the court and stated his reasons for the refusal in an elaborate paper filed in the Circuit Court and styled "Statement of grounds of United States attorney's refusal to obey order." In such paper, after referring to the taking possession of the books and papers and making certain statements concerning the same, it was declared: "As to the direction of this court to turn over the other books and papers now in his possession and taken into custody at the time of the arrest of the defendants, said United States attorney is unwilling and respectfully refuses to comply with said order, and the grounds of his refusal to obey the said order are as follows: . . ." This was followed by eleven paragraphs, in which were recited the charge against the accused, the taking possession of the books and papers, the return of some of them to the accused, the retention of the balance by the district attorney, their use before the grand jury and the intention to use them further. Certain papers were annexed as part of the statement.

The district attorney persisting in his refusal, the court entered an order committing him for contempt. Thereupon this writ of error to the judgment of commitment for contempt was allowed by the circuit judge who ordered the commitment, and assignments of error were filed, concluding as follows: "Wherefore the said Henry A. Wise prays that the order and judgment of said Circuit Court of the United States for the Southern District of New York, adjudging him to be in contempt, may be reversed and that the said court may be directed to enter an order and judgment vacating and setting at naught the said order upon which the commitment and complaint was made."

The Solicitor General for plaintiff in error:

In executing a warrant of arrest upon a charge of crime the officer may at the time and place of making the arrest seize anything upon the person of the defendant or in his possession at that time and place which is evidence of the crime for which he is arrested, and, this being so, the district attorney was entitled to the possession of books and papers containing evidence of the crimes charged against the defendants Mills, Mourraille and Duflot, in the complaint under which they were arrested and which were taken from their possession at the time and place of their arrest; and his refusal to return them under the order of the court was a proper discharge of his duty as the prosecuting officer of the Government. 1 Bishop on Crim. Proc., § 210, Wharton, Crim. Pld. & Prac., 8th ed., § 60; *Dillon* v. *O'Brien*, 16 Cox Crim. Cas. 245; *Ex parte Hurn*, 92 Alabama, 102; *Getchell* v. *Page*, 103 Maine, 387; *Smith* v. *Jerome*, 47 Misc. (N. Y.) 22; *State* v. *Robbins*, 124 Indiana, 308; *Reifsnyder* v. *Lee*, 44 Iowa, 101; *Closson* v. *Morrison*, 47 N. H. 482; *Spalding* v. *Preston*, 21 Vermont, 9; *United States* v. *Wilson*, 163 Fed. Rep. 338.

Mr. A. Leo Everett for defendant in error:

As to the jurisdiction of this court: There is no jurisdiction by appeal. That may be brought only pursuant to §§ 763 *et seq.*, Rev. Stat., which were limited but not repealed by the act of March 3, 1891. *Craemer* v. *The State*, 168 U. S. 124; *Rice* v. *Ames*, 180 U. S. 371; *Fisher* v. *Baker*, 203 U. S. 174; Notes to U. S. Comp. Stat., § 764.

The district attorney here is not restrained of his liberty in violation of the Constitution. While the Constitution provides immunity from unreasonable searches and seizures, it does not grant any right to officers of the law to make reasonable searches and seizures. It seems clear that such a right could be limited or controlled by law-making bodies, or even judges, without infringing on

a district attorney's or police officer's constitutional rights.

The act of March 10, 1908, c. 76, did not give the party aggrieved any greater rights by reason of the allowing of the certificate by a judge of the Circuit Court. 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. 448.

The proceedings below cannot be reviewed in this court by writ of error. This writ is based upon the order adjudging the district attorney in contempt for disobedience to the order requiring him to surrender the books and papers. The original order was not a final order within the meaning of the decisions of this court. The requisite finality was obtained by the order adjudging him in contempt. *Nelson* v. *United States*, 201 U. S. 92; *Alexander* v. *United States*, 201 U. S. 117.

It does not follow, because finality can be obtained in this way, that every decision involving a constitutional question can thus be reviewed.

In this case, the Circuit Judge had complete jurisdiction over his own process and over the district attorney as an officer of his court. He had jurisdiction to compel obedience to his first order even though that may have been improvidently issued or issued upon an erroneous theory of constitutional interpretation. The vice, therefore, if any, in his original order would not inhere in the order adjudging the district attorney in contempt. It is the latter order, only, which is here for review.

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

We have difficulty in understanding upon what theory the writ of error direct from this court was prosecuted, as clearly there was no jurisdiction to allow it, unless the case is within some of the provisions of the Judiciary Act

of 1891, conferring authority to so directly review. The only ground stated in the assignments of error which in the remotest degree refers to a matter which would come within our right to review is the third assignment, which asserts: "The court erred in adjudging that the taking into custody of said books and papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourraille and Emil S. Duflot was in violation of the provisions of the Constitution of the United States." And this, we assume, is the theory upon which it is deemed we have jurisdiction directly to review, since that is the subject elaborately discussed in the argument at bar on behalf of plaintiff in error. But it is obvious on the face of the record that the error thus assigned and the discussion at bar in regard to it concern themselves, not with the order which it is sought to review, that is, the commitment for contempt, but to another and different order not final in its character, that is, the order of the court directing the return of the books and papers. *Alexander* v. *United States*, 201 U. S. 117. Even then, although it be conceded that a question under the Constitution of the United States was involved in the latter, that concession does not establish that a constitutional question was involved in the order committing for contempt. No conceivable constitutional right of the district attorney arose or could have been involved in committing him for contempt for refusing to obey the order of the court, and, therefore, there is no question presented on this record justifying a direct review of the order committing for contempt.

The case here is not even analogous to *Nelson* v. *United States*, 201 U. S. 92, since there the facts were these: A person who as a witness before a special examiner refused to produce books and papers on the ground that to compel him to do so would invade his constitutional rights, was proceeded against for contempt and the authority of this court to directly review the final judgment committing for

contempt was rested upon the express ground that the writ of error directly involved the determination of whether the order to produce, and to punish for the refusal to produce, violated the constitutional rights of the witness. Even if it were to be conceded, for the sake of argument, that the court below had proceeded upon an erroneous conception of the Constitution when it ordered the return of the books and papers, that concession would not serve to establish that the order was so *dehors* the authority of the court as to cause it to be void, and to justify an officer of the court in refusing to respect and obey it. This is obviously true, since it is apparent that, wholly irrespective of the merits of the view which the court took of the constitutional rights of the parties whose books and papers were directed to be returned, the power to direct the return of the books and papers was equally possessed and might have been exerted upon the conception of the abuse of discretion, which was manifested by the taking possession of the books and papers under the circumstances disclosed. Indeed, the basis upon which the assumption that we have jurisdiction to review rests plainly upon a two-fold misconception. The one, that the right to have a direct review of the final contempt order carries with it the right to have at the same time a review of the interlocutory order returning the books—a proposition which directly conflicts with the ruling in the *Alexander Case*, *supra*. The other, because, under the view taken by the court below, the seizure of the books and papers violated the constitutional rights of the accused—that, therefore, some constitutional question was involved in the commitment for contempt for refusing to obey the order of the court for the return of the books and papers.

Under the circumstances we are of opinion that the entire want of foundation for the assumption that there was jurisdiction in this court to directly review the order of commitment which caused this writ of error to be prose-

cuted is, we think, so obvious as not to afford any possible ground for retaining jurisdiction of the cause. That is to say, we are of opinion that the contention upon which the asserted right to prosecute the error directly to this court was based is so devoid of all foundation as to render it necessary to decline to assume a jurisdiction which we have not; and, therefore, the writ of error is dismissed.

Writ of error dismissed.

WISE, INDIVIDUALLY AND AS UNITED STATES ATTORNEY, *v.* HENKEL, UNITED STATES MARSHAL IN NEW YORK.

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

No. 964. Argued April 24, 25, 1911.—Decided May 15, 1911.

Where the court below had authority to make an order directing the performance of an act, irrespective of a constitutional question raised, the denial of a writ of *habeas corpus* on behalf of one committed for contempt for refusing to obey such order does not necessarily involve the construction or application of the Constitution and a direct appeal from the judgment denying the writ does not lie to this court under § 5 of the Judiciary Act of 1891.

The writ of *habeas corpus* cannot be made to perform the functions of a writ of error.

THE facts, which involve the jurisdiction of this court on appeal from a judgment of the Circuit Court of the United States in a *habeas corpus* proceeding, are stated in the opinion.

The Solicitor General for appellant.

Mr. A. Leo Everett for appellee.

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

This case is disposed of by the opinion delivered in *Wise* v. *Mills*, just decided, *ante*, p. 549. It thus arose:

The district attorney on his committal for contempt in refusing to obey the order directing him to return certain books and papers, on being taken into custody sued out a writ of *habeas corpus*, and from the judgment discharging the writ prosecuted this appeal The petition in *habeas corpus* after averring the facts as we have stated them in the opinion in *Wise* v. *Mills*, alleged that the commitment for contempt was based "solely and exclusively on an order of this court made and filed on the 15th day of March," and that the court "was without jurisdiction to compel your petitioner as United States Attorney for this district or in any other capacity to surrender to the persons now under indictment and awaiting trial . . . books and papers which came into his lawful and official custody as aforesaid and are necessary to a prosecution still pending against said defendants." It was then averred that "your petitioner verily believes that for the reasons above stated the order adjudging him guilty of contempt and his commitment pursuant to said order in the custody of the marshal were without legal right, authority or jurisdiction of any kind and are utterly void and ineffective, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges and immunities thereunder."

The right to come directly to this court is controlled by § 5 of the Judiciary Act of 1891, which authorizes an appeal in certain cases. It is plain that the only portion of that subdivision which can possibly have application here is that which relates to cases "involving the construction or application of the Constitution of the United States."

But, as we have seen in *Wise* v. *Mills*, no question as to the construction or application of the Constitution of the United States, in the correct sense of those words, was involved in the order committing for contempt. While it is true that the court, in passing upon the application for the return of the books and papers, expressed the opinion that as the act of seizing them violated the constitutional rights of the petitioners they were entitled to an order for return, this did not cause it to come to pass that the order committing for contempt involved the application or construction of the Constitution. In every aspect this is the case, since the authority of the court to consider and decide the application for the return of the books and papers existed wholly irrespective of whether there was a constitutional right to exact the return of the books and papers. That is to say, it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court. The case, therefore, is but an attempt to cause a writ of *habeas corpus* to serve the functions of a writ of error.

For the reasons stated in case of *Wise* v. *Mills*, we think the contention that a constitutional question was involved in this case upon the existence of which the right to appeal to this court depended, is so wholly devoid of merit as to require here, as it did in the other case, a dismissal for want of jurisdiction. The appeal is, therefore,

Dismissed for want of jurisdiction.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY *v.* UNITED STATES.

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

No. 329. Argued March 9, 1911.—Decided May 15, 1911.

Under the Safety Appliance Acts of March 2, 1893, c. 196, 27 Stat. 531, April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943, there is imposed an absolute duty on the carrier and the penalty cannot be escaped by exercise of reasonable care.

This court in *St. Louis, I. M. & S. Railway Co.* v. *Taylor*, 210 U. S. 281, considered and determined the scope and effect of the Safety Appliance Acts and the degree of care required by the carrier, and the question is not open to further discussion, as this court should not disturb a construction which has been widely accepted and acted upon by the courts.

For this court to give a construction to an act of Congress contrary to one previously given would cause uncertainty if not mischief in the administration of law in Federal courts, and, having placed an interpretation on the Safety Appliance Acts, this court will adhere thereto until Congress by amendment changes the rule announced in *St. Louis, I. M. & S. Railway Co.* v. *Taylor, supra.*

An action for penalties under the Safety Appliance Acts is a civil, and not a criminal one, and the enforcement of such penalties is not governed by considerations controlling prosecution of criminal offenses.

Congress has unquestioned power to declare an offense and to exclude the elements of knowledge and due diligence from the inquiry as to its commission.

170 Fed. Rep. 556, affirmed.

THE facts, which involve the construction of the Safety Appliance Acts, and the duties and liabilities of carriers to equip their cars with safety appliances, are stated in the opinion.

Mr. Ralph W. Breckenridge, with whom *Mr. Charles J. Greene* was on the brief, for petitioner:

The Government cannot recover. It appears not only

that the Railway Company did not know that its cars were defective tested by the act, and there was no intention to offend—but that the company exercised reasonable care to keep its cars repaired. *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, does not discuss the liability of railway companies to the Government, whether or not they comply with the terms of the act. Whether or not all that the court said was necessary to a decision of the case then before the court, it was intended to apply only to the relation of master and servant, and ought not to be interpreted otherwise nor in any event applied to other situations.

The Safety Appliance Acts do not disclose the intent of Congress to make railroad companies insurers of the safety of their employés.

Section 8 creates a new relationship as between master and servant only to the extent that a servant is not required to assume a defective condition of equipment when known to him, as a hazard of his employment. Congress intended that the right of recovery for an injury should depend upon the negligence of the railroad company and the freedom from negligence of the injured person.

In this case no injury had befallen anyone, there was absence of intent, and the offense was established by construction.

Although a penalty can be recovered in a civil action, *Hepner* v. *United States,* 213 U. S. 103,—if the statute upon which it is grounded is a penal statute, the defendant is entitled to have actual ignorance of the defective conditions, exercise of reasonable care to prevent the same, and absence of intention to violate that statute, considered as a defense.

There was no indictment, but the court treated the petition to recover the penalty as though it were an information authorized by the criminal procedure in the Federal courts, and it is not open to the United States, as a litigant,

to claim any advantage based upon such a technical consideration as that involved in the mere form of the action it selected. To select a form of procedure that forecloses a defense is abhorrent to the sense of justice. *Huntington* v. *Attrill*, 146 U. S. 657, 668.

A penalty is none the less a penalty and the statute which imposes it is none the less a penal or criminal statute because the penalty may be recovered in an action which is civil in its form. The difference between the civil and criminal prosecution of corporations is slight. *United States* v. *Illinois Central Ry. Co.*, 156 Fed. Rep. 182; *Ex parte Kentucky* v. *Dennison*, 24 How. 66; *United States* v. *Reisinger*, 128 U. S. 308; *Boyd* v. *United States*, 116 U. S. 616, 634; *Iowa* v. *C., B. & Q. R. R. Co.*, 37 Fed. Rep. 497; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Grafton* v. *United States*, 206 U. S. 333, 353; *Moore* v. *State of Illinois*, 14 How. 13; *Shick* v. *United States*, 195 U. S. 65.

The construction of the Safety Appliance Act, pursuant to which penalties have been adjudged against the Railway Company, violates the social compact. *United States* v. *Wiltberger*, 5 Wheat. 77, 95; *United States* v. *Lacher*, 134 U. S. 624.

There can be no constructive offenses. *Todd* v. *United States*, 158 U. S. 278, 282; *Calder* v. *Bull*, 3 Dallas, 386; The Federalist, No. 84; *McVeigh* v. *United States*, 11 Wall. 259, 267; *Loan Association* v. *Topeka*, 20 Wall. 655, 662.

No tyranny could be more intolerable and hateful and no power more despotic than the punishment of an American citizen or corporation for something which the accused did not know had occurred, and was using diligence to avoid.

For the history of the original act adopting safety appliances on railroads engaged in interstate commerce, see Report House Committee on Interstate and Foreign Commerce, 52nd Congress, to which had been referred sundry bills on the subject, on July 8, 1892 (Vol. 23, Cong. Rec.

pt. 6, p. 5925); H. R. bill 9350, with recommendation that it pass. The committee bill was passed under suspension of the rules without debate. 23 Cong. Rec. 5925, 5927. After the initial proceedings had in the House on July 9, 1892, H. R. bill 9350, was referred to the Senate Committee on Interstate Commerce, 23 Cong. Rec. 5932, July 21, and the Senate Committee reported the bill with a substitute. Rec. 6483. The report of the Senate Committee was presented July 22, 1892, p. 6552, and appears in Vol. 24, pp. 1246, 1247, and see address on February 6, of Senator Cullom, chairman of the Senate Committee on Interstate Commerce, 24 Cong. Rec. 1247, 1248, 1249, 1273, 1275, 1287; see also remarks of Senator (now Mr. Chief Justice White), 24 Cong. Rec. 1277, 1280, 1284; and of Senator Hoar, 24 Cong. Rec. 1287–1288.

The substitute bill of the Senate Committee passed the Senate February 11, 1893, 24 Cong. Rec. 1486; February 27, 1893, the House concurred in the Senate amendments (Cong. Rec., Vol. 24, pp. 2247, 2248); and the bill received executive approval on March 2, 1893 (Cong. Rec., Vol. 24, p. 2457).

If the Safety Appliance Act prescribes a rule or regulation for cars that were equipped as the law required at the commencement of their journey and which were inspected for defects in their equipment at the repair station last preceding the one where defects were found, and which were crippled by unavoidable accident en route, such regulation rests upon judicial construction and judicial legislation, for it cannot be deduced from the arguments of the distinguished gentlemen who took part in the discussion in the House and Senate upon this act, prior to its passage.

There can be no crime or offense where there is no injury. In none of the cases complained of was any injury suffered by any person. 2 Wilson's Works (Andrews' ed.), 338. No criminal offense can be committed where the intention to do or permit the wrongful act is wanting. 1 Bishop on

Criminal Law, 5th ed., § 345; *People* v. *White*, 34 California, 183; *Furley* v. *Chicago, M. & St. P. Ry. Co.*, 90 Iowa, 146; *Schmidt* v. *State*, 78 Indiana, 41; *Hunter* v. *State*, 101 Indiana, 241; McLain on Criminal Law, § 128; *United States* v. *Illinois Central R. R. Co.*, 156 Fed. Rep. 182; *S. C.*, 170 Fed. Rep. 542; *Pettibone* v. *United States*, 148 U. S. 197; *Reynolds* v. *United States*, 98 U. S. 145.

One cannot be convicted of a crime based upon an accidental occurrence. *Barlow* v. *United States*, 7 Pet. 404; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Cruikshank*, 92 U. S. 542; *Davis* v. *United States*, 160 U. S. 469, 484; *Felton* v. *United States*, 96 U. S. 699.

Even in cases involving no moral turpitude, there must be an intention to do the act which constitutes a violation of law. *Armour Packing Co.* v. *United States*, 153 Fed. Rep. 1; *S. C.*, 209 U. S. 56, 85.

No question is raised here of a mistake of law; there was not only no purpose to do or permit the prohibited thing, but an intent not to do it, and an honest effort by the exercise of reasonable diligence, to obey the law, and prevent the very conditions which occurred, and which were in fact incidental to and accidents of, the movement of the cars.

Mr. Assistant Attorney General Fowler, with whom *Mr. Barton Corneau*, special assistant to the Attorney General, was on the brief, for the United States:

The act of March 2, 1893 (c. 196, 27 Stat. 530), as amended by the act of March 2, 1903 (c. 976, 32 Stat. 943), makes it unlawful for any car to be hauled on a railroad engaged in interstate commerce, with safety appliances not in a usable condition; and § 6 of said former act, which provides for the recovery by the United States of a penalty of $100 for a violation of any of the provisions of the act, likewise extends to the maintenance of appliances, and in case of violation makes the liability of the company for such penalty absolute, regardless of whether the statute

was violated with the knowledge of any employé of the company or not.

The provisions of the statute other than § 6 require that the appliances be maintained in a usable condition, and said section should be applied to them as thus construed. 36 Cyc. 1183; 2 Lewis, Suth. Stat. Con., 2d ed., § 337; Endlich, Inter. Stat., § 332; *United States* v. *Keitel*, 211 U. S. 370, 392.

Section 6 should not within itself be strictly construed. *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Lacher*, 134 U. S. 624, 628.

When a penal statute merely imposes a pecuniary penalty it is construed less strictly than where the rule was invoked *in favorem vitæ*. Endlich, Inter. Stat., § 334; 2 Lewis, Suth. Stat. Con., § 518.

When the section is remedial in its nature, as well as penal, it is to be liberally construed to effect the object which Congress had in view when making it. *National Bank* v. *Dearing*, 91 U. S. 29, 35; *Ordway* v. *Central Nat. Bank*, 47 Maryland, 217, 241.

Section 6 certainly does not, by express language, except a violation of the statute which was not intentionally or knowingly done, nor is there anything therein which can permit such an exception by implication.

There is no general principle of statutory construction which warrants, or will permit, the reading into § 6 of the statute the requirement that the violation of the other provisions shall be intentionally or knowingly done, in order to create the liability to the United States provided for in said section. This proceeding is a civil one. *Hepner* v. *United States*, 213 U. S. 103; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320.

This is not a penal statute, as it does not impose punishment for an offense committed against the State which the executive has the power to pardon. *Huntington* v. *Attrill*, 146 U. S. 657, 667.

One can commit a crime or an offense even though he inflict no injury thereby upon anyone.

Offenses created by statute can be committed, though the intention to commit the wrongful act, and the knowledge of such act, be wanting. *Shevlin-Carpenter Co.* v. *State of Minnesota*, 218 U. S. 57; *Regina* v. *Woodrow*, 15 Meeson & Welsby, 403, 417; *Commonwealth* v. *Emmons*, 98 Massachusetts, 6, 8; *People* v. *Snowberger*, 113 Michigan, 86; *People* v. *Roby*, 52 Michigan, 577; *Edgar* v. *The State*, 37 Arkansas, 219, 223; *Crampton* v. *The State*, 37 Arkansas, 108; *State* v. *Sase*, 6 So. Dak. 212; *State* v. *Baltimore & S. Steam Co.*, 13 Maryland, 181, 187, 188; *Halstead* v. *State*, 41 N. J. Law, 552, 591; 3 Greenleaf, 16th ed., § 21; Wharton on Crim. Law, 8th ed., § 88.

Knowledge is not an essential ingredient of a violation of the United States revenue laws, unless the statute either expressly or by implication requires knowledge. *United States* v. *Bayaud*, 16 Fed. Rep. 376, 384, 385; *United States* v. *Adler*, Fed. Case, No. 14,424; *Contra*, 1 Bishop, New Criminal Law, 8th ed., §§ 287, 291, and note 6 to § 303*a*. But see § 291, par. 2.

The decisions of this court cited by counsel for plaintiff in error do not support their contention. See *Barlow* v. *United States*, 7 Pet. 404; *Felton* v. *United States*, 96 U. S. 699, 700, 702; *Reynolds* v. *United States*, 98 U. S. 145; *Commonwealth* v. *Thomas*, 11 Allen, 33; *United States* v. *Hess*, 124 U. S. 483, 486.

The general policy that Congress had in view in passing this act, excludes the idea that it intended that knowledge of or intent to violate the provisions of the act should be necessary to create liability; and in the absence of a universal rule of construction, the provisions of § 6 of the act should be enforced as written.

With the exceptions of the Circuit Court of Appeals, Sixth Circuit, in the case of *United States* v. *Illinois Central Railroad Co.* (170 Fed. Rep. 542), of Judge Evans in

the trial court in the same case (156 Fed. Rep. 182), of Judge Sater in charging the jury in *United States* v. *Baltimore & Ohio R. R. Co.* (Appx. Kent's Dig. of Decisions under the Federal Safety Appliance Act, p. 271), and of Judge Cochran in charging the jury in *United States* v. *Baltimore & Ohio R. R. Co.* (Appx. Kent's Dig., 277, 282), all the Federal courts who have had before them actions brought under § 6 of this act to recover penalties have held that the statute imposes absolute liability upon the companies to not only equip the cars with safety appliances, but to keep such appliances in good repair, and that to haul a car with any of its appliances out of repair rendered the company liable for the prescribed penalty.

The following are the cases decided by Federal courts in which the statute has been so applied in penal cases: *United States* v. *Denver & R. G. R. Co.*, 163 Fed. Rep. 519; *Chicago, M. & S. P. R. Co.* v. *United States*, 165 Fed. Rep. 423; *United States* v. *Southern Pac. Co.*, 169 Fed. Rep. 407; *Chicago, B. & Q. R. Co.* v. *United States*, 170 Fed. Rep. 556, 557; *Atchison, T. & S. F. R. Co.* v. *United States* (two cases), 172 Fed. Rep. 1021; *Atlantic Coast Line R. Co.* v. *United States*, 168 Fed. Rep. 175; *Norfolk & Western R. Co.* v. *United States*, 177 Fed. Rep. 623; *United States* v. *Phila. & R. R. Co.*, 162 Fed. Rep. 403; *United States* v. *Phila. & R. R. Co.*, 162 Fed. Rep. 405; *United States* v. *Pennsylvania R. Co.*, 162 Fed. Rep. 408; *United States* v. *Lehigh Valley R. Co.*, 162 Fed. Rep. 410; *United States* v. *Erie R. Co.*, 166 Fed. Rep. 352; *United States* v. *Wheeling & L. E. R. Co.*, 167 Fed. Rep. 198; *United States* v. *Atch., T. & S. F. R. Co.*, 167 Fed. Rep. 696; *United States* v. *Southern Pacific Co.*, 167 Fed. Rep. 699; *United States* v. *Baltimore & Ohio R. Co.*, 170 Fed. Rep. 456; *United States* v. *Southern Ry. Co.*, 170 Fed. Rep. 1014; *United States* v. *Baltimore & Ohio R. Co.*, App. Kent's Dig. 274; *United States* v. *Atlantic Coast Line*, App. Kent's Dig. 267; *United States* v. *Southern Ry. Co.*, App. Kent's Dig. 270; *United*

States v. *Pennsylvania R. Co.*, App. Kent's Dig. 286; *United States* v. *Southern Pacific Co.*, App. Kent's Dig. 288.

Absolute liability for loss or damages, though such loss or damages cannot be avoided by the utmost degree of diligence, has always in certain instances been recognized both at common law and under many statutes. Wood on Master and Servant, 2d ed., § 277; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 165 U. S. 1; *Jones* v. *Brim*, 165 U. S. 180.

Congress has the constitutional power to impose a penalty for violation of the act, without the presence of knowledge of its violation, or the intent to violate the same. *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 64, 65, 67, 69.

MR. JUSTICE HARLAN delivered the opinion of the court.

Two separate actions were brought by the Government in the District Court of the United States for the District of Nebraska against the Chicago, Burlington and Quincy Railroad Company, an Iowa corporation engaged as a common carrier in interstate commerce. The object of each action was to recover certain penalties which, the United States alleged, had been incurred by the company for violations, in several specified instances, of the Safety Appliance Acts of Congress. March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943. By consent of the parties and by order of court the two actions were consolidated and tried together. At the trial the court directed a verdict of guilty as to each cause of action, and a judgment for $300 was rendered for the Government in one case and for $100 in the other.

By the original act of March 2, 1893 (27 Stat. 531), it was provided that from and after the first day of January, eighteen hundred and ninety-eight, it should be unlawful for any common carrier engaged in moving interstate

traffic by railroad to use on its line any locomotive engine not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or, after that date, to run any train in such traffic that had not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

The second section provided "that on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Section 6, as amended April 1, 1896, c. 87, 29 Stat. 85, provided that any such common carrier using a locomotive engine, running a train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act "shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed. . . . *Provided,* That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

The eighth section is in these words: "That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the

risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

After referring to various cases holding that the omission of Congress to make knowledge and diligence on the part of the carrier ingredients of the act condemned, the trial court said: "Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employés, provided the accident occurs from a defective appliance such as is designated in this act. And for these reasons the jury will be peremptorily instructed to return a verdict for the Government on each count of the indictment." In the Circuit Court of Appeals that judgment was affirmed. In the course of its opinion the latter court said: "The cause is simplified by the concession of counsel for the Railway Company that there was evidence tending to prove the defective condition of each of the four cars as charged, and that they were all being used at the time stated in the several counts in hauling interstate commerce or as a part of a train containing other cars which were doing so. The sole contention is that, notwithstanding this concession, inasmuch as it appears by the proof that defendant did not know its cars were out of repair and had no actual intention at the time to violate the law, but on the contrary had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action. Learned counsel concede, what is undoubtedly true, that sustaining their contention involves a reversal of the doctrine unanimously declared by this court [Circuit Court of Appeals for Eighth Circuit] in *United States* v. *Atchison, T. & S. R. Ry. Co.*, 163 Fed. Rep. 517, and *United States* v. *Denver & Rio Grande R. R. Co.*, 163 Fed.

Rep. 519, and a disregard of what they call the dictum of the Supreme Court in *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; and they accordingly invite us to enter upon a reconsideration of the questions so decided. It was held by us, and in our opinion it was necessarily held by the Supreme Court in the *Taylor Case*, that the duty of railroads under the statute in question is an absolute duty and not one which is discharged by the exercise of reasonable care and diligence. Since those cases were decided, this court in the case of *Chi., Mil. & St. P. Ry. Co.* v. *United States*, 165 Fed. Rep. 423, has again approved of their doctrine, and the Circuit Court of Appeals for the Fourth Circuit in the case of *Atlantic Coast Line R. R. Co.* v. *United States*, decided March 1, 1909, 168 Fed. Rep. 175, in considering this question, made a review of pertinent authorities, and particularly of the cases of this court as well as of the *Taylor Case*, and in an exhaustive opinion reached the same conclusion that we did. . . . The act made it unlawful for railroads to use cars not equipped as therein provided and thereby imposed a duty upon railroad companies to equip cars accordingly. This was by clear and unequivocal language of the lawmaker made an absolute duty not dependable upon the exercise of diligence or the existence of any wrong intent on the part of the railroad companies. Whether a defendant carrier knew its cars were out of order or not is immaterial. Its duty was to know they were in order and kept in order at all times. (Cases *supra*.) A breach of this duty, like the breach of most civil duties, naturally entailed a liability, and Congress fixed the liability, not as a punishment for a criminal offense, but as a civil consequence, so far as the Government was concerned, of a failure to perform the duty which, in the opinion of Congress, the public weal demanded should be performed by railroad companies." 170 Fed. Rep. 556.

Does the act of Congress in question impose on an inter-

state carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars? Can the carrier engaged in moving interstate traffic escape the penalty prescribed for a violation of the act, in the particulars just mentioned, by showing that it had exercised reasonable care in equipping its cars with the required coupler, and had used due diligence to ascertain, from time to time, whether such cars were properly equipped?

The court below held that an explicit answer to the above questions was to be found in *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281. The Government insists that such was the effect of the decision of that case. The defendant contends that the questions here presented were not necessary to be decided in the *Taylor Case*, and that an examination of them now is not precluded by anything involved in that case.

Under the circumstances and because of the importance of the questions raised, it seems appropriate, if not necessary, to state the origin of the *Taylor Case* and the grounds upon which this court proceeded.

Neal, as administrator of the estate of Taylor, brought an action in an Arkansas court against the St. Louis, Iron Mountain & Southern Railway Co. to recover damages for the death of Taylor, one of its employés, whose death, it was alleged, had been caused by the company's failure to provide certain safety appliances required by the act of Congress. Pursuant to the direction of the state court a verdict was returned for the railway company. The case was taken to the Supreme Court of Arkansas, and that court decided that the act of Congress departed from or supplanted that general rule obtaining between master and servant, which protected the master, when charged with the failure to have safe machinery for the servant,

if it appeared that the master used reasonable care and diligence in providing suitable and safe appliances. "But," that court said, "it is different where the injury is caused by a violation of a statutory duty on the part of the master. The statute upon which this case is based does not say that the company shall use ordinary care to provide its cars with drawbars of a certain height, but it imposes as a positive duty upon railway companies that they shall do so. . . . The act of Congress requiring railroad companies to equip their cars with drawbars of standard and uniform heights specifically provides that an employé injured by the failure of a company to comply with the act shall not be deemed to have assumed the risk by reason of his knowledge that the company had not complied with the statute, and there is no question of assumed risk presented." The Supreme Court of the State was therefore of opinion that the trial court had not correctly interpreted the act of Congress in respect of the nature of the duty imposed by the statute on the railroad company, and directed the case to be sent back for a new trial. *Neal* v. *St. Louis, I. M. & S. Ry. Co.*, 71 Arkansas, 445, 450. The second trial was conducted on the basis of the principles announced by the Supreme Court of Arkansas in that case. At the second trial the railway company asked the court to instruct, but the court refused to instruct, the jury as follows: "The court tells you that if you find from the evidence in this case the defendant equipped all its cars with uniform and standard height drawbars when such cars are first built and turned out of the shops, then the defendant is only bound *to use ordinary care* to maintain such drawbars at the uniform and standard height spoken of in the testimony." This was designated as instruction No. 23, asked by the railway company. It appears at page 126 of the original record, on file in this court, of the *Taylor Case*. At the last trial there was a verdict in the state court against the railway company. The company appealed to the Supreme

Court of Arkansas, where the judgment was affirmed. *St. Louis, I. M. & S. Ry. Co.* v. *Neal*, 83 Arkansas, 591, 598.

The railway company prosecuted a writ of error to this court, and the case is reported as *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281. It was assigned by the company for error, and its counsel insisted that the trial court erred in refusing the above instruction, No. 23, and that the Supreme Court of the State erred in not so ruling. (Original record, p. 154.) The reason assigned in support of that view was that "a reasonable construction of the Safety Appliance Act is that if the railroad company equipped all its cars with uniform and standard height drawbars when such cars were first built and turned out of the shops, then that *thereafter* the defendant is only bound to use *ordinary care* to maintain such drawbars at the uniform and standard height mentioned in the testimony." Counsel for the other side contended in the case in 210 U. S. that "under the Safety Appliance Act it is immaterial whether the defendant had notice of the defect or had used ordinary care to prevent this and similar defects from arising," and that "the railroad is liable under the act, unconditionally, for any violation of its provisions"—citing *Carson* v. *Southern Railway*, 194 U. S. 136; *United States* v. *Atlantic Coast Line Railway Co.*, 153 Fed. Rep. 918; *United States* v. *Southern Ry.*, 135 Fed. Rep. 122; *United States* v. *Great Northern Ry. Co.*, 150 Fed. Rep. 229. It is thus seen that whether the act of Congress imposed an absolute duty upon the carrier in the matter of the required safety appliances, or whether knowledge or diligence on its part was an ingredient in the act condemned, was a question distinctly presented here by the assignments of error and by counsel on both sides. This court regarded the question as properly presented on the record, and that its duty was to meet and decide it. Speaking by Mr. Justice Moody, it said: "It is not, and cannot be, disputed that the questions raised by the errors assigned

were seasonably and properly made in the court below, so as to give this court jurisdiction to consider them; so no time need be spent on that." What, then, was held by this court in the *Taylor Case?* Among other things, the court said: "On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow-servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry.* v. *Delk,* 158 Fed. Rep. 931), we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, *not satisfied with the common law duty and its resulting liability,* has prescribed and defined the *duty by statute.* We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact,

use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.* . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case." These views were not new, but were in accord with previous judgments in several cases in the Federal courts. In *United States* v. *Phil. & R. Ry. Co.*, 160 Fed. Rep. 696, 698; *United States* v. *L. & N. R. R. Co.*, 162 Fed. Rep. 185–6; *United States* v. *Chicago, Great Western Ry. Co.*, 162 Fed. Rep. 775, 778.

It cannot then be doubted that this court in the *Taylor Case* considered the scope and effect of the Safety Appliance Act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and

ascertaining their condition from time to time. That the *Taylor Case*, as decided by this court, has been so interpreted and acted upon by the Federal courts generally, is entirely clear as appears from the cases cited in the margin.[1]

In *United States* v. *A., T. & S. F. Ry. Co.*, 163 Fed. Rep. 517, Mr. Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals, referred to the *Taylor Case* in this court saying: "It is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the nonliability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; . . . While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employé, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed

[1] *United States* v. *Phil. & R. Ry. Co.*, 162 Fed. Rep. 403; *United States* v. *Lehigh Valley R. Co.*, 162 Fed. Rep. 410; *United States* v. *Denver & R. G. R.*, 163 Fed. Rep. 519; *Chicago, M. & St. P. Ry. Co.* v. *United States*, 165 Fed. Rep. 423; *Donegan* v. *Baltimore & N. Y. Ry. Co.*, 165 Fed. Rep. 869; *United States* v. *Erie R. Co.*, 166 Fed. Rep. 352; *United States* v. *Wheeling & L. E. R. Co.*, 167 Fed. Rep. 198, 201; *Atlantic Coast Line R. Co.* v. *United States*, 168 Fed. Rep. 175, 184; *Chicago Junction Ry. Co.* v. *King*, 169 Fed. Rep. 372, 377; *United States* v. *Southern Pac. Co.*, 169 Fed. Rep. 407, 409; *Watson* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Wabash R. Co.* v. *United States*, 172 Fed. Rep. 864; *A., T. & S. F. Ry. Co.* v. *United States*, 172 Fed. Rep. 1021; *Norfolk & W. Ry. Co.* v. *United States*, 177 Fed. Rep. 623; *United States* v. *Illinois Cent. R. Co.*, 177 Fed. Rep. 801; *Johnson* v. *Great Northern Ry. Co.*, 178 Fed. Rep. 646; *Siegel* v. *N. Y. Cent. & H. R. R.*, 178 Fed. Rep. 873.

upon the railway company, § 5, relating to drawbars, is the same as § 2, relating to couplers, and § 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty."

In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act, so far as it relates to automatic couplers on trains moving in interstate traffic, as open to further discussion here. If the court was wrong in the *Taylor Case* the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper. This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the Safety Appliance Act. We only mean to say that until Congress, by an amendment of the statute changes the rule announced in the *Taylor Case*, this court will adhere to and apply that rule.

The *Taylor Case* was a strictly civil proceeding, being an action by an individual to recover damages for a personal injury alleged to have been caused by the negligence of a corporation; whereas, the present action is to recover a penalty. This difference, it is suggested, will justify a reëxamination, upon principle, of the rule announced in the *Taylor Case*. In effect, the contention is that the present action for a penalty is a criminal prosecution, and

that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress. This contention is unsound, because the present action is a civil one. It is settled law that "a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal." It was so decided, upon full consideration, in *Hepner* v. *United States*, 213 U. S. 103, 108. In that case it was also held that it was competent for the trial court, even though the action was for a penalty, to direct a verdict for the Government, the court saying that it was "fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law." So, in *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 337, 338; "The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion." If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned. *Regina* v. *Woodrow*, 15 Meeson & Welsby, 403, 417; *People* v. *Snowberger*, 113 Michigan, 86; *Commonwealth* v. *Emmons*, 98 Massachusetts, 6, 8; *People* v. *Roby*, 52 Michigan, 577; *Edgar* v. *State*, 37 Arkansas, 219, 223; *Maryland* v. *Baltimore & Susquehanna Steam Co.*, 13 Maryland, 181,

187, 188. In *Halsted* v. *State*, 41 N. J. L. 552, 591, the suggestion was made that in determining the mind of the legislature, the dictates of natural justice should be the ground of decision, and not simply regarded as a mere circumstance of weight. But that court said: "As there is an undoubted competency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention." So, in Greenleaf on Evidence: "Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril." (3 Greenleaf, 16th ed., §§ 21, 26 and notes.)

We need say nothing more. The case is plainly covered by the act of Congress. And as it is determined by the rule announced in the *Taylor Case*, it must be held that no error of law was committed to the prejudice of the defendant, and the judgment must be affirmed.

It is so ordered.

DELK *v.* ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

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

No. 88. Argued March 9, 1911.—Decided May 15, 1911.

A car containing an interstate shipment, stopped for repairs before it reaches its destination and the cargo whereof is not ready for delivery to the consignees, is still engaged in interstate commerce and subject to the provisions of the Safety Appliance Acts.

Chicago, Burlington & Quincy Railway v. *United States*, *ante*, p. 559, followed to effect that under the Safety Appliance Acts of March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943, the carrier is not bound only to the extent of its best endeavors but is subject to an absolute duty to provide and keep proper couplers at all times and under all circumstances.

Prior to the amendment by the act of April 22, 1908, c. 149, 35 Stat. 65, the carrier had a defense where contributory negligence on the part of the party injured was the proximate cause of the injury. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Railway Co.*, *post*, p. 590.

Where the court instructs the jury to the effect that they must find for plaintiff in case they believe he acted as a reasonably prudent man with his experience would have acted, but that they must find for defendant if they believe the plaintiff acted in a manner a reasonably prudent man would not have acted, the question of contributory negligence is fairly submitted.

Where the Circuit Court rightly construed the law involved and there was no error in the admission of evidence, and the Circuit Court of Appeals reverses the judgment on a mistaken view of the law, there is no reason to disturb the verdict of the trial court and the judgment of the Circuit Court of Appeals will be reversed and that of the trial court affirmed.

THE facts, which involve the construction of the Safety Appliance Acts and the duties and rights of carriers and their employés thereunder, are stated in the opinion.

Mr. Luther M. Walter and *Mr. W. A. Percy*, with whom *Mr. T. F. Kelley* was on the brief, for petitioner.

Mr. Edward T. Miller, with whom *Mr. W. F. Evans* was on the brief, for respondent.

Mr. Assistant Attorney General Fowler, with whom *Mr. Barton Corneau*, Special Assistant to the Attorney General, was on the brief, for the United States as *amicus curiæ*.

MR. JUSTICE HARLAN delivered the opinion of the court.

The St. Louis and San Francisco Railroad Company, a Missouri corporation engaged in commerce as a carrier of freight and passengers through Tennessee and other States, was sued in one of the courts of Tennessee by the plaintiff in error, Delk, for damages alleged to have been sustained by him while engaged in the discharge of his duties as an employé of the company. On the petition of the railroad company the case was removed to the Circuit Court of the United States on the ground of diversity of citizenship.

The declaration contained several counts, but the basis of the plaintiff's claim is the alleged failure of the railroad company to provide proper automatic couplers, as required by the act of Congress of March 2, 1893, known as the original Safety Appliance Act. 27 Stat. 531. The company filed a plea, putting in issue the material allegations of the declaration. It also proceeded on the ground that the injuries complained of were caused by the plaintiff's own fault in not observing proper care in doing the work in which he was engaged when injured.

Upon a trial of the case in the Federal court there was a verdict and judgment in favor of the plaintiff for $7,500. The company moved for a new trial, and the trial court

indicated its purpose to grant that motion unless the plaintiff by remittitur reduced the verdict and judgment to $5,000. The plaintiff complied with that condition, and judgment was entered against the company for the sum last mentioned. In the Circuit Court of Appeals the judgment was reversed and the case remanded for a new trial. *St. Louis & S. F. R. Co.* v. *Delk*, 158 Fed. Rep. 931, 939, 940. Thereafter this court allowed a writ of certiorari.

The title of the Safety Appliance statute declared it to be "An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." 27 Stat. 531, c. 196.

The provisions of the act, so far as it is material to set them out, appear in the opinion of *Chicago, Burlington & Quincy Railway Co.* v. *United States*, just decided, *ante*, p. 559. The Circuit Court of Appeals well said, in the present case, that while the general purpose of the statute was to promote the safety of employés and travelers, its immediate purpose was to provide a particular mode to effect that result, namely, the equipping of each car used in moving interstate traffic with couplers, coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.

The material facts out of which the suit arises and as to which there seems to be no dispute are these: The defendant company received lumber to be carried from Giles, Arkansas, to Memphis, Tennessee. In order that the consignee might receive the lumber, the car containing it was delivered, October 2, 1906, to the Union Railway Company, known as the Belt Line. But it was promptly returned the next day to the present defendant because of a defect in the coupling and uncoupling appliance on one end of it. The car in question was in a new

yard of the defendant company, and was in a "string" of nine cars on what is known as "the dead track" in that yard. This track was called a team track, because it was so arranged that teams might be loaded and unloaded from alongside it.

On the morning after the return of the car, October 4, 1906, Delk, acting under instructions of the agent of the defendant company, undertook to switch certain cars out of the string of nine cars, so as to get two empty cars and three coal cars for removal to some other part of the company's line. The remaining facts upon which the Circuit Court of Appeals proceeded cannot, that court said, be better stated than they are in the brief for the Interstate Commerce Commission, in whose behalf special counsel appeared in that court. Those facts are set out in the opinion of the court below as follows: "The cars were on the track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track on to the lead track. The easternmost two cars, being empties, were left on the team track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn on to the lead track, the three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C., F. S. & M. No. 21,696 was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock

pin or lock block. The drawbar also had a lateral motion of four inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing, his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about three inches by six inches upon the car, and with a blue pencil wrote on said card, 'Out of Order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 a. m., on the third until 10 or 11 o'clock on the fourth, when the accident to the defendant in error occurred. There was evidence tending to show that the inspection was made in the latter part of the third and that the inspector thereupon ordered an employé to go to the repair shops which were some two and a half miles distant and get the material for repairing the coupler, but that the employé did not return until after the accident. The trial court held that the Safety Appliance Act applied to the car with the defective coupler and that by virtue of § 8 of said act, plaintiff in error was denied the defense of assumption of risk on the part of defendant in error, and stated the language of the act to the jury."

The majority of the Circuit Court of Appeals (Judges Severens and Richards) held that the car, with the defective coupler, was, at the time of the injury in question and within the meaning of the act, engaged in interstate commerce. Judge Severens said: "The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee wherewith the commerce would have ended.

Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and was being hauled upon its tracks when the accident occurred." Citing *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Chicago, M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. Rep. 522. Judge Richards said: "The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. . . . After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received. . . . This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order,' and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employé to couple it to another car. This he tried to do with the natural result, and he has been crippled

for life. The case amply justifies the verdict, and the judgment should be affirmed." Judge Lurton expressed the view that the car in question was not employed in interstate traffic at the time the plaintiff was injured; and he was also of opinion that that question was, under the evidence, for the jury. We concur with the majority of the court below that the car in question was being used in interstate traffic when the plaintiff was injured.

Nor were the Judges of the Circuit Court of Appeals in accord as to the meaning and scope of the Safety Appliance Act—Judges Lurton and Severens holding that the statute, reasonably construed, did not impose on the carrier an absolute duty to provide automatic couplers of the kind specified by Congress, and did not subject the carrier to the penalties prescribed, if it appeared that due care and diligence was exercised in meeting the requirements of the act. Judge Richards was of opinion that the statute did not make care and diligence on the part of the carrier ingredients in the act condemned, and that, independently of any inquiry as to its care or diligence, the carrier was liable to the penalty, if the coupler used was not, in fact, such a one as the statute required. The Circuit Court of Appeals, in its opinion, said that the trial court gave the law to the jury by stating the language of the statute, *but in such a way as to lead the jury to suppose that the statute imposed an absolute duty on the carrier to keep its cars in good order at all times.* An order was therefore made reversing the judgment of the Circuit Court and directing the case to be sent back for a new trial. But this court granted a writ of certiorari and the case is here primarily for the review of the judgment of the Circuit Court of Appeals.

The construction of the statute, adopted by a majority of the Circuit Court of Appeals to the effect that the act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its

best endeavor to meet the requirements of the statute, has been rejected by this court in *Chicago, Burlington & Quincy Railway Co.* v. *United States*, just decided, *ante*, p. 559, and on the authority of that case we hold that the Circuit Court of Appeals erred in the particular mentioned.

One other matter requires notice, particularly in view of the decision to-day in *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, in which it is held that under the original Safety Appliance Act, and until that act was amended by that of April 22, 1908, 35 Stat. 65, c. 149, contributory negligence on the part of the party injured, where such negligence was the proximate cause of the injury, was a valid defence for the interstate carrier. It was contended at the trial of this case that the court erred in not instructing the jury, as matter of law, in accordance with the defendant's request, that the plaintiff was guilty of contributory negligence of such a character as to bar him from relief. The rule upon that subject is well settled by the authorities. It is that "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury but may direct a verdict for the defendant." *Pleasants* v. *Fant*, 22 Wall. 116, 122; *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Randall* v. *Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482; *Con. Mut. L. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 615. In the *Doster Case*, it was said that where a cause fairly depends upon the weight or effect of the testimony, it is one for the consideration and determination of the jury under proper instructions as to the principles of law involved. These rules being applied in the present case, we are clear that the court would have erred if it had taken the case from the jury and directed a verdict for the company. The evidence in this case was by no means all one way. There was fair ground for difference of opinion, and

the court's refusal to instruct the jury, *as matter of law*, that the evidence established the defense of contributory negligence was right. We here give the charge of the trial court on the issue of contributory negligence: "If you conclude that he did that as a reasonably prudent man with his experience and his observation and the facts and circumstances in the case as I have detailed or undertaken to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there would not have attempted to do it, and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it, was the proximate cause of the injury, would be such as to bar him in this action, and that question I leave to you entirely without intimating any opinion about it." It thus appears that the question of contributory negligence was fairly submitted to the jury and it was decided against the carrier. Upon the effect of the evidence relating to contributory negligence by the plaintiff, the Circuit Court of Appeals declined to express any opinion, saying "as the case must be remanded for a new trial, we need not express our opinion upon the evidence which may not assume the same aspect upon the new trial."

In this state of the record what must be done with the case? As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the

Circuit Court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267. In this view, the judgment of the Circuit Court of Appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute, under which the case arose, imposed on the carrier an absolute duty to provide its cars, when moving in interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty. But on looking further into the record from the Circuit Court, we find that no error of law was committed by that court; for it proceeded on the construction of the statute which this court has approved in *Chicago, Burlington & Quincy Railroad* v. *United States*, just decided, *ante*, p. 559. Nor did the Circuit Court commit any error in respect to any issue of contributory negligence. It properly submitted that question to the jury. Therefore, the reversal of the judgment of the Circuit Court of Appeals, on the grounds we have above stated, constitutes no reason why the judgment of the trial court should be disturbed.

For the reason stated, the judgment of the Circuit Court of Appeals must be reversed; but as we do not perceive that any error of law was committed in the Circuit Court, to the prejudice of the carrier, the judgment of the latter court must be affirmed.

It is so ordered.

MR. JUSTICE LURTON did not participate in the decision by this court in this case.

SCHLEMMER, NOW CRAIG, *v.* BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 374. Argued April 3, 1911.—Decided May 15, 1911.

Where on writ of error the case is reversed on the Federal question and remanded to the highest state court for further proceedings in conformity with the opinion of this court, the state court should, in its remittitur require the further proceedings by the lower court to be in conformity with the opinion of this court, as the matter involved is a Federal right within the protection of this court.

If, however, the trial court on the second trial of a case reversed by this court on the Federal question does give to the statute involved the construction and effect given by this court, the judgment will not be reversed because the remittitur from the highest court to which the mandate of this court was sent, did not specifically direct that further proceedings be had in conformity with the opinion of this court.

The Safety Appliance Acts of March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943, took away from the carrier the defense of assumption of risk by the employé but did not affect the defense of contributory negligence.

There is a practical and clear distinction between assumption of risk and contributory negligence. By the former, the employé assumes the risk of ordinary dangers of occupation and those dangers that are plainly observable; the latter is the omission of the employé to use those precautions for his own safety which ordinary prudence requires.

Under the Safety Appliance Acts, an employé does not by reason of his knowledge of the fact, take upon himself the risk of injury from a car unequipped as required by the acts—but he is not absolved from duty to use ordinary care for his own protection merely because the carrier has failed to comply with the law; and, in the absence of legislation taking it away, the defense of contributory negligence is open.

On the record in this case there appears to have been contributory

negligence on the part of plaintiff's intestate, apart from the question of assumption of risk, and the state court denied plaintiff no Federal right under the Safety Appliance Acts in dismissing the complaint on the ground of contributory negligence.

222 Pennsylvania, 470, affirmed.

THE facts, which involve the construction of the Safety Appliance Acts and the duties and rights of carriers and of their employés thereunder, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. William Hitz*, *Mr. Edward A. Moseley* and *Mr. A. J. Truitt* were on the brief, for plaintiff in error.

Mr. Marlin E. Olmsted, with whom *Mr. A. C. Stamm* and *Mr. John G. Whitmore* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This action was brought in a Pennsylvania court to recover for wrongfully causing the death of Adam M. Schlemmer, plaintiff's intestate, as a result of injuries received while in the employ of the railroad company. The case has been once before in this court, and is reported in 205 U. S. 1, 13. The injury was received while Schlemmer, an employé of the defendant railroad company, was endeavoring to couple a shovel car to the caboose of one of the railroad trains of the defendant company.

Before the case first came here the Supreme Court of Pennsylvania had held that the plaintiff could not recover damages because of the contributory negligence of the deceased. 207 Pa. 198. This court reversed the Supreme Court of Pennsylvania, and remanded the case for further proceedings in conformity with the opinion of this court.

For a proper understanding of the case a brief state-

ment of the facts will be necessary. The shovel car was not equipped with an automatic coupler as required by the act of March 2, 1893, c. 196, § 2, 27 Stat. 531, and that fact was the basis of the action for damages. The shovel car had an iron drawbar, weighing somewhere about eighty pounds, protruding beyond the end of the shovel car. The end of this drawbar had a small opening, or eye, into which an iron pin was to be fitted when the coupling was made; this was to be effected by placing the end of the drawbar into the slot of the automatic coupler with which the caboose was equipped. Owing to the difference in the height, the end of the shovel car would pass over the automatic coupler on the caboose in case of an unsuccessful attempt to make the coupling, and the end of the shovel car would come in contact with the end of the caboose.

Plaintiff's intestate was an experienced brakeman, having been in the service fifteen or sixteen years. At the time when he undertook to couple the train with the shovel car to the end of the caboose, he went under the end of the shovel car and attempted to raise the iron drawbar so as to cause it to fit into the slot of the automatic coupler on the caboose. While so doing his head was caught between the ends of the shovel car and the caboose, and he was almost instantly killed. This happened between eight and nine o'clock on an evening in the month of August, and while dusk had gathered it was not very dark, and the testimony tends to show that the situation was plainly observable.

When this case was first before the Supreme Court of Pennsylvania, that court expressed doubt as to whether the act of Congress applied in actions of negligence in the courts of Pennsylvania, and the judgment on the nonsuit in the court below was sustained because of the contributory negligence of the deceased.

This court held that the shovel car was in course of

transportation between points of different States, and therefore was being used in interstate commerce; that the shovel car was a car within contemplation of § 2 of the act of Congress; that § 8 of that act had deprived the company of the defense of assumed risk on the part of an employé; that the ruling in the Pennsylvania court upon contributory negligence was so dependent upon an erroneous construction of the statute that it could not stand. 205 U. S. 1, 13. As the alleged right to recover was under a Federal statute, alleged to have been improperly construed against the plaintiff in error, the case presented a claim of Federal right, a denial of which was reviewable here, and the case, for the reason stated, was reversed by this court and sent back for further proceedings in conformity with the opinion of this court.

We find no occasion to depart from the former decision, and will proceed to examine the record as now presented, which, in material respects, differs from the one previously before the court. It is first objected by the plaintiff in error that the Supreme Court of Pennsylvania remanded the case to the lower court for trial contrary to the mandate sent down upon the reversal by this court. The Supreme Court of Pennsylvania remitted the case, after receipt of the mandate from this court, to the lower court to be retried "on the settled principles of contributory negligence, as heretofore declared in the decisions of this court"—Supreme Court of Pennsylvania. The counsel for plaintiff in error moved the Supreme Court of Pennsylvania to amend its judgment and remittitur so as to conform with the mandate of this court, which motion was overruled.

We are of opinion that the order and remittitur of the Supreme Court of Pennsylvania, in compliance with the mandate of this court, should have required the further proceedings to conform to the opinion of this court, as its mandate required, and as was within the authority of this

court, the matter involved being a right of Federal creation within the ultimate protection of this court.

If an examination of the record indicated that by reason of this mandate the subsequent proceedings in the state court had operated to deprive the plaintiff in error of the benefit of a trial under the Federal statute properly construed, we should be constrained to reverse the case. But an examination of the record discloses that the trial judge regarded the decision of this court as settling the right of the plaintiff in error to rely upon the Federal statute in question, and as conclusive of the fact that the shovel car was being employed in interstate commerce at the time of the injury, and was a car within the meaning of the act, and that assumption of risk was no defense to the action. So, it does not appear that the form of mandate sent down by the Supreme Court of Pennsylvania, after the case was reversed here, worked to the prejudice of the plaintiff in error.

The trial court submitted the case to the jury upon the issues joined under the Federal statute, including the question whether the plaintiff's intestate at the time of the injury had been guilty of contributory negligence. Under these instructions the jury found a verdict for the plaintiff.

The court then granted a rule to show cause why judgment should not be rendered *non obstante veredicto*, which motion was granted, and an opinion delivered, in which the judge held that the testimony did not warrant the conclusion that in making the coupling the risk was so obvious that an ordinarily careful and prudent brakeman would not have undertaken it; and therefore under the statute, assumption of risk was no defense, but reached the conclusion that the deceased was guilty of contributory negligence in failing to exercise care according to the circumstances in making the coupling in the way he attempted to make it, and in not adopting a safer way, which was pointed out to him at the time.

Upon the second appeal the Supreme Court of Pennsylvania affirmed the judgment of the trial court, saying: "*Per Curiam:* It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence, either greater or less than his own, of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head, though twice expressly cautioned at the time as to the danger of so doing." 222 Pennsylvania, 470.

The case is now here upon a petition in error to reverse this judgment of affirmance. The statute at the time of the injury complained of took away assumption of risk on the part of the employé as a defense to an action for injuries received in the course of the employment. The defense of contributory negligence was not dealt with by the statute.[1]

When the case was here before we did not find it necessary to pass upon the question whether contributory negligence on the part of an injured employé would be a defense to an action under the law as it then stood, for upon the record as then presented the court was of opinion that to sustain the defense of contributory negligence would amount to a denial to the plaintiff of all benefit of the statute which made the assumption of risk no longer a defense.

While, as was said in the case when here before, assump-

[1] By the third section of the act of April 22, 1908, 35 Stat. 65, c. 149, amending the Employers' Liability Act, no employé injured or killed is to be held guilty of contributory negligence in any case where the violation by a common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

tion of risk sometimes shades into negligence as commonly understood, there is, nevertheless a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employé is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employé may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade*, 191 U. S. 64, 67, 68, and former cases in this court therein cited.

Contributory negligence, on the other hand, is the omission of the employé to use those precautions for his own safety which ordinary prudence requires. (See in this connection *Narramore* v. *Cleveland &c. R. R. Co.*, 37 C. C. A. 499, 506.)

In the present case, the statute of Congress expressly provides that the employé shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel-car was not equipped with an automatic coupler he would not from that knowledge alone, take upon himself the risk of injury without liability from his employer.

But there is nothing in the statute absolving the employé from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employé was not for that reason absolved from the duty of using ordinary care for his own protection under the circum-

stances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employés. *Krause* v. *Morgan*, 53 Oh. St. 26; *Holum* v. *Railway Co.*, 80 Wisconsin, 299; *Grand* v. *Railway Co.*, 83 Michigan, 564; *Taylor* v. *Manufacturing Co.*, 143 Massachusetts, 470. And such was the holding of the Court of Appeals of the Eighth Circuit, where the statute now under consideration was before the court. *Denver & Rio Grande R. R. Co.* v. *Arrighi*, 129 Fed. Rep. 347.

In the absence of legislation, at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist, and the Federal question presented upon this record is: Was the ruling of the state court in denying the right of recovery upon the ground of contributory negligence, in view of the circumstances shown, such as to deprive the plaintiff in error of the benefit of the statute which made assumption of risk a defense no longer available to the employer? To answer this question we shall have to look to the testimony adduced at the trial, all of which is contained in the record before us. As we have already said, the testimony shows that the plaintiff's intestate was an experienced brakeman. A witness who is uncontradicted in the record testified that just before Schlemmer got out of the caboose, when he saw the train backing up, he was told: "We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." (At Bradford the method of making the coupling was by means of pushing the caboose up against the train instead of backing the train against the caboose.) To this Schlemmer replied, with emphasis, "Back up." He then proceeded to make the coupling, with the result stated.

Another witness, the yard conductor, testified without contradiction, that just before the cars got together he walked up to Schlemmer, and told him they had better shove the caboose on by hand, to which he answered:

"Never mind, I will make this coupling." To which the witness answered: "Well, you will have to get down." Witness testified that he called to him twice to get down, the last time not more than a second possibly a couple of seconds, before he was injured. This witness furthermore testified that he had a sufficient crew to push the caboose up by hand, that there was plenty of force to shove the caboose up in that way; that that was a great deal safer way to make the coupling than backing on to the caboose. The testimony further shows that there was plenty of room under the projection of the shovel car to operate the drawbar and raise it up. In fact, in this manner, the coupling was made a few minutes after the unfortunate occurrence which resulted in the death of the deceased.

As the record is now presented there is no proof in the case that the deceased was ordered to make the coupling in the manner he did, and there is testimony to the effect that just before the injury the conductor in charge of the train said to the deceased: "Mr. Schlemmer, you be very careful now, and keep your head down low, so as not to get mashed in between those cars." He said he would.

In view of this record we cannot say that the court, in denying a recovery to the plaintiff upon the ground of contributory negligence of the deceased denied to her any rights secured by the Federal statute. Entirely apart from the question of assumption of risk, which, under the law, could not be a defense to the plaintiff's action, as the law then stood there remained the defense of contributory negligence.

After an examination of the record as now presented, containing testimony not adduced at the former trial, we are constrained to the conclusion that there was ample ground for saying, as both the trial court and the Supreme Court of the State of Pennsylvania did, that the decedent met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at

the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did.

As we have said, the Federal question in the record, and the only one which gives us jurisdiction, is: Did the trial and judgment deprive the plaintiff in error of rights secured by the Federal statute? The views which we have expressed require that the question be answered in the negative.

The judgment of the Supreme Court of Pennsylvania is

Affirmed.

OPINIONS PER CURIAM, ETC., FROM FEBRUARY 21 TO MAY 29, 1911.

No. 532. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* C. W. RICHARDSON. Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. Motion to dismiss or affirm submitted February 27, 1911. Decided March 6, 1911. *Per Curiam.* Judgment affirmed with costs. *Louisville & Nashville Railroad Company* v. *Melton*, 218 U. S. 36; *Mobile, Jackson & Kansas City Railroad Company* v. *Turnipseed, Administrator, &c.*, 219 U. S. 35. *Mr. Cecil H. Smith, Mr. James Hagerman* and *Mr. Joseph M. Bryson* for the plaintiff in error. *Mr. Joseph W. Bailey* and *Mr. Rice Maxey* for the defendant in error.

No. 640. THE VICKSBURG WATER WORKS COMPANY, PLAINTIFF IN ERROR, *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY. Error to the Supreme Court of the State of Mississippi. Motion to dismiss or affirm submitted February 27, 1911. Decided March 6, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *Great Western Telegraph Company* v. *Burnham*, 162 U. S. 339; *Slosser* v. *Hemphill*, 198 U. S. 173. *Mr. J. C. Bryson* for the plaintiff in error. *Mr. Charles N. Burch* and *Mr. Edward Mayes* for the defendant in error.

No. 83. ADA ELMIRA HIRST VAN SYCKEL ET AL., APPELLANTS, *v.* JUAN JOSE ARSUAGA ET AL., PARTNERS AS SOBRINOS DE EZQUIAGA ET AL. Appeal from the District

Court of the United States for Porto Rico. Argued March 7, 1911. Decided March 13, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *St. Louis, Iron Mountain & S. R. R. Co.* v. *Express Co.*, 108 U. S. 24, 28; *Southern Ry. Co.* v. *Postal Telegraph Cable Co.*, 179 U. S. 641, 644; *Covington* v. *First Nat. Bank*, 185 U. S. 270, 277; *Heike* v. *United States*, 217 U. S. 423, 429. *Mr. George H. Lamar* and *Mr. N. B. K. Pettingill* for the appellants. *Mr. Charles F. Carusi* and *Mr. Francis H. Dexter* for the appellees.

No. 90. IRA PERRYMAN, BY O. H. PERRYMAN, HIS NEXT FRIEND, PLAINTIFF IN ERROR, *v.* THOMAS W. COLEMAN, JR., JUDGE, ETC. Error to the Supreme Court of the State of Alabama. Submitted for the plaintiff in error March 10, 1911. Decided March 13, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308; *Farrell* v. *O'Brien*, 199 U. S. 100; *Kaufman* v. *Smith*, 216 U. S. 610. *Mr. John B. Knox* for the plaintiff in error. No appearance for the defendant in error.

No. 91. JESSE NICHOLS, PLAINTIFF IN ERROR, *v.* THE CITY OF CLEVELAND. Error to the Supreme Court of the State of Ohio. Argued March 10, 1911. Decided March 13, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *Great Western Telegraph Company* v. *Burnham*, 162 U. S. 339, 341; *Schlosser* v. *Hemphill*, 198 U. S. 173. *Mr. Andrew Squire* and *Mr. William B. Sanders* for the plaintiff in error. *Mr. Newton D. Baker* for the defendant in error.

No. 94. Box Elder Power & Light Company, Plaintiff in Error, *v.* Brigham City. Error to the Supreme Court of the State of Utah. Argued for the plaintiff in error and submitted for the defendant in error March 10, 1911. Decided March 13, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 308; *Farrell* v. *O'Brien,* 199 U. S. 100; *Kaufman* v. *Smith,* 216 U. S. 610. *Mr. Charles C. Dey, Mr. Hiram E. Booth* and *Mr. E. A. Walton* for the plaintiff in error. *Mr. William H. King, Mr. Henry P. Henderson* and *Mr. Edward B. Critchlow* for the defendant in error.

No. 862. The Home for Destitute Children et al., Appellants, *v.* The Peter Bent Brigham Hospital et al., Trustees, etc. Appeal from the Circuit Court of the United States for the District of Massachusetts. Motion to dismiss or affirm submitted March 6, 1911. Decided March 13, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *Farrell* v. *O'Brien,* 199 U. S. 100; *Kaufman* v. *Smith,* 216 U. S. 610. *Mr. Charles A. Snow* and *Mr. Joseph H. Knight* for the appellants. *Mr. J. L. Thorndike* for the appellees.

No. 596. Globe Printing Company of St. Louis, Plaintiff in Error, *v.* Samuel B. Cook. Error to the Supreme Court of the State of Missouri. Motion to dismiss or affirm submitted March 13, 1911. Decided March 20, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *Farrell* v. *O'Brien,* 199 U. S. 100; *Kaufman* v. *Smith,* 216 U. S. 610; *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 112, 116, and cases cited; *Kansas City Star Com-*

pany v. *Julian*, 215 U. S. 589, 590, and cases cited in last paragraph. *Mr. Edward C. Crow* and *Mr. Hannis Taylor* for the plaintiff in error. *Mr. John H. Atwood* for the defendant in error.

No. 328. GEORGE BIRD ET AL., INDIVIDUALLY AND AS TRUSTEES, ETC., APPELLANTS, *v.* JAMES M. ASHTON ET AL. Appeal from the Circuit Court of the United States for the Western District of Washington. Motion to dismiss or affirm submitted April 3, 1911. Decided April 10, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *McGilvra* v. *Ross*, 215 U. S. 70; *Shively* v. *Bowlby*, 152 U. S. 1; *Goodrich* v. *Ferris*, 214 U. S. 71, 81; *Farrell* v. *O'Brien*, 189 U. S. 89; *United States Fidelity &c. Co.* v. *United States*, 204 U. S. 516, and cases cited. *Mr. Benjamin S. Grosscup* for the appellants. *Mr. W. P. Bell*, *Mr. Frederic D. McKenney*, *Mr. W. H. Doolittle* and *Mr. James M. Ashton* for the appellees.

No. —. Original. *Ex parte:* IN THE MATTER OF HOWARD B. MANINGTON ET AL., PETITIONERS. Motion for leave to file petition submitted April 3, 1911. Decided April 10, 1911. *Per Curiam.* Motion for leave to file petition for writ of mandamus denied. See *Ex parte Harding*, 219 U. S. 363, decided at this term. *Mr. R. W. McCoy* and *Mr. Smith W. Bennett* for the petitioner. No one opposing.

No. 828. HARRY L. BURGOYNE, TRUSTEE, ET AL., APPELLANTS, *v.* PATRICK E. MCKILLIP ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm and petition for

certiorari submitted April 3, 1911. Decided April 17, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589. Petition for a writ of certiorari denied. *Mr. C. C. Flansburg* and *Mr. Robert Ramsey* for the appellants and petitioners. *Mr. Francis A. Brogan* for the appellees and respondents.

No. 123. WILLIAM P. DEVOU, EXECUTOR OF SARAH O. DEVOU, DECEASED, PLAINTIFF IN ERROR, *v.* CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY. Error to the Court of Appeals of the State of Kentucky. Argued for the plaintiff in error April 12, 1911. Decided April 17, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 116, 117, and cases cited; *Cincinnati &c. Railway Co.* v. *Slade*, 216 U. S. 78, 83. *Mr. Herbert Jackson* for the plaintiff in error. *Mr. Frank Wright Cottle*, *Mr. Alfred C. Cassatt* and *Mr. Richard P. Ernst* for the defendant in error.

No. 919. BENJAMIN W. HUBBARD, PLAINTIFF IN ERROR, *v.* WORCESTER ART MUSEUM. Error to the Circuit Court of the United States for the District of Massachusetts. Motion to dismiss or affirm submitted April 10, 1911. Decided April 17, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 116, 117, and cases cited; *Cincinnati &c. Railway Co.* v. *Slade*, 216 U. S. 78, 83. See *Home for Destitute Children* v. *Peter*

Brent Brigham Hospital, ante p. 603, decided at this term. *Mr. Charles A. Snow* and *Mr. Joseph H. Knight* for the plaintiff in error. *Mr. John Chipman Gray* and *Mr. Roland Gray* for the defendant in error.

No. 120. RAT PORTAGE LUMBER COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF MINNESOTA; and No. 121. LESURE LUMBER COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF MINNESOTA. Error to the Supreme Court of the State of Minnesota. Argued April 11, 1911. Decided April 17, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *Farrell* v. *O'Brien*, 199 U. S. 100; *Griffith* v. *Connecticut*, 218 U. S. 563, 571; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 151. *Mr. R. R. Briggs* and *Mr. M. H. Stanford* for the plaintiffs in error. *Mr. George T. Simpson, Mr. C. S. Jelley* and *Mr. Clifford L. Hilton* for the defendant in error.

No. 155. THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM SCHRADIN, AS ADMINISTRATOR, ETC. Error to the Supreme Court of the State of New York. Argued and submitted April 26, 1911. Decided May 15, 1911. *Per Curiam.* Judgment affirmed with costs. *Louisville & Nashville Railroad Company* v. *Melton*, 218 U. S. 36. *Mr. Charles C. Paulding, Mr. Thomas Emery*, and *Mr. Charles F. Brown* for the plaintiff in error. *Mr. George Vivian Smith* for the defendant in error.

No. 147. HENRY MELVILLE WALKER, APPELLANT, v. MARY W. HARRIMAN, EXECUTRIX OF EDWARD H. HARRI-

MAN, DECEASED. Appeal from the Circuit Court of the United States for the Southern District of New York. Argued April 25, 1911. Decided May 15, 1911. *Per Curiam.* Dismissed for want of jurisdiction. *Southern Railway Co.* v. *Postal Telegraph Cable Company,* 179 U. S. 641. *Mr. B. C. Chetwood* for the appellant. *Mr. Maxwell Evarts* for the appellee.

No. 942. JESSIE B. THOMAS, PLAINTIFF IN ERROR, *v.* JOHN R. THOMAS. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted May 1, 1911. Decided May 15, 1911. Dismissed for want of jurisdiction. *Mr. Frank Dale* and *Mr. A. G. C. Bierer* for the plaintiff in error. *Mr. W. J. Hughes, Mr. Preston C. West, Mr. Horace Speed* and *Mr. W. T. Hutchings* for the defendant in error.

No. 853. ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* BLANCHE RUSSELL, ADMINISTRATRIX, ETC. Error to the United States Circuit Court of Appeals for the Second Circuit. Motion to dismiss or affirm and petition for writ of certiorari submitted March 20, 1911. Decided May 15, 1911. Dismissed for want of jurisdiction. Petition for writ of certiorari denied. *Mr. Frederic B. Jennings* for the plaintiff in error and petitioner. *Mr. George A. Clement* for the defendant in error and respondent.

No. 807. UNITED RAILWAYS COMPANY OF ST. LOUIS ET AL., APPELLANTS, *v.* THE CITY OF ST. LOUIS. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. Motion to dismiss submitted

May 1, 1911. Decided May 15, 1911. Dismissed for want of jurisdiction. *Mr. H. S. Priest* for the appellants. *Mr. Lambert E. Walther* for the appellee.

No. 205. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, PLAINTIFF IN ERROR, *v.* HARRY C. BAILEY. Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. Supplemental motion to dismiss or affirm submitted May 15, 1911. Decided May 29, 1911. *Per Curiam.* The judgment is affirmed with costs. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis Ry. Co.* v. *Herrick*, 127 U. S. 210; *Chicago &c. R. R.* v. *Pontius*, 157 U. S. 209; *Tullis* v. *Lake Erie & W. Ry.*, 175 U. S. 348; *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87; *Chicago, B. & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 564. *Mr. Cecil H. Smith*, *Mr. James Hagerman* and *Mr. Joseph M. Bryson* for the plaintiff in error. *Mr. Joseph W. Bailey*, *Mr. Rice Maxey* and *Mr. J. A. L. Wolfe* for the defendant in error.

No. 521. THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* LILLIAN TUCKER, ADMINISTRATRIX OF THE ESTATE OF SYDNEY R. TUCKER, DECEASED. Error to the Court of Appeals of the District of Columbia. Motion to dismiss or affirm submitted May 15, 1911. Decided May 29, 1911. *Per Curiam.* The judgment is affirmed with costs. *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549. *Mr. Frederic D. McKenney*, *Mr. John Spalding Flannery* and *Mr. William Hitz* for the plaintiff in error. *Mr. Levi H. David* and *Mr. Alvin L. Newmyer* for the defendant in error.

Decisions on Petitions for Writs of Certiorari from February 21 to May 29, 1911.

No. 879. JOHN HART, PETITIONER, *v.* THE UNITED STATES. February 27, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas W. Fitzsimons* for the petitioner. *The Attorney General, The Solicitor General,* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 880. THE ATLANTIC CITY RAILROAD COMPANY, PETITIONER, *v.* MARY S. CLEGG, ADMINISTRATRIX. February 27, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Clarence L. Cole* for the petitioner. *Mr. W. Holt Apgar* for the respondent.

No. 884. JOHN J. SESNON COMPANY, PETITIONER, *v.* THE UNITED STATES OF AMERICA. February 27, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William H. Gorham* and *Mr. George H. Lamar* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 886. THE AMERICAN MANUFACTURING COMPANY, PETITIONER, *v.* VALENTI ZULKOWSKI. February 27, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

Mr. Thomas F. Magner for the petitioner. *Mr. Charles Dushkind* and *Mr. Abram J. Rose* for the respondent.

No. 893. A. J. PRESTON, PETITIONER, *v.* STURGIS MILLING COMPANY; No. 894. A. J. PRESTON, PETITIONER, *v.* THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY; and No. 895. A. J. PRESTON, PETITIONER, *v.* T. W. CALLOWAY ET AL. February 27, 1911. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Helm Bruce* and *Mr. Kennedy Helm* for the petitioner. *Mr. James F. Fairleigh* for the respondents in Nos. 893 and 895. *Mr. Edmund F. Trabue, Mr. John C. Doolan, Mr. Attila Cox, Jr.*, and *Mr. Blewett Lee* for the respondent in No. 894.

No. 903. PATRICK K. CONNOLLY, PETITIONER, *v.* FRANCIS E. BOUCK, ADMINISTRATOR, ETC., ET AL. February 27, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hugh Butler* for the petitioner. No appearance for the respondent.

Nos. 850 and 851. THE MICHIGAN TRUST COMPANY, PETITIONER, *v.* EDWARD P. FERRY. March 6, 1911. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Willard F. Keeney, Mr. E. B. Critchlow* and *Mr. Charles S. Thomas* for the petitioner. *Mr. Franklin S. Richards* for the respondent.

No. 878. FRANCES A. BECKER, PETITIONER, *v.* EXCHANGE MUTUAL FIRE INSURANCE COMPANY OF PENNSYLVANIA. March 6, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Edmund Bayly Seymour, Jr.*, for the petitioner. No appearance for the respondent.

No. 883. MONTANA MINING COMPANY, LIMITED, PETITIONER, *v.* ST. LOUIS MINING & MILLING COMPANY OF MONTANA. March 6, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. E. C. Day, Mr. L. O. Evans, Mr. A. B. Browne, Mr. Alexander Britton* and *Mr. Evans Browne* for the petitioner. *Mr. Thomas J. Walsh* and *Mr. M. S. Gunn* for the respondent.

No. 892. FRANK W. FLETCHER ET AL., PETITIONERS, *v.* ALBERT W. BROWN. March 6, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry M. Campbell* and *Mr. Henry Ledyard* for the petitioners. *Mr. Harrison Geer* and *Mr. Walter B. Grant* for the respondent.

No. 900. THE FOSTER HOSE SUPPORTER COMPANY, PETITIONER, *v.* THOMAS P. TAYLOR. March 6, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Kennedy* for the petitioner. *Mr. Morris W. Seymour* and *Mr. David S. Day* for the respondent.

No. 922. CHARLES F. NEUREUTHER, PETITIONER, *v.* MINERAL POINT ZINC COMPANY. March 6, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas F. Sheridan* for the petitioner. *Mr. Edward Rector* for the respondent.

No. 885. CARL ADAMSON, PETITIONER, *v.* THE UNITED STATES. March 13, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *William C. Reid* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 897. MALINDA TANNER, PETITIONER, *v.* WILLIAM H. MURPHY ET AL.; and No. 898. WILLIAM H. SHEA ET AL., PETITIONERS, *v.* WILLIAM H. MURPHY ET AL. March 13, 1911. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. B. Middlecoff* and *Mr. R. Sleight* for the petitioners. *Mr. M. H. Stanford* for the respondents.

No. 952. THE BAKER TRANSPORTATION COMPANY, PETITIONER, *v.* THE STEAM TUG "JOHN A. HUGHES," ETC. March 20, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Macklin* and *Mr. DeLagnel Berier* for the petitioner. *Mr. James Emerson Carpenter* and *Mr. Samuel Park* for the respondents.

No. 924. THE CORPORATION OF ST. ANTHONY IN NEW BEDFORD, PETITIONER, *v.* MICHAEL J. HOULIHAN. April 3, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. James E. Cotter* for the petitioner. *Mr. Franklin T. Hammond* for the respondent.

No. 946. THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER, *v.* JEAN D. MCKELL, ADMINISTRATRIX, ETC. April 10, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Judson Harmon, Mr. Edward Colston* and *Mr. F. B. Enslow* for the petitioner. *Mr. John H. Holt, Mr. James F. Brown* and *Mr. Murray Seasongood* for the respondent.

No. 959. D. H. HALLOCK, PETITIONER, *v.* THE UNITED STATES. April 10, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank Dale, Mr. A. G. C. Bierer, Mr. Earl W. Evans* and *Mr. R. R. Vermilion* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 960. JAMES H. BURTON, PETITIONER, *v.* CURTIS M. JENNINGS, SOLE SURVIVING PARTNER, ETC. April 10, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Taylor, Jr., Mr. Charles R. Carruth,* and *Mr. Selig Edelman* for the petitioner. *Mr. Nelson Zabriskie* for the respondents.

No. 966. WORTH, MAISON LA FERRIERE AND GUILLOT & CIE, PETITIONERS, *v.* CHARLES A. CHASE, TRUSTEE, ETC. April 10, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel W. Cooper* for the petitioners. No appearance for the respondent.

No. 979. LUCIEN B. WILSON, PETITIONER, *v.* THE UNITED STATES. April 10, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. T. A. Brown* and *Mr. James S. McCluer* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 928. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, PETITIONER, *v.* BUD R. LATTA. April 17, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Carl C. Wright* and *Mr. B. T. White* for the petitioner. *Mr. H. C. Brome* for the respondent.

No. 814. THOMAS J. LYNCH, EXECUTOR, ETC., PETITIONER, *v.* THE TRAVELERS' INSURANCE COMPANY. April 17, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. George W. Heselton* for the petitioner. *Mr. R. Ross Perry* and *Mr. R. Ross Perry, Jr.*, for the respondent.

No. 976. THE EAGLE WHITE LEAD COMPANY, PETITIONER, *v.* ALBERT PFLUGH ET AL. April 17, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. William H. Singleton* and *Mr. Charles E. Riordon* for the petitioner. *Mr. Clifton V. Edwards* and *Mr. Robert Watson* for the respondent.

No. 983. METROPOLITAN WATER COMPANY OF WEST VIRGINIA, PETITIONER, *v.* THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, ET AL. April 17, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. F. Hutchings, Mr. Willard P. Hall* and *Mr. O. L. Miller* for the petitioner. No appearance for the respondents.

No. 986. JOHN H. WIKLE, AS TRUSTEE, ETC., PETITIONER, *v.* MRS. M. C. JONES ET AL. April 17, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. T. Norris* for the petitioner. *Mr. Barry Wright* for the respondents.

No. 991. EGBERT H. GOLD, PETITIONER, *v.* WILLIAM P. COSPER ET AL.; and No. 992. EGBERT H. GOLD, PETITIONER, *v.* WILLIAM P. COSPER. April 17, 1911. Petitions for writs of certiorari and writs of error to the Court of Appeals of the District of Columbia denied. *Mr. Otto Raymond Barnett* for the petitioner. *Mr. Charles Neave* for the respondent.

No. 970. THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, PETITIONER, *v.* BOISE CITY, IDAHO. April 24, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. B. Heyburn* and *Mr. Richard H. Johnson* for the petitioner. *Mr. Oliver O. Haga* for the respondent.

No. 977. GUARANTY TRUST COMPANY OF NEW YORK, PETITIONER, *v.* CHICAGO RAILWAYS COMPANY ET AL.; and No. 978. JULIEN T. DAVIES ET AL., PETITIONERS, *v.* CHICAGO RAILWAYS COMPANY ET AL. April 24, 1911. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John C. Spooner, Mr. John Barton Payne* and *Mr. Julien T. Davies* for the petitioners. *Mr. W. W. Gurley, Mr. Henry S. Robbins* and *Mr. Martin H. Foss* for the respondents.

No. 980. MATTIE B. DUFFER, PETITIONER, *v.* HERBERT G. SEEFELD. April 24, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Winchester Kelso* and *Mr. Nathaniel Wilson* for the petitioner. No appearance for the respondent.

No. 995. INA LAW ROBERTSON, PETITIONER, *v.* THE UNITED STATES. April 24, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edwin M. Ashcraft* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 996. W. T. DAY, PETITIONER, v. ATLANTIC COAST LINE RAILROAD COMPANY. April 24, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederick S. Tyler* and *Mr. A. J. Montague* for the petitioner. *Mr. William B. McIlwaine* for the respondent.

No. 1001. MERRITT & CHAPMAN DERRICK & WRECKING COMPANY, PETITIONER, *v.* CORNELL STEAMBOAT COMPANY. April 24, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. G. Philip Wardner* and *Mr. Eugene P. Carver* for the petitioner. *Mr. J. Parker Kirlin* for the respondent.

No. 1005, JOHN STIRLEN, PETITIONER, *v.* THE UNITED STATES. April 24, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Tracy L. Jeffords* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 742. THE ALABAMA & GEORGIA MANUFACTURING COMPANY OF THE STATE OF ALABAMA, PETITIONER, *v.* THE WEST POINT MANUFACTURING COMPANY OF THE STATE OF ALABAMA ET AL. May 1, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John M. Thurston, Mr. R. B. Brown* and *Mr. C. A. Mountjoy* for

the petitioner. *Mr. Louis D. Brandeis* and *Mr. William H. Dunbar* for the respondents.

No. 1007. WILLIAM V. SNYDER ET AL., PETITIONERS, *v.* THE AMERICAN PNEUMATIC SERVICE COMPANY ET AL. May 1, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. James H. Griffin* and *Mr. Hector T. Fenton* for the petitioners. *Mr. M. B. Philipp* for the respondents.

No. 1009. CHARLES WEST, ATTORNEY GENERAL, ETC., ET AL., PETITIONERS, *v.* THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.; No. 1010. CHARLES WEST, ATTORNEY GENERAL, ETC., ET AL., PETITIONERS, *v.* GULF, COLORADO & SANTA FE RAILWAY COMPANY ET AL.; No. 1011. CHARLES WEST, ATTORNEY GENERAL, ETC., ET AL., PETITIONERS, *v.* THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY; No. 1012. CHARLES WEST, ATTORNEY GENERAL, ETC., ET AL., PETITIONERS, *v.* MIDLAND VALLEY RAILROAD COMPANY; No. 1013. CHARLES WEST, ATTORNEY GENERAL, ETC., ET AL., PETITIONERS, *v.* KANSAS CITY SOUTHERN RAILWAY COMPANY; No. 1014. CHARLES WEST, ATTORNEY GENERAL, ETC., ET AL., PETITIONERS, *v.* THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; and No. 1015. CHARLES WEST, ATTORNEY GENERAL, ETC., ET AL., PETITIONERS, *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. May 1, 1911. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frederick N. Judson* and *Mr. Charles West* for the petitioners. *Mr. Frank Hagerman* for the respondents.

No. 999. WILLIAM S. INGRAHAM, ETC., PETITIONER, *v.* COMMERCIAL LEAD COMPANY ET AL. May 1, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William B. Thompson* and *Mr. Ford W. Thompson* for the petitioner. No appearance for the respondents.

No. 1003. MARY VIRGINIA MILLER, PETITIONER, *v.* WEST VIRGINIA PULP & PAPER COMPANY ET AL. May 1, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Kemp Bartlett* and *Mr. Maynard F. Stiles* for the petitioner. *Mr. W. Calvin Chesnut* and *Mr. John W. Davis* for the respondent.

No. 1004. FOURTEENTH STREET SAVINGS BANK, PETITIONER, *v.* SIGMUND DERNFELD. May 1, 1911. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. H. Winship Wheatley* for the petitioner. No appearance for the respondent.

No. 899. THE AMERICAN BANK PROTECTION COMPANY, PETITIONER, *v.* ELECTRIC PROTECTION COMPANY. May 15, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. C. Paul* and *Mr. Arthur P. Greeley* for the petitioner. *Mr. John E. Stryker* for the respondent.

No. 958. CHARLES S. LESTER, PETITIONER, *v.* EDWARD G. BENEDICT, TRUSTEE, ETC. May 15, 1911. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Remington* for the petitioner. *Mr. Daniel P. Hays* for the respondents.

No. 1051. THE UNITED STATES, PETITIONER, *v.* WONG YOU ET AL. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the petitioner. No appearance for the respondents.

No. 1052. STANLEY FRANCIS, PETITIONER, *v.* J. HECTOR MCNEAL, TRUSTEE, ETC. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Charles L. Frailey* for the petitioner. No appearance for the respondent.

No. 953. WILLIAM JENKINS ET AL., PETITIONERS, *v.* CHARLES DILLINGHAM, RECEIVER, ETC. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Gordon* and *Mr. Jack Beall* for the petitioners. No appearance for the respondent.

No. 1020. TITLE GUARANTEE & TRUST COMPANY ET AL., PETITIONERS, *v.* JOHN G. WARD, AS UNITED STATES COLLECTOR, ETC. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Second Circuit denied. *Mr. H. T. Newcomb* and *Mr. Morris F. Frey* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 1021. A. K. ATKINSON, PETITIONER, *v.* THE UNITED STATES. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert T. Hough* and *Mr. J. R. Saussy* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 1022. FRED G. AUSTIN, AS TRUSTEE, ETC., PETITIONER, *v.* THE NEW YORK STOCK EXCHANGE ET AL. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry M. Campbell, Mr. Henry Ledyard* and *Mr. Frederick Geller* for the petitioner. *Mr. Walter F. Taylor* and *Mr. K. R. Babbitt* for the respondents.

No. 1025. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE, PETITIONER, *v.* THE CANAL-LOUISIANA BANK & TRUST COMPANY, EXECUTOR, ETC., ET AL. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. Howard McCaleb* for the petitioner. No appearance for the respondent.

No. 1029. J. M. BALEY, UNITED STATES MARSHAL, ETC., PETITIONER, *v.* RICHARD J. WOOLLEY ET AL. May 29,

1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Theodore F. Davidson*, *Mr. Louis M. Bourne* and *Mr. Lee S. Overman* for the petitioner. No appearance for the respondent.

No. 1039. THE AMERICAN DISAPPEARING BED COMPANY, PETITIONER, *v.* EDWARD ARNAELSTEEN. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Melville Church* for the petitioner. No appearance for the respondent.

No. 1040. NORMAN MARSHALL, PETITIONER, *v.* THE BRYANT ELECTRIC COMPANY. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William R. Sears* for the petitioner. *Mr. Charles Howson* and *Mr. Hubert Howson* for the respondent.

No. 1042. THE BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED, PETITIONER, *v.* MALDONADO & COMPANY, INCORPORATED. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Archibald G. Thacher* for the petitioner. No appearance for the respondent.

No. 1045. EDWARD A. KUEHMSTED, PETITIONER, *v.* FARBENFABRIKEN OF ELBERFELD COMPANY. May 29,

1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John G. Elliott* for the petitioner. *Mr. Livingston Gifford* and *Mr. Anthony Gref* for the respondent.

No. 1048. MARKS & RAWOLLE, PETITIONERS, *v.* THE UNITED STATES. May 29, 1911. Petition for a writ of certiorari to the United States Court of Customs Appeals denied. *Mr. Benjamin A. Levett* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Lloyd* for the respondent.

No. 1049. MATTHIAS RADIN ET AL., PETITIONERS, *v.* THE UNITED STATES. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry Levor* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 1050. THE CINCINNATI EQUIPMENT COMPANY, PETITIONER, *v.* JOSEPH P. DEGNAN, RECEIVER, ETC. May 29, 1911. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alexander L. Smith* and *Mr. J. H. Ralston* for the petitioner. No appearance for the respondent.

No. 1053. COLWELL LEAD COMPANY, PETITIONER, *v.* FRANCIS J. TORRANCE ET AL. May 29, 1911. Petition

for a writ of certiorari to the Circuit Court of the United States for the Eastern District of Pennsylvania denied. *Mr. A. Parker Smith* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Edwin P. Grosvenor* for the respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM FEBRUARY 21 TO MAY 29, 1911.

No. 352. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* THOMAS FRANKLIN. Error to the Circuit Court of the United States for the Southern District of New York. February 27, 1911. Dismissed, on motion of *Mr. Solicitor General Lehmann* for the plaintiff in error. *The Attorney General* for the plaintiff in error. *Mr. S. T. Ansell* for the defendant in error.

No. 926. M. G. SAMUELS, APPELLANT, *v.* CHARLES A. READ, TRUSTEE IN BANKRUPTCY OF A. LANDSBERGER, BANKRUPT. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. February 27, 1911. Docketed and dismissed with costs, on motion of *Mr. E. C. Brandenburg* for the appellee. *Mr. E. C. Brandenburg* for the appellee. No one opposing.

No. 86. THE CITY OF POND CREEK ET AL., PLAINTIFFS IN ERROR, *v.* C. N. HASKELL, GOVERNOR OF THE STATE OF OKLAHOMA, ET AL. Error to the Supreme Court of the State of Oklahoma. March 3, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. W. A. Ledbetter*

for the plaintiffs in error. *Mr. A. G. C. Bierer* and *Mr. Frank Dale* for the defendants in error.

No. 449. JOHN M. WATERBURY AND CHAUNCEY MARSHALL, PLAINTIFFS IN ERROR, *v.* PHENIX NATIONAL BANK. Error to the Supreme Court of the State of New York. March 3, 1911. Dismissed per stipulation of counsel. *Mr. Charles L. Atterbury* for the plaintiffs in error. *Mr. George Coffing Warner* for the defendant in error.

No. 461. NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* MICHAEL GOLDEN. Error to the Supreme Court of the State of Montana. March 20, 1911. Dismissed with costs, on motion of *Mr. Evans Browne* for the plaintiff in error. *Mr. Charles W. Bunn* and *Mr. W. Wallace, Jr.*, for the plaintiff in error. No appearance for the defendant in error.

No. 146. THE UNITED STATES EX REL. WILLIAM H. BOYER, PLAINTIFF IN ERROR, *v.* EDWARD B. MOORE, COMMISSIONER OF PATENTS. Error to the Court of Appeals of the District of Columbia. April 3, 1911. Dismissed with costs per stipulation, on motion of *Mr. Solicitor General Lehmann* for the defendant in error. *Mr. Charles L. Sturtevant* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 156. J. C. WEBBER, PLAINTIFF IN ERROR, *v.* THE

STATE OF MISSOURI. Error to the Supreme Court of the State of Missouri. April 3, 1911. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. William Warner* and *Mr. O. H. Dean* for the plaintiff in error. *Mr. Elliott W. Major* for the defendant in error.

No. 830. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* FRED A. BROOKE ET AL., ETC. Error to the District Court of the United States for the Southern District of New York. April 17, 1911. Dismissed per stipulation of counsel, on motion of *Mr. Solicitor General Lehmann* for the plaintiff in error. *The Attorney General* for the plaintiff in error. *Mr. W. Wickham Smith* for the defendants in error.

No. 153. THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* ABE COHN. Error to the Supreme Court of Appeals of the State of Virginia. April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. Addison L. Holladay, Mr. Rush Taggart, Mr. George H. Fearons, Mr. Henry D. Estabrook* and *Mr. Francis Raymond Stark* for the plaintiff in error. No appearance for the defendant in error.

No. 157. THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* ABE COHN. Error to the Circuit Court of the City of Richmond, State of Virginia. April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. Addison L. Holladay, Mr. Rush Taggart, Mr. George H. Fearons, Mr. Henry D. Estabrook*

and *Mr. Francis Raymond Stark* for the plaintiff in error. No appearance for the defendant in error.

No. 168. THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE J. TAMER. Error to the Circuit Court of Wise County, State of Virginia. April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. George H. Fearons, Mr. Rush Taggart, Mr. Francis Raymond Stark* and *Mr. Henry D. Estabrook* for the plaintiff in error. No appearance for the defendant in error.

No. 169. THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE J. TAMER. Error to the Supreme Court of Appeals of the State of Virginia. April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. George H. Fearons, Mr. Rush Taggart, Mr. Francis Raymond Stark* and *Mr. Henry D. Estabrook* for the plaintiff in error. No appearance for the defendant in error.

No. 648. BELLE BURDETT ET AL., PLAINTIFFS IN ERROR, *v.* SUDIE M. BURDETT ET AL. Error to the Supreme Court of the State of Oklahoma. April 18, 1911. Dismissed with costs on motion of counsel for the plaintiffs in error. *Mr. Amos L. Beaty* for the plaintiffs in error. *Mr. William A. Collier* for the defendants in error.

No. 143. THE COMMONWEALTH OF PENNSYLVANIA EX REL. BUELL N. BURLINGAME, PLAINTIFF IN ERROR, *v.*

A. L. HARE, SHERIFF, AND THE STATE OF ILLINOIS. Error to the Superior Court of the State of Pennsylvania. April 21, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. L. Cabell Williamson* and *Mr. Henry E. Davis* for the plaintiffs in error. No appearance for the defendants in error.

No. 154. R. M. MACKENZIE, TRUSTEE, ETC., PLAINTIFF IN ERROR, *v.* LAWRENCE C. WOODS. Error to the Supreme Court of the State of Pennsylvania. April 25, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. Lowrie C. Barton* for the plaintiff in error. *Mr. A. Leo Weil* for the defendant in error.

No. 163. MASON WILLIAMS, TRUSTEE, ETC., APPELLANT, *v.* THE NATIONAL BANK OF COMMERCE OF ST. LOUIS, MO. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. April 26, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. Mason Williams* for the appellant. No appearance for the appellee.

No. 161. JENNIE M. TUTTLE, PLAINTIFF IN ERROR, *v.* IOWA STATE TRAVELING MEN'S ASSOCIATION. Error to the Supreme Court of the State of Iowa. April 27, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. Alfred H. McVey* for the plaintiff in error. *Mr. Albert B. Cummins* for the defendant in error.

No. 171. CHARLES MAUK, PLAINTIFF IN ERROR, *v.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY. Error to the Circuit Court of the United States for the Southern District of Iowa. April 27, 1911. Dismissed with costs, pursuant to the tenth rule. *Mr. C. C. Cole* for the plaintiff in error. *Mr. N. T. Guernsey* for the defendant in error.

No. 715. CHIN YING DON ET AL., APPELLANTS, *v.* GEORGE B. BILLINGS, UNITED STATES COMMISSIONER, ETC. Appeal from the District Court of the United States for the District of Massachusetts. May 1, 1911. Dismissed with costs, on authority of counsel for the appellant, on motion of *Mr. Solicitor General Lehmann* for the appellee. *Mr. Warren Ozro Kyle* for the appellants. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the appellee.

No. 921. BRADFORD KENNEDY COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* ARTHUR C. MORBECK ET AL. Error to the Supreme Court of the State of Idaho. May 1, 1911. Dismissed per stipulation of counsel. *Mr. Miles Poindexter, Mr. W. T. Stoll* and *Mr. O. C. Moore* for the plaintiffs in error. *Mr. Robert Early McFarland* and *Mr. Robert H. Elder* for the defendants in error.

No. 250. SAMUEL R. COLHOUN, APPELLANT, *v.* THE UNITED STATES. Appeal from the Court of Claims. May 15, 1911. Dismissed on motion of *Mr. Archibald King* for the appellant. *Mr. George A. King* for the appellant. *The Attorney General* and *The Solicitor General* for the appellee.

No. 268. LAWRENCE G. BOGGS, APPELLANT, *v.* THE UNITED STATES. Appeal from the Court of Claims. May 15, 1911. Dismissed on motion of *Mr. Archibald King* for the appellant. *Mr. George A. King* and *Mr. William B. King* for the appellant. *The Attorney General* for the appellee.

No. 305. THE STATE OF MISSOURI EX REL. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PLAINTIFF IN ERROR, *v.* WILLIAM D. VANDIVER, SUPERINTENDENT OF INSURANCE, ETC.; No. 306. THE STATE OF MISSOURI EX REL. METROPOLITAN LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM D. VANDIVER, SUPERINTENDENT OF INSURANCE, ETC.; and No. 307. THE STATE OF MISSOURI EX REL. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PLAINTIFF IN ERROR, *v.* WILLIAM D. VANDIVER, SUPERINTENDENT OF INSURANCE, ETC. Error to the Supreme Court of the State of Missouri. May 15, 1911. Dismissed per stipulation of counsel. *Mr. O. M. Spencer* and *Mr. Frank Hagerman* for the plaintiffs in error. *Mr. Elliott W. Major* for the defendant in error.

No. 140. DENNIS C. SHEA, APPELLANT, *v.* CUNO H. RUDOLPH ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA ET AL. Appeal from the Court of Appeals of the District of Columbia. May 29, 1911. Decree affirmed with costs, per stipulation to abide decision in No. 141. *Mr. Samuel Maddox* and *Mr. H. Prescott Gatley* for the appellant. *Mr. Edward H. Thomas* for the appellees.

No. 795. DAVID H. EDINGTON, TRUSTEE, ETC., APPEL-

LANT, *v.* FRANCES D. MASSON ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. May 29, 1911. Dismissed with costs, on motion of counsel for the appellant. *Mr. Charles Payne Fenner* and *Mr. H. Snowden* for the appellant. *Mr. Harry T. Smith* for the appellees.

No. 430. JOHN A. BENSON, APPELLANT, *v.* L. J. DOLAN, SHERIFF, ETC. Appeal from the Circuit Court of the United States for the Northern District of California. May 29, 1911. Dismissed on motion of *Mr. Solicitor General Lehmann* in behalf of counsel for the appellant, the cause having abated by reason of the death of appellant. *Mr. Joseph C. Campbell* for the appellant. *The Attorney General* for the appellee.

INDEX.

ACTS OF CONGRESS.

CASES DISTINGUISHED.

Grafton v. *United States*, 206 U. S. 333, distinguished in *Gavieres* v. *United States*, 338.

Harten v. *Loffler*, 212 U. S. 397, distinguished in *Martinez* v. *International Banking Corporation*, 214.

Nelson v. *United States*, 201 U. S. 92, distinguished in *Wise* v. *Mills*, 549.

New Hampshire v. *Louisiana*, 108 U. S. 76, distinguished in *Virginia* v. *West Virginia*, 1.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, distinguished in *Flint* v. *Stone Tracy Co.*, 107.

United States v. *Old Settlers*, 148 U. S. 427, distinguished in *The Sac and Fox Indians*, 481.

CASES FOLLOWED.

Alexander v. *United States*, 201 U. S. 117, followed in *Wise* v. *Mills*, 549.

Baltimore & Ohio R. R. Co. v. *Pitcairn*, 215 U. S. 481, followed in *Interstate Com. Comm.* v. *Delaware, L. & W. R. R. Co.*, 235.

Beuttell v. *Magone*, 157 U. S. 154, followed in *Sena* v. *American Turquoise Co.*, 497.

Canal Co. v. *Clark*, 13 Wall. 311, followed in *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 446.

Carter v. *McClaughry*, 183 U. S. 367, followed in *Gavieres* v. *United States*, 338.

Chicago, B. & Q. R. R. Co. v. *McGuire*, 219 U. S. 549, followed in *Missouri, K. & T. Ry. Co.* v. *Bailey*, 608; *Philadelphia, B. & W. R. R. Co.* v. *Tucker*, 608.

Chicago, B. & Q. R. R. Co. v. *United States*, 220 U. S. 559, followed in *Delk* v. *St. Louis & San Francisco R. R. Co.*, 580.

Chicago &c. R. R. v. *Pontius*, 157 U. S. 209, followed in *Missouri, K. & T. Ry. Co.* v. *Bailey*, 608.

Cincinnati &c. Ry. Co. v. *Slade*, 216 U. S. 78, followed in *Devou* v. *Cincinnati, C. & E. Ry. Co.*, 605; *Hubbard* v. *Worcester Art Museum*, 605.

Columbus Watch Co. v. *Robbins*, 148 U. S. 266, followed in *Hills & Co.* v. *Hoover*, 329.

CATTLE.

See CRIMINAL LAW, 3; STATUTES, A 6;
PUBLIC LANDS, 2–7; TRESPASS.

CONSOLIDATION OF CAUSES.

See JURISDICTION, A 12, 13.

CONSTITUTIONAL LAW.

1. *Contract impairment; taxation by municipality of its leased property.*

A lease of property belonging to a municipality in which the lessees have expressly agreed to pay taxes due the state or Federal Government is not impaired by an assessment made by the municipality under power to tax acquired subsequent to the making of the lease. *J. W. Perry Co.* v. *Norfolk*, 472.

2. *Contract impairment; taxation by municipality of its leased property under power subsequently acquired.*

Parties to a lease by a municipality not then possessing taxing powers are chargeable with notice that the power to tax may be subsequently conferred, and the conferring of such power does not impair the contract in the lease if there is no exemption expressly contained therein. *Ib.*

See CONTRACTS, 1, 4, 5.

Delegation of powers. See CONGRESS, POWERS OF, 2, 3; PUBLIC LANDS, 3.

3. *Double jeopardy; when two prosecutions for single act does not amount to.*

A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution or conviction under the other. (*Carter* v. *McClaughry*, 183 U. S. 367.) *Gavieres* v. *United States*, 338.

4. *Double jeopardy; conviction for one offense not bar to prosecution for separate offense growing out of single act.*

In this case *held* that one convicted and punished under an ordinance prohibiting drunkenness and rude and boisterous language was not put in second jeopardy by being subsequently tried under another ordinance for insulting a public officer although the latter charge was based on the same conduct and language as the former. They were separate offenses and required separate proof to convict. *Grafton* v. *United States*, 206 U. S. 333, distinguished. *Ib.*

Due process of law. See Infra, 6, 15, 16, 17, 20, 29.

5. *Equal protection of the law; application of Fourteenth Amendment to statutory changes.*

The Fourteenth Amendment does not forbid statutes and statutory

19. *Supreme law of the land.*

Enactments of Congress levying taxes are, as are other laws of the Federal Government acting within constitutional authority, the supreme law of the land. *Flint* v. *Stone Tracy Co.*, 107.

20. *Taxation by Federal Government; due process of law; validity of Corporation Tax Law.*

Congress has power to impose the Corporation Tax and the act is not void as lacking in due process of law under the Fifth Amendment. *Ib.*

21. *Taxation by Federal Government; equal protection of the law; denial by exemptions.*

Congress has the right to select the objects of excise taxation, and this includes the right to make exemptions; exceptions in the Corporation Tax Law of labor, agricultural, religious and certain other organizations, do not invalidate the tax or render the law unconstitutional. *Ib.*

22. *Taxation by Federal Government; equal protection of the law; validity of classification in Corporation Tax Law of 1909.*

Even if the principles of the equal protection provision of the Fourteenth Amendment were applicable there is no such arbitrary and unreasonable classification of business activities enumerated in and subject to the Corporation Tax Law as would render that law invalid. There is a sufficiently substantial difference between business as carried on in the manner specified in the act and as carried on by partnerships and individuals to justify the classification. *Ib.*

23. *Taxation by Federal Government; uniformity required.*

The constitutional limitation of uniformity in excise taxes does not require equal application of the tax to all coming within its operation, but is limited to geographical uniformity throughout the United States. (*Knowlton* v. *Moore*, 178 U. S. 41.) *Ib.*

24. *Taxation by Federal Government; power to tax state agencies carrying on private business.*

The exemption from Federal taxation of the means and instrumentalities employed in carrying on the governmental operations of the States does not extend to state agencies and instrumentalities used for carrying on business of a private character. (*South Carolina* v. *United States*, 199 U. S. 437.) *Ib.*

CRIMINAL LAW.

EXECUTORS AND ADMINISTRATORS.

See PHILIPPINE ISLANDS, 1.

EXEMPTIONS.

See CONSTITUTIONAL LAW, 21, 24, 29; CONTRACTS, 5; RAILROADS, 4; TAXES AND TAXATION, 12, 15.

FACTS.

See COURT OF CLAIMS;
COURTS, 3, 4, 5;
PRACTICE AND PROCEDURE, 6, 7, 8, 10.

FEDERAL QUESTION.

1. *Constitutional question in order of court; effect to raise Federal question in order committing for contempt for disobedience.*

The fact that a question under the Constitution is involved in an order requiring production of books and papers, does not establish that a constitutional question is involved in the order committing for contempt for refusing to comply with the order to produce. *Nelson* v. *United States*, 201 U. S. 92, distinguished, and *Alexander* v. *United States*, 201 U. S. 117, followed. *Wise* v. *Mills*, 549.

2. *Right of municipality to tax own property not a Federal question.*

Whether a municipality may list and tax its own property is a matter of state practice and, except as it may affect a right previously acquired and protected by the Federal Constitution, presents no Federal question. *J. W. Perry Co.* v. *Norfolk*, 472.

3. *When question of rights under act of Congress an abstract one.*

The operative effect of the act of Congress of March 2, 1887, c. 319, 24 Stat. 446, regulating charges of a railway in Oklahoma Territory having ceased by its own terms on Oklahoma becoming a State, the question of what rights the State had in that respect under the Enabling Act is merely an abstract one. *Oklahoma* v. *Chicago, R. I. & Pac. Ry. Co.*, 302.

See JURISDICTION, A 4, 5; B;
PRACTICE AND PROCEDURE, 15, 16.

FENCE LAWS.

See TRESPASS.

INTERSTATE COMMERCE ACT.

PROHIBITION.

1. *Writ will issue when; discretion of court.*

Prohibition is an extraordinary writ which will issue against a court which is acting clearly without any jurisdiction whatever, and where there is no other remedy; but where there is another legal remedy, by appeal or otherwise, or where the question of jurisdiction is doubtful or depends on matters outside the record, the granting or refusal of the writ is discretionary. (*In re Rice*, 155 U. S. 396.) *Ex parte Oklahoma*, 191, 210.

2. *Adequacy of remedy to bar right to.*

Where in an action to enjoin state officers from enforcing a state statute against articles in interstate commerce, the interlocutory injunction can be corrected in the Circuit Court of Appeals, and there is an appeal on the question of jurisdiction to this court after final decree, an adequate remedy is provided and the writ of prohibition could only be granted on the ground of absolute right and this court in this case declines to allow it to issue. *Ib.*

See MANDAMUS, 2.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW, 6, 12, 15, 16, 17, 29;
MUNICIPAL CORPORATIONS, 3;
TREATIES.

PROPRIETARY MEDICINES.

See RESTRAINT OF TRADE, 3;
SALES, 2.

PUBLIC LANDS.

1. *Administration a legislative, not judicial, question.*

It is for Congress and not for the courts to determine how the public lands shall be administered. *Light* v. *United States*, 523.

2. *Forest reserves; revocation of implied license to graze, by statute authorizing the making of regulations which prohibit.*

Even if there is no express act of Congress making it unlawful to graze sheep or cattle on a forest reserve, when Congress expressly provides that such reserves can only be used for lawful purposes subject to regulations and makes a violation of such regulations an offense, any existing implied license to graze is curtailed and qualified by Congress; and one violating the regulations when promulgated makes an unlawful use of the Government's prop-

SALES.

STATES.

remedy is with the people by the election of their representatives. *Ib.*

See CONSTITUTIONAL LAW, 1, 2, 8, 13, 14, 18–29;
FEDERAL QUESTION, 2;
STATUTES, A 3, 4, 5.

TELEGRAPHS.

See INTERSTATE COMMERCE, 1, 5;
RAILROADS, 2;
STATUTES, A 2.

TERRITORIAL CESSION.

See MUNICIPAL CORPORATIONS, 2, 3.

TERRITORIES.

See CONGRESS, POWERS OF, 1;
FEDERAL QUESTION, 3;
STATES, 4, 5.

TERRITORY.

1. *Sovereign right to extinguish municipalities in ceded territory.*

Although the United States might have extinguished every municipality in the territory ceded by Spain under the treaty of 1898, it will not, in view of the practice of nations to the contrary, be presumed to have done so. *Vilas* v. *Manila*, 345.

2. *Sovereignty; effect of change on laws in force at time.*

While there is a total abrogation of the former political relations of inhabitants of ceded territory, and an abrogation of laws in conflict with the political character of the substituted sovereign, the great body of municipal law regulating private and domestic rights continues in force until abrogated or changed by the new ruler. *Ib.*

TORTS.

See ACTIONS, 2;
REMOVAL OF CAUSES, 1.

TRADE.

See RESTRAINT OF TRADE;
SALES.

TRADE-MARKS.

TRADE-NAME.

TREATIES.

TRESPASS.

WORDS AND PHRASES.

WRIT AND PROCESS.

See HABEAS CORPUS;
MANDAMUS;
PROHIBITION.