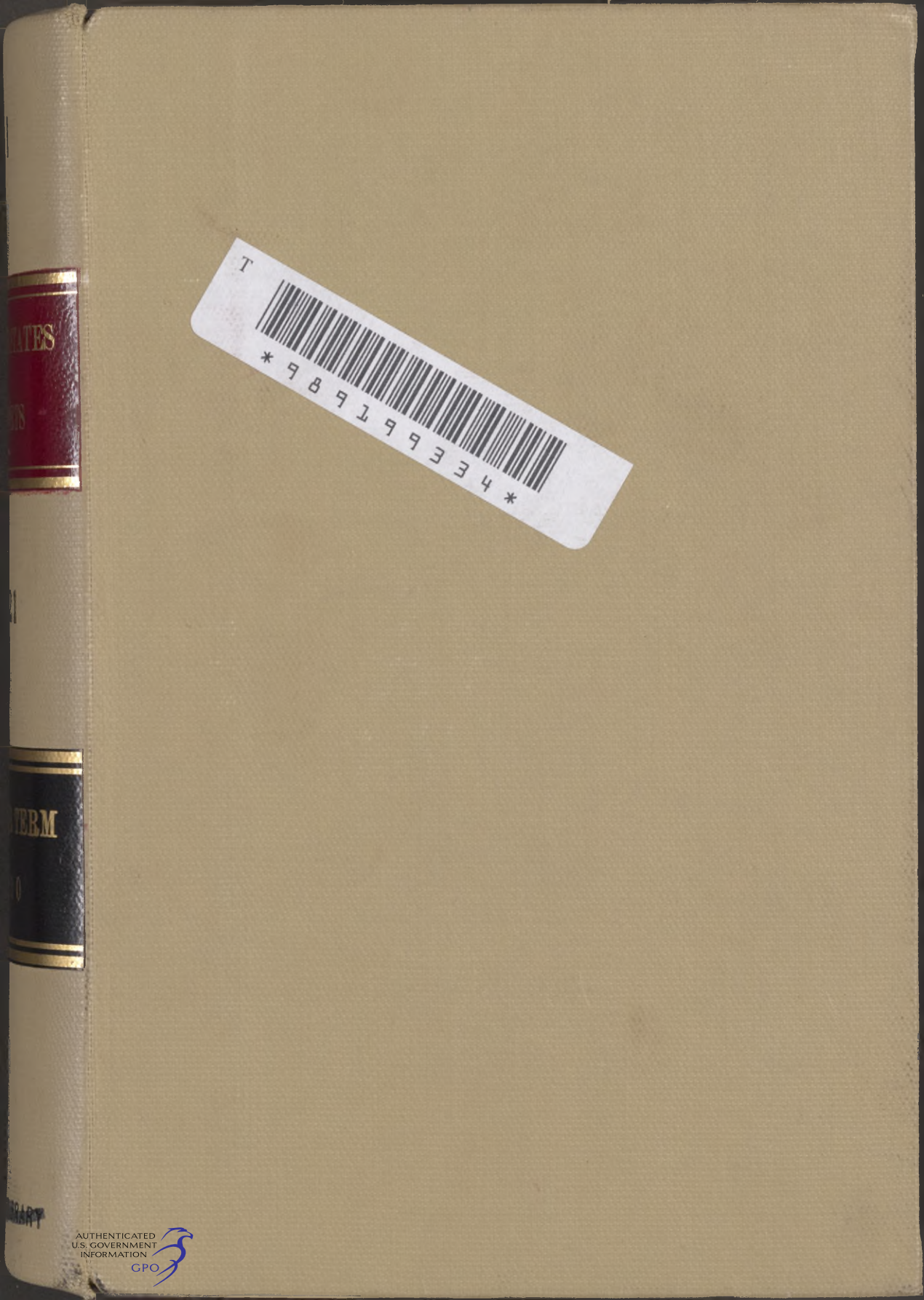
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UNITED STATES REPORTS

VOLUME 221

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.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1910.

THE STANDARD OIL COMPANY OF NEW JERSEY ET AL. *v.* THE UNITED STATES.

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

Argued March 14, 15, 16, 1910; restored to docket for reargument April 11, 1910; reargued January 12, 13, 16, 17, 1911.—Decided May 15, 1911.

The Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209, should be construed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in interstate commerce.

The combination of the defendants in this case is an unreasonable and undue restraint of trade in petroleum and its products moving in interstate commerce, and falls within the prohibitions of the act as so construed.

Where one of the defendants in a suit, brought by the Government in a Circuit Court of the United States under the authority of § 4 of the Anti-trust Act of July 2, 1890, is within the district, the court, under the authority of § 5 of that act, can take jurisdiction and order notice to be served upon the non-resident defendants.

Allegations as to facts occurring prior to the passage of the Anti-trust Act may be considered solely to throw light on acts done after the passage of the act.

The debates in Congress on the Anti-trust Act of 1890 show that one of the influences leading to the enactment of the statute was doubt as to whether there is a common law of the United States governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absence of legislation.

While debates of the body enacting it may not be used as means for interpreting a statute, they may be resorted to as a means of ascertaining the conditions under which it was enacted.

The terms "restraint of trade," and "attempts to monopolize," as used in the Anti-trust Act, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the act, and their meaning should be sought from the conceptions of both English and American law prior to the passage of the act.

The original doctrine that all contracts in restraint of trade were illegal was long since so modified in the interest of freedom of individuals to contract that the contract was valid if the resulting restraint was only partial in its operation and was otherwise reasonable.

The early struggle in England against the power to create monopolies resulted in establishing that those institutions were incompatible with the English Constitution.

At common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public and at common law; and contracts creating the same evils were brought within the prohibition as impeding the due course of, or being in restraint of, trade.

At the time of the passage of the Anti-trust Act the English rule was that the individual was free to contract and to abstain from contracting and to exercise every reasonable right in regard thereto, except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his right to carry on his trade. *Mogul Steamship Co.* v. *McGregor*, 1892, A. C. 25.

A decision of the House of Lords, although announced after an event, may serve reflexly to show the state of the law in England at the time of such event.

This country has followed the line of development of the law of England, and the public policy has been to prohibit, or treat as illegal, contracts, or acts entered into with intent to wrong the public and which unreasonably restrict competitive conditions, limit the right of individuals, restrain the free flow of commerce, or bring about public evils such as the enhancement of prices.

The Anti-trust Act of 1890 was enacted in the light of the then existing practical conception of the law against restraint of trade, and the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which do not unduly restrain interstate or foreign commerce, but to protect that commerce from contracts or combinations by methods, whether old or new, which would constitute an interference with, or an undue restraint upon, it.

The Anti-trust Act contemplated and required a standard of interpretation, and it was intended that the standard of reason which had been applied at the common law should be applied in determining whether particular acts were within its prohibitions.

The word "person" in § 2 of the Anti-trust Act, as construed by reference to § 8 thereof, implies a corporation as well as an individual.

The commerce referred to by the words "any part" in § 2 of the Anti-trust Act, as construed in the light of the manifest purpose of that act, includes geographically any part of the United States and also any of the classes of things forming a part of interstate or foreign commerce.

The words "to monopolize" and "monopolize" as used in § 2 of the Anti-trust Act reach every act bringing about the prohibited result.

Freedom to contract is the essence of freedom from undue restraint on the right to contract.

In prior cases where general language has been used, to the effect that reason could not be resorted to in determining whether a particular case was within the prohibitions of the Anti-trust Act, the unreasonableness of the acts under consideration was pointed out and those cases are only authoritative by the certitude that the rule of reason was applied; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505, limited and qualified so far as they conflict with the construction now given to the Anti-trust Act of 1890.

The application of the Anti-trust Act to combinations involving the production of commodities within the States does not so extend the power of Congress to subjects *dehors* its authority as to render the statute unconstitutional. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, distinguished.

The Anti-trust Act generically enumerates the character of the acts prohibited and the wrongs which it intends to prevent and is susceptible of being enforced without any judicial exertion of legislative power.

The unification of power and control over a commodity such as pe-

troleum, and its products, by combining in one corporation the stocks of many other corporations aggregating a vast capital gives rise, of itself, to the *prima facie* presumption of an intent and purpose to dominate the industry connected with, and gain perpetual control of the movement of, that commodity and its products in the channels of interstate commerce in violation of the Anti-trust Act of 1890, and that presumption is made conclusive by proof of specific acts such as those in the record of this case.

The fact that a combination over the products of a commodity such as petroleum does not include the crude article itself does not take the combination outside of the Anti-trust Act when it appears that the monopolization of the manufactured products necessarily controls the crude article.

Penalties which are not authorized by the law cannot be inflicted by judicial authority.

The remedy to be administered in case of a combination violating the Anti-trust Act is two-fold: first, to forbid the continuance of the prohibited act, and second, to so dissolve the combination as to neutralize the force of the unlawful power.

The constituents of an unlawful combination under the Anti-trust Act should not be deprived of power to make normal and lawful contracts, but should be restrained from continuing or recreating the unlawful combination by any means whatever; and a dissolution of the offending combination should not deprive the constituents of the right to live under the law but should compel them to obey it.

In determining the remedy against an unlawful combination, the court must consider the result and not inflict serious injury on the public by causing a cessation of interstate commerce in a necessary commodity.

173 Fed. Rep. 177, modified and affirmed.

THE facts, which involve the construction of the Sherman Anti-trust Act of July 2, 1890, and whether defendants had violated its provisions, are stated in the opinion.

Mr. John G. Johnson and *Mr. John G. Milburn*, with whom *Mr. Frank L. Crawford* was on the brief, for appellants:

The acquisition in 1899 by the Standard Oil Company of New Jersey of the stocks of the other companies was not a combination of independent enterprises. All of the

companies had the same stockholders who in the various corporate organizations were carrying on parts of the one business. The business as a whole belonged to this body of common stockholders who, commencing prior to 1870, had as its common owners gradually built it up and developed it. The properties used in the business, in so far as they had been acquired by purchase, were purchased from time to time with the common funds for account of the common owners. For the most part the plants and properties used in the business in 1899 had not been acquired by purchase but were the creation of the common owners. The majority of the companies, and the most important ones, had been created by the common owners for the convenient conduct of branches of the business. The stocks of these companies had always been held in common ownership. The business of the companies and their relations to each other were unchanged by the transfer of the stocks of the other companies to the Standard Oil Company of New Jersey.

The Sherman Act has no application to the transfer to, or acquisition by, the Standard Oil Company of New Jersey of the stocks of the various manufacturing and producing corporations, for the reason that such transfer and acquisition were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate and foreign commerce, nor within the power of Congress to regulate interstate and foreign commerce. *United States* v. *Knight*, 156 U. S. 1; *In re Greene*, 52 Fed. Rep. 104.

The contracts, combinations and conspiracies of § 1 of the Sherman Act are contracts and combinations which contractually restrict the freedom of one or more of the parties to them in the conduct of his or their trade, and combinations or conspiracies which restrict the freedom of others than the parties to them in the conduct of their business, when these restrictions directly affect interstate

or foreign trade. Purchases or acquisitions of property are not in any sense such contracts, combinations or conspiracies. Contracts in restraint of trade are contracts with a stranger to the contractor's business, although in some cases carrying on a similar one, which wholly or partially restricts the freedom of the contractor in carrying on that business as otherwise he would. Holmes, J., in *Northern Securities Case*, 193 U. S. 404; Pollock on Contracts, 7th ed., p. 352. Such contracts are invalid because of the injury to the public in being deprived of the restricted party's industry and the injury to the party himself by being precluded from pursuing his occupation. *Oregon Steam Navigation Co.* v. *Windsor*, 20 Wall. 68; *Alger* v. *Thacker*, 19 Pick. 54. Combinations in restraint of trade are combinations between two or more persons whereby each party is restricted in his freedom in carrying on his business in his own way. *Hilton* v. *Eckersley*, 6 El. & Bl. 47.

The cases in which combinations have been held invalid at common law as being in restraint of trade deal with executory agreements between independent manufacturers and dealers whereby the freedom of each to conduct his business with respect to his own interest and judgment is restricted. *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Salt Co.* v. *Guthrie*, 35 Oh. St. 666; *Arnot* v. *Pittston and Elmira Coal Co.*, 68 N. Y. 558; *Craft* v. *McConoughy*, 79 Illinois, 346; *India Bagging Association* v. *Kock*, 14 La. Ann. 168; *Vulcan Powder Co.* v. *Hercules Powder Co.*, 96 California, 510; *Oil Co.* v. *Adoue*, 83 Texas, 650; *Chapin* v. *Brown*, 83 Iowa, 156.

The cases in which trusts and similar combinations have been held invalid as combinations in restraint of trade all deal with devices employed to secure the centralized control of separately owned concerns. *People* v. *North River Sugar Refining Co.*, 54 Hun, 354; *S. C.*, 121 N. Y. 582; *State* v. *Nebraska Distilling Co.*, 29 Nebraska, 700; *Poca-*

hontas Coke Co. v. *Powhatan Coal & Coke Co.*, 60 W. Va. 508.

A conspiracy in restraint of trade is a combination of two or more to deprive others than its members of their freedom in conducting their business in their own way by acts having that effect. A combination to boycott is a sufficient illustration.

The Sherman Act did not enlarge the category of contracts, combinations and conspiracies in restraint of trade. *United States* v. *Trans-Missouri Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *Swift* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274; *Continental Wall Paper Co.* v. *Voight & Sons*, 212 U. S. 227, all involved combinations, either expressly by the terms of the agreements constituting them, restricting the freedom of each of the members in the conduct of his or its business, or in the nature of conspiracies to restrict the freedom of others than their members in the conduct of their business. The *Northern Securities Case*, 193 U. S. 197, was a combination which, through the device adopted, restricted the freedom of the stockholders of two independent railroad companies in the separate and independent control and management of their respective companies.

Purchases and acquisitions of property do not restrain trade. The freedom of a trader is not restricted by the sale of his property and business. The elimination of competition, so far as his property and business is concerned, is not a restraint of trade, but is merely an incidental effect of the exercise of the fundamental civil right to buy and sell property freely. The acquisition of property is not made illegal by the fact that the purchaser intends thereby to put an end to the use of such property in competition with him. Every purchase of

property necessarily involves the elimination of that property from use in competition with the purchaser and, therefore, implies an intent to effect such elimination. *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179.

The transfer to, and acquisition by, the Standard Oil Company of New Jersey of the stocks of the various corporations in the year 1899 was not, and the continued ownership of those shares with the control which it confers is not, a combination or conspiracy in restraint of trade declared to be illegal by the first section of the Sherman Act. Because of the common ownership of the different properties in interest they were not independent or competitive but they were the constituent elements of a single business organism. This situation was not affected by the transfer to the Standard Oil Company of New Jersey, who had the same body of stockholders and had controlled the separate companies and continued to control them through the Standard Oil Company of New Jersey. These considerations differentiate the present case from the *Northern Securities Case*, 193 U. S. 197. The *Northern Securities Case* dealt with a combination of diverse owners of separate and diverse properties which were bound by the law of their being as quasi-public corporations invested with public franchises to continue separate, independent and competitive, creating through the instrumentality of the holding company a common control which would necessarily prevent competitive relations.

There is no warrant for the assumption that corporations engaged in the same business are naturally or potentially competitive regardless of their origin or ownership. If the same body of men create several corporations to carry on a large business for the economical advantages of location or for any other reason, and the stocks of these corporations are all in common ownership, it is a fiction to say that they are potentially com-

petitive or that their natural relation is one of competition.

The common owners of the Standard Oil properties and business had the right to vest the properties and business in a single corporation, notwithstanding that such a transaction might tend to prevent the disintegration of the different properties into diverse ownerships. The Sherman Act does not impose restrictions upon the rights of joint owners.

The acquisitions prior to 1882 were lawful and their effect upon competition was incidental. The purpose of the trust of 1879 was to bring the scattered legal titles to the joint properties then vested in various individuals into a single trusteeship. The purpose of the Trust Agreement of 1882 was to provide a practicable trusteeship to hold the legal title to the joint properties, an effective executive management and a marketable symbol or evidence of the interest of each owner. The only question raised in the case of *State* v. *Standard Oil Company*, 49 Oh. St. 137, was whether it was *ultra vires* for the Standard Oil Company of Ohio to permit its stock to be held by the trustees instead of by the real owners. The method of distribution adopted on the dissolution of the trust was the only feasible plan of distribution. Each certificate-holder was given an assignment of his proportionate interest in all the companies. All being parts of the common business there was no basis for separate valuations. The value of the interest of every owner was dependent upon its being kept together as an entirety. The transaction of 1899 was practically an incorporation of the entire business by the common owners through the ownership of the Standard Oil Company of New Jersey. That was the plain purpose, object and effect of the transaction.

The first section of the Sherman Act deals directly with contracts, combinations and conspiracies in restraint of trade. The second section deals directly with monopoliz-

ing and attempts to monopolize. Monopolizing does not enlarge the operation of the first section nor does its absence restrict the operation of that section.

The first section deals with entities, a contract, combination, a conspiracy; and the entities themselves are expressly declared to be illegal, and may be annulled or destroyed. The second section deals with acts.

At common law monopoly had a precise definition. Blackstone, Vol. 4, p. 160; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 756. Monopoly imports the idea of exclusiveness and an exclusiveness existing by reason of the restraint of the liberty of others. With the common-law monopoly the restraint resulted from the grant of the exclusive right or privilege. Under the Sherman Act there must be some substitute for the grant as a source of the exclusiveness and restraint essential to monopolizing. The essential element is found in the statement of Judge Jackson (*In re Greene*, 52 Fed. Rep. 116) that monopolizing is securing or acquiring "the exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein." Exclusion by competition is not monopolizing. Pollock on Torts, 8th ed., p. 152; *Mogul Case*, L. R. 23 Q. B. D. 615; (1892) App. Cas. 51. Monopolizing within the act is the appropriation of a trade by means of contracts, combinations or conspiracies in restraint of trade or other unlawful or tortious acts, whereby "the subject in general is restrained from that liberty of . . . trading which he had before." In the absence of such means or agencies of exclusion, size, aggregated capital, power, and volume of business are not monopolizing in a legal sense.

Swift v. *United States*, 196 U. S. 375, was the case of a combination of corporations, firms and individuals separately and independently engaged in the business, together controlling nearly the whole of it, to monopolize it by certain acts and courses of conduct effective to

that end when done and pursued by such a combination.

Richardson v. *Buhl*, 77 Michigan, 632; *People* v. *North River Sugar Refining Co.*, 54 Hun, 354; *State* v. *Standard Oil Co.*, 49 Oh. St. 137; *State* v. *Distillery Co.*, 29 Nebraska, 700; *Distilling Co.* v. *People*, 156 Illinois, 448, and *Anderson* v. *Shawnee Compress Co.*, 209 U. S. 423, rest upon special grounds and are not applicable to this case. See on the other hand, *In re Greene*, 52 Fed. Rep. 104, Jackson, J.; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507; *Oakdale Co.* v. *Garst*, 18 R. I. 484; *State* v. *Continental Tobacco Co.*, 177 Missouri, 1; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Davis* v. *Booth & Co.*, 131 Fed. Rep. 31; *Robinson* v. *Brick Co.*, 127 Fed. Rep. 804. The acquisition of existing plants or properties however extensive, though made to obtain their trade and eliminate their competition, is not a monopoly at common law or monopolizing under the Sherman Act, in the absence of the exclusion of others from the trade by conspiracies to that end or contracts in restraint of trade on an elaborate and effective scale, or other systematic, wrongful, tortious or illegal acts. When such monopolizing is present the remedy of the act is to prohibit the offending conspiracies, contracts, and illegal acts or means of exclusion, leaving the individual or corporation to pursue his or its business with the properties and plants that have been acquired or created shorn of the monopolizing elements in the conduct of the business.

The acquisition of competing plants and properties cannot be rendered unlawful by imputing to such acquisitions an intent to monopolize. The acquisition of plants and properties does not exclude anyone from the trade and therefore the intent to monopolize cannot be attributed to such acquisitions. The proposition that an acquisition of property is rendered invalid because of a collateral intent to monopolize is not sustained by the

authorities relied upon to support it. *Addyston Pipe Case,* 85 Fed. Rep. 291, and cases there cited. The substantial acquisitions made by the owners of the Standard Oil business antedated the Sherman Act and they resulted from separate transactions extending over a long period of years. They were in all cases accretions to an existing business. They formed an insignificant part of the business as it now exists. The Sherman Act is intended to prevent present monopolizing or attempts to monopolize. Whether acquisitions made many years ago were or were not associated with an attempt to monopolize has no relation with the present attempt at monopolizing.

The Standard Oil Company of New Jersey was not monopolizing, or attempting to monopolize, or combining with anyone else to monopolize, interstate and foreign trade in petroleum and its products when this proceeding was instituted, or at any time.

The ownership of the pipe lines has not been a means of monopolizing. Substantially all of the pipe lines owned by the Standard Oil companies have been constructed by those companies. There has never been any exclusion of anyone from the oil fields either in the production of oil, or its purchase, or its storage, or its gathering or transportation by pipe lines. Ownership of the pipe lines does not give the Standard companies any advantages in dealing with the producers which are not open to others.

The decree erroneously includes and operates upon several of the appellant companies.

The sixth section of the decree is unwarranted and impracticable in various of its provisions.

It was error to deny the motion of the appellants to vacate the order permitting service upon them outside of the Eastern Division of the Eastern District of Missouri, and to set aside the service upon them of the writs of subpœna issued thereunder; and error to overrule the pleas of the appellants to the jurisdiction of the court

over them. The appellants were not residents of the Eastern District of Missouri nor were they found therein when the order was made authorizing the service of process upon them outside of the district. There was no proceeding pending in that district involving a controversy for the determination of which the appellants were necessary parties.

Mr. D. T. Watson, also for appellants:

The Government has failed to maintain the affirmative of the issue made by the pleadings. *Brent* v. *The Bank,* 10 Pet. 614; *The Siren,* 7 Wall. 154; *United States* v. *Stinson,* 197 U. S. 200, 205.

The transfer in 1899 to the Standard Oil Company of New Jersey of the various non-competitive properties jointly used by them as one property was not a restriction of interstate trade, or an attempt to monopolize, or a violation of the Sherman Act.

The Sherman Act permits trusts, combines, corporations and individuals to enter into and compete for interstate trade so long as they act lawfully. It does not seek to regulate the methods nor forbid those who enter into trade from doing their business in the form of a trust, corporation or combine, provided they carry it on lawfully.

The Standard Oil Company of New Jersey after 1899 might legitimately and properly compete for interstate trade, notwithstanding the combination of the group of properties gave it a great power, only provided it did not restrain such trade or by unlawful means seek to gain a monopoly contrary to the provisions of the Sherman Act.

There is nothing in this case to show that after 1899 the combination did unlawfully compete, restrict or seek to monopolize interstate trade; yet such evidence was indispensable to prove that the combination was violating the Sherman Act in 1906. See the *Calumet & Hecla*

Case, Judge Knappen, 167 Fed. Rep. 709, 715; Judge Lurton, 167 Fed. Rep. 727, 728; Judge Gray in *United States* v. *Reading Co.*, decided December 8, 1910.

There is a great difference between the *Northern Securities Case* and the case at bar.

On the question of potential competition, the idea of competition between properties all owned by the same persons is a novelty. The idea that properties themselves compete, and that if one man owns two or more he must compete with himself, is startling. Competition between joint owners is also novel. *Fairbanks* v. *Leary*, 40 Wisconsin, 642, 643; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454.

Competition is the striving of two or more persons, or corporations, either individually or jointly, for one thing, i. e., trade; it is personal action; the strife between different persons. Properties do not compete. Their relative locations may more readily enable their owners to use them in competition, but of themselves and as against each other, they do not compete.

This idea makes the Sherman Act read that the same person or group of individuals shall not own and operate two or more sites for refineries or for stores or for any kind of manufactories which might be used by different owners in competition. *Joint Traffic Association Case*, 171 U. S. 505, 567.

The words "potential" or "naturally competitive" are not in the Sherman Act. *Cascade Railroad Co.* v. *Superior Court*, 51 Washington, 346. The rule of potential competition refers only to the ownership of the physical properties which produce the oil which goes into interstate commerce, and not to the oil itself. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Northern Securities Co.* v. *United States*, 193 U. S. 407.

The Sherman Act is a highly penal one. In a criminal prosecution under the act the degree of proof is beyond a

reasonable doubt. In a civil suit under it, the degree is not so great, but the proof must be direct, plain and convincing. *United States* v. *Trans-Missouri Freight Assn.*, 58 Fed. Rep. 77; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401; *State* v. *Continental Tobacco Co.*, 177 Mississippi, 1.

There is a distinction between private traders and railroad companies; and see also distinction under Sherman Act between quasi-public corporations and private traders. *Trans-Missouri Case*, 166 U. S. 290.

The mere method in which stocks are held is not prescribed by the Sherman Act; all methods are lawful if not used to restrict trade or gain an unlawful monopoly. Under the court's ruling the effectiveness of a large business organization may, by reason of that very fact, bring it under the Sherman Act.

The decree below was not justified by the facts found by the court; or by the Sherman Act; after the court in § 5 permitted the distribution among the shareholders of the Standard Oil Company of New Jersey of the stocks held by that company, it did without lawful authority so to do, define and limit the method of that distribution; restrict the distributees in the future sale, use and disposal of their stocks; restrict the distributees in the sale, use and disposal of their properties; and in the contract relations thereafter to exist, as well as the use and disposition of the different properties in such a drastic manner as to greatly injure and destroy the value of the same and render their future profitable use practically impossible. The decree disintegrates properties built with appellants' moneys for joint use so as to create units that never before existed and compels these units separately to carry on business and compete with other units, directly contrary to the purpose of their creation. It allows the future operation and use of the refineries, pipe lines, and other properties of the appellants only under the vague and

indefinite, but broad and comprehensive, terms of § 6 of the decree, by subjecting those who in the future operate them to attachment for contempt for unwittingly violating vague and indefinite terms. It prohibits appellants from engaging in all interstate commerce until the discontinuance of the operation of the illegal combination, thus inflicting a new penalty for an indefinite and uncertain period.

All of such restrictions are unauthorized by the Sherman Act, are in violation of the settled rules governing injunctions, and are contrary to the provisions of the different decrees heretofore approved by this court under the Sherman Act, and especially the one in the *Northern Securities Case.*

The decree authorized by the Sherman Act is wholly negative, and one that merely enjoins—stops an illegal thing in operation when the petition is filed or which then is foreseen. *Lacassagne* v. *Chapius*, 144 U. S. 124; *E. C. Knight Co. Case*, 156 U. S. 1, 17; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 289; *Swift & Co.* v. *United States*, 196 U. S. 375, 402; *United States* v. *Reading Co.*, decided by Circuit Court of the Third Circuit, December 8, 1910.

The Sherman Act prescribes certain specific methods of relief which are exclusive of all others. Noyes on Intercorporate Relations, 2d ed., 1909, § 406; *Greer, Mills & Co.* v. *Stoller*, 77 Fed. Rep. 1, 3; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 71; *Barnet* v. *National Bank*, 98 U. S. 555, 558; *East Tennessee R. R. Co.* v. *Southern Tel. Co.*, 112 U. S. 306, 310; *Farmers' Bank* v. *Dearing*, 91 U. S. 29, 35; *United States* v. *Union Pacific Railroad Co.*, 98 U. S. 569.

The decree hampers and greatly injures the value of the stock of the stockholders, though they are not parties to the bill.

A corporation, when party to a bill in equity, does rep-

resent its stockholders, but only within the scope of corporate power, and not as to the individual rights of the stockholder to do with his property as he chooses. *Taylor & Co.* v. *Southern Pacific Co.*, 122 Fed. Rep. 147, 153, 154. A corporation has no right to conclude or affect the right of any shareholder in respect of the ownership or incidents of his particular shares. *Brown* v. *Pacific Mail Steamship Co.*, Fed. Cas. No. 2025; 5 Blatch. 525; *Morse* v. *Bay State Gas Co.*, 91 Fed. Rep. 944, 946; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 288–290.

The decree follows the appellants and their properties after the dissolution.

The Sherman Act closely limits and defines the power of the court on a petition filed to give equitable relief. The petition must pray that such violations shall be enjoined or otherwise prohibited; and it is these violations of the act that the court may now enjoin, and only such violations. Past unlawful competition does not deprive parties of their right to conduct lawful competition. *New Haven R. R. Case*, 200 U. S. 361, 404.

The Sherman Act does not give power to the courts to strike down and disintegrate a non-competing group of physical properties used to manufacture an article of trade. These physical properties are bought and held and used under state laws; they do not enter into interstate commerce and hence are not under Federal control. *New Haven R. R. Co.* v. *Interstate Com. Comm.*, 200 U. S. 361, 404; *State* v. *Omaha Elevator Co.*, 75 Nebraska, 637.

The effect of the decree is ruinous. For instance, these companies jointly own 54,616 miles of pipe lines, of which the seven individual defendants and their associates built over 50,000 miles, in which they have an investment of over $61,000,000.

The decree splits up this pipe line system into eleven parts, takes away from the owners, who jointly built the pipe lines and who created the sub-companies, all control

over the different sub-companies, and compels the eleven different parts to stand alone, independently of their principal and of each other, to be hostile to and to compete with their principal and with one another.

Pipe lines are never parallel but always continuous, and each line has a value which depends wholly upon its connection with other parts of the system, and whether all are used together as one whole. The carrying out of the decree would cut the pipe line system into isolated segments, prevent such use, and make the successful operation of the pipe lines impossible.

The decree would especially destroy the value of the stock of all shareholders who each had five shares or less. The stockholders on August 19, 1907, holding from one to four shares each numbered 1,157, and the stockholders owning five shares each numbered 439, out of a total number of 5,085 stockholders.

Considering the case *de novo*, and not on the findings of the court below, it is not true that when the petition in this case was filed in 1906, the seven individual appellants and their associates, private traders in oil, were, contrary to the provisions of the Sherman Act, carrying on a conspiracy to restrain interstate and foreign trade in oils, and to gain by illegal means a monopoly thereof.

The Federal law allowed and allows each of the individuals to compete freely for the interstate and foreign traffic in oil and its products. He may use all the weapons that his ingenuity and skill can suggest, to wage a successful warfare. His rights to compete are not limited to merely such means as are fair or reasonable, but are only limited to such as are unlawful and directly tend to the violation of the Sherman Act. The Federal law also allows and assures to each competitor whatever share, however large, of the interstate or foreign trade in oil he or they may win provided his means are not unlawful. The Sherman Act was passed to protect trade and further

competition. It makes such restraint and monopoly a crime and inflicts, on conviction, severe penalties for such offense. It permits one set of competitors to purchase the property of other competitors solely to avoid further competition. The mere size of the competing corporations or combinations is immaterial.

The monopoly of a trade at common law was forbidden because, and only because, it excluded all others from practicing such trade, and seems to have been then limited to a royal grant, as, for example, giving the exclusive right to manufacture playing cards. It was and is a distinct thing from engrossing, regrating or forestalling the market, all of which were based on the prevention of artificial prices for the necessaries of life. No one of these falls under Federal jurisdiction, but each is subject to state control only.

The present litigation is between the Federal Government and certain of its citizens. The questions involved are solely the rights of these Federal citizens and the effect upon those rights of the Sherman Act, and whether these Federal citizens have violated the provisions of that act.

There was and is no such thing as a Federal crime, aside from express congressional acts, and as no such act was in existence prior to 1890, as to the matters charged in the petition, all the matters and things done by the defendants prior thereto are immaterial.

This case involves, and only involves, the question of the restraint and monopolization of interstate and foreign trade in oil in November, 1906, when the petition was filed; it does not involve any alleged restraint or monopoly of the oil industry in any of the States.

The appellants were lawfully entitled to so hold and use in interstate trade all of its combined properties.

To succeed in this case, the Government must also show that the said Standard Oil Company was then in 1906

using its power to actually restrain interstate or foreign trade in oil, or was then in 1906 excluding or attempting to exclude by illegal means others from said trade and attempting to monopolize the same, or a part thereof.

The Sherman Act does not compel private traders, however organized, to compete with each other. The character of the oil business was and is such that a great corporation was and is an economic necessity for carrying on that industry. The growth and success of the Standard Oil Company was the result of individual enterprise and the natural laws of trade. It was not the result of unlawful means, but of skill, unremitting toil, denials and hardships, and is an instance of where the continuous use for forty years of skill, labor and capital reached a great success.

To prove a violation of § 1 of the Sherman Act the Government must clearly show that when the petition was filed appellants were then actually restraining interstate trade in oil.

To prove a monopoly under § 2 of the Sherman Act, the Government must show that the appellants were, when the petition was filed, then using unlawful means to maintain their control of the industry and that the appellants were then by unlawful means excluding others from said industry.

The Attorney General and *Mr. Frank B. Kellogg,* with whom *Mr. Cordenio N. Severance* was on the brief, for the United States:

It is immaterial that this conspiracy had its inception prior to the enactment of the Sherman Law, or that many of the rebates and discriminations granted by the railroads which enabled the defendants to monopolize the commerce in petroleum antedated the enactment of the Interstate Commerce Act; the principles of the common law applied to interstate as well as to intrastate com-

merce. *Western Union Telegraph Co.* v. *Call Pub. Co.*, 181 U. S. 92; *Murray* v. *C. & N. W. R. Co.*, 62 Fed. Rep. 24; *Interstate Com. Comm.* v. *B. & O. R. Co.*, 145 U. S. 263; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174; *National Lead Co.* v. *Grote Paint Store Co.*, 80 Mo. App. 247; *People* v. *Chicago Gas Trust*, 130 Illinois, 268; *Richardson* v. *Buhl*, 77 Michigan, 632; *State* v. *Nebraska Distilling Co.*, 29 Nebraska, 700; *Distilling & Cattle Feeding Co.* v. *People*, 156 Illinois, 448.

From the earliest date these various corporations were held together by trust agreements which were void at common law. But whether they were void or not, the combination was a continuing one; there was no vested right by reason of the acquisition of these stocks by the trustees, and when the Sherman Act was passed the continuance of the combination became illegal. *United States* v. *Freight Association*, 166 U. S. 290, cited and approved in *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Thompson* v. *Union Castle Steamship Co.*, 166 Fed. Rep. 251; *United States* v. *American Tobacco Co.*, 164 Fed. Rep. 700; *Finck* v. *Schneider Granite Co.*, 86 S. W. Rep. 221; *Ford* v. *Chicago Milk Assn.*, 155 Illinois, 166.

The Standard Oil Company, through various defendant subsidiary corporations is engaged in producing and purchasing crude petroleum in Pennsylvania, West Virginia, Ohio, Indiana, Illinois, Oklahoma, Kansas and California; in transporting the same by pipe lines from the States in which the same is produced into the various other States to the manufactories of the various defendants; in manufacturing the same into the products of petroleum and transporting those products, largely in the tank cars of the Union Tank Line Company (controlled by the Standard Oil Company of New Jersey) to the various marketing places throughout the United States, and in selling and disposing of the same. This clearly makes the defendants engaged in interstate commerce. *Swift & Co.* v.

United States, 196 U. S. 375; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Loewe* v. *Lawlor*, 208 U. S. 274.

The amalgamation of the stocks of all these companies in 1899 in the Standard Oil Company of New Jersey as a holding corporation was a combination in restraint of trade within § 1 of the Sherman Act. *United States* v. *Northern Securities Co.*, 193 U. S. 197; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Swift & Co.* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274; *Continental Wall Paper Co.* v. *Voight*, 148 Fed. Rep. 939; 212 U. S. 227; *Burrows* v. *Inter. Met. Co.*, 156 Fed. Rep. 389; *Montague* v. *Lowry*, 193 U. S. 38; *Distilling & Cattle Feeding Co.* v. *People*, 156 Illinois, 48; *Harding* v. *Am. Glucose Co.*, 55 N. E. Rep. 577; *Dunbar* v. *American Tel. & Teleg. Co.*, 79 N. E. Rep. 427; *Missouri* v. *Standard Oil Co.*, 218 Missouri, 1; *Merchants' Ice & Cold Storage Co.* v. *Rohrman*, 128 S. W. Rep. 599; *State* v. *International Harvester Co.*, 79 Kansas, 371; *International Harvester Co.* v. *Commonwealth*, 124 Kentucky, 543; *State* v. *Creamery Package Mfg. Co.*, 126 N. W. Rep. 126.

The *Northern Securities Case* and other authorities cited under this head are conclusive of the proposition that this is a combination in restraint of trade. The court held that the inhibitions of the Sherman Act were not limited to those direct restraints upon trade and commerce evidenced by contracts between independent lines of railway to fix rates or to maintain rates, or manufacturing or other corporations to limit the supply or control prices; that the power of suppression of competition and therefore of restraint of trade exercised or which could be exercised by reason of stock ownership and control of the various corporations, was as much in violation of the Anti-trust Act as direct restraint by contract. There is nothing in the act which can be construed to prohibit the suppression of competition by reason of stock control of railways

and at the same time to permit it in manufacturing industries, pipe line companies, or car line companies engaged in the manufacture and transportation of oil. The contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, which are inhibited by the first section of the act as applied to these classes of corporations cannot be distinguished from those contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, when applied to railway companies. The thing inhibited is the restraint of interstate commerce. The thing to be accomplished is the maintenance of the freedom of trade. The inhibition against the suppression of competition by any instrumentality, scheme, plan or device, to evade the act, applies to all corporations and all devices. The real point is not the instrumentality or the scheme used to suppress the competition, but whether competition is thus suppressed and trade restrained and monopolized. Nowhere in the decisions of this court is there authority for the proposition that combinations by stock ownership or the purchase of competing properties is invalid as to railroads but valid as to trading and manufacturing companies. The act of Congress and the decisions of this court, so far as the principle goes, places them upon the same plane. In the argument of the *Freight Association cases* it was urged by counsel that the inhibitions of the Sherman Act in this regard did not apply to railroads, but only included trading companies. It is now urged that they apply to railroads and do not apply to manufacturing and trading companies. But this court in the *Freight Association cases* clearly laid down the rule that while there are points of difference existing between the two classes of corporations, yet they are all engaged in interstate commerce, that the injuries to the public have many common features, and that the inhibitions apply to all. 166 U. S. 322.

The transfer of the stocks of these companies in 1899 to the Standard Oil Company of New Jersey had no greater legal sanctity than the transfer to the trustees in 1882, nor was it different from the transfer of the stocks of the Northern Pacific and Great Northern Railways to the Northern Securities Company in 1901, two years after the organization of the present corporate Standard Oil combination. It is the usual course of reasoning urged in all of these trust cases—because a person has a right to purchase property, he may therefore purchase a competitor, and because he may purchase one competitor he may purchase all of his competitors, and what an individual may do a corporation may do. These were the identical arguments pressed with great ability by counsel in the *Northern Securities Case* and in the subsequent case of *Harriman* v. *Northern Securities Co.*, 197 U. S. 291; but this court held to the contrary. The position is also contrary to the almost universal trend of the American decisions both Federal and state. The exercise of an individual right disconnected from all other circumstances may be legal, but when taken together with the other circumstances may accomplish the prohibited thing.

The second section of the act prohibits a person or a single corporation from monopolizing or attempting to monopolize any part of the commerce of the country by any means whatever, and also from conspiring with any other person or persons to accomplish the same object. The two sections of the act were manifestly not intended to cover the same thing; otherwise the second section would be useless. Any contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade which tends to monopoly is prohibited by the first section. *Addyston Pipe Case*, 175 U. S. 211; *United States* v. *Northern Securities Co.*, 193 U. S. 334.

The question then is: What is the meaning of the word "monopoly," as used in the second section of the act?

Of course Congress did not have in mind monopoly by legislative or executive grant. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 129; *Burrows* v. *Inter. Met. Co.*, 156 Fed. Rep. 389, opinion by Judge Holt. Such monopolies could not exist in this country except by grant of Congress or the States, and it has been held that exclusive grants to pursue an ordinary legitimate business are void. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 754. Neither did Congress have in mind an absolute monopoly. This can only be obtained by legislative grant. In a country like ours, where everyone is free to enter the field of industry, no absolute monopoly is probable. It is sufficient to bring it within the act if the combination or the aggregation of capital "tends to monopoly . . . or are reasonably calculated to bring about the things forbidden." *Waters-Pierce Co.* v. *Texas*, 212 U. S. 86. Originally monopoly meant a grant by sovereign power of the exclusive right to carry on any employment. The only act of exclusion was the grant itself. If the grant was void, then there was no monopoly. These monopolies were common in all monarchial countries. Monopoly, however, came to have a broader meaning under the common law in the later days, and especially in the United States, and in order to arrive at what Congress intended by the act of 1890 it is important to understand the history of the times and the general understanding of monopoly as defined by the courts and the political economists, and the monopolies which were known to the people generally and against which Congress was legislating. Prior to the passage of this law, the various trust cases had been decided, in which trusts, like the Standard Oil of 1882, had been held illegal because they tended to create a monopoly. *People* v. *North River Sugar Refining Co.*, 54 Hun, 354; *State* v. *Nebraska Distilling Co.*, 29 Nebraska, 700; *State* v. *Standard Oil Co.*, 49 Oh. St. 137. Various other decisions had defined monopoly as known

in this country,—such cases as *Alger* v. *Thacher*, 19 Pick. 51; *People* v. *Chicago Gas Trust*, 130 Illinois, 268; *Salt Co.* v. *Guthrie*, 35 Oh. St. 666; *Craft* v. *McConoughy*, 79 Illinois, 346; *Central R. R. Co.* v. *Collins*, 40 Georgia, 582.

These cases were decided before the Sherman Act was passed, and defined monopoly at common law as it was understood and existed in this country. They embrace trusts like the Standard Oil trust; agreements fixing prices, dividing territory, or limiting production, thereby tending to enhance or control the price of products; general agreements restraining individuals from engaging in any employment except as incident to the sale of property; purchases by corporations of all or a large proportion of competing manufacturing or mechanical plants; combinations of separate businesses in the form of partnership but really for the purpose of controlling the trade; and various other forms of acquiring monopoly. There was no unlawful exclusion of anyone else from doing business in these cases. They show that the term "monopoly" as applied in American jurisprudence meant monopoly acquired by mere individual acts, as distinguished from grant of government, although the individual act in and of itself was not illegal; the concentration of business in the hands of one combination, corporation, or person, so as to give control of the product or prices; as said by Mr. Justice McKenna, in the *Cotton Oil Case*, "all suppression of competition, by unification of interest or management."

The case of *Craft* v. *McConoughy*, *supra*, well illustrates this argument. The pretended copartnership formed between the dealers of the town of Rochelle, while carrying on the business separately, enabled them to control the prices to the detriment of the surrounding country. It was therefore a monopolizing or an attempt to monopolize a part of the commerce of the State; and the monopolization would have been just as effective had these sepa-

rate business enterprises been stock corporations and the stock placed in the hands of a holding company. A similar illustration was the case of *Smiley* v. *Kansas*, 196 U. S. 447 (affirming 65 Kansas, 240), in which an attempt to control the grain trade of a particular station was held illegal under a state statute. The Standard combination is an attempt to control and monopolize a vast commerce of the entire country, as these people undertook to control and monopolize a local commerce.

The term "monopoly," therefore, as used in the Sherman Act was intended to cover such monopolies or attempts to monopolize as were known to exist in this country; those which were defined as illegal at common law by the States, when applied to intrastate commerce, and those which were known to Congress when the act was passed. The monopoly most commonly known in this country, and which the debates in Congress [1] show were intended to be prohibited by the act, were those acquired by combination (by purchase or otherwise) of competing concerns. The purchase of a competitor, as a separate transaction standing alone, was the exercise of a lawful privilege, not in and of itself unlawful at common law nor prohibited by statute, yet in the *Northern Securities Case* the purchase of stock in a railway was held to be illegal when done in pursuance of a scheme of monopoly.

It is not necessary in this case, and we doubt whether in any case it is possible, to make a comprehensive definition of monopoly which will cover every case that might arise. It is sufficient if the case at bar clearly comes within the provisions of the act. We believe that the defendants have acquired a monopoly by means of a combination of the principal manufacturing concerns through

[1] Cong. Rec., Vol. 21, part 3, pp. 2456–2460, 2562, 2645, 2726, 2728, 2791, 2928; Cong. Rec., Vol. 21, part 5, pp. 4089, 4093, 4098, 4101; Vol. 21, part 6, p. 5954.

a holding company; that they have, by reason of the very size of the combination, been able to maintain this monopoly through unfair methods of competition, discriminatory freight rates, and other means set forth in the proofs. If this act did not mean this kind of monopoly, we doubt if there is such a thing in this country. The men who framed the Constitution of this country were familiar with the history of monopolies growing out of acts of the Government. They guarded the people against these by constitutional provisions, but they left open the widest field for the exercise of individual enterprise, and it was the abuse of these personal privileges, made easy by state laws permitting unlimited incorporation, which gave rise to the evils that convinced the people of the necessity for the passage of the Sherman Anti-trust Act. It was not monopolies as known to the English common law, but monopolies such as were commonly understood to exist in this country which that act prohibited.

As a natural conclusion from the foregoing definition of monopoly by appellants' counsel they claim that the inhibitions of the second section are against the unlawful means used to acquire the monopoly, but that acquired monopoly is not illegal; therefore that the court can only restrain the means by which the monopoly was acquired, leaving the monopoly to exist. We believe this to be an altogether too refined construction of the act. If such be the true interpretation, the result would be that one could combine all the separate manufactures in a given branch of industry in this country by use of unlawful means such as discriminatory freight rates, but, if not attacked by the Government before it had obtained complete control of the business, its very size, with its ramifications through all the States, would make it impossible for anyone else to compete, and it could control the price of products in the entire country and would be beyond the reach of the law. It could, by selling at a low price where a competitor was

engaged in business and by raising the price where there was no attempt at competition, absolutely control the business without itself suffering any loss; and yet the Government would be powerless to destroy the monopoly because the unlawful means had been abandoned.

If the court finds this combination to be in restraint of trade and a monopoly, it is authorized by § 3 to enjoin the same and has plenary power to make such decree as is necessary to enforce the terms and provisions of the act. *Northern Securities Co.* v. *United States,* 193 U. S. 336, 337, 344; *Swift & Co.* v. *United States,* 196 U. S. 375; *United States* v. *Marigold,* 9 How. 560, 566; *Crutcher* v. *Kentucky,* 141 U. S. 57; *In re Rapier,* 143 U. S. 110; *The Lottery Case,* 188 U. S. 321; *United States* v. *General Paper Co.,* opinion of Judge Sanborn in settling the decree, not reported; *United States* v. *American Tobacco Co.,* 164 Fed. Rep. 700; *Chicago, Rock Island & Pacific R. R. Co.* v. *Union Pacific R. R. Co.,* 47 Fed. Rep. 15, 26.

Evidence that the defendant companies obtained rebates and discriminatory rates in the transportation of their product as against their competitors, and engaged in unfair and oppressive methods of competition thereby destroying the smaller manufacturers and dealers throughout the country, is material in this case. *State of Missouri* v. *Standard Oil Co.,* 218 Missouri, 1; *State of Minnesota* v. *Standard Oil Co.,* 126 N. W. Rep. 527; *Standard Oil Co.* v. *State of Tennessee,* 117 Tennessee, 618; *S. C.,* 120 Tennessee, 86; *S. C.,* 217 U. S. 413; *State of South Dakota* v. *Central Lumber Co.,* 123 N. W. Rep. 504; *Citizens' Light, Heat & Power Co.* v. *Montgomery,* 171 Fed. Rep. 553; *State of Nebraska* v. *Drayton,* 82 Nebraska, 254; *S. C.,* 117 N. W. Rep. 769; *People* v. *American Ice Co.,* 120 N. Y. Supp. 443.

A person or corporation joining a conspiracy after it is formed, and thereafter aiding in its execution, becomes from that time as much a conspirator as if he originally designed and put it into operation. *United States* v.

Standard Oil Co., 152 Fed. Rep. 294; *Lincoln* v. *Claflin*, 7 Wall. 132; *United States* v. *Babcock*, 24 Fed. Cas. 915, No. 14,487; *United States* v. *Cassidy*, 67 Fed. Rep. 698, 702; *The Anarchist Case*, 122 Illinois, 1; *United States* v. *Johnson*, 26 Fed. Rep. 682, 684; *People* v. *Mather*, 4 Wend. 230.

This conspiracy was a continuing offense. Every overt act committed in furtherance thereof was a renewal of the same as to all of the parties. The statute of limitations does not begin to run until the commission of the last overt act. Neither can the parties claim a vested right to violate the law. 19 Am. & Eng. Ency. of Law, 2d ed, "Limitations of Actions;" *United States* v. *Greene*, 115 Fed. Rep. 343; *Ochs* v. *People*, 124 Illinois, 399; *Spies* v. *People*, 122 Illinois, 1; 8 Cyc. 678; *State* v. *Pippin*, 88 N. Car. 646; *United States* v. *Bradford*, 148 Fed. Rep. 413; *Commonwealth* v. *Bartilson*, 85 Pa. St. 489; *People* v. *Mather*, 4 Wend. 261; *State* v. *Kemp*, 87 No. Car. 538; *American Fire Ins. Co.* v. *State*, 22 So. Rep. (Miss.) 99; *Lorenz* v. *United States*, 24 App. D. C. 337; *People* v. *Willis*, 23 Misc. (N. Y.) 568; *Raleigh* v. *Cook*, 60 Texas, 438; *Commonwealth* v. *Gillespie*, 10 Am. Dec. (Pa.) 480.

Mr. Chief Justice White delivered the opinion of the court.

The Standard Oil Company of New Jersey and 33 other corporations, John D. Rockefeller, William Rockefeller and five other individual defendants prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of § 4, of the act of July 2, 1890, c. 647, p. 209, known as the Anti-trust Act, and had for its object the enforcement of the provisions of that act. The record is inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about twelve thousand pages, containing a vast amount of confusing and conflicting testi-

mony relating to innumerable, complex and varied business transactions, extending over a period of nearly forty years. In an effort to pave the way to reach the subjects which we are called upon to consider, we propose at the outset, following the order of the bill, to give the merest possible outline of its contents, to summarize the answer, to indicate the course of the trial, and point out briefly the decision below rendered.

The bill and exhibits, covering one hundred and seventy pages of the printed record, was filed on November 15, 1906. Corporations known as Standard Oil Company of New Jersey, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio and sixty-two other corporations and partnerships, as also seven individuals were named as defendants. The bill was divided into thirty numbered sections, and sought relief upon the theory that the various defendants were engaged in conspiring "to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other products of petroleum, among the several States and Territories of the United States and the District of Columbia and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed in or about the year 1870 by three of the individual defendants, viz: John D. Rockefeller, William Rockefeller and Henry M. Flagler. The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill.

The general charge concerning the period from 1870 to 1882 was as follows:

"That during said first period the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and obtained interests through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations, and limited partnerships engaged in purchasing, shipping, refining, and selling petroleum and its products among the various States for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several States, and monopolizing the said commerce."

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870, a corporation known as the Standard Oil Company of Ohio and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards became participants in the illegal combination and either transferred property to the corporation or to individuals to be held for the benefit of all parties in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the power thus obtained and in further execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its mem-

bers obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question the following results were brought about: *a.* That the combination, in addition to the refineries in Cleveland which it had acquired as previously stated, and which it had either dismantled to limit production or continued to operate, also from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio and elsewhere. The properties thus acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some in the name of corporations or limited partnerships affiliated therewith, or some being left in the name of the original owners who had become stockholders in the Standard Oil Company of Ohio and thus members of the alleged illegal combination. *b.* That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York and New Jersey. *c.* That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent of the business of producing, shipping, refining and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim:

"That during the said second period of conspiracy the defendants entered into a contract and trust agreement,

by which various independent firms, corporations, limited partnerships and individuals engaged in purchasing, transporting, refining, shipping and selling oil and the products thereof among the various States turned over the management of their said business, corporations and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said trust agreement was in restraint of trade and commerce and in violation of law, as hereinafter more particularly alleged."

The trust agreement thus referred to was set out in the bill. It was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination and which was held in diverse forms, as we have previously indicated, for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion thereof, became parties to the agreement. This list is in the margin.[1]

[1] 1st. All the stockholders and members of the following corporations and limited partnerships, to wit:

Acme Oil Company, New York.
Acme Oil Company, Pennsylvania.
Atlantic Refining Company of Philadelphia.
Bush & Co. (Limited).
Camden Consolidated Oil Company.
Elizabethport Acid Works.
Imperial Refining Company (Limited).
Charles Pratt & Co.
Paine, Ablett & Co.
Standard Oil Company, Ohio.
Standard Oil Company, Pittsburg.
Smith's Ferry Oil Transportation Company.
Solar Oil Company (Limited).

The agreement made provision for the method of controlling and managing the property by the trustees, for the formation of additional manufacturing, etc., corpora-

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Sone & Fleming Manufacturing Company (Limited).

Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

2d. The following individuals, to wit:

W. C. Andrews, John D. Archbold, Lide K. Arter, J. A. Bostwick, Benjamin Brewster, D. Bushnell, Thomas C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, John Huntington, H. A. Hutchins, Charles F. G. Heye, A. B. Jennings, Charles Lockhart, A. M. McGregor, William H. Macy, William H. Macy, jr., estate of Josiah Macy, William H. Macy, jr., executor; O. H. Payne, A. J. Pouch, John D. Rockefeller, William Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandergrift, William T. Wardwell, W. G. Warden, Joseph L. Warden, Warden, Frew & Co., Louise C. Wheaton, H. M. Hanna, and George W. Chapin, D. M. Harkness, D. M. Harkness, trustee, S. V. Harkness, O. H. Payne, trustee; Charles Pratt, Horace A. Pratt, C. M. Pratt, Julia H. York, George H. Vilas, M. R. Keith, trustees, George F. Chester.

Also all such individuals as may hereafter join in the agreement at the request of the trustees herein provided for.

3d. A portion of the stockholders and members of the following corporations and limited partnerships, to wit:

American Lubricating Oil Company.
Baltimore United Oil Company.
Beacon Oil Company.
Bush & Denslow Manufacturing Company.
Central Refining Co. of Pittsburg.
Chesebrough Manufacturing Company.
Chess Carley Company.
Consolidated Tank Line Company.
Inland Oil Company.
Keystone Refining Company.
Maverick Oil Company.
National Transit Company.
Portland Kerosene Oil Company.
Producers' Consolidated Land and Petroleum Company.
Signal Oil Works (Limited).
Thompson & Bedford Company (Limited).

tions in various States, and the trust, unless terminated by a mode specified, was to continue "during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." The agreement provided for the issue of Standard Oil Trust certificates to represent the interest arising under the trust in the properties affected by the trust, which of course in view of the provisions of the agreement and the subject to which it related caused the interest in the certificates to be coincident with and the exact representative of the interest in the combination, that is, in the Standard Oil Company of Ohio. Soon afterwards it was alleged the trustees organized the Standard Oil Company of New Jersey and the Standard Oil Company of New York, the former having a capital stock of $3,000,000 and the latter a capital stock of $5,000,000, subsequently increased to $10,000,000 and $15,000,000 respectively. The bill alleged "that pursuant to said trust agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and copartnerships, who owned apparently independent refineries and other properties employed in the business of refining and transporting and selling oil in and among said various States and Terri-

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Devoe Manufacturing Company.
Eclipse Lubricating Oil Company (Limited).
Empire Refining Company (Limited).
Franklin Pipe Company (Limited).
Galena Oil Works (Limited).
Galena Farm Oil Company (Limited).
Germania Mining Company.
Vacuum Oil Company.
H. C. Van Tine & Company (Limited).
Waters-Pierce Oil Company.

Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for."

tories of the United States as aforesaid, to transfer their property situated in said several States to the respective Standard Oil Companies of said States of New York, New Jersey, Pennsylvania and Ohio, and other corporations organized or acquired by said trustees from time to time. . . ." For the stocks and property so acquired the trustees issued trust certificates. It was alleged that in 1888 the trustees "unlawfully controlled the stock and ownership of various corporations and limited partnerships engaged in such purchase and transportation, refining, selling, and shipping of oil," as per a list which is excerpted in the margin.[1]

[1] *List of Corporations the Stocks of Which Were Wholly or Partially Held by the Trustees of Standard Oil Trust,*

	Capital Stock.	S. O. trust ownership.
New York State:		
Acme Oil Company, manufacturers of petroleum products.	$300,000	Entire.
Atlas Refining Company, manufacturers of petroleum products.	200,000	Do.
American Wick Manufacturing Company, manufacturers of lamp wicks.	25,000	Do.
Bush & Denslow Manufacturing Company, manufacturers of petroleum products.	300,000	50 per cent.
Chesebrough Manufacturing Company, manufacturers of petroleum.	500,000	2,661–5,000
Central Refining Company (Limited), manufacturers of petroleum products.	200,000	1–67.2 per ct.
Devoe Manufacturing Company, packers, manufacturers of petroleum.	300,000	Entire.
Empire Refining Company (Limited), manufacturers of petroleum products.	100,000	80 per cent.

The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the Supreme Court of Ohio, on March 2, 1892, of a decree

	Capital Stock.	S. O. trust ownership.
New York State (*cont.*):		
Oswego Manufacturing Company, manufacturers of wood cases.	100,000	Entire.
Pratt Manufacturing Company, manufacturers of petroleum products.	500,000	Do.
Standard Oil Company of New York, manufacturers of petroleum products.	5,000,000	Do.
Sone & Fleming Manufacturing Company (Limited), manufacturers of petroleum products.	250,000	Do.
Thompson & Bedford Company (Limited), manufacturers of petroleum products.	250,000	80 per cent.
Vacuum Oil Company, manufacturers of petroleum products.	25,000	75 per cent.
New Jersey:		
Eagle Oil Company, manufacturers of petroleum products.	350,000	Entire.
McKirgan Oil Company, jobbers of petroleum products.	75,000	Do.
Standard Oil Company of New Jersey, manufacturers of petroleum products.	3,000,000	Do.
Pennsylvania:		
Acme Oil Company, manufacturers of petroleum products.	300,000	Do.
Atlantic Refining Company, manufacturers of petroleum products.	400,000	Do.
Galena Oil Works (Limited), manufacturers of petroleum products.	150,000	86¼ per cent.
Imperial Refining Company (Limited), manufacturers of petroleum products.	300,000	Entire.

adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself

	Capital Stock.	S. O. trust ownership.
Pennsylvania (*cont.*):		
Producers' Consolidated Land and Petroleum Company, producers of crude oil.	1,000,000	$\frac{65}{182}$ per cent.
National Transit Company, transporters of crude oil.	25,455,200	94 per cent.
Standard Oil Company, manufacturers of petroleum products.	400,000	Entire.
Signal Oil Works (Limited), manufacturers of petroleum products.	100,000	38¾ per cent.
Ohio:		
Consolidated Tank-Line Company, jobbers of petroleum products.	1,000,000	57 per cent.
Inland Oil Company, jobbers of petroleum products.	50,000	50 per cent.
Standard Oil Company, manufacturers of petroleum products.	3,500,000	Entire.
Solar Refining Company, manufacturers of petroleum products.	500,000	Do.
Kentucky:		
Standard Oil Company, jobbers of petroleum products.	600,000	Do.
Maryland:		
Baltimore United Oil Company, manufacturers of petroleum products.	600,000	5,059–6,000
West Virginia:		
Camden Consolidated Oil Company, manufacturers of petroleum products.	200,000	51 per cent.
Minnesota:		
Standard Oil Company, jobbers of petroleum products.	100,000	Entire.
Missouri:		
Waters-Pierce Oil Company, jobbers of petroleum products.	400,000	50 per cent.

was in restraint of trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of the stock held by the trust in 64 of the companies which it controlled to some of the remaining 20 companies, it having controlled before the decree 84 in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected for transfer was virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the Attorney-General of Ohio instituted contempt proceedings in the quo warranto case based upon the claim that the trust had not been dissolved as required by the decree in that case. About the same time also proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe Line Company, an

	Capital Stock.	S. O. trust ownership.
Massachusetts:		
Beacon Oil Company, jobbers of petroleum products.	100,000	Entire.
Maverick Oil Company, jobbers of petroleum products.	100,000	Do.
Maine:		
Portland Kerosene Oil Company, jobbers of petroleum products.	200,000	Do.
Iowa:		
Standard Oil Company, jobbers of petroleum products.	600,000	60 per cent.
Continental Oil Company, jobbers of petroleum products.	300,000	62½ per cent.

Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows:

"That during the third period of said conspiracy and in pursuance thereof the said individual defendants operated through the Standard Oil Company of New Jersey, as a holding corporation, which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged."

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended; "so that the business and objects of said company were stated as follows, to wit: 'To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts of the world, and

to hold, purchase, mortgage, and convey real estate and personal property outside the State of New Jersey.'"

The capital stock of the company—which since March 19, 1892, had been $10,000,000—was increased to $110,000,000; and the individual defendants, as theretofore, continued to be a majority of the board of directors.

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its common stock to the amount of $97,250,000. The bill contained allegations referring to the development of new oil fields, for example, in California, southeastern Kansas, northern Indian Territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose of restraining and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899 and the Standard Oil Company of New Jersey since 1899 had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences and other discriminatory practises in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practises against com-

peting pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce and which had monopolized the same, as alleged in the bill, be found to have existence and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the first and second sections of the Anti-trust Act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.

Of the numerous defendants named in the bill, the Waters-Pierce Oil Company was the only resident of the

district in which the suit was commenced and the only defendant served with process therein. Contemporaneous with the filing of the bill the court made an order, under § 5 of the Anti-trust Act, for the service of process upon all the other defendants, wherever they could be found. Thereafter the various defendants unsuccessfully moved to vacate the order for service on non-resident defendants or filed pleas to the jurisdiction. Joint exceptions were likewise unsuccessfully filed, upon the ground of impertinence, to many of the averments of the bill of complaint, particularly those which related to acts alleged to have been done by the combination prior to the passage of the Anti-trust Act and prior to the year 1899.

Certain of the defendants filed separate answers, and a joint answer was filed on behalf of the Standard Oil Company of New Jersey and numerous of the other defendants. The scope of the answers will be adequately indicated by quoting a summary on the subject made in the brief for the appellants.

"It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899, was a combination of *independent or competing* concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged or of their purpose, intent or effect."

On June 24, 1907, the cause being at issue, a special examiner was appointed to take the evidence, and his report was filed March 22, 1909. It was heard on April 5

to 10, 1909, under the expediting act of February 11, 1903, before a Circuit Court consisting of four judges.

The court decided in favor of the United States. In the opinion delivered, all the multitude of acts of wrongdoing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the Anti-trust Act, "except as evidence of their (the defendants') purpose, of their continuing conduct and of its effect." (173 Fed. Rep. 177.)

By the decree which was entered it was adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade and also an attempt to monopolize and a monopolization under § 2 of the Anti-trust Act. The decree was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six domestic companies and one foreign company which the Standard Oil Company of New Jersey controls by stock ownership; these 38 corporate defendants being held to be parties to the combination found to exist.[1]

The bill was dismissed as to all other corporate defendants, 33 in number, it being adjudged by § 3 of the decree that they "have not been proved to be engaged in the operation or carrying out of the combination."[2]

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[1] Counsel for appellants says: "Of the 38 (37) corporate defendants named in section 2 of the decree and as to which the judgment of the court applies, four have not appealed, to wit: Corsicana Refining Co., Manhattan Oil Co., Security Oil Co., Waters-Pierce Oil Co., and one, the Standard Oil Co. of Iowa, has been liquidated and no longer exists."

[2] Of the dismissed defendants 16 were natural gas companies and 10 were companies which were liquidated and ceased to exist before the filing of the petition. The other dismissed defendants, 7 in number, were: Florence Oil Refining Co., United Oil Co., Tidewater Oil Co., Tide Water Pipe Co. (L't'd), Platt & Washburn Refining Co., Franklin Pipe Co. and Pennsylvania Oil Co.

The Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over the said 37 subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Oil Company or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Oil Company, and the 37 subsidiary corporations were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.

At the outset a question of jurisdiction requires consideration, and we shall, also, as a preliminary, dispose of another question, to the end that our attention may be completely concentrated upon the merits of the controversy when we come to consider them.

First. We are of opinion that in consequence of the presence within the district of the Waters-Pierce Oil Company, the court, under the authority of § 5 of the Anti-trust Act, rightly took jurisdiction over the cause and properly ordered notice to be served upon the non-resident defendants.

Second. The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the Anti-trust Act,—whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill,—we think by no possibility in the present stage of the case can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the

passage of the Anti-trust Act and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

We are thus brought face to face with the merits of the controversy.

Both as to the law and as to the facts the opposing contentions pressed in the argument are numerous and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which by being disposed of would decide them all. For instance, as to the law. While both sides agree that the determination of the controversy rests upon the correct construction and application of the first and second sections of the Anti-trust Act, yet the views as to the meaning of the act are as wide apart as the poles, since there is no real point of agreement on any view of the act. And this also is the case as to the scope and effect of authorities relied upon, even although in some instances one and the same authority is asserted to be controlling.

So also is it as to the facts. Thus, on the one hand, with relentless pertinacity and minuteness of analysis, it is insisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and that its entire career exemplifies an inexorable carrying out of such wrongful intents, since, it is asserted, the pathway of the combination from the beginning to the time of the filing of the bill is marked with constant proofs of wrong inflicted upon the public and is strewn with the wrecks resulting from crushing out, without regard to law, the individual rights of others. Indeed, so conclusive, it is urged, is the proof on these subjects that it is asserted that the existence of the principal corporate defendant—the Standard Oil Company of New Jersey—with the vast accumulation of property which it owns or controls, because of its infinite potency

for harm and the dangerous example which its continued existence affords, is an open and enduring menace to all freedom of trade and is a byword and reproach to modern economic methods. On the other hand, in a powerful analysis of the facts, it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals. It is not denied that in the enormous volume of proof contained in the record in the period of almost a lifetime to which that proof is addressed, there may be found acts of wrongdoing, but the insistence is that they were rather the exception than the rule, and in most cases were either the result of too great individual zeal in the keen rivalries of business or of the methods and habits of dealing which, even if wrong, were commonly practised at the time. And to discover and state the truth concerning these contentions both arguments call for the analysis and weighing, as we have said at the outset, of a jungle of conflicting testimony covering a period of forty years, a duty difficult to rightly perform and, even if satisfactorily accomplished, almost impossible to state with any reasonable regard to brevity.

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernable, which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the first and second sections of the Anti-trust Act. We shall

therefore—departing from what otherwise would be the natural order of analysis—make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the first and second sections of the Anti-trust Act by the text, and after discerning what by that process appears to be its true meaning we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this we shall then approach the facts. Following this course we shall make our investigation under four separate headings: First. The text of the first and second sections of the act originally considered and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely. Third. The application of the statute to facts, and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the first and second sections of the act, as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by

imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 318, and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second sec-

tion is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor then, first to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-trust Act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

"'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181, c. 85.)"

Hawkins thus defined them:

"'A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making,

working, or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before.' (Hawk. P. C. bk. 1, c. 29.)"

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices.

This is illustrated by the definition of engrossing found in the statute, 5 and 6 Edw. VI, ch. 14, as follows:

"Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual, whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers."

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus Pollexfen, in his argument in *East India Company* v. *Sandys*, Skin. 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Inst. 81; F. B. 65; 1 Roll. 4; that the common law is as much against 'monopoly' as 'engrossing;' and that they differ only, that a 'monopoly' is by patent from the king, the other is by the act of the subject between party and party; but that the mischiefs are the same from both, and there is the same law against both. Moore, 673; 11 Rep. 84. The sole trade of anything is 'engrossing' *ex rei natura*, for whosoever hath the sole trade of buying and selling hath 'engrossed' that trade; and who-

soever hath the sole trade to any country, hath the sole trade of buying and selling the produce of that country, at his own price, which is an 'engrossing.' "

And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord Coke's definition of monopoly as being "an institution or allowance . . . whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." It is illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of Parker, C. J., in *Mitchel* v. *Reynolds* (1711), 1 P. Williams, 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or busi-

ness was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade.

From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition

of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul Steamship Co.* v. *McGregor* (1892), A. C. 25. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the Anti-trust Act, it serves reflexly to show the exact state of the law in England at the time the Anti-trust statute was enacted.

In this country also the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the Province of Massachusetts, that is, chap. 31 of the laws of 1778–1779, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized

in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject or many judicial decisions which illustrate it would unnecessarily prolong this opinion. We append in the margin a note to treatises, &c., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.[1]

It will be found that as modern conditions arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought

[1] Purdy's Beach on Private Corporations, vol. 2, pp. 1403, *et seq.*, chapter on Trusts and Monopolies; Cooke on Trade and Labor Combinations, App. II, pp. 194–195; Am. & Eng. Ency. Law, 2d ed., article "Monopolies and Trusts," pp. 844, *et seq.*

justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, and *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be

of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.[1]

As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is what was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of

[1] *Swearingen* v. *United States*, 161 U. S. 446; *United States* v. *Wong Kim Ark*, 169 U. S. 649; *Keck* v. *United States*, 172 U. S. 446; *Kepner* v. *United States*, 195 U. S. 100, 126.

interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, . . ." By reference to the terms of § 8 it is certain that the word person clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize" as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it

was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless before definitively applying that meaning it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects a much wider and in every view at least a somewhat different significance. And to do this brings us to the second question which, at the outset, we have stated it was our purpose to consider and dispose of.

Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the Government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the appli-

cation of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States* v. *Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed

contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning it is true to say that the cases relied upon do not when rightly construed sustain the doctrine contended for is established by all of the numerous decisions of this court which have applied and enforced the Anti-trust Act, since they all in the very nature of things rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted. Indeed intermediate the decision of the two cases, that is, after the decision in the *Freight Association Case* and before the decision in the *Joint Traffic Case*, the case of *Hopkins* v. *United States*, 171 U. S. 578, was de-

cided, the opinion being delivered by Mr. Justice Peckham, who wrote both the opinions in the *Freight Association* and the *Joint Traffic cases.* And, referring in the *Hopkins Case* to the broad claim made as to the rule of interpretation announced in the *Freight Association Case,* it was said (p. 592): "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And in the *Joint Traffic Case* this statement was expressly reiterated and approved and illustrated by example; like limitation on the general language used in *Freight Association* and *Joint Traffic Cases* is also the clear result of *Bement* v. *National Harrow Co.,* 186 U. S. 70, 92, and especially of *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

If it be true that there is this identity of result between the rule intended to be applied in the *Freight Association Case*, that is, the rule of direct and indirect, and the rule of reason which under the statute as we construe it should be here applied, it may be asked how was it that in the opinion in the *Freight Association Case* much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met, for if it be now deemed that the *Freight Association Case* was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason. This distinction, we think, serves to point out what in its ultimate conception was the thought underlying the reference to the rule of reason made in the *Freight Association Case*, especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the *Hopkins Case* and in *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179.

And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the *Freight Association* and *Joint Traffic cases* from the con-

text and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the Anti-trust Law has been applied and enforced and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Anti-trust Law aside from the contention as to the *Freight Association* and *Joint Traffic cases*, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

So far as the objections of the defendants are concerned they are all embraced under two headings:—

a. That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States. But all the structure upon which this argument proceeds is based upon the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no ex-

press notice. *United States* v. *Northern Securities Co.*, 193 U. S. 197, 334; *Loewe* v. *Lawlor*, 208 U. S. 274; *Swift & Co.* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423.

b. Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade, which is essentially necessary to the well-being of society and which it is insisted is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.

So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from

the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce.

We come then to the third proposition requiring consideration, viz:

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio;

2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the Supreme Court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the

situation as it existed at the time of the entry of the decree below, since during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation of course had somewhat changed, a change which when analyzed in the light of the proof, we think, establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence, that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of §§ 2 and 4 of the decree below, which are excerpted in the margin.[1]

[1] SECTION 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, Consolidated, Cumberland Pipe Line Company, Colonial Oil Company, Continental Oil Company, Crescent Pipe Line Company, Henry C. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil and Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company, of California, Standard Oil Company, of Indiana, Standard Oil Company, of Iowa, Standard Oil

Giving to the facts just stated, the weight which it was deemed they were entitled to, in the light afforded by the

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Company, of Kansas, Standard Oil Company, of Kentucky, Standard Oil Company, of Nebraska, Standard Oil Company, of New York, Standard Oil Company, of Ohio, Swan and Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, Waters-Pierce Oil Company, have entered into and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the states, in the territories and with foreign nations, in violation of section 2 of the anti-trust act.

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SECTION 4. That in the formation and execution of the combination or conspiracy the Standard Company has issued its stock to the amount of more than $90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling interests in some corporations and stock in other corporations as follows:

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Anglo-American Oil Company, Limited	£1,000,000	£999,740
Atlantic Refining Company	$5,000,000	$5,000,000
Borne-Scrymser Company	200,000	199,700
Buckeye Pipe Line Company	10,000,000	9,999,700
Chesebrough Manufacturing Company, Consolidated	500,000	277,700
Colonial Oil Company	250,000	249,300
Continental Oil Company	300,000	300,000
Crescent Pipe Line Company	3,000,000	3,000,000
Eureka Pipe Line Company	5,000,000	4,999,400
Galena-Signal Oil Company	10,000,000	7,079,500
Indiana Pipe Line Company	1,000,000	999,700
Lawrence Natural Gas Company	450,000	450,000
Mahoning Gas Fuel Company	150,000	149,900
Mountain State Gas Company	500,000	500,000
National Transit Company	25,455,200	25,451,650
New York Transit Company	5,000,000	5,000,000

proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Northern Pipe Line Company	4,000,000	4,000,000
Northwestern Ohio Natural Gas Company	2,775,250	1,649,450
Ohio Oil Company	10,000,000	9,999,850
People's Natural Gas Company	1,000,000	1,000,000
Pittsburg Natural Gas Company	310,000	310,000
Solar Refining Company	500,000	499,400
Southern Pipe Line Company	10,000,000	10,000,000
South Penn Oil Company	2,500,000	2,500,000
Southwest Pennsylvania Pipe Lines	3,500,000	3,500,000
Standard Oil Company (of California)	17,000,000	16,999,500
Standard Oil Company (of Indiana)	1,000,000	999,000
Standard Oil Company (of Iowa)	1,000,000	1,000,000
Standard Oil Company (of Kansas)	1,000,000	999,300
Standard Oil Company (of Kentucky)	1,000,000	997,200
Standard Oil Company (of Nebraska)	600,000	599,500
Standard Oil Company (of New York)	15,000,000	15,000,000
Standard Oil Company (of Ohio)	3,500,000	3,499,400
Swan and Finch Company	100,000	100,000
Union Tank Line Company	3,500,000	3,499,400
Vacuum Oil Company	2,500,000	2,500,000
Washington Oil Company	100,000	71,480
Waters-Pierce Oil Company	400,000	274,700

That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following-named corporations and limited partnerships stated opposite each, respectively, as follows:

Name of company.	Total capital stock.	Owned by National Transit Company.
Connecting Gas Company	$825,000	$412,000
Cumberland Pipe Line Company	1,000,000	998,500
East Ohio Gas Company	6,000,000	5,999,500
Franklin Pipe Company, Limited	50,000	19,500
Prairie Oil and Gas Company	10,000,000	9,999,500

proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have

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That the Standard Company has also acquired the control by the ownership of its stock or otherwise of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont in that State, and the Manhattan Oil Company, a corporation, which owns a pipe line situated in the States of Indiana and Ohio; that the Standard Company, and the corporations and partnerships named in Section 2, are engaged in the various branches of the business of producing, purchasing and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Louisiana, Texas, Colorado and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other states, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the states and territories of the United States, the District of Columbia and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various states and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the states and territories of the United States, in the District of Columbia and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

construed it upon the inferences deducible from the facts, for the following reasons:

a. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

b. Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering, *1*, the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; *2*, by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the

expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the Supreme Court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the method first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated and which among other things impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control,

the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, viz:

Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift* v. *United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted

the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

Let us then, as a means of accurately determining what relief we are to afford, first come to consider what relief was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force.

The court below by virtue of §§ 1, 2, and 4 of its decree, which we have in part previously excerpted in the margin, adjudged that the New Jersey corporation in so far as it held the stock of the various corporations, recited in §§ 2 and 4 of the decree, or controlled the same was a combination in violation of the first section of the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock. To

make this command effective § 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporation or doing any act which would recognize further power in that company, except to the extent that it was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

By § 7, pending the accomplishment of the dissolution of the combination by the transfer of stock and until it was consummated, the defendants named in § 2, constituting all the corporations to which we have referred, were enjoined from engaging in or carrying on interstate commerce. And by § 9, among other things a delay of thirty days was granted for the carrying into effect of the directions of the decree.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of § 5 of the decree which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership

in the New Jersey corporation of the stocks which were ordered to be retransferred.

But the contention is that, in so far as the relief by way of injunction which was awarded by § 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, the relief awarded was too broad: *a.* Because it was not sufficiently specific and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a general injunction. *New Haven R. R.* v. *Interstate Commerce Commission,* 200 U. S. 404. Besides it is said that the restraint imposed by § 6—even putting out of view the consideration just stated—was moreover calculated to do injury to the public and it may be in and of itself to produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the

Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved. In other words we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest it was obviously right. We think that in view of the magnitude of the interests involved and their complexity that the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation but by all the subsidiary companies until the dissolution of the combination by the transfer of the stocks in accordance with the decree, the injunction provided for in § 7 thereof should not have been awarded.

Our conclusion is that the decree below was right and

should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

MR. JUSTICE HARLAN concurring in part, and dissenting in part.

A sense of duty constrains me to express the objections which I have to certain declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Company of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce—all in violation of what is known as the Anti-trust Act of 1890. 26 Stat. 209, c. 647. The evidence in this case overwhelmingly sustained that view and led the Circuit Court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while affirming the decree, directs some modifications in respect of what it characterizes as "minor matters." It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that "it does not necessarily follow that because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation,

that a like restraint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation." Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed—unwisely, I think—that although the New Jersey corporation, being an illegal combination, must go out of existence, *they* may join in an agreement *to restrain commerce* among the States if such restraint be not "undue."

In order that my objections to certain parts of the court's opinion may distinctly appear, I must state the circumstances under which Congress passed the Anti-trust Act, and trace the course of judicial decisions as to its meaning and scope. This is the more necessary because the court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the Government. With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions. Let us see how the matter stands.

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then

imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. All agreed that the National Government could not, by legislation, regulate the domestic trade carried on wholly within the several States; for, power to regulate such trade remained with, because never surrendered by, the States. But, under authority expressly granted to it by the Constitution, Congress could regulate commerce among the several States and with foreign states. Its authority to regulate such commerce was and is paramount, due force being given to other provisions of the fundamental law devised by the fathers for the safety of the Government and for the protection and security of the essential rights inhering in life, liberty and property.

Guided by these considerations, and to the end that the people, *so far as interstate commerce* was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-trust Act of 1890 in these words (the italics here and elsewhere in this opinion are mine):

"SEC. 1. *Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make *any such contract or engage in any such combination or conspiracy*, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons,

to monopolize *any part* of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 3. *Every* contract, combination in form of trust *or otherwise*, or conspiracy, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any *such* contract or engage in any *such* combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, c. 647.

The important inquiry in the present case is as to the meaning and scope of that act in its application to interstate commerce.

In 1896 this court had occasion to determine the meaning and scope of the act in an important case known as the *Trans-Missouri Freight Case*. 166 U. S. 290. The question there was as to the validity under the Anti-trust Act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules and regulations in respect of freight traffic over specified routes. Two questions were involved: first, whether the act applied to railroad carriers; second, whether the agreement the annulment of which as illegal was the basis of the suit which the United States brought. The court

held that railroad carriers were embraced by the act. In determining that question, the court, among other things, said:

"The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to *any* contract of the nature described. A contract therefore that is in restraint of trade or commerce is, by the strict language of the act prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it, the agreement is condemned by this act. . . . Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited *all* contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All* combinations which are *in restraint of trade or commerce* are prohibited, whether in the form of trusts or *in any other form whatever.*" *United States* v. *Freight Assn.*, 166 U. S. 290, 312, 324, 326.

The court then proceeded to consider the second of the above questions, saying: "The next question to be discussed is as to what is the true construction of the statute,

assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal?' Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. . . . By the simple use of the term 'contract in restraint of trade,' *all* contracts of that nature, whether valid or otherwise, would be included, and *not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.* When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. . . . If only that kind of contract

which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. . . . To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. . . . But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found *in the terms of the statute* under consideration. . . . The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government*, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This *we cannot and ought not to do*. . . .

"If the act ought to read, as contended for by defendants, *Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable.* Large numbers do not agree that the view taken by defendants

is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found *in its statutes*, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, *public policy in such a case is what the statute enacts.* If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the Anti-trust Act applies to railroads, and that it renders illegal *all* agreements which are *in restraint* of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature."

I have made these extended extracts from the opinion of the court in the *Trans-Missouri Freight Case* in order to show beyond question, that the point was there urged by counsel that the Anti-trust Act condemned *only* contracts, combinations, trusts and conspiracies that were in *unreasonable* restraint of interstate commerce, and that the court in clear and decisive language met that point. It adjudged that Congress had in unequivocal words declared that "*every* contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States" shall be illegal, and that no distinction, *so far as interstate commerce was concerned,* was to be tolerated between restraints of such commerce as were undue or unreasonable, and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business, Congress deter-

mined to meet, and did meet, the situation by an absolute, statutory prohibition of "*every* contract, combination in the form of trust or otherwise, in restraint of trade or commerce." Still more; in response to the suggestion by able counsel that Congress intended only to strike down such contracts, combinations and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation*, an exception not placed there by the law-making branch of the Government." "This," the court said, as we have seen, "*we cannot* and *ought not* to do."

It thus appears that fifteen years ago, when the purpose of Congress in passing the Anti-trust Act was fresh in the minds of courts, lawyers, statesmen and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the *Freight Association Case*. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so *amend* the act as to recognize the right to restrain interstate commerce to a *reasonable* extent. The public press, magazines and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent and scope of the Anti-trust Act had been judicially determined by this court, and that the only question remaining open for discussion was the

wisdom of the policy declared by the act—a matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the Government, with full knowledge of that decision, has refused to change the policy it had declared or to so amend the act of 1890 as to except from its operation contracts, combinations and trusts that *reasonably* restrain interstate commerce.

But those who were in combinations that were illegal did not despair. They at once set up the baseless claim that the decision of 1896 disturbed the "business interests of the country," and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to *reasonable* restraints. Finally, an opportunity came again to raise the same question which this court had, upon full consideration, determined in 1896. I now allude to the case of *United States* v. *Joint Traffic Association*, 171 U. S. 505, decided in 1898. What was that case?

It was a suit by the United States against more than thirty railroad companies to have the court declare illegal, under the Anti-trust Act, a certain agreement between these companies. The relief asked was denied in the subordinate Federal courts and the Government brought the case here.

It is important to state the points urged in that case by the defendant companies charged with violating the Anti-trust Act, and to show that the court promptly met them. To that end I make a copious extract from the opinion in the *Joint Traffic Case*. Among other things, the court said: "Upon comparing that agreement [the one in the *Joint Traffic Case*, then under consideration, 171 U. S. 505] with the one set forth in the case of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the great similarity between them suggests that a similar result should be reached in the two cases" (p. 558).

Learned counsel in the *Joint Traffic Case* urged a reconsideration of the question decided in the *Trans-Missouri Case* contending that "the decision in that case [the *Trans-Missouri Freight Case*] is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-trust statute has been received by the public with surprise and alarm." They suggested that the point made in the *Joint Traffic Case* as to the meaning and scope of the act might have been but was not made in the previous case. The court said (171 U. S. 559) that "the report of the *Trans-Missouri Case* clearly shows not only that the point now taken *was* there urged upon the attention of the court, but it was then *intentionally* and *necessarily* decided."

The question whether the court should again consider the point decided in the *Trans-Missouri Case*, 171 U. S. 573, was disposed of in the most decisive language, as follows: "Finally, we are asked to reconsider the question decided in the *Trans-Missouri Case*, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same

questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri Case* shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, *with care and deliberation* and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now *for the third time* the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the *Trans-Missouri Case.* The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White [in the *Freight Case*] that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of

the court came to the conclusion it did. It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed. *As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention*, it could hardly be expected that our opinion should now change from that already expressed."

These utterances, taken in connection with what was previously said in the *Trans-Missouri Freight Case*, show so clearly and affirmatively as to admit of no doubt that this court, many years ago, upon the fullest consideration, interpreted the Anti-trust Act as prohibiting and making illegal not only *every* contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempts to monopolize "any part" of such trade or commerce. Let me refer to a few other cases in which the scope of the decision in the *Freight Association Case* was referred to: In *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92, the court said: "It is true that it has been held by this court that the act (Anti-trust Act) included any restraint of commerce, whether *reasonable or unreasonable*"—citing *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe &c. Co.* v. *United States*, 175 U. S. 211. In *Montague* v. *Lowry*, 193 U. S. 38, 46, which involved the validity, under the Anti-trust Act, of a certain association formed for the sale of tiles, mantels, and grates, the court referring to the contention that the sale of tiles in San Francisco was so small "as to be a negligible quantity," held that the association was nevertheless a combination in restraint of interstate trade or com-

merce in violation of the Anti-trust Act. In *Loewe* v. *Lawlor*, 208 U. S. 274, 297, all the members of this court concurred in saying that the *Trans-Missouri*, *Joint Traffic* and *Northern Securities cases* "hold in effect that the Anti-trust Law has a broader application than the prohibition of restraints of trade unlawful at common law." In *Shawnee Compress Co.* v. *Anderson* (1907), 209 U. S. 423, 432, 434, all the members of the court again concurred in declaring that "it has been decided that not only unreasonable, but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." In *United States* v. *Addyston Pipe Company*, 85 Fed. Rep. 271, 278, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, said that according to the decision of this court in the *Freight Association Case*, "contracts in restraint of interstate transportation were within the statute, whether the restraints could be regarded as reasonable at common law or not." In *Chesapeake & Ohio Fuel Co.* v. *United States* (1902), 115 Fed. Rep. 610, 619, the Circuit Court of Appeals for the Sixth Circuit, after referring to the right of Congress to regulate interstate commerce, thus interpreted the prior decisions of this court in the *Trans-Missouri*, the *Joint Traffic* and the *Addyston Pipe and Steel Co. cases:* "In the exercise of this right, Congress has seen fit to prohibit *all* contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but *all* contracts and combinations are declared illegal if in restraint of trade or commerce among the States." As far back as *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497, it was held that certain local regulations, subjecting drummers engaged in both interstate and domestic trade, could not be sustained by reason of the fact that no discrimina-

tion was made among citizens of the different States. The court observed that this did not meet the difficulty, for the reason that "interstate commerce cannot be taxed *at all*." Under this view Congress no doubt acted, when by the Anti-trust Act it forbade *any* restraint whatever upon interstate commerce. It manifestly proceeded upon the theory that interstate commerce could not be restrained *at all* by combinations, trusts or monopolies, but must be allowed to flow in its accustomed channels, wholly unvexed and unobstructed by anything that would restrain its ordinary movement. See also *Minnesota* v. *Barber*, 136 U. S. 313, 326; *Brimmer* v. *Rebman*, 138 U. S. 78, 82, 83.

In the opinion delivered on behalf of the minority in the *Northern Securities Case*, 193 U. S. 197, our present Chief Justice referred to the contentions made by the defendants in the *Freight Association Case*, one of which was that the agreement there involved did not unreasonably restrain interstate commerce, and said: "Both these contentions were decided against the association, the court holding that the Anti-trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited *any* contract in restraint of interstate commerce, *it hence embraced all contracts of that character, whether they were reasonable or unreasonable.*" One of the Justices who dissented in the *Northern Securities Case* in a separate opinion, concurred in by the minority, thus referred to the *Freight* and *Joint Traffic cases:* "For it cannot be too carefully remembered that that clause applies to 'every' contract of the forbidden kind—a consideration which was the turning point of the *Trans-Missouri Freight Association* case. . . . Size has nothing to do with the matter. A monopoly of 'any part' of commerce among the States is unlawful."

In this connection it may be well to refer to the adverse report made in 1909, by Senator Nelson, on behalf of the Senate Judiciary Committee, in reference to a certain bill

offered in the Senate and which proposed to amend the Anti-trust Act in various particulars. That report contains a full, careful and able analysis of judicial decisions relating to combinations and monopolies in restraint of trade and commerce. Among other things said in it which bear on the questions involved in the present case are these: "The Anti-trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. . . . And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries.* What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of *People* v. *Sheldon*, 139 N. Y. 264, Chief Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, *the only sure remedy is to prohibit all agreements of that character.* If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' . . . To amend the Anti-trust Act, as suggested by this bill, would be to entirely emasculate it, and for all practical purposes render it nugatory as a reme-

dial statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain and highly remedial. It practically covers the field of Federal jurisdiction, and is in every respect a model law. To destroy or undermine it at the present juncture, when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity." The result was the indefinite postponement by the Senate of any further consideration of the proposed amendments of the Anti-trust Act.

After what has been adjudged, upon full consideration, as to the meaning and scope of the Anti-trust Act, and in view of the usages of this court when attorneys for litigants have attempted to reopen questions that have been deliberately decided, I confess to no little surprise as to what has occurred in the present case. The court says that the previous cases, above cited, "cannot by any possible conception be treated as authoritative without the certitude that *reason* was resorted to for the purpose of deciding them." And its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason," or "the light of reason." It is more than once intimated, if not suggested, that if the Anti-trust Act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court

was delivered by a Justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States and lawyers who were recognized, on all sides, as great leaders in their profession. The same eminent jurist who delivered the opinion in the *Trans-Missouri Case* delivered the opinion in the *Joint Traffic Association Case*, and the Association in that case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the Justice who expressed the views of the court, or of the ability of the profound, astute lawyers, who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words, would amount to "judicial legislation"? Now this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered, the first inquiry will be, that as the court is unanimous in holding that the particular things done by the Standard Oil Company and its subsidiary companies, in this case, were illegal under the Anti-trust Act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which, in frankness, can be given to this question is, that the court intends to decide that its deliberate judgment, fifteen years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with

the "rule of reason." In effect the court says, that it will now, for the first time, bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

Still more, what is now done involves a serious departure from the settled usages of this court. Counsel have not ordinarily been allowed to discuss questions already settled by previous decisions. More than once at the present term, that rule has been applied. In *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 295, the court had occasion to determine the meaning and scope of the original Safety Appliance Act of Congress passed for the protection of railroad employés and passengers on interstate trains. 27 Stat. 531, § 5, c. 196. A particular construction of that act was insisted upon by the interstate carrier which was sued under the Safety Appliance Act; and the contention was that a different construction, than the one insisted upon by the carrier, would be a harsh one. After quoting the words of the act, Mr. Justice Moody said for the court: "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." And at the present term of this court we were asked, in a case arising under the Safety Appliance Act, to reconsider the question decided in the *Taylor Case.* We declined to do so, saying in an opinion just now handed down: "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 to 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." *C., B. & Q. Ry. Co.* v. *United States,* 220 U. S. 559. When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the Anti-trust Act as would allow reasonable restraints of interstate commerce, this

court, in deference to established practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce among the States and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress and obtain an amendment of the Anti-trust Act if they think this court was wrong in its former decisions; and (5) this court cannot and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law. Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations and trusts in restraint of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint in not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily ap-

plied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer, more fully than I have heretofore done, to another, and, in my judgment—if we look to the future—the most important aspect of this case. That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions, deemed no part of the National Constitution of more consequence or more essential to the permanancy of our form of government than the provisions under which were distributed the powers of Government among three separate, equal and coördinate departments —legislative, executive, and judicial. This was at that time a new feature of governmental regulation among the nations of the earth, and it is deemed by the people of every section of our own country as most vital in the workings of a representative republic whose Constitution was ordained and established in order to accomplish the objects stated in its Preamble by the means, *but only by the means*, provided either expressly or by necessary implication, by the instrument itself. No department of that government can constitutionally exercise the

powers committed strictly to another and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by "*judicial legislation*," read words into the Anti-trust Act not put there by Congress, and which, being inserted, give it a meaning which the words of the Act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to *amend* legislative enactments. "What is termed the policy of the Government with reference to any particular legislation," as this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden* v. *Collector*, 5 Wall. 107. Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating

the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.

After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the People of the United States—the source of all National power—shall, in their own time, upon reflection and through the legislative department of the Government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the States without being subject to governmental authority. But that would not be liberty, regulated by law, and liberty, which cannot be regulated by law, is not to be desired. The Supreme Law of the Land—which is binding alike upon all—upon Presidents, Congresses, the Courts and the People—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this Bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. *Boyd* v. *United States*, 116 U. S. 616, 635. We shall do well to heed the warnings of that great jurist.

I do not stop to discuss the merits of the policy embodied in the Anti-trust Act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the Government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the Anti-trust Act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

UNITED STATES OF AMERICA *v.* AMERICAN TOBACCO COMPANY.

AMERICAN TOBACCO COMPANY *v.* UNITED STATES OF AMERICA.

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

Nos. 118, 119. Argued January 3, 4, 5, 6, 1910; restored to docket for reargument April 11, 1910; reargued January 9, 10, 11, 12, 1911.—Decided May 29, 1911.

Standard Oil Co. v. *United States*, *ante*, p. 1, followed and reaffirmed as to the construction to be given to the Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209; and *held* that the combination in this case is one in restraint of trade and an attempt to monopolize the business of tobacco in interstate commerce within the prohibitions of the act.

In order to meet such a situation as is presented by the record in this case and to afford the relief for the evils to be overcome, the Anti-trust Act of 1890 must be given a more comprehensive application than affixed to it in any previous decision.

In *Standard Oil Co.* v. *United States, ante*, p. 1, the words "restraint of trade" as used in § 1 of the Anti-trust Act were properly construed by the resort to reason; the doctrine stated in that case was in accord with all previous decisions of this court, despite the contrary view at times erroneously attributed to the expressions in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505.

The Anti-trust Act must have a reasonable construction as there can scarcely be any agreement or contract among business men that does not directly or indirectly affect and possibly restrain commerce. *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568.

The words "restraint of trade" at common law, and in the law of this country at the time of the adoption of the Anti-trust Act, only embraced acts, contracts, agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade, and Congress intended that those words as used in that act should have a like significance; and the ruling in *Standard Oil Co.* v. *United States, ante*, p. 1, to this effect is reëxpressed and reaffirmed.

The public policy manifested by the Anti-trust Act is expressed in such general language that it embraces every conceivable act which can possibly come within the spirit of its prohibitions, and that policy cannot be frustrated by resort to disguise or subterfuge of any kind.

The record in this case discloses a combination on the part of the defendants with the purpose of acquiring dominion and control of interstate commerce in tobacco by methods and manners clearly within the prohibition of the Anti-trust Act; and the subject-matters of the combination and the combination itself are not excluded from the scope of the act as being matters of intrastate commerce and subject to state control.

In this case the combination in all its aspects both as to stock ownership, and as to the corporations independently, including foreign corporations to the extent that they became coöperators in the combination, come within the prohibition of the first and second sections of the Anti-trust Act.

In giving relief against an unlawful combination under the Anti-trust Act the court should give complete and efficacious effect to the

prohibitions of the statute; accomplish this result with as little injury as possible to the interest of the general public; and have a proper regard for the vested property interests innocently acquired.

In this case the combination in and of itself, and also all of its constituent elements, are decreed to be illegal, and the court below is directed to hear the parties and ascertain and determine a plan or method of dissolution and of recreating a condition in harmony with law, to be carried out within a reasonable period (in this case not to exceed eight months), and, if necessary, to effectuate this result either by injunction or receivership.

Pending the achievement of the result decreed all parties to the combination in this case should be restrained and enjoined from enlarging the power of the continuation by any means or device whatever.

Where a case is remanded, as this one is, to the lower court with directions to grant the relief in a different manner from that decreed by it, the proper course is not to modify and affirm, but to reverse and remand with directions to enter a decree in conformity with the opinion and to carry out the directions of this court with costs to defendants.

164 Fed. Rep. 700, reversed and remanded with directions.

THE facts, which involve the construction of the Anti-trust Act of July 2, 1890, and the question whether the acts of the defendants amounted to a combination in restraint of interstate commerce in tobacco, are stated in the opinion.

The Attorney General and *Mr. James C. McReynolds* for the United States:

What constitutes or materially affects interstate or foreign commerce is a practical question to be decided upon a view of the facts presented in each case. *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Dozier* v. *Alabama*, 218 U. S. 124. In the constantly recurring course of affairs commerce among the States passes through three stages: soliciting orders; manufacturing the goods; transporting them to the purchaser. And each is an essential of the entire movement. Soliciting orders undoubtedly is inter-

state commerce, *Robbins* v. *Shelby County*, 120 U. S. 489. Transporting the manufactured article likewise is clearly of the same. The manufacture is as essential as either of the other elements; and some restrictions upon it, as all know, affect the very foundations of interstate trade.

The commerce clause gives Congress power to indicate its will in conformity to which interstate commerce shall be carried on. This is supreme and admittedly extends to whatever is itself interstate commerce, and all instrumentalities and persons engaged therein. Legislation which directly regulates any of these things comes clearly within the constitutional grant. *Delaware & Hudson R. R. Co.* v. *United States*, 213 U. S. 366. And, consequently, whenever manufacture can be regarded as a part of such commerce Congress may inhibit a monopoly thereof, as in so doing it would be directly regulating commerce.

The granted power may be made effective by all means reasonably necessary therefor. Experience demonstrates that the indicated will of Congress concerning interstate trade and commerce may be directly hindered, obstructed and nullified by some things which are no part thereof. Whatever of these, therefore, as an efficient cause, will probably occasion as a natural and reasonable consequence material obstruction or hindrance to the efficacious operation of its lawful will, Congress may prohibit. A monopoly of production, as the efficient cause, may occasion material hindrance or obstruction to such operation of the indicated will of Congress, and in that event may be prohibited because of this effect although manufacture be regarded as no part of commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, 208, 209; *United States* v. *Coombes*, 12 Pet. 72, 78; *The Daniel Ball*, 10 Wall. 557.

Where matters of economic opinion or theory are elements for consideration and conclusions depend thereon, the courts must accept whatever declaration Congress has

made in respect of them, and frame their judgments in harmony therewith, unless such declaration is plainly without reasonable foundation. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115.

Contracts, combinations, conspiracies and monopolies which directly and materially hindered or obstructed interstate or foreign commerce were unlawful prior to the act of July 2, 1890.

The principles of the common law are applicable to interstate commerce transactions. *Western Union Telegraph Company* v. *Call*, 181 U. S. 92, 102. Without congressional enactment, every contract, combination, conspiracy or monopoly, unlawful at common law, would be so regarded by the Federal courts although relating solely to interstate or foreign commerce; and certainly no affirmative aid would be given to the purposes of any of them.

Congress has power "To Regulate Commerce with Foreign Nations, and Among the Several States, and with the Indian Tribes." Except as limited by other provisions, this power is supreme and cannot be abridged by State, individual or corporation.

Inaction by Congress indicates its will that interstate and international commerce shall be free; and therefore whatever substantially obstructs, interferes with or hampers such commerce conflicts with the will of Congress and the Federal Constitution. *Leisy* v. *Hardin*, 135 U. S. 100; *Re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 135; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328, 334; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218.

The doctrine that inaction by Congress is equivalent to a positive declaration that commerce shall be free and untrammeled and that whatever substantially interferes with or hampers the same is in conflict with the Constitution of the United States rests upon the intention of

Congress reasonably implied from its silence in respect to the subject of commerce. *Bowman* v. *Chicago &c. R. R. Co.*, 125 U. S. 465, 482.

Contracts, combinations, conspiracies and monopolies may and often do prevent the free flow of commerce—substantially obstruct, interfere with and hamper the same. *Addyston Pipe Case*, 175 U. S. 211; *Loewe* v. *Lawlor*, 208 U. S. 274.

If state legislation which substantially hinders or obstructs commerce is invalid, because in conflict with the contrary intention of Congress reasonably implied from silence, *a fortiori* is this true of any arrangements by corporations which bring about like results.

In the absence of express legislation any contract, combination, or other arrangement by corporations which directly and materially hinders, restrains or obstructs the free flow of interstate or foreign commerce would be unlawful. *Re Debs*, 158 U. S. 564, 577, 599; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Galveston R. R.* v. *Texas*, 210 U. S. 217; *Caldwell* v. *North Carolina*, 187 U. S. 622. How far the courts, in the absence of a statute, could prevent and restrain such obstructions, or whether parties thereto might be prosecuted criminally, it is not necessary to discuss, since the Anti-trust Act now clearly applies to them.

The anti-trust provisions of the Wilson Tariff Act (1894) apply to any combination or agreement intended to restrain free competition when one of the parties is engaged in importing.

These provisions have not been construed by this court. They denounce every combination, one party to which is engaged in importing, when intended to restrain lawful commerce or free competition therein. The language differs somewhat from the Sherman Act, not improbably because of prior opinions in the lower Federal courts. *Re Greene*, 52 Fed. Rep. 104; *United States* v. *Trans-Missouri*

Freight Assn., 53 Fed. Rep. 440; 58 Fed. Rep. 58; *United States* v. *E. C. Knight Co.*, 60 Fed. Rep. 934.

The Sherman Act prescribes the rule of free competition in its broad and general sense and denounces contracts, combinations and conspiracies in whatever form which in effect or necessary tendency directly and materially obstruct interstate or foreign commerce. The natural effect of competition is to increase commerce; to extinguish or prevent the free play of competition is to hinder it.

The rights of an individual acting alone are not involved in the present controversy. (Concurring opinion of Justice Brewer in *Northern Securities Case*.)

The record reveals gross violations of the anti-trust statutes within any construction consistent with repeated decisions of this court; if limited to unreasonable restraints the present case would be clearly within them. And if duress, and wicked and unfair methods are essential, they all appear.

Interstate commerce is a term of very large significance. It comprehends intercourse for the purposes of trade in any and all forms, including transportation, purchase, sale and exchange of commodities between citizens of different States. Regulation and commerce are both practical conceptions, and their limits must be fixed by practical lines. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Caldwell* v. *North Carolina*, 187 U. S. 622, 632; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *Galveston R. R.* v. *Texas*, 210 U. S. 217, 225.

The anti-trust laws must be reasonably construed with a view to practical enforcement, and not so as to defeat the purposes leading to their enactment. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd

conclusion." *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 567; *Hopkins* v. *United States*, 171 U. S. 578, 600; *Anderson* v. *United States*, 171 U. S. 604, 616; *Swift & Company* v. *United States*, 196 U. S. 375, 396; *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179, 184.

The general principles adopted in reference to state legislation affecting interstate commerce are applicable for determining whether combinations of corporations or individuals materially affect the free flow of such commerce. The validity of such state legislation turns upon whether its direct effect or necessary tendency is the material or substantial restraint, hindrance or obstruction of commerce. If so, it is unconstitutional irrespective of intent. But if the effect is only immaterial and incidental this does not invalidate. *Asbell* v. *Kansas*, 209 U. S. 251, 256; *Galveston &c. R. R.* v. *Texas*, 210 U. S. 217, 227; *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Richmond &c, R. R. Co.* v. *Patterson*, 169 U. S. 311, 314; *Chicago &c. R. R.* v. *Solan*, 169 U. S. 133; *Missouri &c. R. R.* v. *Haber*. 169 U. S. 613, 626; *Bowman* v. *Chicago &c. R. R. Co.*, 125 U. S. 465, 482; *Smith* v. *Alabama*, 124 U. S. 465, 473.

The Sherman Act applies when the direct result or necessary tendency of the prohibited thing—contract, combination, etc.—is material obstruction, hindrance or restraint of interstate or foreign commerce. This thing need not be any part of commerce, nor be done by parties engaged therein. And whether such obstruction, hindrance, restraint or tendency exists must be determined by the court upon the facts of each case. That which did not restrain commerce fifty years ago may do so to-day. *Loewe* v. *Lawlor*, 208 U. S. 274, 293; *Union Bridge Company* v. *United States*, 204 U. S. 364, 400; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, and 18 How. 421.

The settled rule, and one constantly invoked by those engaged in interstate commerce, is that any state statute

which in effect or necessary tendency directly and materially obstructs or hinders the free flow of interstate commerce conflicts with the Federal Constitution. Certainly one purpose of the Sherman Act was to prevent any such interference with commerce through contracts, combinations, conspiracies or monopolies (*Loewe* v. *Lawlor*), and if state statutes are cut down because of congressional intent inferred from silence, there can be no question of the power of Congress by a positive enactment to destroy obnoxious arrangements amongst individuals or corporations. The interpretation of the Sherman Act expounded in the unanimous opinion in *Loewe* v. *Lawlor* supports this suggestion.

The natural effect of competition in its broad and legitimate sense is to increase trade. To suppress such competition restrains, hinders and obstructs trade within the meaning of the Anti-trust Act. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177. This rule is especially rigid in respect of public service corporations. *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; but it is applicable to all commerce.

Persons of sound mind are presumed to intend the necessary or ordinary consequences of their acts, *Clarion Bank* v. *Jones*, 21 Wall. 325, 337; and, in general, the intent consciously entertained or dominant in the minds of parties to a combination is not material—certainly not decisive of its legality. Where attempts to monopolize are charged, or where essential to show a plan not necessarily inferred from circumstances, or where the effect of established acts may be doubtful, the actual purpose may be material—perhaps essential. *United States* v. *Trans-Mo.*

Ft. Assn., 166 U. S. 290, 341, 342; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 234; *Swift & Co.* v. *United States*, 196 U. S. 375, 396.

The fundamental design of the anti-trust legislation is not punishment of immorality, but prevention of mischief consequent upon unification of control and destruction of competition. The public is chiefly concerned about practical results—not mental attitudes. The lawfulness of a combination cannot be determined by the conscious purpose of the parties; necessary consequences are presumed to have been intended. *United States* v. *Trans-Mo. Ft. Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 562; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 234.

The word "unreasonable" cannot be read into the first section of the Sherman Act; but this does not render the prohibitions applicable merely because commerce is in some way affected, or to transactions always enforceable, and never regarded as objectionable from any standpoint. This court has never declared unlawful those ordinary business arrangements always sanctioned at common law and wholly outside the mischief intended to be prevented. Any act, however, although entirely innocent when standing alone may be criminal if part of an unlawful plan. *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 567, 568; *Hopkins* v. *United States*, 171 U. S. 578, 600; *Aikens* v. *Wisconsin*, 195 U. S. 194, 205; *Swift & Company* v. *United States*, 196 U. S. 375, 396; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179.

The Government does not maintain that restraint, obstruction or hindrance of commerce is denounced by the act unless direct and material either in tendency or effect; and, of course, do not insist that every contract or arrangement which merely eliminates a competitor in interstate trade is for that sole reason unlawful. The statute was intended to foster, not destroy, business operations

universally regarded as promotive of public welfare. The suggestion that the statute denounces as criminal every party to any sort of contract which eliminates any independent dealer in interstate commerce however insignificant is untenable. But when, as in the present case, the restraint is the direct consequence of or that to which the challenged contract or combination necessarily tends, and is also of a material or substantial character it is clearly within the prohibition. The Government does not avouch and will not attempt to support this extreme construction which was adopted by the presiding judge below.

Contracts, combinations or conspiracies which give power materially to restrain commerce and indicate a dangerous probability of its exercise and those which necessarily tend to monopoly are unlawful without more. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *United States* v. *Trans-Missouri Ft. Assn.*, 166 U. S. 290; *Northern Securities Company* v. *United States*, 193 U. S. 197; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177. The essential purpose of the statute is to prevent injury—not merely to reverse a course of conduct.

The words, "contract, combination and conspiracy" in the statute are used in their ordinary sense, and there is no exception in favor of sales, conveyances or other executed arrangements. *Pettibone* v. *United States*, 148 U. S. 197, 203; Noyes on Intercorporate Relations, §§ 324 *et seq.*

The decision in *United States* v. *E. C. Knight Company* turned upon the conclusion that under the peculiar circumstances of that case what was alleged and proved did not show a direct or necessary obstruction to interstate commerce; and it may be relied upon only where the evidence requires a like finding on that point. The facts of the present case render such a conclusion impossible. The things done had direct reference to interstate and foreign

commerce; competition therein has been effectively destroyed and monopoly secured. In support of the foregoing doctrines, see *United States* v. *E. C. Knight Company* (1895), 156 U. S. 1; *Pearsall* v. *Great Northern R. R. Co.* (1896), 161 U. S. 646; *United States* v. *Trans-Missouri Freight Assn.* (1897), 166 U. S. 290; *United States* v. *Joint Traffic Assn.* (1898), 171 U. S. 505; *Hopkins* v. *United States* (1898), 171 U. S. 578; *Anderson* v. *United States* (1898), 171 U. S. 604; *Addyston Pipe & Steel Company* v. *United States* (1899), 175 U. S. 211; *Montague & Company* v. *Lowry* (1903), 193 U. S. 38; *Northern Securities Company* v. *United States* (1904), 193 U. S. 197; *Harriman* v. *Northern Securities Company* (1905), 197 U. S. 244; *Swift & Company* v. *United States* (1905), 196 U. S. 375; *Cincinnati etc., Packet Co.* v. *Bay* (1906), 200 U. S. 179; *Loewe* v. *Lawlor* (1908), 208 U. S. 274. See also *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *Pennsylvania Sugar Refining Company* v. *American Sugar Refining Co.*, 166 Fed. Rep. 254; *Bigelow* v. *Calumet & Hecla Mining Company*, 167 Fed. Rep. 704, 721; *National Fireproofing Company* v. *Mason Builders Assn.*, 169 Fed. Rep. 259; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177.

Monopoly is the outcome of the practical cessation of effective business competition. This word in the Anti-Trust Act has no reference to a grant of special privileges but is used in a broad sense. Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) acting in concert practically acquire power to control prices and smother competition.

The rights of an individual acting alone are not involved and it is unnecessary to inquire how far his acts

may be limited. Corporations do not have all the constitutional rights of an individual and are themselves combinations subject to the rules of law applicable to acts done in concert.

The word "monopolize" has no reference to a governmental grant. Congress was striking at an existing evil—unification of control with consequent destruction of competition through powerful organizations. The essential idea of monopoly is ability to control prices or to deprive the public of advantages flowing from free competition. Whether the power has been actually exercised, or prices or the total volume of trade increased or diminished is immaterial; and its existence must be determined by practical consideration of existing conditions, giving due weight to the peculiarities of the commerce involved. It is certain that where parties have deliberately pursued a course, the ordinary result or necessary tendency of which is monopoly, they cannot be heard to deny an unlawful intent; and a monopoly acquired through contract, combination or conspiracy which directly and essentially destroys competition clearly is unlawful. *United States* v. *Trans-Mo. Ft. Assn.*, 166 U. S. 290; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Swift & Co.* v. *United States*, 196 U. S. 375.

The courts have long referred to "monopoly" the outcome of individual action as distinguished from governmental grant, and have declared unlawful every arrangement tending thereto. The word in the Sherman Act has the same significance as in the well-known opinions, from *Mitchell* v. *Reynolds*, 1 P. Williams, 181, to *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *United States* v. *Addyston Pipe Co.*, 85 Fed. Rep. 271; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 644; *United States* v. *Freight Association*, 166 U. S. 290, 323; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Shawnee Compress Co.* v. *Anderson*,

209 U. S. 423, 433; *People* v. *North River Sugar Refining Co.*, 54 Hun, 354; *American Biscuit Co.* v. *Klotz*, 44 Fed. Rep. 721, 724; *Richardson* v. *Buhl*, 77 Michigan, 632; *Pocahontas Coke Co.* v. *Powhatan C. & C. Co.*, 60 W. Va. 508; *Harding* v. *American Glucose Co.*, 182 Illinois, 619, 620; Noyes on Intercorporate Rels., §§ 329 *et seq.*, 389; Andrews, Amer. Law (2d Ed.), Vol. I, 773.

The legislation against combinations and monopolies cannot be defeated by causing a corporation to acquire the shares or property and business of competing corporations; nor by any other scheme or device.

Corporate combinations which bring about the results denounced by the statute are unlawful. They are in fact more injurious to the public than the old forms of simple agreement among separate concerns or the well-known trust forms. Eddy on Combinations, Vol. I, §§ 617, 620 *et seq.;* Noyes on Intercorporate Relations, § 307; *Distillery Co.* v. *People*, 156 Illinois, 448.

If the corporate form of combination is beyond the reach of Congress, it lacks supreme power to regulate commerce. Certainly a corporation, a mere creature of state law, cannot be endowed with power to obstruct commerce not possessed by the State itself. *Deb's Case*, 158 U. S. 564; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Northern Securities Case*, 193 U. S. 197.

The right to buy, sell and transfer property is not superior to the right to make other contracts; and all are subordinate to the power of Congress to regulate commerce. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 396; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *United States* v. *Del. & Hud. R. R.* (*Commodities Clause Case*), 212 U. S. 366; *Natl. Harrow Co.* v. *Hench*, 83 Fed. Rep. 36; *S. C.*, 84 Fed. Rep. 226.

A corporation which, not as an incident to orderly

growth, secures control of competitors by purchasing their shares or property and business and thereby acquires power to suppress competition is no less inimical to public interests than a technical "Trust," and indeed is often a mere modification thereof. The direct, necessary result of such an arrangement is to hinder and obstruct commerce. The *Pearsall Case*, 161 U. S. 644; *Northern Securities Case*, 193 U. S. 344; *Shawnee Compress Case*, 209 U. S. 423; *Distillery Co.* v. *People*, 156 Illinois, 448, 491. *In re Greene*, 52 Fed. Rep. 104, and the *E. C. Knight Case*, if to the contrary, must be considered disapproved.

There is no foundation for the claim that the Sherman Act was directed only against contracts and combinations of an executory nature, and is without application where transfers of property have been actually executed. It was intended to, and does, prohibit *obstructions* to commerce whether resulting from executory or executed arrangements. *Northern Securities Case*, 193 U. S. 197; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *People* v. *Chicago Gas Trust*, 130 Illinois, 268; *Distillers & Cattle Feeding Co.* v. *The People*, 156 Illinois, 448; *Pocahontas Coke Co.* v. *Powhatan Coal & Coke Co.*, 60 W. Va. 508; Eddy on Combinations, § 622; Noyes on Intercorporate Relations, §§ 354, 386.

A foreign corporation doing business within the United States has no right to violate its policy or laws. An agreement or combination which in purpose or effect conflicts therewith, although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it.

If Congress is powerless to prevent wrongs in its own jurisdiction, when the actors are foreigners, or when done in pursuance of agreements made abroad, its sovereignty is a myth.

A crime is committed within the jurisdiction where the act of the parties actually takes effect, although the in-

strumentalities may have been set in motion in another jurisdiction. *Re Palliser*, 136 U. S. 256, 265; *Horner* v. *United States*, 143 U. S. 207; *Benson* v. *Henkel*, 198 U. S. 1; *Burton* v. *United States*, 202 U. S. 344, 387; *United States* v. *Thayer*, 209 U. S. 39, 44.

The courts should enforce the anti-trust legislation by all appropriate processes known to their usages; and decrees should be so moulded as to suppress effectually the mischief consequent upon unlawful arrangements.

Congress has forbidden monopolies and combinations. When one exists everything done in furtherance of its purpose is unlawful; especially every act constituting a part of interstate or foreign commerce. Therefore the privilege of engaging therein may be denied. The power to regulate extends to prohibition of anything directly conflicting with the will of Congress lawfully expressed. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Champion* v. *Ames* (*Lottery Case*), 188 U. S. 321; *United States* v. *D. & H. Co.*, 213 U. S. 366; *Loewe* v. *Lawlor*, 208 U. S. 274.

The statute requires the court "to prevent and restrain violations"—not merely to determine the legality of past transactions. The public interest is the thing to be subserved, and it demands the destruction of existing mischief and prevention of impending wrongs—the removal of obstruction existing or threatened.

Where an unlawful corporate combination exists and identity of constituents has been destroyed, or where one corporation has acquired a forbidden monopoly, there are two possible effective remedies. The first is to enjoin the corporation from doing interstate or foreign business until (if ever) it can affirmatively show that its affairs have been readjusted so as to render future operations lawful. The second is to appoint a receiver to take possession of the concern and by proper action restore opportunities for free competition. *Deb's Case*, 158 U. S. 564; *Chicago*,

Rock Island &c. Ry. v. *Union Pacific Ry.*, 47 Fed. Rep. 15, 26; *Stockton, Atty.-Genl.*, v. *Central R. R. Co.*, 50 N. J. Eq. 52, 489; *Taylor* v. *Simon*, 4 Mylne & Craig, 141; Pomeroy on Eq. Juris., 2d Ed., §§ 111, 170.

The Government established violations of the Sherman Act by proving first, the existence of contracts, combinations, conspiracies and monopolies; and, second, that the direct result or necessary tendency of these is materially to obstruct, hinder and burden the free flow of interstate and foreign commerce.

The *Knight Case* is not controlling; the combinations established here directly and materially affect not only the production and manufacture, but every department of trade and commerce in tobacco; and the results have been destruction of competition in such commerce and the creation of monopolies by defendants.

The purposes of anti-trust legislation cannot be frustrated by operating through a corporation, nor by means of executed sales and transfers of property. *The Northern Securities Co.* v. *United States*, 193 U. S. 197; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, seem decisive on this point.

Moreover, if important, the evidence clearly establishes that the defendants' actions have been characterized by duress, and unfair and oppressive methods; and that following a fixed plan they have sought to suppress competition and secure monopolies.

The decree below was right in so far as it enjoined acts in furtherance of the combination; enjoined the control of certain defendant corporations by others through stock ownership; and also in so far as it prohibited the American Tobacco Company and other defendants adjudged to be in and of themselves combinations in restraint of trade from engaging in interstate or foreign commerce.

The decree below did no more than was necessary to destroy the unlawful combinations and prevent violations

of the act—in fact it did not go far enough. Prohibition of acts in furtherance of the combination and also of control by one corporation of another is abundantly supported by *The Northern Securities Co.* v. *United States; Swift & Co.* v. *United States,* and *United States* v. *D. & H. R. R.*

That part of the decree which adjudges the American Tobacco Company and others unlawful combinations and enjoins them from engaging in commerce is novel—apparently without a direct precedent; but it harmonizes with the duty to enforce the act. *Swift & Co.* v. *United States, supra.*

The petition should not have been dismissed as to the individual defendants.

In order effectually to destroy combinations the intelligent manipulators of corporate agencies must be reached.

Observance and every act done in pursuance of the English contracts within the United States are unlawful; and the petition was wrongfully dismissed as to the Imperial Tobacco Company, British-American Tobacco Company and domestic corporations controlled by the latter.

The effect of the agreements entered into in England between the American combination and the Imperial Tobacco Company was to suppress competition between those two great concerns both within and without the United States. The British-American Tobacco Company was brought into existence as the instrumentality for making the agreements effective. The result of the whole arrangement was to destroy competition, and inevitably tends to monopoly. Observance of these arrangements should have been prohibited. The British-American Tobacco Company should have been enjoined from doing business within the United States; and the same prohibition should have been applied to the Imperial Tobacco Company during the continuation of the unlawful contracts.

The petition should not have been dismissed as to the

United Cigar Stores Company. This concern is one of the instrumentalities in the hands of the American Tobacco Company for carrying out its unlawful purposes, and the connection between them should have been severed.

The final decree should have adjudged that defendants were attempting to monopolize, and had monopolized, a part of interstate and foreign commerce.

Monopoly is a practical conception, and its existence must be determined in view of business conditions. The evidence abundantly establishes that the defendants have acquired power to control prices and smother competition.

The final decree should have enjoined corporations holding shares of others from collecting dividends thereon.

This relief was granted in the *Northern Securities Case*, and is an appropriate way to destroy the relationship where one corporation improperly controls another by stock ownership.

Mr. John G. Johnson, *Mr. DeLancey Nicoll* and *Mr. Junius Parker*, with whom *Mr. William J. Wallace* and *Mr. W. W. Fuller* were on the brief, *Mr. William M. Ivins* also filing a brief, for the American Tobacco Company and all the other defendants except the Imperial Tobacco Company (of Great Britain and Ireland), Limited, United Cigar Stores Company and R. P. Richardson, Jr., & Co., Inc.:

The transactions principally complained of by the Government in this bill involve the validity of one or the other of the two following transactions, to-wit: (a) Consolidation of manufacturing interests through the formation of the corporation and the transfer to it of the properties in such manufacturing industries for exchange of stock of the vendee corporation or for cash; (b) purchase by a corporation engaged in manufacturing of the property of a competitor, or through the purchase by such corporation of whole or part of the stock of the corporation of such

competing corporation, generally for cash. These transactions are not within the operation of the Sherman Law, because they primarily affect manufacturing and not commerce. *Veazie* v. *Moor*, 14 How. 568; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Coe* v. *Errol*, 116 U. S. 517; *Turpin* v. *Burgess*, 117 U. S. 504; *Kidd* v. *Pearson*, 128 U. S. 1; *In re Greene*, 52 Fed. Rep. 104; *United States* v. *Knight*, 156 U. S. 1.

The *Knight Case* was not a sporadic decision of this court, but was the logical outcome of the cases that preceded it that have just been cited, and it has not been overruled or modified by any subsequent decision, but has been expressly recognized wherever mentioned. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Loewe* v. *Lawlor*, 208 U. S. 274; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 406; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *Ware* v. *Mobile County*, 209 U. S. 405; *Bigelow* v. *Calumet Co.*, 167 Fed. Rep. 721. Confusion has arisen and it has been assumed that the *Knight Case* has been overruled or modified because of the failure to distinguish between the persons complained of and the transaction which is the basis of the complaint. The defendants in this case and the defendants in the *Knight Case* were engaged in interstate commerce, but the question is not whether the defendant is engaged or not in interstate commerce, but whether the transaction complained of is an act of, or direct in its effect on, interstate commerce; one engaging in interstate commerce does not thereby subject himself and his whole business to the control of Congress. *Howard* v. *Railroad Company*, 207 U. S. 463, 502.

Any attempt to distinguish this case from the *Knight Case* based upon unskillful pleading on the part of the Government in the *Knight Case*, is defeated by a consider-

ation of the record of that case on file in this court. The scope of the *Knight Case* as here contended has been assumed by the law department of the Government from 1895 to 1907. Annual Reports of the Attorney General 1895, p. 13; for 1896, p. xxvii; for 1899, pp. 21 *et seq.;* for 1906, p. 7; Senate Document No. 687, 2d Session, 60th Congress, p. 27. Upon the decision in the *Knight Case,* the defendants—and these defendants are only one among many in this respect—have proceeded; this adjudication of this court has become a rule of property, and to overrule it would make wrecks of these enterprises; a case of such close analogy to *ex post facto* laws is presented that the maxim of *stare decisis* becomes almost as if embodied in the Constitution itself. It is as important that the law should be settled permanently as that it should be settled correctly. *Gilbert* v. *Philadelphia,* 3 Wall. 713, 724; *Vale* v. *Arizona,* 207 U. S. 201, 205.

Without reference to whether the trade is interstate, the transactions shown by this record do not constitute contracts, combinations or conspiracies in restraint of trade, and are not against the public policy which this court has (*Northern Securities Case, supra*) declared to be the purpose and effect of the Sherman Law. The intent of Congress was not to unsettle legitimate business enterprises, but rather to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. (Mr. Justice Brewer in *Northern Securities Case*). The transfer of property by purchase, sale, or consolidation, whether by the formation of partnerships, organization of corporations, or consolidation of preëxisting corporations, is not violative of the common law. See *Fairbanks* v. *Leary,* 40 Wisconsin, 637; *People* v. *North River Sugar Refining Co.,* 121 N. Y. 583; *Trenton Potteries Co.* v. *Oliphant,* 58 N. J. Eq. 507; *Cameron* v. *Water Co.* (N. Y.), 62 Hun, 269; *Vinegar Co.* v. *Foehrenback,* 148 N. Y.

58; *Dittman* v. *Distilling Co.*, 64 N. J. Eq. 544; *Commonwealth* v. *Hunt*, 4 Metc. 111; *Oakdale Co.* v. *Garst*, 18 R. I. 484; *McCauley* v. *Tierney*, 19 R. I. 225; *Bohn Co.* v. *Northwestern Assn.*, 54 Minnesota, 223; *Monongahela Co.* v. *Jutte*, 210 Pa. St. 288, 300. Such transfer and consolidation is not opposed to the public policy, but is expressly authorized and facilitated by the merger statutes of many States, and is forbidden by the statutes of none. Many of the States which authorize the merger of corporations have anti-trust statutes of the same general import as the Sherman Anti-Trust Law, and to give to the Federal Anti-Trust statute the meaning contended for by the Government and to import that meaning into the various state anti-trust statutes would work the incongruity of assuming that the States had facilitated the formation of corporations, which by their very formation would become outlaws of commerce.

The decision of this court in *Northern Securities Case* is not in conflict with the contention here made; this court in the *Northern Securities Case* did not overrule or modify the declarations theretofore made, and in subsequent decisions has not recognized the *Northern Securities Case* as in conflict with the contention here made. *Trans-Missouri Freight Assn. Case*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Smiley* v. *Kansas*, 196 U. S. 447; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Cincinnati Packing Co.* v. *Bay*, 200 U. S. 179; *Chesapeake & Ohio Co.* v. *United States*, 115 Fed. Rep. 610, 620; *Davis* v. *Booth*, 131 Fed. Rep. 31, 37; *Robinson* v. *Brick Co.*, 127 Fed. Rep. 804; *Connor-McConnell Co.* v. *McConnell*, 140 Fed. Rep. 412; aff., *idem*, 987; *Fisheries Co.* v. *Lennen*, 116 Fed. Rep. 217; *Harrison* v. *Glucose Co.*, 116 Fed. Rep. 304; *National Co.* v. *Haberman*, 120 Fed. Rep. 415; *Bigelow* v. *Calumet Co.*, 167 Fed. Rep. 721. The combinations and contracts in existence at the passage of the Sherman Law, and in the contemplation of Congress in its enactment,

were entirely distinct from those combinations of capital and ability which had long existed in the form of joint-stock associations or corporations or partnerships, and it is the duty of the court to apply the Sherman Law as an evolutionary statute, and not assume a revolutionary purpose in the mind of Congress in its enactment.

These defendants have not violated the Sherman Law by monopolizing trade or commerce, although they in the aggregate enjoy large, but varying, proportions of the business in the products of tobacco. Monopolizing under the Sherman Law is an activity and not a state of being, and size, and the power that is inherent in size, whether size be considered in relation to investment or to the proportion of business at the time enjoyed, is not monopolizing or an element of monopolizing. Monopoly at common law was a license or privilege for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty in manufacturing or trading which he had before. 4 Blackstone, 159. Monopolizing under the statute carries with it the idea of exclusion, and whatever the magnitude of a concern may be, it is not guilty of monopolizing or attempting to monopolize unless it is doing something by which there is either attained or attempted this result, to-wit, that "the subject in general is restrained from that liberty of trading which he had before." See dissenting opinion of Mr. Justice Holmes in *Northern Securities Case*, 193 U. S. 409; *In re Greene*, 52 Fed. Rep. 115; *Chemical Co.* v. *Providence Co.*, 64 Fed. Rep. 946, 949; *Whitwell* v. *Continental Tob. Co.*, 125 Fed. Rep. 462; *United States* v. *Reading Co.*, 183 Fed. Rep. 427. This is true not only with respect to this statute, but it is so recognized at common law and among economic writers. *Mogul Co.* v. *McGregor*, L. R. 23 Q. B. 598, 618; *Oakdale* v. *Garst*, 18 R. I. 484; Prof. Ely's "Monopolies and Trusts," 34; Clark's Control of Trusts, 6.

These defendants have not, either singly or in combination, excluded or attempted to exclude anyone from trade and commerce. (a) They have not cornered nor attempted to corner the supply of raw material; it is a matter of serious doubt whether such corner or attempting to corner would fall within the inhibition of the Sherman Law, or within the constitutional power of Congress, as being an act of, or direct in its effect on, interstate commerce, even if the record disclosed it. But decisions as to those questions are not necessary to an adjudication of this case. (b) Defendants have not enjoyed rebates or other preference in transportation; (c) they have not enjoyed exclusive advantage in the use of machinery and facilities for manufacturing; (d) they have not excluded nor attempted to exclude competitors from the avenues of distribution—marketing their products. It is impossible to conceive of exclusion or attempt to exclude competitors from trade that does not involve one or the other of the foregoing methods or avenues. The defendants have met active competition, and in meeting it have adopted the ordinary methods of competition. To give a construction to the Sherman Law, intended as it is to foster competition, that would forbid the usual methods of competition, would make the statute self-destructive. Competition, it is often said, is the life of trade, but the object of all competition is to drive out other competitors. To say that a man is to trade freely, but that he is to stop short of any act which is calculated to harm other tradesmen and which is designed to attract business to his own shop would be a strange and impossible counsel of perfection. The rights of competitors are different from the rights of strangers to the trade, and conduct is justified on the part of the person or corporation who seeks to build his own business that would be unlawful if adopted by him whose only motive was the injury of another. *Loewe* v. *Lawlor, supra; Bonsack Machine Co.* v. *Smith,* 70 Fed. Rep. 383, 388;

Mogul Co. v. *McGregor*, L. R. 23 Q. B. 598, 618; *Berry* v. *Donovan*, 188 Massachusetts, 353; *Barnes* v. *Typographical Union*, 232 Illinois, 424; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101, 124; *Doremus* v. *Hennessey*, 176 Illinois, 608; *Whitwell* v. *Continental Tob. Co.*, *supra*. The rights of competitors as recognized at common law include the right to undersell competitors; *Commonwealth* v. *Hunt* (Mass.), 4 Metc. 111, 134; *Lough* v. *Outerbridge*, 143 N. Y. 271, 283; to have secret partners; 1 Lindley on Part. (2d Am. Ed.) * 16; *Winship* v. *Bank*, 5 Peters, 529, 562; to adopt a policy of business that can only result in destruction of weak competitors, even though a part of it is the sale of goods below cost; *Lough* v. *Outerbridge*, 143 N. Y. 271, 283; *Martel* v. *White*, 185 Massachusetts, 255; *Lewis* v. *Lumber Co.*, 121 Louisiana, 658; *Karges Co.* v. *Amalgamated Union*, 165 Indiana, 421; to make provision for exclusive handling; *Palmer* v. *Stebbins* (Mass.), 3 Pick. 188, 192; *In re Greene*, *supra*; *Whitwell* v. *Continental Tob. Co.*, *supra*; *Houch* v. *Wright*, 77 Mississippi, 476.

Purchasers of competing businesses do not constitute attempts to monopolize, for such purchases do not exclude others from the trade, but leave the field open; this is true, although the inducement to purchase is to get rid of a competitor. The law of self-defense and protection applies to one's business as well as to his person. *United Shoe Co.* v. *Kimball*, 193 Massachusetts, 351; *Wood* v. *Whitehead Bros. Co.*, 165 N. Y. 545, 551; *United States Co.* v. *Provident Co.*, 64 Fed. Rep. 946, 950; *Butt* v. *Ebel*, 29 N. Y. App. Div. 256, 259; *Lanyon* v. *Garden City Sand Co.*, 223 Illinois, 616; *National Co.* v. *Cream City Co.*, 86 Wisconsin, 352. Covenants taken from a vendor not to engage in a business in competition with that sold are not only not criminal, but are altogether valid and enforceable. *Cincinnati Co.* v. *Bay*, 200 U. S. 179; *Fowle* v. *Park*, 131 U. S. 88; *Navigation Co.* v. *Winsor*, 20 Wall. 64; *Electric Co.* v. *Hawks*, 171 Massachusetts, 101.

The Sherman Law properly construed and applied is a beneficent and evolutionary statute, whose purpose and effect is to preserve to every one liberty and opportunity to engage in interstate commerce—it preserves this liberty and opportunity as against the unreasonable covenants and contracts of the party himself, as well as against the tortious conduct of others, whether those others seek in combination to exclude a stranger to the combination, or seek singly to exclude him. In other words, this statute applies to interstate trade the doctrines of the common law applicable to trade and commerce, without respect to whether interstate or not, and the words used in it are well known words at common law, which must, in the interpretation of this law, be given their common law meaning. The chief purpose of the statute was to make certain the application in the Federal jurisdiction of the principles of the common law, and to provide definite and certain remedies for the enforcement thereof.

In addition to the considerations heretofore mentioned, this construction, and this construction alone, gives meaning and effect to every word of the statute: (a) The first section of the statute condemns *every* contract, etc., in restraint of trade—the construction contended for by the Government in this case would eliminate the word "every" from the statute and makes the test dependent not upon the nature of the act, but its magnitude or result; these defendants contend that it is the nature of the act that is the test and that *every* transaction of the prohibited nature is forbidden, whatever its magnitude, result, or intent; (b) the second section forbids the monopolizing or attempt to monopolize of *any part* of interstate trade or commerce—the Government's contention as to the meaning of this second section eliminates these words from the statute or substitutes for them the words "in *large* part," or "*a dominating* part"; the construction contended for by these defendants gives full force to the mean-

ing "any part"—it is a violation of the statute to exclude or attempt to exclude by tortious means a trader from even the smallest part of interstate trade or commerce.

An additional argument in favor of the construction of the statute here contended for is seen when the remedy is considered. The court below, construing the statute as contended for by the Government, said that it condemned that incidental elimination of competition which comes from ordinary consolidation, sale, and purchase; in order to give vitality to such construction there are involved two grave constitutional questions: First: Is there a constitutional power in Congress to forbid the ordinary transactions that have characterized all commercial peoples, and that are unquestionably valid at common law? Second: Has Congress the constitutional power to prevent a state corporation from engaging in interstate commerce in wholesome products? These defendants believe that these two questions should be each answered in the negative; Congress has no right under its authority to regulate commerce, great and paramount as that power is, to violate the fundamental rights secured by other provisions of the Constitution. *Monongahela Co.* v. *United States*, 148 U. S. 312, 336; *Adair* v. *United States*, 208 U. S. 161, 180; *Allgeyer Case*, 165 U. S. 578, 589, 591. Congress has not a right to forbid corporations or natural persons from engaging in interstate commerce in wholesome products—the right of intercourse between State and State derives its source from those laws whose authority is acknowledged by civilized man throughout the world—the Constitution found it an existing right and gave to Congress only the power to regulate it. *Gibbons* v. *Ogden*, 9 Wheat. 1, 211; *Paul* v. *Virginia*, 8 Wall. 168. Corporations have this right as certainly and as thoroughly as natural persons. *Santa Clara County* v. *R. R.*, 118 U. S. 394, 396; Justice Field at Circuit in *Railroad Tax Cases*, 13 Fed. Rep. 722, 746; *Hale* v. *Henkel*, 201 U. S. 43, 76, 85. The *Lottery*

Case, 188 U. S. 321, is not in conflict with this contention, because it was based on the inherent vicious nature of the commodity involved, to-wit, lottery tickets.

It is well settled that if a statute be susceptible of two interpretations, by one of which it would be unconstitutional or of doubtful constitutional validity, and by the other valid, the latter construction should be adopted. *Commodities Case*, 213 U. S. 366. The court below, however, having construed the Sherman Anti-Trust Law as forbidding the elimination of competition that results incidentally from sale, purchase and consolidation, resolved these two grave constitutional questions against the defendants, and, under the language of a statute which authorizes a court to restrain and enjoin only "violations of the Act," restrained and enjoined the assumed violators of the act from all interstate activity. It is practicable for a court to "prevent and restrain" the making or the continued operation of an executory contract or conspiracy, or combination in the nature of a contract or conspiracy; and it is practicable for a court to prevent and restrain a practice which involves monopolizing trade—tortiously excluding or attempting to exclude strangers to the scheme contemplated; these are the things condemned by the Sherman Law; it is not practicable nor constitutional to prevent or restrain the purchaser of private property from the use of his property, or penalize such use by preventing his engaging in interstate commerce in wholesome articles. The impracticability of constitutional remedy demonstrates the unsoundness of the construction of the act contended for by the Government.

Mr. William B. Hornblower, with whom *Mr. John Pickrell*, *Mr. William W. Miller*, and *Mr. Morgan M. Mann*, were on the brief for appellee, the Imperial Tobacco Company:

By far the greater part of the testimony taken in this

cause has to do with the alleged combinations entered into by the American Tobacco Company and its allied companies in this country, with which the Imperial Company and the British-American Company have no concern. It is claimed, however, by the Government that certain contracts entered into by the Imperial Company in 1902 with the American Company were in violation of the Sherman Act, and that the transactions of the Imperial Company since that date have been in violation of the act. These contracts were entered into in England in the summer of 1902 for the purpose of putting an end to the ruinous competition which was being carried on in England by the Ogdens Limited owned by the American Company.

The court below was right in dismissing the bill as to the Imperial Company and as to the British-American Tobacco Company, on the ground that those companies were British companies, that the contracts to which they were parties were made in Great Britain and were valid under the laws of Great Britain, and that the Sherman Anti-Trust Act has no extraterritorial effect. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

The agreements of September 27, 1902, between the American Tobacco Company and the Imperial Tobacco Company were not in violation of the Sherman Anti-Trust Act. So far as those agreements operated to restrain trade in Great Britain or between Great Britain and countries other than the United States, they are not within the prohibition of the Sherman Act. So far as they operate to restrain trade between England and this country, or between the various States of this country, such restraint is merely incidental to the sale of certain plants and good will, and is not within the prohibition of the Sherman Act.

The principle that there are certain contracts in partial restraint of trade which would not be invalid at common law, and which do not come within the prohibition of the Sherman Act, has been recognized by this court in the

very cases which are cited by the Government as holding that all contracts in restraint of trade whether reasonable or unreasonable, are in violation of the Sherman Act. See *United States* v. *Trans-Missouri Freight Association.* 166 U. S. 290, 329. The same principle is recognized in *United States* v. *Joint Traffic Association,* 171 U. S. 505, 566; *Northern Securities Co.* v. *United States,* 193 U. S. 197, per Mr. Justice Brewer at p. 361; *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, per Mr. Justice Holmes at p. 184.

Mr. Justice Peckham in the *Joint Traffic Case* held that the statute is to have a "reasonable construction." When he states that contracts in restraint of trade are invalid under the statute, whether reasonable or unreasonable, he refers not to contracts between mercantile or manufacturing concerns, but to contracts or combinations between competing railroad corporations, all of which contracts or combinations are illegal under the statute even though the rates and fares established are reasonable. See 171 U. S. 568, 570.

The distinction between contracts affecting public service corporations, and contracts between private individuals or corporations, is well stated in *Gibbs* v. *Baltimore Gas Co.,* 130 U. S. 396, where it was held that a corporation cannot disable itself by contract from the performance of public duties which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests, but where the public welfare is not involved, and where the restraint of one party is not greater than protection to the other party requires, the contract in restraint of trade may be sustained.

The validity of covenants between vendor and vendee, for the purpose of protecting the covenantee in the enjoyment of the legitimate fruits of the contract, have been upheld under the Sherman Act in the *Addyston Pipe Case,* 85 Fed. Rep. 291, modified and affirmed without approval of the opinion below in 175 U. S. 211; *Brett* v.

Ebel, 29 N. Y. App. Div. 256; *Lanyon* v. *Garden City Sand Co.*, 223 Illinois, 616; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454; *Bancroft & Rich* v. *U. S. Embossing Co.*, 72 N. H. 402; *Harbison-Walker Refractories Co.* v. *Stanton*, 227 Pa. St. 55.

In view of the statement of Mr. Justice Brewer in his concurring opinion in the *Northern Securities Case*, 193 U. S. 361, that "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade," and in view of the limitations placed upon the effect of the statute in Mr. Justice Peckham's opinion in the *Trans-Missouri Case*, we may fairly assume the statement made by Mr. Justice Brewer to represent the views of this court, especially as to contracts of a mercantile character not affecting railroads or other direct instruments of commerce. The subject of contracts not in restraint of trade at common law prior to the act of 1890 is discussed by this court in *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396, 409; *Fowles* v. *Park*, 131 U. S. 88–96.

The lower Federal courts have decided numerous cases both before and since the Sherman Act, upholding contracts, the avowed object of which was to buy off competition of a business rival. *Carter* v. *Alling*, 43 Fed. Rep. 208; *U. S. Chemical Co.* v. *Provident Chemical Co.*, 64 Fed. Rep. 946; *Harrison* v. *Glucose Sugar Refining Co.*, 116 Fed. Rep. 304; *National Enameling & Stamping Co.* v. *Haberman*, 120 Fed. Rep. 415; *Praine* v. *Ferrell*, 166 Fed. Rep. 702; *Walker* v. *Lawrence*, 177 Fed. Rep. 363.

Contracts between parties which have for their object the removal of a rival competitor in a business are not to be regarded as contracts in restraint of trade. Contracts although in partial restraint of trade, if valid at common law, and if not a cover for a combination or conspiracy to raise prices, or to prevent general competition, are not invalid under the Sherman Act. This proposition

is clearly held by the authorities above cited from the Federal reports.

As to what contracts would not be illegal at common law as in restraint of trade, see *Rousillon* v. *Rousillon*, 14 Ch. Div. 351; *Leather Cloth Co.* v. *Lorsent*, L. R. 9 Eq. 345; approved by this court in *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396.

In *Nordenfelt* v. *Maxim, Nordenfelt Guns and Ammunition Co.*, L. R. 1894, App. Cases, 535, the House of Lords reviewed at great length and in elaborate opinions the whole subject of covenants in restraint of trade, and held unanimously that a covenant, though unrestricted as to space, was not invalid where it was shown to be no wider than was necessary for the protection of the company, nor injurious to the public interests.

The case of *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473, establishes the proposition that in connection with the sale of a factory and the good will thereof, a covenant, practically unrestricted in time or space, not to engage in the manufacture or sale of competing articles, is not a covenant in restraint of trade. The same principle is laid down in the cases of *Hodge* v. *Sloane*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Tode* v. *Gross*, 127 N. Y. 480; *Matthews* v. *Associated Press*, 136 N. Y. 333; *Oakes* v. *Cataragus Water Co.*, 143 N. Y. 430; *Wood* v. *Whitehead Brothers Co.*, 165 N. Y. 545; *New York Bank Note Co.* v. *Hamilton Bank Note Co.*, 180 N. Y. 280; *Anchor Electric Co.* v. *Hawkes*, 171 Massachusetts, 101; *United Shoe Machinery Co.* v. *Kimball*, 193 Massachusetts, 351; *Rakestraw* v. *Lanier*, 104 Georgia, 188; *Bullock* v. *Johnson*, 110 Georgia, 486.

The most recent decisions in the state courts in which covenants to refrain from competition have been held reasonable and lawful, are, *Freudenthal* v. *Espey* (Cal.), 102 Pac. Rep. 280; *Louisville Board of Underwriters* v. *Johnson* (Ky.), 119 S. W. Rep. 152; *Wolf* v. *Duluth Board of Trade*

(Minn.), 121 N. W. Rep. 395; *Seigal* v. *Marcus*, (No. Dak.), 119 N. W. Rep. 358; *Buckhout* v. *Witler* (Mich.), 122 N. W. Rep. 184; *Blume* v. *Home Ins. Agency* (Ark.), 121 S. W. Rep. 293; *Wooten* v. *Harris* (No. Car.), 68 S. E. Rep. 989; *Home Telephone Co.* v. *North Manchester Telephone Co.* (Ind.), 92 N. E. Rep. 558; *Artistic Porcelain Co.* v. *Boch* (N. J.), 74 Atl. Rep. 680; *Harbison-Walker Refractories Co.* v. *Stanton* (Pa.), 75 Atl. Rep. 988.

As to the British-American agreement there is absolutely nothing in that agreement which prevents, or tends to prevent, any other company or companies from manufacturing and exporting tobacco to other countries than Great Britain and the United States. There is no agreement to restrict prices or to interfere in any way with free competition. The evidence shows that there has been no actual diminution in the business of exporting either leaf tobacco or manufactured tobacco from the United States to foreign countries by reason of the British-American agreement.

None of the decisions heretofore made by this court under the Sherman Act are applicable to the agreements here involved. The *Joint Traffic*, *Trans-Missouri* and *Northern Securities* cases dealt with agreements between railroad companies or holders of railroad stocks, the effect and intent of which were held to restrict competition between common carriers and public service corporations. They have no application to agreements between manufacturers, but are based upon the peculiar obligations of common carriers and public service corporations. The *Addyston Pipe Case*, 175 U. S. 211, involved an agreement between rival and competing manufacturers that there should be no competition between them in certain States or Territories, the direct, immediate and intended effect of which agreement was the enhancement of the price.

Montague v. *Lowry*, 193 U. S. 38, was an agreement, the effect of which was to raise prices in the California market.

The case of *Swift & Co.* v. *United States* involved a combination of independent meat dealers who agreed not to bid against each other in the livestock markets, to fix selling prices and to restrict shipments of meat when necessary.

The case of *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, was a sequel of the *Addyston Pipe Case.*

The case of *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, was a case where the lessor company had agreed with the lessee company not only to go out of the field of competition, and not to enter that field again, but had further agreed to render every assistance to prevent others from entering it.

The case of *Continental Wall Paper Co.* v. *Voight Sons*, 212 U. S. 227, was a case of an agreement between a number of manufacturers who organized a selling company through which their entire output was sold to such persons only as would enter into a purchasing agreement by which their sales were restricted. The agreement provided for selling by jobbers at particular specified prices. The company was a selling company organized to control all the selling business of the manufacturing wall paper corporations, partnerships and persons who owned the stock of the Continental Wall Paper Company, and made separate contracts with that corporation giving it entire control of the selling business of the manufacturers.

None of the cases in this court apply to the agreements between the American and Imperial Companies, which are involved in this suit. They had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and did not unlawfully restrain interstate commerce. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 461.

The oral testimony shows that the agreements did not and could not, under the existing circumstances, operate to restrain trade or create a monopoly, and therefore could

not, and did not operate as a violation of the Sherman Anti-trust Act. It appears from the testimony that at the time of the agreements, there was practically no exportation or importation of manufactured products between Great Britain and the United States, owing to the protective duties in this country and the differentials imposed upon imported goods in Great Britain. It was not possible to sell manufactured tobacco imported into this country in competition with the domestic articles of manufacture, nor was it possible to export to England and sell in competition with domestic manufacture.

So far as the bill of complaint herein avers, that there was any restraint of competition in the purchase of leaf tobacco, the evidence overwhelmingly disproves any such claim. There was no agreement, arrangement or understanding between the American Tobacco Company and the Imperial or its representatives, to refrain from active competition in the purchase of leaf tobacco. The testimony shows without any contradiction that there has been at all times active competition between the Imperial Company's agents and the agents of the American Company, and of the independent concerns, and of the "Rigi" countries in the purchase of leaf tobacco, and the testimony shows that the price of leaf tobacco has increased since the agreements between the Imperial and American Company were made, and is still increasing. The amount of the consumption of leaf tobacco and the prices paid for it have both increased since 1902 up to the present time.

No decree can be made in this suit as against the Imperial Company which will be just and equitable.

There are three possible evils aimed at by the Sherman Anti-trust Act. First, the raising of the price of the commodity to consumers; second; the lowering of the price of raw material to producers; third, the crushing out of competitors. There is no evidence in the case at bar that the agreements between the Imperial Company and the

American Company which are attacked in this suit, have resulted in any one of these three evils.

There is no evidence that the price of tobacco products in any of their forms, has been raised to the consumer. So far as appears, the price has remained the same.

There is no evidence that the price to the producers of leaf tobacco has been reduced. On the contrary, the evidence is uncontradicted that the price has steadily increased.

There is no evidence that any competitor has been in any way interfered with by reason of the agreements between the Imperial Company and the American Company. Every manufacturer in the United States has been at liberty to manufacture and export his goods without hindrance on the part of either the Imperial or the American Company, or the British-American or any of the other defendants in this case. The agreements in this suit do not undertake to fix prices or to pool profits, or to eliminate competition in any way, or to interfere with the ordinary laws of supply and demand.

Mr. Sol M. Stroock for the United Cigar Stores Company:

The company has not violated any of the provisions of § 1 of the Sherman Anti-trust Act. It has not made any contract, nor engaged in any combination or conspiracy restraining the interstate commerce of the other defendants or any of them; or restraining its own interstate commerce; or restraining the interstate commerce of any competitor of the other defendants, or any of them; or restraining the interstate commerce of any competitor with it.

The United Cigar Stores Company has not violated any of the provisions of § 2 of the Sherman Anti-trust Act. It has not secured nor attempted to secure a monopoly for any of the other defendants nor combined

with any of the other defendants to exclude others from the field of competition with them.

It has not secured nor attempted to secure a monopoly of the retail trade for itself, nor attempted, either alone or in combination or conspiracy with the other defendants, to exclude others from the field of competition with it.

The United Cigar Stores Company has not, as an incident of obtaining a monopoly, or as part of any combination in restraint of trade, prevented vendors from engaging in the business of handling and dealing in tobacco products.

Mr. Charles R. Carruth, Mr. Charles J. McDermott, Mr. C. B. Watson, Mr. James T. Morehead and *Mr. A. J. Burton* for R. P. Richardson, Jr., & Company, Inc., appellee, submitted.

Mr. W. Bourke Cockran, by leave of the court, submitted a brief as *amicus curiæ*.

Mr. Thomas Thacher and *Mr. J. Parker Kirlin*, by leave of the court, submitted a brief as *amici curiæ* on certain questions common to this case and other pending causes.

Mr. Chief Justice White delivered the opinion of the court.

This suit was commenced on July 19, 1907, by the United States, to prevent the continuance of alleged violations of the first and second sections of the Anti-trust Act of July 2, 1890. The defendants were twenty-nine individuals, named in the margin,[1] sixty-five American

[1] James B. Duke, Caleb C. Dula, Percival S. Hill, George Arents, Paul Brown, Robert B. Dula, George A. Helme, Robert D. Lewis, Thomas J. Maloney, Oliver H. Payne, Thomas F. Ryan, Robert K. Smith, George W. Watts, George G. Allen, John B. Cobb, William R. Harris, William H. McAlister, Anthony N. Brady, Benjamin N. Duke,

corporations, most of them created in the State of New Jersey, and two English corporations. For convenience of statement we classify the corporate defendants, exclusive of the two foreign ones, which we shall hereafter separately refer to, as follows: The American Tobacco Company, a New Jersey corporation, because of its dominant relation to the subject-matter of the controversy as the primary defendant; five other New Jersey corporations (viz., American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, and Conley Foil Company), because of their relation to the controversy as the accessory, and the fifty-nine other American corporations as the subsidiary defendants.

The ground of complaint against the American Tobacco Company rested not alone upon the nature and character of that corporation and the power which it exerted directly over the five accessory corporations and some of the subsidiary corporations by stock ownership in such corporations, but also upon the control which it exercised over the subsidiary companies by virtue of stock held in said companies by the accessory companies by stock ownership in which the American Tobacco Company exerted its power of control. The accessory companies were impleaded either because of their nature and character or because of the power exerted over them through stock ownership by the American Tobacco Company and also because of the power which they in turn exerted by stock ownership over the subsidiary corporations, and finally the subsidiary corporations were impleaded either because of their nature or because of the control to which they were subjected in and by virtue of the stock ownership above stated. We append in the margin a statement showing

H. M. Hanna, Herbert D. Kingsbury, Pierre Lorillard, Rufus L. Patterson, Frank H. Ray, Grant B. Schley, Charles N. Strotz, Peter A. B. Widener, Welford C. Reed (now deceased), and Williamson W. Fuller.

the stock control exercised by the principal defendant, the American Tobacco Company, over the five accessory corporations and also the authority which it directly exercised over certain of the subsidiary corporations, and a list showing the control exercised over the subsidiary corporations as a result of the stock ownership in the accessory corporations, they being in turn controlled as we have said by the principal defendant, the American Tobacco Company.[1]

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[1] Extent of control of American Tobacco Company over the accessory corporations:

American Snuff Company—of 120,000 shares of preferred stock owns 12,517 shares directly and 11,274 shares by reason of stock control of P. Lorillard Co., in all 23,764 shares; of 110,017 shares of common stock owns 41,214 directly and 34,594 by reason of stock control of P. Lorillard Co., in all 75,808 shares.

American Cigar Company—of 100,000 shares of preferred stock owns 89,700 shares directly and 5,000 shares through control of American Snuff Co., in all 94,700 shares; of 100,000 shares of common stock owns directly 77,451 shares.

American Stogie Company—of 108,790 shares of common stock controls 73,072¾ shares through stock interest in American Snuff Company. The American Stogie Company owns all of the stock—12,500—of the Union American Cigar Company—cigars and stogies.

MacAndrews & Forbes Company—of 37,583 shares of preferred stock (no voting power) owns 7,500 shares; of 30,000 shares of common stock owns 21,129 shares directly and 983 shares through stock control of the R. J. Reynolds Co., in all 22,112 shares.

The Conley Foil Company—of 8,250 shares of stock, directly owns 4,950 shares.

The American Tobacco Company—by stock ownership is the owner outright of the following defendant companies:

S. Anargyros [The S. Anargyros Company owns all the capital stock (10 shares) of the London Cigarette Co.]; F. F. Adams Tobacco Co.; Blackwell's Durham Tobacco Co.; Crescent Cigar and Tobacco Co.; Day and Night Tobacco Co.; Luhrman & Wilbern Tobacco Co.; Nall & Williams Tobacco Co.; Nashville Tobacco Works; R. A. Patterson Tobacco Co.; Monopol Tobacco Works; Spalding & Merrick.

The two foreign corporations were impleaded either because of their nature and character and the operation and effect of contracts or agreements with the American To-

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The American Tobacco Co. also has the stock interest indicated in the following defendant corporations:

British-American Tobacco Co.—owns 1,200,000 shares of 1,500,000 shares of preferred stock and 2,280,012 shares of 3,720,021 shares of common stock.

The Imperial Tobacco Co., &c.—owns 721,457 pounds sterling of 18,000,000 pounds sterling of stock.

The John Bollman Co.—of 2,000 shares of stock owns 1,020 shares.

F. R. Penn Tobacco Co.—of 1,503 shares of stock owns 1,002 shares (through Blackwell's Durham Tobacco Co.).

R. P. Richardson, Jr., & Co., Inc.—owns 600 out of 1,000 shares of stock and $120,000 of $200,000 issue of bonds.

R. J. Reynolds Tobacco Co.—owns 50,000 out of 75,250 shares of stock.

Pinkerton Tobacco Co.—owns 775 out of 1,000 shares of stock.

Reynolds Tobacco Co. (of Bristol, Tenn.)—owns 1,449 shares out of 2,500 shares.

J. W. Carroll Tobacco Co.—owns 2,000 out of 3,000 shares.

P. Lorillard Co.—owns 15,813 out of 20,000 shares of preferred and all the common stock (30,000 shares).

Kentucky Tobacco Product Co.—owns 14 of 1,900 shares preferred and owns directly 5,264, and, through the American Cigar Co., 355 out of 8,100 shares of common stock. [The Kentucky Tobacco Product Co. owns all the capital stock (100 shares) of the Kentucky Tobacco Extract Co.]

Porto Rican-American Tobacco Co.—owns directly 6,578, and, through the American Cigar Co., 6,576 of 19,984 shares of stock. [The Porto Rican-American Tobacco Co. owns 190 of the 380 shares of preferred and 300 of the 450 shares of common stock of Ind. Co. of Porto Rico; also owns 2,150 of the 5,000 shares of capital stock of the Porto Rico Leaf Tobacco Co.]

The American Tobacco Company is also interested, as indicated, in the following defendants, supply or machinery companies:

Golden Belt Manufacturing Co. (cotton bags)—owns 6,521 of 7,000 shares.

Mengel Box Co. (wooden boxes)—British-American Tobacco Co. owns 3,637 of 5,000 shares of stock.

[The Mengel Company owns all of the capital stock of the Columbia

bacco Company, or the power which it exerted over their affairs by stock ownership.

As we shall have occasion hereafter in referring to mat-

Box Company and of the Tyler Box Company, respectively 1,500 and 250 shares.]

Amsterdam Supply Co.—(agency to purchase supplies)—owns majority of stock and controls large part of remainder through subsidiary companies.

Thomas Cusack Co.—(bill posting)—owns 1,000 out of 1,500 shares.

Manhattan Briar Pipe Co.—owns all of stock, 3,500 shares.

International Cigar Machinery Co.—of 100,000 shares owns 33,637 shares directly and 29,902 shares through Am. Cigar Co.—in all 63,539 shares.

The American Tobacco Company is also interested in the following companies, not named as defendants:

American Machine & Foundry Co.—owns 510 shares directly and remainder (490) through Am. Cigar Co.

New Jersey Machine Co.—owns 510 shares directly and remainder (490) through Am. Cigar Co.

Standard Tobacco Stemmer Co.—of 17,300 shares owns 16,895 shares.

Garson Vending Machine Co.—of 500 shares owns 250 shares.

The American Snuff Company in addition to stock, etc., interests in the American Tobacco Co., American Cigar Company, and the Amsterdam Supply Company, has stock interests in the following defendants:

H. Bolander—owns all of stock, 1,350 shares;

De Voe Snuff Co.—owns all of stock, 500 shares. [The De Voe Snuff Co. owns all the capital stock, 400 shares of Skinner & Co., snuff.]

Standard Snuff Co.—owns all of stock, 2,816 shares.

The American Cigar Co. in addition to stock interests in the Amsterdam Supply Co., American Stogie Co., Porto Rican-American Tobacco Co., Kentucky Tobacco Product Co. and International Cigar Machinery Co., has the stock interest indicated in the following defendants:

R. D. Burnett Cigar Co.—owns 77 out of 150 shares;

M. Blaskower Co.—owns 1,875 out of 2,500 shares pref. and 1,875 out of 2,500 shares of common.

ters beyond dispute to set forth the main facts relied upon by the United States as giving rise to the cause of action alleged against all of the defendants it suffices at this

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Cuban Land & Leaf Tobacco Co.—owns all of stock, 1,000 shares. [The Cuban Land, &c., Co. owns 1,320 of the 1,890 shares of stock of the Vuelta Abajo S. S. Co.]

Cliff Weil Cigar Co.—owns 255 out of 500 shares.

Dusel, Goodloe & Co.—owns 510 out of 750 shares.

Federal Cigar Real Estate Co.—owns all stock, 6,000 shares.

J. J. Goodrum Tobacco Co.—owns 477 out of 600 shares.

Havana-American Co.—owns all stock, 2,500 shares.

Havana Tobacco Co.—owns 700 shares out of 47,038 preferred, 166,800 out of 297,912 common stock, and $3,500,000 of $7,500,000 bonds.

Jordan Gibson & Baum Co., Inc.—owns all preferred and common stock, 250 shares each.

Louisiana Tobacco Co., Limited—owns 375 out of 500 shares.

The J. B. Moos Company—owns all of stock, 2,000 shares.

J. & B. Moos—owns all of common stock, 1,000 shares.

Porto Rican Leaf Tobacco Co.—owns 2,500 out of 5,000 shares.

The Smokers' Paradise Corporation—owns all of common stock (250 shares) and 349 of 500 shares preferred.

Havana Tobacco Co. has a stock interest in the following corporations:

H. de Cabanis y Carbajal—all of stock, 15,000 shares.

Hy. Clay and Bock & Co., Lim.—owns 9,749 out of 16,950 shares preferred and 14,687 out of 15,990 shares common.

[The Hy. Clay, &c., Co. is owner of 16,667 shares of the ordinary capital stock of the Havana Cigar & Tobacco Factories, Limited; and also owns 64 shares of the 1,890 shares of the capital stock of the Vuelta Abajo S. S. Co.]

Cuban Tobacco Co.—owns all of stock, 50 shares.

Havana Commercial Co.—owns 55,562 out of 60,000 shares preferred and 124,718 out of 125,000 shares common.

[The Havana Commercial Co. owns all of the capital stock—100 shares—of the M. Valle y Co.—cigars.]

Havana Cigar & Tobacco Factories, Lim.—owns 6,774 out of 25,000 shares ordinary stock.

J. S. Murias y Co.—owns all of stock—7,500 shares.

Blackwell's Durham Tobacco Co.—in addition to a stock interest in the

moment to say that the bill averred the origin and nature of the American Tobacco Company and the origin and nature of all the other defendant corporations, whether accessory or subsidiary, and the connection of the individual defendants with such corporations. In effect the bill charged that the individual defendants and the defendant corporations were engaged in a conspiracy in restraint of interstate and foreign trade in tobacco and the products of tobacco and constituted a combination in restraint of such trade in violation of the first section of the act, and also were attempting to monopolize and were actually a monopolization of such trade in violation of the second section. In support of these charges general averments were made in the bill as to the wrongful purpose and intent with which acts were committed which it was alleged brought about the alleged wrongful result.

The prayer of the bill was as follows:

"Wherefore petitioner prays:

Amsterdam Supply Co., has the stock interest, indicated, in the following defendant corporations:

F. P. Penn Tobacco Co.—owns 1,002 out of 1,503 shares.

Scotten-Dillon Co.—owns $10,000 out of $500,000 of stock.

Wells-Whitehead Tobacco Co.—owns all of stock, 1,500 shares.

Conley Foil Company—owns all of the capital stock (3,000 shares) of the Johnson Tin Foil and Metal Co.

P. Lorillard Company—has a stock interest in the American Snuff Company and the Amsterdam Supply Co.

R. J. Reynolds Tobacco Co.—in addition to a stock interest in the Amsterdam Supply Company and the MacAndrews & Forbes Company, owns two-thirds of the 5,000 shares of stock of the Liipfert Scales Co.

The British-American Tobacco Co.—in addition to a small interest in the Amsterdam Supply Company, has the following stock interest in certain defendants:

David Dunlop—plug—owns 3,000 of 4,500 shares.

W. S. Mathews & Sons—smoking—owns 3,637 out of 5,000 shares of stock.

T. C. Williams Company—plug—owns all of stock, 4,000 shares.

"1. That the contracts, combinations, and conspiracies in restraint of trade and commerce among the States and with foreign nations, together with the attempts to monopolize and the monopolies of the same hereinbefore described be declared illegal and in violation of the act of Congress passed July 2, 1890, and subsequent acts, and that they be prevented and restrained by proper orders of the court.

"2. That the agreements, contracts, combinations, and conspiracies entered into by the defendants on or about September 27, 1902, and thereafter, and evidenced among other things by the two written agreements of that date, Exhibits 1 and 2 hereto, be declared illegal, and that injunctions issue restraining and prohibiting defendants from doing anything in pursuance of or in furtherance of the same within the jurisdiction of the United States.

"3. That the Imperial Tobacco Company, its officers, agents, and servants be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States until it shall cease to observe or act in pursuance of said agreements, contracts, combinations, and conspiracies entered into by it and other defendants on or about September 27, 1902, and thereafter, and evidenced among other things by the contracts of that date, Exhibits 1 and 2 hereto.

"4. That the British-American Tobacco Company be adjudged an unlawful instrumentality created solely for carrying into effect the objects and purposes of said contract, combination, and conspiracy entered into on or about September 27, 1902, and thereafter, and that it be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States.

"5. That the court adjudge the American Tobacco Company, the American Snuff Company, the American Cigar Company, the American Stogie Company, the Mac-Andrews & Forbes Company, and the Conley Foil Company is each a combination in restraint of interstate and

foreign trade and commerce; and that each has attempted and is attempting to monopolize, is in combination and conspiracy with other persons and corporations to monopolize, and has monopolized part of the trade and commerce among the several States and with foreign nations; and order and decree that each one of them be restrained from engaging in interstate or foreign commerce, or, if the court should be of opinion that the public interests will be better subserved thereby, that receivers be appointed to take possession of all the property, assets, business, and affairs of said defendants and wind up the same, and otherwise take such course in regard thereto as will bring about conditions in trade and commerce among the States and with foreign nations in harmony with law.

"6. That the holding of stock by one of the defendant corporations in another under the circumstances shown be declared illegal, and that each of them be enjoined from continuing to hold or own such shares in another and from exercising any right in connection therewith.

"7. That defendants, each and all, be enjoined from continuing to carry out the purposes of the above-described contracts, combinations, conspiracies, and attempts to monopolize by the means herein described, or by any other, and be required to desist and withdraw from all connection with the same.

"8. That each of the defendants be enjoined from purchasing leaf tobacco or from selling and distributing its manufactured output as a part of interstate and foreign trade and commerce in conjunction or combination with any other defendant, and from taking part or being interested in any agreement of combination intended to destroy competition among them in reference to such purchases or sales.

"9. That petitioner have such other, further, and general relief as may be proper."

As to the answers, it suffices to say that all the individual

and corporate defendants other than the foreign corporations denied the charges of wrongdoing and illegal combination and the corporate defendants in particular in addition averred their right under state charters by virtue of which they existed to own and possess the property which they held and further averred that they were engaged in manufacturing and that any combination amongst them related only to that subject, and therefore was not within the Anti-trust Act. The two foreign corporations asserted the validity of their corporate organization and of the assailed agreements, and denied any participation in the alleged wrongful combination.

After the taking of much testimony before a special examiner, the case was heard before a court consisting of four judges, constituted under the expediting act of February 11, 1903. In deciding the case in favor of the Government each of the four judges delivered an opinion (164 Fed. Rep. 700). A final decree was entered on December 15, 1908. The petition was dismissed as to the English corporations, three of the subsidiary corporations, the United Cigar Stores Company and all the individual defendants. It was decreed that the defendants other than those against whom the petition was dismissed, had theretofore entered into and were parties to combinations in restraint of trade, etc., in violation of the Anti-trust Act and said defendants and each of them, their officers, agents, etc., were restrained and enjoined "from directly or indirectly doing any act or thing whatsoever in furtherance of the objects and purposes of said combinations and from continuing as parties thereto." It specifically found that each of the defendants, "The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and MacAndrews & Forbes Company constitutes and is itself a combination in violation of the said Act of Congress." The corporations thus named, their officers, etc., were next restrained

and enjoined "from further directly or indirectly engaging in interstate or foreign trade and commerce in leaf tobacco or the products manufactured therefrom or articles necessary or useful in connection therewith. But if any of said last-named defendants can hereafter affirmatively show the restoration of reasonably competitive conditions, such defendant may apply to this court for a modification, suspension or dissolution of the injunction herein granted against it." The decree then enumerated the various corporations which it was found held or claimed to own some or all of the capital stock of other corporations and particularly specified such other corporations, and then made the following restraining provisions:

"Wherefore each and all of defendants, The American Tobacco Company, the American Snuff Company, the American Cigar Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, Blackwell's Durham Tobacco Company and Conley Foil Company, their officers, directors, agents, servants and employés are hereby restrained and enjoined from acquiring by conveyance or otherwise, the plant or business of any such corporation wherein any one of them now holds or owns stock; and each and all of said defendant corporations so holding stock in other corporations as above specified, their officers, directors, agents, servants and employés, are further enjoined from voting or attempting to vote said stock at any meeting of the stockholders of the corporation issuing the same and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of such corporation. And it is further ordered and decreed that each and every of the defendant corporations the stock of which is held by any other defendant corporation as hereinbefore shown, their officers, directors, servants and agents, be and they are hereby respectively and collectively restrained and enjoined from permitting the stock so held to be voted by any other de-

fendant holding or claiming to own the same or by its attorneys or agents at any corporate election for directors or officers and from permitting or suffering any other defendant corporation claiming to own or hold stock therein, or its officers or agents, to exercise any control whatsoever over its corporate acts."

Judgment for costs was given in favor of the petitioner and against the defendants as to whom the petition had not been dismissed, except the R. P. Richardson, Jr., & Company, a corporation which had consented to the decree. The decree also contained a provision that the defendants or any of them should not be prevented "from the institution, prosecution or defense of any suit, action or proceeding to prevent or restrain the infringement of a trade-mark used in interstate commerce or otherwise assert or defend a claim to any property or rights." In the event of a taking of an appeal to this court, the decree provided that the injunction which it directed "shall be suspended during the pendency of such appeal."

The United States appealed, as did also the various defendants against whom the decree was entered. For the Government it is contended: 1. That the petition should not have been dismissed as to the individual defendants. 2. That it should not have been dismissed as to the two foreign corporations—the Imperial Tobacco Company and the British-American Tobacco Company and the domestic corporations controlled by the latter, and that, on the contrary, the decree should have commanded the observance of the Anti-trust Act by the foreign corporations so far as their dealings in the United States were concerned, and should have restrained those companies from doing any act in the United States in violation of the Anti-trust Act, whether or not the right to do said acts was asserted to have arisen pursuant to the contracts made outside of or within the United States. 3. The petition should not have been dismissed as to the United Cigar Stores

Company. 4. The final decree should have adjudged defendants parties to unlawful contracts and conspiracies. 5. The final decree should have adjudged that defendants were attempting to monopolize and had monopolized parts of commerce. More particularly, it is urged, it should have adjudged that the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, the Conley Foil Company and the British-American Tobacco Company were severally attempting to monopolize and had monopolized parts of commerce, and that appropriate remedies should have been applied. 6. The decree was not sufficiently specific, since it should have described with more particularity the methods which the defendants had followed in forming and carrying out their unlawful purpose, and should have prohibited the resort to similar methods. 7. The decree should have specified the shares in corporations disclosed by the evidence to be owned by the parties to the conspiracy, and should have enjoined those parties from exercising any control over the corporations in which such stock was held, and the latter, if made defendant, from permitting such control, and should have also enjoined the collecting of any dividends upon the stock. 8. The decree improperly provided that nothing therein should prevent defendants from prosecuting or defending suits; also improperly suspended the injunction pending appeal.

The defendants, by their assignments of error, complain because the petition was not dismissed as to all, and more specifically, (a) because they were adjudged parties to a combination in restraint of interstate and foreign commerce, and enjoined accordingly; (b) because certain defendant corporations holding shares in others were enjoined from voting them or exercising control over the issuing company, and the latter from permitting this; and (c) because the American Tobacco Company, American

Snuff Company, American Cigar Company, American Stogie Company and the MacAndrews & Forbes Company were adjudged unlawful combinations and restrained from engaging in interstate and foreign commerce.

The elaborate arguments made by both sides at bar present in many forms of statement the conflicting contentions resulting from the nature and character of the suit and the defense thereto, the decree of the lower court and the propositions assigned as error to which we have just referred. In so far as all or any of these contentions, as many of them in fact do, involve a conflict as to the application and effect of §§ 1 and 2 of the Anti-trust Act, their consideration has been greatly simplified by the analysis and review of that act and the construction affixed to the sections in question in the case of *Standard Oil Company* v. *United States,* quite recently decided, *ante,* p. 1. In so far as the contentions relate to the disputed propositions of fact, we think from the view which we take of the case they need not be referred to, since in our opinion the case can be disposed of by considering only those facts which are indisputable and by applying to the inferences properly deducible from such facts the meaning and effect of the law as expounded in accordance with the previous decisions of this court.

We shall divide our investigation of the case into three subjects: First, the undisputed facts; second, the meaning of the Anti-trust Act and its application as correctly construed to the ultimate conclusions of fact deducible from the proof; third, the remedies to be applied.

First. Undisputed facts.

The matters to be considered under this heading we think can best be made clear by stating the merest outline of the condition of the tobacco industry prior to what is asserted to have been the initial movement in the combination which the suit assails and in the light so afforded to briefly recite the history of the assailed acts and con-

tracts. We shall divide the subject into two periods, (*a*) the one from the time of the organization of the first or old American Tobacco Company in 1890 to the organization of the Continental Tobacco Company, and (*b*) from the date of such organization to the filing of the bill in this case.

Summarizing in the broadest way the conditions which obtained prior to 1890, as to the production, manufacture and distribution of tobacco, the following general facts are adequate to portray the situation.

Tobacco was grown in many sections of the country having diversity of soil and climate and therefore was subject to various vicissitudes resulting from the places of production and consequently varied in quality. The great diversity of use to which tobacco was applied in manufacturing caused it to be that there was a demand for all the various qualities. The demand for all qualities was not local, but widespread, extending as well to domestic as to foreign trade, and, therefore, all the products were marketed under competitive conditions of a peculiarly advantageous nature. The manufacture of the product in this country in various forms was successfully carried on by many individuals or concerns scattered throughout the country, a larger number perhaps of the manufacturers being in the vicinage of production and others being advantageously situated in or near the principal markets of distribution.

Before January, 1890, five distinct concerns—Allen & Ginter, with factory at Richmond, Va.; W. Duke, Sons & Co., with factories at Durham, North Carolina, and New York City; Kinney Tobacco Company, with factory at New York City; W. S. Kimball & Company, with factory at Rochester, New York; Goodwin & Company, with factory at Brooklyn, New York—manufactured, distributed and sold in the United States and abroad 95 per cent of all the domestic cigarette and less than 8 per cent

of the smoking tobacco produced in the United States. There is no doubt that these factories were competitors in the purchase of the raw product which they manufactured and in the distribution and sale of the manufactured products. Indeed it is shown that prior to 1890 not only had normal and ordinary competition existed between the factories in question, but that the competition had been fierce and abnormal. In January, 1890, having agreed upon a capital stock of $25,000,000, all to be divided amongst them, and who should be directors, the concerns referred to organized the American Tobacco Company in New Jersey, "for trading and manufacturing," with broad powers, and conveyed to it the assets and businesses, including good will and right to use the names of the old concerns; and thereafter this corporation carried on the business of all. The $25,000,000 of stock of the Tobacco Company was allotted to the charter members as follows: Allen & Ginter, $3,000,000 preferred, $4,500,000 common; W. Duke, Sons & Co., $3,000,000 preferred, $4,500,000 common; Kinney Tobacco Company, $2,000,000 preferred, $3,000,000 common; W. S. Kimball & Co., $1,000,000 preferred, $1,500,000 common; and Goodwin & Co., $1,000,000 preferred, $1,500,000 common.

There is a charge that the valuation at which the respective properties were capitalized in the new corporation was enormously in excess of their actual value. We, however, put that subject aside, since we propose only to deal with facts which are not in controversy.

Shortly after the formation of the new corporation the Goodwin & Co. factory was closed, and the directors ordered "that the manufacture of all tobacco cigarettes be concentrated at Richmond." The new corporation in 1890, the first year of its operation, manufactured about two and one half billion cigarettes, that is, about 96 or 97 per cent of the total domestic output, and about five and one-half million pounds of smoking tobacco out

of a total domestic product of nearly seventy million pounds.

In a little over a year after the organization of the company it increased its capital stock by ten million dollars. The purpose of this increase is inferable from the considerations which we now state.

There was a firm known as Pfingst, Doerhoefer & Co., consisting of a number of partners, who had been long and successfully carrying on the business of manufacturing plug tobacco in Louisville, Kentucky, and distributing it through the channels of interstate commerce. In January, 1891, this firm was converted into a corporation known as the National Tobacco Works, having a capital stock of $400,000 all of which was issued to the partners. Almost immediately thereafter, in the month of February, the American Tobacco Company became the purchaser of all the capital stock of the new corporation, paying $600,000 cash and $1,200,000 in stock of the American Tobacco Company. The members of the previously existing firm bound themselves by contract with the American Tobacco Company to enter its service and manage the business and property sold, and each further agreed that for ten years he would not engage in carrying on, directly or indirectly, or permit or suffer the use of his name in connection with the carrying on of the tobacco business in any form.

In April following, the American Tobacco Company bought out the business of Philip Whitlock, of Richmond, Virginia, who was engaged in the manufacture of cheroots and cigars, and with the exclusive right to use the name of Whitlock. The consideration for this purchase was $300,000, and Whitlock agreed to become an employé of the American Tobacco Company for a number of years and not to engage for twenty years in the tobacco business.

In the month of April the American Tobacco Company also acquired the business of Marburg Brothers, a well-known firm located at Baltimore, Maryland, and engaged

in the manufacture and distribution of tobacco, principally smoking and snuff. The consideration was a cash payment of $164,637.65 and stock to the amount of $3,075,000. The members of the firm also conveyed the right to the use of the firm name and agreed not to engage in the tobacco business for a lengthy period.

Again, in the same month, the American Tobacco Company bought out a tobacco firm of old standing, also located in Baltimore, known as G. W. Gail & Ax, engaged principally in manufacturing and selling smoking tobacco, buying with the business the exclusive right to use the name of the firm or the partners, and the members of the firm agreed not to engage in the tobacco business for a specified period. The consideration for this purchase was $77,582.66 in cash and stock to the amount of $1,760,000. The plant was abandoned soon after.

The result of these purchases was manifested at once in the product of the company for the year 1891, as will appear from a note in the margin.[1] It will be seen that as to cheroots, smoking tobacco, fine cut tobacco, snuff and plug tobacco, the company had become a factor in all branches of the tobacco industry.

Referring to the occurrences of the year 1891, as in all

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[1] The output of the American Tobacco Company for 1891 was—

	Number.	Pounds.
Cigarettes	2,788,778,000	.....
Cheroots and little cigars	40,009,000	.....
Smoking	.....	13,813,355
Fine cut	.....	560,633
Snuff	.....	383,162
Plug	.....	4,442,774
Total output for the United States, 1891—		
Cigarettes	3,137,318,596	.....
Smoking	.....	76,708,300
Fine cut	.....	16,968,870
Plug and twist	.....	166,177,915
Snuff	.....	10,674,241

respects typical of the occurrences which took place in all the other years of the first period, that is during the years 1892, 1893, 1894, 1895, 1896, 1897 and 1898, we content ourselves with saying that it is undisputed that between February, 1891, and October, 1898, including the purchases which we have specifically referred to, the American Tobacco Company acquired fifteen going tobacco concerns doing business in the States of Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina and Virginia. For ten of the plants an all cash consideration of $6,410,235.26 was paid, while the payments for the remaining five aggregated in cash $1,115,100.95 and in stock $4,123,000. It is worth noting that the last purchase, in October, 1898, was of the Drummond Tobacco Company, a Missouri corporation dealing principally in plug, for which a cash consideration was paid of $3,457,500.

The corporations which were combined for the purpose of forming the American Tobacco Company produced a very small portion of plug tobacco. That an increase in this direction was contemplated is manifested by the almost immediate increase of the stock and its use for the purpose of acquiring, as we have indicated, in 1891 and 1892, the ownership and control of concerns manufacturing plug tobacco and the consequent increase in that branch of production. There is no dispute that as early as 1893 the president of the American Tobacco Company, by authority of the corporation, approached leading manufacturers of plug tobacco and sought to bring about a combination of the plug tobacco interests, and upon the failure to accomplish this, ruinous competition, by lowering the price of plug below its cost, ensued. As a result of this warfare, which continued until 1898, the American Tobacco Company sustained severe losses aggregating more than four millions of dollars. The warfare produced its natural result, not only because the company acquired

during the last two years of the campaign, as we have stated, control of important plug tobacco concerns, but others engaged in that industry came to terms. We say this because in 1898, in connection with several leading plug manufacturers, the American Tobacco Company organized a New Jersey corporation styled the Continental Tobacco Company, for "trading and manufacturing," with a capital of $75,000,000, afterwards increased to $100,000,000. The new company issued its stock and took transfers to the plants, assets and businesses of five large and successful competing plug manufacturers.[1]

The American Tobacco Company also conveyed to this corporation, at large valuations, the assets, brands, real estate and good will pertaining to its plug tobacco business, including the National Tobacco Works, the James G. Butler Tobacco Co., Drummond Tobacco Company, and Brown Tobacco Co., receiving as consideration $30,274,200 of stock (one-half common and one-half preferred), $300,000 cash, and an additional sum for losses sustained in the plug business during 1898, $840,035. Mr. Duke, the president of the American Tobacco Company, also became president of the Continental Company.

Under the preliminary agreement which was made looking to the formation of the Continental Tobacco

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[1] P. J. Sorg Co., having factory at Middletown, Ohio, who received preferred stock $4,350,000, common stock $4,525,000, and cash $224,375.

John Finzer and Brothers, having factory at Louisville, Kentucky, who received preferred stock $2,250,000, common stock $3,050,000, and cash $550,000.

Daniel Scotten & Co., having factory at Detroit, Michigan, who received preferred stock $1,911,100, and common stock $3,012,500.

P. H. Mayo & Bros., having factory at Richmond, Va., who received preferred stock $1,250,000, common stock $1,925,000, and cash $66,125.

John Wright Co., having factory at Richmond, Va., who received preferred stock $495,000, common stock $495,000, and cash $4,116.67.

Company, that company acquired from the holders all the $3,000,000 of the common stock of the P. Lorillard Company in exchange for $6,000,000 of its stock, and $1,581,300 of the $2,000,000 preferred in exchange for notes aggregating a sum considerably larger. The Lorillard Company, however, although it thus passed practically under the control of the American Tobacco Company by virtue of its ownership of stock in the Continental Company, was not liquidated, but its business continued to be conducted as a distinct corporation, its goods being marked and put upon the market just as if they were the manufacture of an independent concern.

Following the organization of the Continental Tobacco Company the American Tobacco Company increased its capital stock from thirty-five millions of dollars to seventy millions of dollars, and declared a stock dividend of one hundred per cent on its common stock, that is, a stock dividend of $21,000,000.

As the facts just stated bring us to the end of the first period which at the outset we stated it was our purpose to review, it is well briefly to point out the increase in the power and control of the American Tobacco Company and the extension of its activities to all forms of tobacco products which had been accomplished just prior to the organization of the Continental Tobacco Company. Nothing could show it more clearly than the following: At the end of the time the company was manufacturing eighty-six per cent or thereabouts of all the cigarettes produced in the United States, above twenty-six per cent of all the smoking tobacco, more than twenty-two per cent of all plug tobacco, fifty-one per cent of all little cigars, six per cent each of all snuff and fine cut tobacco, and over two per cent of all cigars and cheroots.

A brief reference to the occurrences of the second period, that is, from and after the organization of the Continental Tobacco Company up to the time of the bringing of this

suit, will serve to make evident that the transactions in their essence had all the characteristics of the occurrences of the first period.

In the year 1899 and thereafter either the American or the Continental company, for cash or stock, at an aggregate cost of fifty millions of dollars ($50,000,000), bought and closed up some thirty competing corporations and partnerships theretofore engaged in interstate and foreign commerce as manufacturers, sellers, and distributors of tobacco and related commodities, the interested parties covenanting not to engage in the business. Likewise the two corporations acquired for cash, by issuing stock, and otherwise, control of many competing corporations, now going concerns, with plants in various States, Cuba and Porto Rico, which manufactured, bought, sold and distributed tobacco products or related articles throughout the United States and foreign countries, and took from the parties in interest covenants not to engage in the tobacco business.

The plants thus acquired were operated until the merger in 1904, to which we shall hereafter refer, as a part of the general system of the American and Continental companies. The power resulting from and the purpose contemplated in making these acquisitions by the companies just referred to, however, may not be measured by considering alone the business of the company directly acquired, since some of those companies were made the vehicles as representing the American or Continental company for acquiring and holding the stock of other and competing companies, thus amplifying the power resulting from the acquisitions directly made by the American or Continental company, without ostensibly doing so. It is besides undisputed that in many instances the acquired corporations with the subsidiary companies over which they had control through stock ownership were carried on ostensibly as independent concerns disconnected

from either the American or the Continental company, although they were controlled and owned by one or the other of these companies. Without going into details on these subjects, for the sake of brevity, we append in the margin a statement of the corporations thus acquired, with the mention of the competing concerns which such corporations acquired.[1]

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[1] Monopol Tobacco Works (New York, N. Y.)—Capital $40,000—cigarettes and smoking tobacco. In 1899 the American Tobacco Co. acquired all the shares for $250,000, and it is now a selling agency.

Luhrman & Wilbern Tobacco Company (Middletown, Ohio)—Capital $900,000—scrap tobacco. This business was formerly carried on by a partnership.

Mengel Box Company (Louisville, Ky.)—Capital $2,000,000—boxes for packing tobacco. This company has acquired the stock ($150,000) of Columbia Box Company and of Tyler Box Company ($25,000), both at St. Louis.

The Porto Rican-American Tobacco Company (Porto Rico)—Capital $1,799,600. In 1899 the American Company caused the organization of the Porto Rican-American Tobacco Company, which took over the partnership business of Rucabado y Portela—manufacturer of cigars and cigarettes—with covenants not to compete. The American Tobacco Company and American Cigar Company each hold $585,300 of the stock; the balance is in the hands of individuals.

Kentucky Tobacco Product Company (Louisville, Ky.)—Capital $1,000,000. In 1899 the Continental Company acquired control of the Louisville Spirit-Cured Tobacco Co., engaged in curing and treating tobacco and utilizing the stems for fertilizers. By agreement, the Kentucky Tobacco Product Company was organized in New Jersey, with $1,000,000 capital, $450,000 issued to the old stockholders, and $550,000 to Continental Company as consideration for agreement to supply stems.

Golden Belt Manufacturing Company (North Carolina)—Capital, $700,000—cotton bags and containers. In 1899 the American Tobacco Company acquired the business of this corporation, which was formed to take over a going business.

The Conley Foil Company (New York)—Tinfoil Combination—Capital, $825,000. In December, 1899, The American Tobacco Company secured control of the business of John Conley & Son (Partnership), New York, N. Y., manufacturers of tinfoil, an essential for pack-

It is of the utmost importance to observe that the acquisitions made by the subsidiary corporations in some cases likewise show the remarkable fact stated above, that is, the disbursement of enormous amounts of money to

ing tobacco products. By agreement the Conley Foil Company was incorporated in New Jersey "for trading and manufacturing," etc., with $250,000 capital (afterwards $375,000 and $825,000)—which took over the firm's business and assets, etc., and The American Tobacco Company became owner of the majority shares. The Conley Foil Company has acquired all the stock of the Johnson Tinfoil & Metal Company—a defendant—of St. Louis, a leading competitor, and they supply under fixed contracts, the tinfoil used by defendants.

R. J. Reynolds Tobacco Company (Winston-Salem, North Carolina). In 1899 the Continental Tobacco Company acquired control of the R. J. Reynolds Tobacco Company, one of the largest manufacturers of plug—output in 1898, 6,000,000 pounds. By agreement, a new corporation (with same name) was organized in New Jersey and capitalized at $5,000,000 (afterwards $7,525,000), which took over the business and assets of the old one. The Continental Company immediately acquired the majority shares and The American Company now holds $5,000,000 of stock. The separate organization has been preserved.

There was acquired in the name of the new Reynolds Company, with covenants against competition, the following plants:

In 1900, T. L. Vaughn & Company, partnership, of Winston, N. C.; consideration, $90,506; Brown Brothers Company, a North Carolina corporation, Winston, N. C.; consideration, $67,615; and P. H. Hanes & Company and B. F. Hanes & Company, Winston, N. C., partnership; consideration, $671,950.

In 1905, Rucker & Witten Tobacco Company, Martinsville, Va.; consideration, $512,898.

In 1906, D. H. Spencer & Company, Martinsville, Va.; consideration, $314,255.

(All of the foregoing plants were closed as soon as purchased.)

A majority of the $400,000 capital stock in the Liipfert-Scales Company, of Winston, N. C., a corporation largely engaged in the manufacture of plug tobacco and interstate and foreign commerce in leaf tobacco and its products, was acquired by the Reynolds Company. The separate organization of the Liipfert-Scales Company is preserved and the business carried on under its corporate name.

The R. J. Reynolds Tobacco Company also holds $98,300 of stock of

acquire plants, which on being purchased were not utilized but were immediately closed. It is also to be remarked, that the facts stated in the memorandum in the margin show on their face a singular identity between the conceptions which governed the transactions of this latter period with those which evidently existed at the very birth of the original organization of the American Tobacco Company, as exemplified by the transactions in the first period. A statement of particular transactions outside of those previously referred to as having occurred during the period in question will serve additionally to make the situation clear. And to accomplish this purpose we shall, as briefly as may be consistent with clarity, separately refer to the facts concerning the organization during the

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the MacAndrews & Forbes Company and $9,600 of the Amsterdam Supply Company.

Blackwell's Durham Tobacco Company (Durham, N. C.)—Capital $1,000,000. In 1899 The American Tobacco Company procured for $4,000,000 all the stock of Blackwell's Durham Tobacco Company at Durham, N. C., manufacturer and distributer of tobacco products. Thereupon the Blackwell's Durham Tobacco Company, of New Jersey, capital, $1,000,000, all owned by the American, was organized and took over the assets of the old company, then under receivership. Its separate organization has been preserved.

The Durham Company has acquired control of the following competitors—Reynold's Tobacco Company; F. R. Penn Tobacco Company; and Wells-Whitehead Tobacco Company.

The following companies came also under the control of the American Tobacco Company through acquired stock ownership.

S. Anargyros—capital $650,000—Turkish cigarettes. In 1890 The American Tobacco Company procured the organization of corporation of S. Anargyros, which took over that individual's going business and has since controlled it. Through this company the business in Turkish cigarettes is largely conducted.

The John Bollman Company (San Francisco)—Capital $200,000—cigarettes. In 1900 The American Tobacco Company procured organization of The John Bollman Company, which took over the business of the former concern in exchange for stock. Its separate organization has been preserved.

second period of the five corporations which were named as defendants in the bill, as heretofore stated and which for the purpose of designation we have hitherto classified as accessory defendants, such corporations being the American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company (licorice), and Conley Foil Company.

(1). *The American Snuff Company.*

As we have seen, the American Tobacco Company at the commencement of the first period produced a very small quantity of snuff. Its capacity, however, in that regard was augmented owing particularly to the formation of the Continental Tobacco Company and the acquisition of the Lorillard Company, by which it came to be a serious factor as a snuff producer. There shortly ensued an aggressive competition in the snuff business between the American Tobacco Company, with the force acquired from the vantage ground resulting from the dominancy of its expanded organization, and others in the trade operating independently of that organization. The result was identical with that which had previously arisen from like conditions in the past.

In March, 1900, there was organized in New Jersey a corporation known as The American Snuff Company, with a capital of $25,000,000, one-half preferred and one-half common, which took over the snuff business of the P. Lorillard Company, Continental Tobacco Company and The American Tobacco Company, with that of a large competitor, viz: The Atlantic Snuff Co. The stock of the new company was thus apportioned: Atlantic Snuff Company, preferred, $7,500,000, common, $25,000,000; P. Lorillard Company, preferred, $1,124,700, common, $3,459,400; The American Tobacco Company, preferred, $1,177,800, common, $3,227,500; Continental Tobacco Company, preferred, $197,500, common, $813,100. The stock issued to Continental Tobacco Company and the

defendants, P. Lorillard Company and the American Tobacco Company, is still held by the latter, and they have at all times had a controlling interest in the Snuff Company. All the companies, together with their officers and directors, covenanted that they would not thereafter engage as competitors in the tobacco business or the manufacture, sale, or distribution of snuff.

Among the assets transferred by the Atlantic Snuff Company to American Snuff Company were all the shares ($600,000) of W. E. Garrett & Sons, Inc., then and now one of the oldest and very largest producers of snuff, for a long time and still engaged at Yorkland, Del., in interstate and foreign commerce in tobacco and its products, and which controlled through stock ownership the Southern Snuff Company, Memphis, Tenn.; Dental Snuff Company, Lynchburg, Va., and Stewart-Ralph Snuff Company, Clarksville, Tenn. The separate existence of W. E. Garrett & Sons, Inc., has been preserved and its business conducted under the corporate name. In March, 1900, the American Snuff Company acquired all the shares of George W. Helme Company, one of the oldest and largest producers of snuff and actively engaged at Helmetta, N. J., in interstate and foreign commerce in competition with defendants, by issuing in exchange therefor $2,000,000 preferred stock and $1,000,000 common; and it thereafter took a conveyance of all assets of the acquired company and now operates the plant under its own name.

As a result of the transactions just stated it came to pass that the American Tobacco Company, which had at the end of the first period only a very small percentage of the snuff manufacturing business, came virtually to have the dominant control as a manufacturer of that product.

2. *Conley Foil Company—manufacturers of tinfoil, an essential for packing tobacco products.*

In December, 1899, the American Tobacco Company secured control of the business of John Conley & Sons, a

partnership of New York City. By agreement the Conley Foil Company was incorporated in New York "for trading and manufacturing," etc., with $250,000 capital, ultimately increased to $825,000. The corporation took over the business and assets of the firm, and the American Tobacco Company became owner of a majority of the shares of stock. The Conley Foil Company has acquired all the shares of stock of the Johnson Tinfoil & Metal Company, of St. Louis, a leading competitor, and they supply under fixed contracts at remunerative prices the tinfoil used by the defendants, which constitutes the major part of the total production in the United States.

3. *American Cigar Company.*

Prior to 1901 the American and Continental tobacco companies manufactured, sold, and distributed cigars, stogies, and cheroots. In the year stated the companies determined to engage in the business upon a larger scale. Under agreement with Powell, Smith & Company, large manufacturers and dealers in cigars, they caused the incorporation in New Jersey of the American Cigar Company "for trading and manufacturing," etc., to which all three conveyed their said business, and it has since carried on the same. The American and Continental companies each acquired 46½ per cent of the shares, and Powell, Smith & Company 7 per cent; the original capitalization was $10,000,000 (afterwards $20,000,000), and more than three-fourths is owned by the former. The Cigar Company acquired many competitors (partnerships and corporations) engaged in interstate and foreign commerce, taking from the parties covenants against engaging in the tobacco business; and it has also procured the organization of controlled corporations which have acquired competing manufacturers, jobbers and distributors in the United States, Cuba and Porto Rico. It manufactures, sells and distributes a considerable per centage of domestic cigars; is the dominating factor in the tobacco business,

foreign and domestic, in Cuba and Porto Rico, and is there engaged in tobacco planting. It also controls corporate jobbers in California, Alabama, Virginia, Pennsylvania, Georgia, Louisiana, New Jersey and Tennessee.

4. *The MacAndrews & Forbes Company—manufacturers of licorice.*

There is no question that licorice paste is an essential ingredient in the manufacture of plug tobacco, and that one who is debarred from obtaining such paste would therefore be unable to engage in or carry on the manufacture of such product. The control over this article was thus secured: In May, 1902, the Continental Company secured control of MacAndrews & Forbes Co. of Newark, New Jersey, and organized "for trading and manufacturing" a corporation known as the MacAndrews & Forbes Co., with a capital of $7,000,000, $4,000,000 preferred and $3,000,000 common, which took over the business of MacAndrews & Forbes and another large competitor. The Continental Company acquired two-thirds of the common stock by agreeing to purchase its supply of paste from the new company. The American Tobacco Company, at the time of the filing the bill, was the owner of $2,112,900 of the common stock and $750,000 preferred. By various purchases and agreements the MacAndrews & Forbes Company acquired, substantially, the business of all competitors. Thus, in June, 1902, it purchased the business of the Stamford Mfg. Co., of Stamford, Connecticut, and incorporated the National Licorice Company, which acquired the business of Young & Smylie and F. B. & V. P. Scudder, and the National Company agreed with MacAndrews & Forbes not to produce licorice for tobacco manufacturers. In 1906 all the stock in the J. S. Young Company ($1,800,000), which had been organized to take over the business of the J. S. Young Co. of Baltimore, Md., was acquired by the MacAndrews & Forbes Co. The MacAndrews & Forbes Co. use in excess

of ninety-five per cent of the licorice root consumed in the United States.

5. *American Stogie Company.*

In May, 1903, the American Cigar Company and the American and Continental Tobacco Companies caused the American Stogie Company to be incorporated in New Jersey, with $11,979,000 capital, which immediately took over the stogie and tobie business of the companies named in exchange for $8,206,275 stock and then in the usual ways acquired the business of others in the manufacture, sale, and distribution of such products, with covenants not to compete. It acquired in exchange for $3,647,725 stock all shares of United States Cigar Company (which had previously acquired and owned the business of important competitors) and subsequently took the conveyance of the plant and assets. The majority shares always have been held by defendant, the American Cigar Company.

As we think the legitimate inferences deducible from the undisputed facts which we have thus stated will be sufficient to dispose of the controversy, we do not deem it necessary to expand this statement so as to cause it to embrace a recital of the undisputed facts concerning the entry of the American Tobacco Company into the retail tobacco trade through the acquisition of a controlling interest in the stock of what is known as the United Cigar Stores Company, as well as to some other subjects which for the sake of brevity we likewise pass over, in order to come at once to a statement concerning the foreign companies.

The English Companies.

In September, 1901, the American Tobacco Co. purchased for $5,347,000 a Liverpool (Eng.) corporation, known as Ogden's Limited, there engaged in manufacturing and distributing tobacco products. A trade conflict which at once ensued caused many of the English manufacturers to combine into an incorporation known as the

Imperial Tobacco Company of Great Britain and Ireland, capital 15,000,000, afterwards increased to 18,000,000, pounds sterling. The trade war was continued between this corporation and the American Tobacco Company, with a result substantially identical with that which had hitherto, as we have seen, arisen from such a situation.

In September, 1902, the Imperial and the American companies entered into contracts (executed in England) stipulating that the former should limit its business to the United Kingdom, except purchasing leaf in the United States (it buys 54,000,000 pounds annually); that the American companies should limit their business to the United States, its dependencies and Cuba; and that the British-American Tobacco Company, with capital of 6,000,000 pounds sterling apportioned between them, should be organized, take over the export business of both, and operate in other countries, etc. This arrangement, was immediately put into effect, and has been observed.

The Imperial Company holds one-third and the American Company two-thirds of the capital stock of the British-American Tobacco Company, Limited. The latter company maintains a branch office in New York City and the vice-president of the American Tobacco Company is a principal officer. This company uses large quantities of domestic leaf, partly exported to various plants abroad and about half manufactured here and then exported. By agreement, all this is purchased through the American Tobacco Company. In addition to many plants abroad it has warehouses in various States and plants at Petersburg, Va., and Durham, N. C., where tobacco is manufactured and then exported.

The purchase of necessary leaf tobacco in the United States by the Imperial Company is now made through a resident general agent and is exported as a part of foreign commerce.

Not to break the continuity of the narrative of facts we

have omitted in the proper chronological order to state the facts relative to what was known as the Consolidated Tobacco Company. We now particularly refer to that subject.

The Consolidated Tobacco Co.

In June, 1901, parties largely interested in the American and Continental companies caused the incorporation in New Jersey of the Consolidated Tobacco Company, capital $30,000,000 (afterwards $40,000,000), with broad powers and perpetual existence; to do business throughout the world, and to guarantee securities of other companies, etc. A majority of shares was taken by a few individuals connected with the old concerns: A. N. Brady, J. B. Duke, A. H. Payne, Thomas Ryan, W. C. Whitney, and P. A. B. Widener. J. B. Duke, president of both the old companies, became president of the Consolidated. Largely in exchange for bonds the new company acquired substantially all the shares of common stock of the old ones. Its business, of holding and financing, was continued until 1904, when, with the American and Continental companies, it was merged into the present American Tobacco Company.

By proceedings in New Jersey, October, 1904, the (old) American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company were merged into one corporation, under the name of The American Tobacco Company, the principal defendant here. The merged company, with perpetual existence, was capitalized at $180,000,000 ($80,000,000 preferred, ordinarily without power to vote).

The powers conferred by the charter are stated in the margin.[1]

[1] To buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; . . . to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder; . . .

Prior to the merger the Consolidated Tobacco Company, a majority of whose $40,000,000 share capital was held by J. B. Duke, Thomas F. Ryan, William C. Whitney, Anthony N. Brady, Peter A. B. Widener and Oliver H. Payne, had acquired, as already stated, nearly all common shares of both old American and Continental companies, and thereby control. The preferred shares, however, were held by many individuals. Through the method of distribution of the stock of the new company, in exchange for shares in the old American and in the Continental Company, it resulted that the same six men in control of the combination through the Consolidated Tobacco Company continued that control by ownership of stock in the merged or new American Tobacco Company. The assets, property, etc., of the old companies passed to the American Tobacco Company (merged), which has since carried on the business.

The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation but

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to carry on any business operations deemed by such merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; . . . to conduct business in all other States, territories, possessions and dependencies of the United States of America, and in all foreign countries; . . . to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock or of any bonds, securities, or other evidences of indebtedness created by any other corporation or corporations of this or any other State or government, and to issue its own obligations in payment or exchange therefor. . . .

were at once abandoned. Second, that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied.

Thus reaching the end of the second period and coming to the time of the bringing of the suit, brevity prevents us from stopping to portray the difference between the condition in 1890 when the (old) American Tobacco Company was organized by the consolidation of five competing cigarette concerns and that which existed at the commencement of the suit. That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the common stock of the new American Tobacco Company exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce indeed relatively over foreign commerce, and the commerce of the whole world, in the raw and manufactured products stand out in such bold relief from the undisputed facts which have been stated as to lead us to pass at once to the second fundamental proposition which we are required to consider. That is, the construction of the Anti-trust Act and the application of the act as rightly construed to the situation as proven in consequence of having determined the ultimate and final inferences properly deducible from the undisputed facts which we have stated.

The construction and application of the Anti-trust Act.

If the Anti-trust Act is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents it can only be because that law will be given a

more comprehensive application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the Anti-trust Act not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Company in the accessory and subsidiary companies and the ownership of stock in any of those companies among themselves were held, as was decided in *United States* v. *Standard Oil Co.*, to be a violation of the act and all relations resulting from such stock ownership were therefore set aside, the question would yet remain whether the principal defendant, the American Tobacco Company, and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the first and second sections of the act. Again, if it were held that the corporations, the existence whereof was due to a combination between such companies and other companies was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations but whose power alone arose from the exercise of the right to acquire and own property would be amenable to the prohibitions of the act. Yet further: Even if this proposition was held in the affirmative the question would remain whether the principal defendant, the American Tobacco Company, when stripped of its stock ownership, would be in and of itself within the prohibitions of the act although that company was organized and took being before the Anti-trust Act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power to cause them to be in

and of themselves either a restraint of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act. The necessity of relief as to all these aspects, we think, seemed to the Government so essential, and the difficulty of giving to the act such a comprehensive and coherent construction as would be adequate to enable it to meet the entire situation, led to what appears to us to be in their essence a resort to methods of construction not compatible one with the other. And the same apparent conflict is presented by the views of the act taken by the defendants when their contentions are accurately tested. Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the old American Tobacco Company, asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that as the act forbids every contract, and combination, it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war. But as thus construing the act by the rule of the letter which kills, would necessarily operate to take out of the reach of the act some one of the accessory and many subsidiary corporations, the existence of which depend not at all upon combination or agreement or contract, but upon mere purchases of property, it is insisted in many forms of argument that the rule of construction to be applied must be the spirit and intent of the act and therefore its prohibitions must be held to extend to acts even if not within the literal terms of the statute if they are within its spirit because done with an intent to bring about the harmful results which it was the purpose of the statute to prohibit. So as to the defendants. While it is argued on the one hand that the forms by which various properties

were acquired in view of the letter of the act exclude many of the assailed transactions from condemnation, it is yet urged that giving to the act the broad construction which it should rightfully receive, whatever may be the form, no condemnation should follow, because, looking at the case as a whole, every act assailed is shown to have been but a legitimate and lawful result of the exertion of honest business methods brought into play for the purpose of advancing trade instead of with the object of obstructing and restraining the same. But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the Anti-trust Act. We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded, the contention really destroys the great purpose of the act, since it renders it impossible to apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter. This must be the case unless it be possible in reason to say that for the purpose of including one class of acts which would not otherwise be embraced a literal construction although in conflict with reason must be applied and for the purpose of including other acts which would not otherwise be embraced a reasonable construction must be resorted to. That is to say two conflicting rules of construction must at one and the same time be applied and adhered to.

The obscurity and resulting uncertainty however, is now but an abstraction because it has been removed by the consideration which we have given quite recently to the construction of the Anti-trust Act in the *Standard Oil Case*. In that case it was held, without departing from

any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the *Trans-Missouri Freight Association* and *Joint Traffic cases*, 166 U. S. 290, and 171 U. S. 505). That such view was a mistaken one was fully pointed out in the *Standard Oil Case* and is additionally shown by a passage in the opinion in the *Joint Traffic Case* as follows (171 U. S. 568): "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it." Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding

that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against which would result from giving to the statute a narrow, unreasoning and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the *Standard Oil Case*, the application of which rule to the statute we now, in the most unequivocal terms, reëxpress and re-affirm.

Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because although it was held in the *Standard*

Oil Case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

Considering then the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon

the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: *a.* By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination. *b.* Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued. *c.* By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the

few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. *d.* By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade. *e.* By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade. *f.* By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders or employés, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act, considerations which also serve to clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.

In stating summarily, as we have done, the conclusions which, in our opinion, are plainly deducible from the undisputed facts, we have not paused to give the reasons why we consider, after great consideration, that the elaborate arguments advanced to affix a different complexion to the case are wholly devoid of merit. We do not, for the sake of brevity, moreover, stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject-matter of the combination which we find to exist and the

combination itself are not within the scope of the Anti-trust Act because when rightly considered they are merely matters of intrastate commerce and therefore subject alone to state control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the *Standard Oil Case*, as not to require restatement.

Leading as this does to the conclusion that the assailed combination in all its aspects—that is to say, whether it be looked at from the point of view of stock ownership or from the standpoint of the principal corporation and the accessory or subsidiary corporations viewed independently, including the foreign corporations in so far as by the contracts made by them they became coöperators in the combination—comes within the prohibitions of the first and second sections of the Anti-trust Act, it remains only finally to consider the remedy which it is our duty to apply to the situation thus found to exist.

The remedy.

Our conclusion being that the combination as a whole, involving all its coöperating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section, and an attempt to monopolize or a monopolization within the second section of the Anti-trust Act, it follows that the relief which we are to afford must be wider than that awarded by the lower court, since that court merely decided that certain of the corporate defendants constituted combinations in violation of the first section of the act, because of the fact that they were formed by the union of previously competing concerns and that the other defendants not dismissed from the action were parties to such combinations or promoted their purposes. We hence, in determining the relief proper to be given, may not model our action upon that granted by the court below, but in order to enable us to

award relief coterminous with the ultimate redress of the wrongs which we find to exist, we must approach the subject of relief from an original point of view. Such subject necessarily takes a two-fold aspect—the character of the permanent relief required and the nature of the temporary relief essential to be applied pending the working out of permanent relief in the event that it be found that it is impossible under the situation as it now exists to at once rectify such existing wrongful condition. In considering the subject from both of these aspects three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. Mindful of these considerations and to clear the way for their application we say at the outset without stopping to amplify the reasons which lead us to that conclusion, we think that the court below clearly erred in dismissing the individual defendants, the United Cigar Stores Company, and the foreign corporations and their subsidiary corporations.

Looking at the situation as we have hitherto pointed it out, it involves difficulties in the application of remedies greater than have been presented by any case involving the Anti-trust Act which has been hitherto considered by this court: First. Because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof, would afford no adequate measure of relief, since different

ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy. Second. Because the methods of apparent ownership by which the wrongful intent was, in part, carried out and the subtle devices which, as we have seen, were resorted to for the purpose of accomplishing the wrong contemplated, by way of ownership or otherwise, are of such a character that it is difficult if not impossible to formulate a remedy which could restore in their entirety the prior lawful conditions. Third. Because the methods devised by which the various essential elements to the successful operation of the tobacco business from any particular aspect have been so separated under various subordinate combinations, yet so unified by way of the control worked out by the scheme here condemned, are so involved that any specific form of relief which we might now order in substance and effect might operate really to injure the public and, it may be, to perpetuate the wrong. Doubtless it was the presence of these difficulties which caused the United States, in its prayer for relief to tentatively suggest rather than to specifically demand definite and precise remedies. We might at once resort to one or the other of two general remedies—*a*, the allowance of a permanent injunction restraining the combination as a universality and all the individuals and corporations which form a part of or coöperate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured, a measure of relief which would accord in substantial effect with that awarded below to the extent that the court found illegal combinations to exist; or, *b*, to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications for the purpose of preventing a continued violation of the law, and thus working out by a sale of the

property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act. But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. We so consider as to the first because in view of the extent of the combination, the vast field which it covers, the all-embracing character of its activities concerning tobacco and its products, to at once stay the movement in interstate commerce of the products which the combination or its coöperating forces produce or control might inflict infinite injury upon the public by leading to a stoppage of supply and a great enhancement of prices. The second because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Anti-trust Act. 2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3d. That for the accomplish-

ment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirements of the statute.

Pending the bringing about of the result just stated, each and all of the defendants, individuals as well as corporations, should be restrained from doing any act which might further extend or enlarge the power of the combination, by any means or device whatsoever. In view of the considerations we have stated we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property.

While in many substantial respects our conclusion is in accord with that reached by the court below, and while also the relief which we think should be awarded in some respects is coincident with that which the court granted, in order to prevent any complication and to clearly define the situation we think instead of affirming and modifying, our decree, in view of the broad nature of our conclusions, should be one of reversal and remanding with directions to the court below to enter a decree in conformity with this opinion and to take such further steps as may be necessary to fully carry out the directions which we have given.

And it is so ordered.

MR. JUSTICE HARLAN concurring in part and dissenting in part.

I concur with many things said in the opinion just delivered for the court, but it contains some observations from which I am compelled to withhold my assent.

I agree most thoroughly with the court in holding that the principal defendant, the American Tobacco Company and its accessory and subsidiary corporations and companies, including the defendant English corporations, constitute a combination which, "in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately," is illegal under the Anti-trust Act of 1890, and should be decreed to be in restraint of interstate trade and an attempt to monopolize and a monopolization of part of such trade.

The evidence in the record is, I think, abundant to enable the court to render a decree containing all necessary details for the suppression of the evils of the combination in question. But the case is sent back, with *directions* further to hear the parties, by evidence or otherwise, "for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, *and* of *recreating* out of the elements *now* composing it, a new condition" which shall not be repugnant to law. The court, in its opinion, says of the present combination, that its illegal purposes are overwhelmingly established by many facts, among others, "by the ever-present manifestation which is exhibited of a *conscious wrong-doing* by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another, or in several, so as to obscure the result actually attained, nevertheless uniform in their manifestations of the purpose to restrain

others, and to monopolize and retain power in the hands of the few, who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade." The court further says of this combination and monopoly: "The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence, from the beginning, of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised to monopolize the trade, by driving competitors out of business, which were ruthlessly carried out, upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible."

But it seems that the course I have suggested is not to be pursued. The case is to go back to the Circuit Court in order that out of the elements of the old combination a new condition may be "re-created" that will not be in violation of the law. I confess my inability to find, in the history of this combination, anything to justify the wish that a new condition should be "re-created" out of the mischievous elements that compose the present combination, which, together with its component parts, have, without ceasing, pursued the vicious methods pointed out by the court. If the proof before us—as it undoubtedly does—warrants the characterization which the court has made of this monster combination, why cannot all necessary directions be now given as to the terms of the decree? In my judgment, there is enough in the record to enable this court to formulate specific directions as to what the decree should contain. Such directions would

not only end this litigation, but would serve to protect the public against any more conscious wrong-doing by those who have persistently and "ruthlessly," to use this court's language, pursued illegal methods to defeat the act of Congress.

I will not say what, in my opinion, should be the form of the decree, nor speculate as to what the details ought to be. It will be time enough to speak on that subject when we have the decree before us. I will, however, say now that in my opinion the decree below should be affirmed as to the Tobacco company and its accessory and subsidiary companies, and reversed on the cross appeal of the Government.

But my objections have also reference to those parts of the court's opinion reaffirming what it said recently in the *Standard Oil Case* about the former decisions of this court touching the Anti-trust Act. We are again reminded, as we were in the *Standard Oil Case,* of the necessity of applying the "rule of reason" in the construction of this act of Congress—an act expressed, as I think, in language so clear and simple that there is no room whatever for construction.

Congress, with full and exclusive power over the whole subject, has signified its purpose to forbid *every* restraint of interstate trade, in whatever form, or to whatever extent, but the court has assumed to insert in the act, by construction merely, words which make Congress say that it means only to prohibit the "undue" restraint of trade.

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the *Standard Oil Case,* was in accordance with our previous decisions in the *Trans-Missouri* and *Joint Traffic cases,* 166 U. S. 290, 171 U. S. 505, if we resort to *reason.* This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two cases for the

court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time in the *Standard Oil Case*, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression, the majority, in the *Trans-Missouri* and *Joint Traffic cases*, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say, what, as I think, it plainly did not intend to say and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the Government has exclusive cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason;" for, it may be assumed that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason" and felt and said time and again

that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation.* Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the Anti-trust Act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta,* pure and simple.

These views are fully discussed in the dissenting opinion delivered by me in the *Standard Oil Case.* I will not repeat what is therein stated, but it may be well to cite an additional authority. In the *Trade-Mark Cases,* 100 U. S. 82, the court was asked to sustain the constitutionality of the statute there involved. But the statute could not have been sustained except by inserting in it words not put there by Congress. Mr. Justice Miller, delivering the unanimous judgment of the court, said: "If we should, in the case before us, undertake to make by *judicial construction* a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do." This language was cited with approval in *Employers' Liability Cases,* 207 U. S. 463, 502. I refer to my dissenting opinion in the *Standard Oil Case, ante,* p. 82, as containing a full statement of my views of this particular question.

For the reasons stated, I concur in part with the court's opinion and dissent in part.

HANNIBAL BRIDGE COMPANY *v.* UNITED STATES.

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

No. 100. Argued April 17, 1911.—Decided May 15, 1911.

Section 18 of the act of March 3, 1899, c. 425, 30 Stat. 1153, authorizing the Secretary of War to require the removal of bridges which are obstructions to navigation over navigable waterways of the United States, is within the constitutional powers of Congress, and was enacted to carry out the declared policy of the Government as to the free and unobstructed navigation of waters of the United States over which Congress has paramount control in virtue of its power to regulate commerce.

As the statute only imposes on the Secretary of War the duty of attending to details necessary to carry out such declared policy it is not an unconstitutional delegation of legislative or judicial power to an executive officer.

Requiring the alteration of a bridge which is an obstruction to navigation is not a taking of property of the owners of such bridge within the meaning of the Constitution.

Notice was duly served on all parties in interest and the hearings given on the report of the Chief of Engineers by the Secretary of War were in accord with the statute and the owners of the bridge, the removal whereof was ordered, cannot complain.

The head of an executive department of this Government cannot himself sign every official communication emanating from his department, and a proper notice signed by the Assistant Secretary has the same force as though signed by the Secretary.

The notice of alterations required was sufficient in this case as it left no reasonable doubt as to what was to be done.

The fact that a bridge was erected over a navigable water of the United States under authority of the act of July 25, 1866, c. 246, 14 Stat. 244, does not prevent Congress from ordering its removal when it becomes an obstruction, as the act expressly reserves the right to alter or amend it so as to prevent obstructions to navigation. *Union Bridge Co.* v. *United States*, 204 U. S. 364.

THE facts, which involve the construction of the provisions of the act of March 3, 1899, relating to the removal of obstructions from navigable waters of the United States, and the validity of proceedings taken, and orders made, thereunder in connection with plaintiff in error's bridge over the Mississippi River at Hannibal, Missouri, are stated in the opinion.

Mr. R. Burnham Moffat, for plaintiff in error, Hannibal Bridge Company; *Mr. Wells H. Blodgett*, with whom *Mr. James L. Minnis*, and *Mr. George A. Mahan* were on the brief, for plaintiff in error, Wabash Railroad Company:

The special act of July 25, 1866, under which the bridge was erected, and which reserved to Congress the power to require changes in the structure, was not repealed, or in any wise affected, by the subsequent general law of March 3, 1899, under which this proceeding was instituted. *State* v. *Stoll*, 17 Wall. 436; *Rogers* v. *United States*, 185 U. S. 87; Sedgwick on Stat. Const. 123; Bishop, Written Law, § 112-B; *Commissioners* v. *Board of Public Works*, 39 Oh. St. 628; *Fosdic* v. *Perrysburg*, 14 Oh. St. 472.

The bridge having been erected in accordance with the act of 1866, it became a lawful structure, and necessarily continues so until that act shall be amended. What Congress has made lawful, only Congress can make unlawful. *United States* v. *Keokuk Bridge Co.*, 45 Fed. Rep. 178.

The alterations to be made in the bridge were not described, in the notice, with such certainty as to enable the defendants to know when they had complied therewith.

As the only offense charged in the information consisted of a failure, on the part of defendants, to do the things required to be done by the notice, it follows that the things required to be done should have been described

in the notice with the same degree of certainty that is required in describing the things that may be done, or may not be done, in a penal statute. *United States* v. *Keokuk Bridge Co.*, 45 Fed. Rep. 178; *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. Rep. 876; *United States* v. *Cruikshank*, 92 U. S. 557; *McConville* v. *Myer*, 39 N. J. Law, 38; *Louisville & Nashville Ry. Co.* v. *Commissioners*, 19 Fed. Rep. 679.

A contract for work, of such vague description, could not be specifically enforced. If this were a suit on a contract to build a long pier, a proper guard fence, or a good house, there could be no decree for specific performance, because of insufficient description of the work to be performed. Bishop on Contracts, § 316; Beach on Contracts, § 76.

Defendants should have been discharged, because it was no offense under § 18 of the act of 1899, to refuse to comply with the notice signed by the Assistant Secretary of War. That office is not mentioned in § 18, and criminal statutes cannot be enlarged by construction, nor can new, or additional words, be read into them. There is nothing in the act creating the office that advised defendants that they were required to obey a notice signed by that officer. 26 Stat. 17; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Harris*, 177 U. S. 305; *In re Enterprise*, 1 Paine, 32.

The parties owning and operating the bridge were not given a reasonable opportunity to be heard, in the sense in which those words are employed in the act of 1899.

The words "hearing" and "reasonable opportunity to be heard," are not new in legislative enactments. They signify the right to be present, to be represented by counsel, to have the witnesses testify under sanction of an oath, and the right of cross-examination. These rights were not accorded to defendants. *Keach* v. *Thompson*, 94 N. Y. 451; *Mayor* v. *Nichols*, 79 N. Y. 582.

There was a fatal variance between material allegations of the information, and the proof; the allegation being that the Secretary of War gave the notice, and the proof being that the Assistant Secretary of War gave the notice. *United States* v. *Cantril*, 4 Cranch, 167; *United States* v. *Hardyman*, 13 Pet. 176.

There was absolutely no proof offered, either at the so-called "hearing" before the Secretary or at the trial of the defendants in the District Court, to support the charge in the information to the effect that the bridge was not erected in accordance with the act of July 25, 1866.

Congress has not, by the act of 1866, surrendered its right to determine, for the purposes of the contract, the fact upon which alone it may require alterations; plaintiffs in error are entitled to an ascertainment of the fact by Congress, and not by an officer of one of the executive departments of the Government. *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235; *Walker* v. *Whitehead*, 16 Wall. 314; *People ex rel.* v. *Otis*, 90 N. Y. 48; *State* v. *Julow*, 129 Missouri, 172.

Mr. Assistant Attorney General Harr for the United States:

The power conferred upon the Secretary of War by § 18 of the act of March 3, 1899, 30 Stat. 1121, 1153, may be exercised with respect to the Hannibal bridge, although constructed pursuant to the act of July 25, 1866, 14 Stat. 244.

The rule *generalia specialibus non derogant* has no application. 25 Op. A. G. 212; *United States* v. *Keokuk Bridge Co.*, 45 Fed. Rep. 178, upon which plaintiffs in error rely; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 194.

Even if § 18 of the act of 1899, does not apply to a bridge constructed pursuant to the act of July 25, 1866, the action of the Secretary of War and the proceedings

in this case are none the less authorized and valid as the Hannibal bridge was constructed in accordance with the act of July 25, 1866. *Hannibal Railroad Co.* v. *Packet Co.*, 125 U. S. 260, 269.

The alterations specified in the notice served upon plaintiffs in error were set forth with sufficient particularity.

The notice to alter, signed by the Assistant Secretary of War, met the requirements of § 18. On its face, and in legal effect, the notice is given by the Secretary of War, the Assistant Secretary, who signed it, being merely the medium for its transmittal. *Miller* v. *Mayor*, 109 U. S. 385; *Wilcox* v. *Jackson*, 13 Pet. 498; *Wolsey* v. *Chapman*, 101 U. S. 755, 769.

In the absence of any proof to the contrary, it must be assumed that the statements contained in the notice were true and that the Assistant Secretary was authorized by the Secretary to send the same. *United States* v. *Peralta*, 19 How. 343, 347; *Parish* v. *United States*, 100 U. S. 500; *United States* v. *Adams*, 24 Fed. Rep. 348, 351; *John Shillito Co.* v. *McClung*, 51 Fed. Rep. 868; *Re Huttman*, 70 Fed. Rep. 699; *Billings* v. *United States*, 23 C. Cl. 166; Act of March 5, 1890, 26 Stat. 17; *United States* v. *Heinszen*, 206 U. S. 370, 382.

The hearing accorded plaintiffs in error met the requirements of § 18. Having acquiesced not only in the manner of conducting the original hearing, but the rehearing as well, any objection by them at this time comes too late. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 369; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177.

Inquiry as to whether a bridge is a reasonable obstruction to navigation is a legislative and not a judicial one. *Bridge Company* v. *United States*, 105 U. S. 475.

The proceeding is not the exercise of the power of eminent domain. Cooley's Const. Lim., § 564. The ac-

tion of Congress in requiring the alteration of bridges across navigable waterways to meet the needs of navigation is not the exercise of the power of eminent domain but of police power, to the exercise of which uncompensated obedience is required. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *New Orleans Gas Light Co.* v. *Drainage Commissioners*, 197 U. S. 453; *C., B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *West Chicago Street Railroad* v. *Chicago*, 201 U. S. 506.

And see as to hearings, *The Japanese Immigrant Case*, 189 U. S. 86; Cooley's Const. Lim., § 496; *Spencer* v. *Merchant*, 125 U. S. 345; *Hibben* v. *Smith*, 191 U. S. 310; Cooley on Taxation, 3d ed., 59; *King* v. *Mullins*, 171 U. S. 429.

The parties to this proceeding are not in a position to question the sufficiency of the hearing in this case, in the respects to which they refer, because they not only acquiesced but participated in the procedure followed without any objection whatsoever.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a criminal Information against the Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company, under the eighteenth section of the River and Harbor Appropriation Act of Congress of March 3, 1899, c. 425, 30 Stat. 1121.

That section is as follows: "Whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such

bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If, at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and *every month* such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation or association so offending to the penalties above prescribed: *Provided,* That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

Proceeding under the above statute, certain vessel owners, masters, pilots and others interested in the navigation of the Mississippi River, represented to the Secre-

tary of War, by petition, that the bridge over that river at Hannibal, Missouri, had become and was an unreasonable obstruction to free navigation by reason of the location of the then existing draw-openings, the entire absence of guard-fences or sheer-booms, and the presence of artificial deposits of stone about the piers of the bridge, which they believed had increased the current through the draw-openings to a dangerous extent. The Secretary was asked by the petitioners to exercise the powers granted to him by the above act, and after due hearing of all interested persons or corporations, require such alterations to be made in and about the bridge as would render navigation through it reasonably free, easy and unobstructed.

The matter was referred by the War Department to an officer of the Engineer Corps of the Army, for report. That officer, after examination, reported that from personal observation and experience, especially during the great flood of June, 1903, he was satisfied that the bridge was an unreasonable obstruction to navigation, by reason of the wrong location of the draw-spans, the absence of guard-fences or sheer-booms, and the deposit of rip-rap in considerable quantities about the piers and abutments. The report recommended certain changes in order that navigation through the bridge might be reasonably safe, easy and unobstructed. In these recommendations the Chief of Engineers concurred. "The character of this bridge as an unreasonable obstruction to navigation is," the report stated, "so generally understood, and has been so well established by former hearings, that further hearings would appear to be superfluous; but, as the alteration of the structure so as to make it reasonably safe for navigation will be expensive, and on that account will probably be antagonized by its owners, I believe it would be best to hold another hearing, at which all parties in interest may be heard; the said new hearing to take place as soon as practicable."

Subsequently, under date of March 10, 1906, there was issued by the War Department an official communication to the Bridge Company, as follows: "Take notice that, Whereas, The *Secretary of War* has good reason to believe that the drawbridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company (and by the Wabash Railroad Company), *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard-fences or sheer-booms, and the presence of obstructing rip-rap around the piers, there being difficulty in passing the draw-openings or draw-spans of such bridge by rafts, steamboat or other water craft; and whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy, and unobstructed, to wit: (Here follows specifications of proposed alterations) . . . And whereas, to March 15, 1907, is a reasonable time in which to alter the said bridge as described above. Now, therefore, in obedience to, and by virtue of, section eighteen of an act of Congress of the United States entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899 (30 Stat., c. 425, 1153), the *Secretary of War* hereby notifies the said Hannibal Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15, 1907."

Similar notices were given to the Wabash Railroad Company and the Missouri Pacific Railroad Company, respectively, each notice being signed by "Robert Shaw Oliver, Asst. Secretary of War."

Such a hearing as that notice required was had at Rock Island, Illinois, before an Engineer officer designated by the War Department, the parties interested having been previously notified of the time, place and object of the hearing. It appears also that notice of the hearing was given through newspapers, published at St. Paul, St. Louis and Hannibal. Among those present at the hearing were numerous river men, masters and pilots. The Bridge Company was also present by counsel and participated in the investigation. After the hearing was concluded the Engineer officer who presided made a report to the Chief of Engineers, in which he said: "The law and the orders of the Department have been fully complied with; every opportunity has been given the representatives of this bridge to present their full views; the bridge to-day is an illegal structure; it is an unreasonable obstruction to the present navigation of the Mississippi River; there is great difficulty in passing its draw openings at high stages; the continuance of existing conditions is liable at any moment to lead to an appalling disaster and great loss of life; previous recommendations as to alterations necessary in this bridge to render navigation through it reasonably free, easy and unobstructed are concurred in."

He further said that "the bridge is an unreasonable obstruction, and that there is difficulty in passing its draw, seems overwhelmingly shown by the statements and affidavits of those competent to give opinions on such a subject. The river pilots are almost unanimous in their views regarding this bridge."

It should be here stated that, so far as the record shows, no objection was made by the Bridge Company as to the manner in which the hearing was conducted.

Subsequently, under date of March 10, 1906, in an official notice to the Bridge Company, signed by "Robert Shaw Oliver, Asst. Secretary of War," the Secretary of War (Mr. Taft) expressed his approval of the recommenda-

tions of the Chief of Engineers, and directed the Bridge Company, on or before March 15, 1907, to make the alterations suggested by that officer. Later on, the Bridge Company requested a hearing before the Secretary of War himself. The Secretary assented to another hearing being had, but said that it must be held before the Judge Advocate General of the Army. After seasonable notice to the parties interested in the navigation of the river, the latter officer heard the case anew and reported to the Secretary of War that the case was covered by the act of March 3, 1899, c. 425, 30 Stat. 1121, and that the action theretofore taken by the War Department should be adhered to. The Secretary of War formally approved the report of the Judge Advocate General, and directed the Chief of Engineers to "act accordingly."

The Bridge Company failed or refused to make the required alterations of the bridge. Then followed the Information in question, the Wabash Railroad Company and the Missouri Pacific Railway Company being made co-defendants with the Bridge Company on the ground that they owned or controlled the bridge.

There were two counts in the Information; the first count, charging the defendants with having willfully failed and refused to make the above alterations in the bridge, within the time prescribed by the Secretary of War, and to comply with the order of that officer; the second count charging the willful failure and refusal of the defendants to make such alterations within one month after the time allowed by the Department.

A demurrer to the Information was overruled, and plea of not guilty entered. The jury found the Bridge Company and the Wabash Railroad Company each guilty, but by direction of the court it returned a verdict of not guilty as to the Missouri Pacific Railway Company. Judgment was rendered in favor of the United States against the Bridge Company for $2,500 on each count of the Infor-

mation. A like judgment was rendered against the Wabash Railroad Company.

The assignments of error are very numerous. But we feel constrained to say that no one of them causes a serious doubt as to the correctness of the judgment sought to be reviewed. This court has heretofore held, upon full consideration, that Congress had full authority, under the Constitution, to enact § 18 of the act of March 3, 1899, c. 425, 30 Stat. 1153, and that the delegation to the Secretary of War of the authority specified in that section was not a departure from the established constitutional rule that forbids the delegation of strictly legislative or judicial powers to an executive officer of the Government. All that the act did was to impose upon the Secretary the duty of attending to such details as were necessary in order to carry out the declared policy of the Government as to the free and unobstructed navigation of those waters of the United States over which Congress in virtue of its power to regulate commerce had paramount control. It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the Chief of Engineers recommended, and as the Secretary of War required to be made after notice and hearing the parties interested, was not a taking of the property of the owners of such bridges within the meaning of the Constitution. *Union Bridge Company* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470.

What the Secretary did in relation to the bridge here in question seems to have been in substantial, if not in exact accordance with the statute. He was officially informed, through the Engineer Corps, that the complaints that came to him from many sources as to the Hannibal bridge were sufficient to require such action on his part as the statute authorized. He ordered a hearing, first causing notice to be given to the parties interested of the time and

place of the hearing. We cannot doubt from the record that the hearing was adequate and was fairly conducted. The result of the hearing was a recommendation, concurred in by the Chief of Engineers, that certain alterations of the bridge were demanded by the public interests. There was a second hearing, with a like result. Then the Secretary acted and directed the making of such alterations in the bridge as had been found to be necessary. Of the character and extent of those alterations the Bridge Company was notified by an official communication from the War Department. It is true that that communication was signed by the Assistant Secretary of War, and not by the Secretary himself. And that fact is relied upon to invalidate the entire proceeding. There is no merit in this objection. The communication signed by the Assistant Secretary shows, upon its face, that it was from the War Department and from the Secretary of War, and that the Secretary, without abrogating his authority under the statute, only used the hand of the Assistant Secretary in order to give the owners of the bridge notice of what was required of them under the statute. It is physically impossible for the head of an executive department to sign, himself, every official communication that emanates from his Department.

Equally without merit is the objection that the nature and character of the required alterations were not sufficiently indicated. This is a mistake. The communication from the War Department was full and adequate. The owners of the bridge could have had no reasonable doubt as to what was expected and required of them.

The defendants also insist that their bridge was constructed under the authority of a special act of Congress of July 25, 1866 (14 Stat. 244, c. 246), and that its maintenance, as constructed, is not affected by a subsequent general appropriation act, like the one of which the above § 18 forms a part. This view cannot be sustained. The

act of July 25, 1866, 14 Stat. 244, c. 246, expressly reserves the right to alter or amend it so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges. In the *Union Bridge Case*, above cited, it appeared that the bridge was required by the Secretary of War to be altered, at the expense of the owners. The point was made that the bridge having been originally erected under the authority of the State of Pennsylvania and without objection from the General Government, the power of the Secretary and of Congress did not go so far as the Government claimed. But this court said, 204 U. S., p. 400: "Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways

of the United States, cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the Bridge Company contends would seriously impair the exercise of the beneficient power of the Government to secure the free and unobstructed navigation of the waterways of the United States."

We have said enough to dispose of every essential question made in the case or which requires notice.

Judgment affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* TRODICK.

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

No. 117. Argued April 11, 1911.—Decided May 15, 1911.

Land within place limits of the Northern Pacific Land Grant Act of July 2, 1864, c. 217, 13 Stat. 365, actually occupied by a homesteader intending to acquire title, did not pass by the grant but were excepted from its operation, and no right of the railroad attached to such lands when its line was definitely located. *Nelson* v. *Northern Pacific Railway*, 188 U. S. 108.

Where a *bona fide* settler was in actual occupation of unsurveyed lands at the time of definite location of the line, the land occupied was excepted from the grant; and if, before survey, he sold his improvements to one who also settled on the land intending to apply for title under the homestead laws of the United States, the claim of the latter is superior to that of the railroad company notwithstanding the original settler had no claim of record.

A settler in actual occupation before the location of the definite line of

the railroad can stand upon his occupancy until the lands are surveyed, and his claim cannot be defeated by the railroad assuming without right at a date prior to his application to assert a claim to the lands.

Under the act of May 14, 1880, c. 89, 21 Stat. 140, delay on the part of a homesteader in making application after survey cannot be taken advantage of by one who had acquired no rights prior to the filing; and so *held*, that where the Northern Pacific land grant had not attached on account of actual occupation, delay on the part of the settler in filing after survey did not inure to the benefit of the company.

Nelson v. *Northern Pacific Railway Co.*, 188 U. S. 108, was not modified by *United States* v. *Chicago, Milwaukee & St. Paul Railway*, 218 U. S. 233, as to the rights of *bona fide* settlers which attached prior to definite location.

Where, by error of law, the Land Office incorrectly holds a party is entitled to patent and issues it, the courts can declare that the patent is held by the patentee in trust for the party actually entitled to have his ownership in the lands recognized.

THE facts, which involve the rights of settlers on the public lands and those of the Northern Pacific Railroad Company under the act of July 2, 1864, are stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for appellants.

Mr. Thomas J. Walsh for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

In this suit, involving the title to the southeast quarter of section 35, township 15 north, range 4 west, in the State of Montana, the defendants McDonald and Auchard, now co-appellants, claim title under patent issued by the United States to the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company to which a grant of lands was made by the act of Congress of

July 2, 1864. 13 Stat. 365, c. 217. The plaintiff Trodick, now appellee, seeks to obtain a decree adjudging that the title, under the patent, be held in trust for him, his contention being that he is the real, equitable owner of the land by virtue of the homestead laws of the United States, and that no patent therefor could rightfully have been issued to the railroad company. The Circuit Court of the United States dismissed the bill with costs to defendants. But the Circuit Court of Appeals reversed the decree with directions to give judgment for the plaintiff.

The facts in the case are few and are substantially undisputed.

By the third section of the act of 1864, Congress made a grant of public lands to the Northern Pacific Railroad Company in these words (so far as it is necessary to state them): "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, *or other claims or rights*, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-

empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." 13 Stat. 365, 368.

The company filed its map of definite location on July 6, 1882, but one Lemline was then in the actual occupancy of the land as a residence. He settled upon it in 1877 and thereafter made claim to it as his homestead, intending from the outset to acquire title under the laws of the United States as soon as the land was surveyed. He continuously resided on the land until his death, which did not occur until 1889. A short time prior to his death Lemline sold the improvements he had made on the land to the plaintiff Trodick. This he had the right to do, although he did not hold the title. *Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155. The latter took possession of the land on the death of Lemline. The lands had not been surveyed when Lemline died or when Trodick went into possession. They were not surveyed until August 10, 1891. Trodick applied on January 10, 1896, to make homestead entry of the land, but his application was rejected "without prejudice to his right to apply for a hearing to determine the status of the land, July 6th, 1882, when the right of the company became effective." In the letter or opinion of the Commissioner of the Land Office, addressed to the local Register and Receiver, under date of December 24, 1898, it was said: "He [Trodick] applied for a hearing August 10, 1896, whereupon notice issued citing the parties in interest to appear at your office September 21, 1896. The hearing was continued from time to time until April 16, 1897, when both parties were represented. It appears from the evidence adduced that one Martin Lemline established his residence on the land, with his family, in 1877, continued to reside there until his

death, some time in 1891, and his improvements on the premises were of the estimated value of $1,000. Mr. Trodick settled on the land in 1891, and since then has continuously resided there. The material question for determination in this case is this: Did the settlement claim of Mr. Lemline *except the land from the operation of the grant* to the company? It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company attached, that he was qualified to make entry of the same and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife would, without doubt, have been allowed to perfect the claim by them initiated prior to July 6, 1882. Since Mr. Lemline had no claim *of record*, and the claim of Trodick had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant. (*N. P. R. R. Co.* v. *Colburn*, 164 U. S. 383.) Your action is therefore approved and the application of Trodrick is accordingly rejected, subject to the usual right of appeal within sixty days."

In 1896 the railroad company contracted to sell the land to Auchard, and in 1899 conveyed to him by warranty deed. Subsequently, January 10, 1903, a patent was issued to the railroad company.

The former decisions of this court clearly sustain the decree rendered by the Circuit Court of Appeals. According to the provisions of the act of 1864, the railroad company could not acquire any vested interest in the granted lands—even such as were within the primary or place limits—until it made a definite location of its line, evidenced by an accepted map of location; nor would such location be of any avail as to lands, even in place limits, which, at the time of definite location, were occupied by a *homestead settler* intending, in good faith, to acquire title under the laws of the United States. Lemline, we

have seen, was in the actual occupancy of the lands as a homestead settler when the railroad company definitely located its line. Therefore, the lands *did not pass* by the grant of 1864, *but were excepted from its operation*, and no right of the railroad *attached* to the lands when its line was definitely located.

In *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1, 5, a case arising under the Northern Pacific grant of 1864, it was distinctly held that "land which *previously to definite location* had been reserved, sold, granted or otherwise appropriated, or upon which there was a preëmption 'or other claim or right' *did not pass by the grant* of Congress." In *United States* v. *Northern Pacific R. R. Co.*, 152 U. S. 284, 296, the court, referring to the same grant, said: "The act of 1864 granted to the Northern Pacific Railroad Company *only* public land, . . . free from preemption *or* other claims or rights *at the time its line of road was definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office."

In *Northern Pacific R. R.* v. *Sanders*, 166 U. S. 620, 629, it was said that the act of July 2, 1864, under which the railroad company claims title *excluded* from the grant "all lands that were not, *at the time the line of the road was definitely fixed*, free from preëmption or other claims or rights."

In *United States* v. *Oregon &c. R. R.*, 176 U. S. 28, 50, the court held that the "Northern Pacific Railroad Company could take no lands except such as were *unappropriated* at the time its line was definitely fixed."

In *Nelson* v. *Northern Pacific Railway*, 188 U. S. 108, 121–124, 130, the court again construed the act of 1864. That was the case of one who went upon and occupied certain lands, within the place limits, before the definite location of the railroad line, with the *bona fide* purpose to acquire title under the laws of the United States. This court said: "It results that the railroad company did not

acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such land was not 'free from preëmption or other claims or rights,' or was 'occupied by homestead settlers' at the date of the definite location on December 8, 1884, it did not pass by the grant of 1864. Now prior to that date, that is, in 1881, Nelson, who is conceded to have been qualified to enter public lands under the homestead act of May 20, 1862, went upon *and occupied this land*, and has continuously *resided* thereon. The land was not surveyed until 1893, but as soon as it was surveyed he attempted to enter it under the homestead laws of the United States, but his application was rejected, solely because, in the judgment of the local land officers, it conflicted with the grant to the Northern Pacific Railroad Company. He was not a mere trespasser, but went upon the land in good faith, and, as his conduct plainly showed, with a view to residence thereon, not for the purposes of speculation, and with the intention of taking the benefit of the homestead law by perfecting his title under that law, whenever the land was surveyed. And for fourteen years before the railroad company by an *ex parte* proceeding, and without notice to him, so far as the record shows, obtained from the Land Office a recognition of its claim, and for sixteen years before this action was brought, he maintained an actual residence on this land. It is so stipulated in this case. As the railroad had not acquired any vested interest in the land when Nelson went upon it, *his continuous occupancy of it, with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed*, constituted, in our opinion, a *claim* upon the land within the meaning of the Northern Pacific Act of 1864; and as that claim existed *when the railroad company definitely located its line*, the land was, by the express words of that act, *excluded from the grant*." Again, in the same case, there appear these pertinent observations, ap-

plicable in the discussion here: "If it be said that Nelson's claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition of things for which he was not in anywise responsible, and his rights, in law, were not lessened by reason of that fact. *The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey.* He acted with as much promptness as was possible under the circumstances. . . . So far we have proceeded on the ground that as the act of 1864 granted to the railroad company the alternate sections to which at the time of definite location the United States had full title, not reserved, sold, granted or appropriated, *and* which were *free* from preëmption or other claims or rights at date of definite location, and authorized the company to select other lands in lieu of those then found to be 'occupied by homestead settlers,' Congress *excluded from the grant* any land so occupied with the intention to perfect the title under the homestead laws whenever the way to that end was opened by a survey."

To the same effect are numerous decisions in the Land Department by different Secretaries of the Interior. Those decisions are cited in the *Nelson Case*, 188 U. S. 126 to 131.

In view of the authorities cited, it must be taken that by reason of Lemline's actual occupancy of them as a *bona fide* homestead settler, at the time of the definite location of the railroad line, these lands were *excepted from the grant* and the railroad company did not acquire and could not acquire any interest in them *by reason of such location.* So that the issuing of a patent to it in 1903, based on such location, was wholly without authority of law. So far as the railroad company was concerned, the way was open to Trodick, who had purchased the improvements from Lemline and was in actual possession of the lands as a residence, to carry out his original purpose to make appli-

cation to enter them under the homestead laws, and thus acquire full technical title in himself. He made such an application in 1896, the railroad company not having at that time any claims whatever upon the land; for it acquired nothing, as to these lands, by the definite location of its line. He was admittedly qualified to enter lands under the laws of the United States, but his application was disregarded solely on the ground that, when the railroad line was definitely located, Lemline had no claim "of record," and Trodick's application to the Land Office was after the date of such location. This was error of law, as the authorities above cited—particularly the *Nelson Case* —show. Lemline's entry and occupancy did not need, as between himself and the railroad company, to be evidenced by a record of any kind, for the reason, if there were no other, that the lands which he settled upon with the purpose of acquiring title under the laws of the United States, had not at that time been surveyed. He was not responsible for the delay in surveying, any more than was the homesteader in the *Nelson Case*, for the neglect to survey. He was entitled under the circumstances, having made his application in proper form, and the railroad company having acquired no interest under the definite location of its line, to wait until the land was surveyed and in the meantime to stand upon his occupancy, accompanied, as such occupancy was, with a *bona fide* intention to acquire title and to reside upon the lands. His claim on the land could not be postponed or defeated by the fact that the railroad company had assumed, without right, at a prior date, to assert a claim to the lands as having passed by the grant and to have become its property, on the definite location of its line.

Some reliance is placed on the delay occurring after the survey of the lands before Trodick made his homestead application—the statute of May 14, 1880, c. 89, 21 Stat. 140, prescribing a certain period within which the home-

steader should act after the survey of the lands. But that delay was immaterial as affecting the rights of the homestead applicant, because no rights of others had intervened intermediate the survey and Trodick's formal application. A similar question arose in *Whitney* v. *Taylor*, 158 U. S. 85, 97, and it was thus disposed of: "It is true that § 6 of the act of 1853 (10 Stat. 246) provides 'that where unsurveyed lands are claimed by preëmption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices.' But it was held in *Johnson* v. *Towsley*, 13 Wall. 72, 87, that a failure to file within the prescribed time did not vitiate the proceeding, neither could the delay be taken advantage of by one *who had acquired no rights prior to the filing*. As said in the opinion in that case (p. 90): 'If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done *before any one else has initiated a right of preëmption by settlement or declaration*, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right.' See also *Lansdale* v. *Daniels*, 100 U. S. 113, 117, where it is said: 'Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as in the latter event it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim.' The delay in filing, therefore, had

no effect upon the validity of the declaratory statement." In *McNeal's Case*, 6 L. D. 653, Secretary Vilas referred to the act of May 14, 1880, 21 Stat. 140, which related to settlers on public lands and provided that their rights should relate back to the date of settlement, the same as if he settled under the preëmption laws. The entry in that case was cancelled by the Commissioner. The Secretary said: "*There being no intervening claim*, I see no reason why his rights may not relate back to the time of his settlement, even though he did not file for the land within three months thereafter in strict accordance with the requirements of the act of May 14, 1880." We may add that the Commissioner of the General Land Office made no objection, in this case, to Trodick's application on the ground of his delay in making formal application. His decision, in effect, conceded that the application was not objectionable and was not to be denied, except on the ground that Lemline, who preceded Trodick in interest, had no claim "*of record*" and that Trodick's formal application was not made until after the location of the railroad line. It is not for the railroad company to which was wrongfully issued a patent to make an objection to Trodick's claim which the Land Office would not make. The authorities cited show that the grounds assigned by the Commissioner were wholly untenable, as matter of law, in that he assumed that the railroad company accquired an interest in the land by the mere location of its line when Lemline was, at the time, in actual occupancy as a homestead settler.

Attention is called to the decision at the present term of *United States* v. *Chicago, Milwaukee & St. Paul Ry.*, 218 U. S. 233. That case, it is contended, is authority for the proposition that the railroad company, upon the definite location of its line, under a land grant act, acquired a vested interest in the lands granted, unless there was at the time some claim on the land "of record." It is true the opinion in that case referred to the stipulation be-

tween the parties, to the effect that, at the time of the definite location of the road, "none of the lands described in the bill of complaint had been covered by any homestead entry, preëmption, declaratory statement or warrant location or other existing claims of record in the office of the Commissioner of the Land Office," and then proceeded: "In that view, and if this were the whole case, then, beyond all question, the law would be in favor of the railway company; for the grant of 1864 was one *in præsenti* for the purposes therein mentioned, and according to the settled doctrines of this court, the beneficiary of the grant was entitled to the lands granted in place limits which had not been appropriated or reserved by the United States for any purpose, or to which a homestead or preëmption right had not attached *prior to the definite location of the road* proposed to be aided. The grant plainly included odd-numbered sections, within ten miles on each side of the road, which were part of the public domain, not previously appropriated or set apart for some specific purpose at the time of the definite location." The above words "of record," it is supposed, show that the court intended to modify the doctrine that a *bona fide* settlement upon unsurveyed lands, within place limits, which were entered upon and occupied in good faith as a residence, before the railway company located its line, with the intention of acquiring title, after such lands shall have been surveyed, gave the homesteader a "claim" on the lands which excepted them from the grant to the railroad company. But this is an error. The words referred to were only intended to describe one class of the claims, the attaching of which to lands specified in an act of Congress, prior to definite location, had the effect to except them from the granting act. There was no purpose to modify the principles of the *Nelson Case.*

It will serve no useful purpose to extend this discussion of the cases cited, on behalf of the company, which, it is

alleged, distinguish this from the *Nelson Case*. The facts bring the present case within the ruling of that case, and we adhere to the principles there announced.

We are of opinion that as between the railroad company and the appellee the latter has the better right to the land, and that the Land Office incorrectly held that the company was entitled to a patent. That was an error of law which was properly corrected by the reversal in the Circuit Court of Appeals of the decree of the Circuit Court, with directions to render a final decree recognizing Trodick's ownership of the lands in controversy and adjudging that the title, under the patent was held in trust for him. The judgment of the Circuit Court of Appeals is

Affirmed.

UNITED STATES *v.* HAMMERS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 314. Argued April 12, 13, 1911.—Decided May 15, 1911.

Under the Desert Land Act of March 3, 1877, c. 107, 19 Stat. 377, as added to by the act of March 3, 1891, c. 561, 26 Stat. 1096, a desert land entry is assignable.

Where a statute is so ambiguous as to render its construction doubtful the uniform practice of the officers of the Department whose duty has been to construe and administer the statute since its enactment and under whose constructions rights have been acquired is determinatively persuasive on the courts.

There is confusion between the original desert land act of 1877 and the act as amended in 1891 as to whether entries can be assigned, and the court turns for help to the practice of the Land Department in construing the act, and that has uniformly been since 1891 that entries were assignable.

THE facts, which involve the construction of Desert Land Acts of 1877 and 1891 and the assignability thereunder of entries of desert lands, are stated in the opinion.

Mr. Ernest Knaebel, for the United States.

Mr. L. H. Valentine, with whom *Mr. Nathan Newby* was on the brief, for the defendant in error.

Mr. Oscar A. Trippett, *Mr. J. M. Eshleman*, *Mr. LeCompte Davis* and *Mr. William C. Prentiss* filed a brief, by leave of the court, as *amici curiæ*, in support of the position of the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case is here to review an order sustaining a demurrer to an indictment found against defendant in error, herein called defendant.

Omitting the repetitions and accentuations which are usually found in indictments, the following are the facts stated in the indictment in this case: On the fourteenth of August, 1907, one Granville M. Boyer made a desert land entry for certain lands under the public land laws of the United States, and particularly under and by virtue of the act of Congress approved March 3, 1877, 19 Stat. 377, c. 107, or 2 U. S. Comp. Stat. 1548, the land being then open to entry, settlement and reclamation and he having the proper qualifications under the laws. The record was number 3903. On the twenty-sixth of August he assigned, by an instrument in writing, his entry and his interest in the land which was the subject thereof to one Beulah Rose Beekler, she being a citizen of the United

States. She filed the assignment with the Register and Receiver of the United States land office of the Los Angeles, California land district.

On the thirtieth of January, 1908, and while entry No. 3903 was pending before the Register and Receiver, Beulah Rose Beekler, "in pretended compliance" with the public land laws of the United States and the rules and regulations of the General Land Office of the Department of the Interior relating to desert land entries, applied at the office of one Daniel Elder, clerk of the Superior Court of Imperial county, within the southern division of the southern district of California, to make her first yearly proof of improvement, irrigation, reclamation and cultivation of the land, with the intention of thereafter obtaining a patent from the United States therefor. Elder was an officer authorized to receive such proof and to administer oaths to witnesses.

Defendant appeared and gave testimony in such proceeding and subscribed the same, swearing that the statements therein were true.

The specific details of his testimony are not necessary to the points of law which are involved. It is enough to say that it is set out in the indictment with particularity and showed that the improvements required by the desert land laws were made, and it is charged, that the testimony was wilfully and corruptly given, he knowing it to be false. And it was further charged that the testimony was filed with the Register and Receiver as part of the proceedings in relation to the entry.

The indictment was demurred to on the ground that it did not state facts sufficient to constitute an offense against the United States. The demurrer was sustained.

The question of law in the case is the materiality of defendant's affidavit, and that again depends upon whether the desert land laws authorized an assignment of the entry.

These propositions have been argued at great length. Besides oral argument a brief of 71 pages is presented by the United States, which is replied to by defendant's brief of 132 pages, and supported by a brief of *amici curiæ* of 135 pages, and there are supplemental briefs besides. In our view, however, the case does not require so much expansion, and for its general discussion we may refer to the able opinion of the court below. We disagree, it is true, with that learned court, but the grounds of our disagreement can be briefly stated.

We may assume that under the Desert Land Act of 1877, an entry was not assignable. The contention of the Government, however, is, opposing that of the defendant, that by the additions made by §§ 5 and 7 of the act of March 3, 1891, 26 Stat. 1096, c. 561, to the desert land law an entry is assignable. These sections read as follows:

"SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and

extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided. That proof be further required of the cultivation of one-eighth of the land.

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be cancelled, and the lands and moneys paid therefor shall be forfeited to the United States."

The learned District Court in its discussion, stated

that the following proposition is established: "Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government," citing, among other cases, *Myers* v. *Croft*, 13 Wall. 291; *Deffeback* v. *Hawke*, 115 U. S. 393; and this ownership and right of assignment the court concluded §§ 5 and 7 only recognized. In other words did not grant or create a new right, but referred to a right already existing, and that, therefore, the act of 1891 did not authorize an assignment of the land by an entryman until he had acquired such equitable title by the performance by him, and by him only, of the conditions prescribed.

It was conceded that the Interior Department had uniformly placed upon the act of 1891 a different construction in five decisions, the earliest of which was rendered on December 22, 1895, and the last in June, 1900, and it was also conceded that the rule often authoritatively announced is that "where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive if not controlling." Such decision, however, it was said, only determined in cases of doubt, and, as the court found no ambiguity in the act, decided against the ruling of the Department and the contention of the Government. It recognized the force of such a uniform practice in the Land Office and of the fact which was urged upon its attention, that a large number of reclamations had been effected by assignees in the very valley where the entry in controversy had been made, and said that such fact and practice would resolve doubts in favor of the Government, if it, the court, had any.

We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land

Department the weight to which in such case, the court acknowledged, they are entitled.

The act of 1891, was an amendment of the act of 1877, and made a change in the latter act, and a change in the provisions of an act usually indicates, or is intended to indicate, a change of purpose, to enlarge or restrict the provisions of the prior law. This very natural presumption seems to be contested by defendant. We say "seems" because it may be that it is only its application in the present case which is questioned. Counsel say the "intent to amend, modify or repeal any provision of the act of 1877, must be made clearly to appear by the terms of the amendatory act." In support of this it is urged that the dominant purpose of the act of 1877, was that an entryman should personally reclaim the land in the manner prescribed by the act, and because of the purpose and to secure it, the courts and the Department had ruled that before reclamation the entryman had no rights which he could transfer. Counsel, therefore, deny that a change was made in the act of 1877 by the act of 1891, and urge that where a statute which had been construed by the courts has been reënacted in the same, or substantially the same, terms, the legislature is presumed to have adopted the construction as part of the law unless a different intention is expressly declared. But was there a substantial reënactment of the act of 1877 by the act of 1891? In the act of 1877, the word "assignors" did not appear at all, and the act required, it is contended, that reclamation should be personally made by the entryman. To this requirement the opening words of § 5 of the act of 1891 present a contrast. It reads: "That no land shall be patented to any person under this act unless *he or his assignors* (italics ours) shall have expended in the necessary irrigation, reclamation, and cultivation thereof . . . three dollars per acre for the purpose aforesaid. . . ." The meaning of these words con-

sidered alone is clear. An entryman or his assignors may make reclamation. It is said, however, that the words which follow them explain them and take all ambiguity from them. It is provided that "within one year after making entry . . . the party so entering shall expend not less than one dollar per acre" and that *he* (italics ours) "shall in like manner" expend the same sum during the second and third year. "Said party," it is further provided, "shall file the proofs of such expenditure" and at the expiration of the third year a map or plan showing the character and extent of such improvements." And again: "If any party fail to file the proofs the entry shall be canceled." It is finally provided that nothing in the section contained "shall prevent the claimant from making *his* final proof and receiving *his* patent at an earlier date than that prescribed for the performance of the conditions required. These provisions, it is insisted, designate the entry and entryman and only him. This is made indubitable, it is urged, by the use of the pronouns "he" and "his," excluding every other person, and requiring the expenditure and improvements to be made by him individually. But the opening sentences of the section are to be accounted for, and these are, to repeat, "That no land shall be patented to any person under this act unless *he or his assignors* shall have expended in the necessary irrigation, reclamation, and cultivation thereof . . . at least three dollars per acre. . . ," and the word "assigns" is also used in § 7. Counsel feel the necessity of accounting for the provision and to give it a meaning that will neither contradict nor make doubtful that for which they contend. Their explanation is, "that Congress used the words 'or his assignors' in § 5 and 'or his assigns' in § 7 only in recognition of the right that every entryman has under any of the public land laws of the United States to make an assignment after he has acquired the equitable title to the land embraced within

his entry." In other words, as observed by the court below, a new right was not created, but a right already existing was incidentally referred to. In aid of this conclusion, and in opposition to the contention made by the Government that "assignors" designated persons who may legally do the things prescribed in § 5 before the equitable title vests, it is answered that an applicant can have more than one assignor but they must be assignors of perfected entries, perfected by the performance of the conditions by the respective entrymen. Examples are given under the practice which obtained in the Land Department prior to 1908 (an act of that year limits the assignment to one) of issuing patents to an applicant who had taken assignment of more than one entry if the aggregate area of the land embraced in the entries did not exceed 320 acres. But to support this view reliance is had upon decisions made after the act of 1891, and which, it is admitted, "apply to assignments made before the vesting of equitable title, as permitted by the Land Office since 1891." That, it is insisted, is not material so far as the point is concerned. But manifestly it is material. To support and give force to a practice of the Land Department under the act of 1891, to impugn its construction of the act, is certainly confusing. We cannot assume that the Land Department did not know what it was about and made its practice under the act oppose its construction of the act. But, it may be granted that there is strength in the argument, and in that based on the words of the statute. They are, however, opposed by arguments of equal, if not greater strength. Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coinci-

dent with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.

We are constrained, therefore, to reverse the order of the District Court sustaining the demurrer and remand the case for further proceedings.

Reversed.

WEST, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, *v.* KANSAS NATURAL GAS COMPANY.

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

No. 916. Argued April 4, 5, 1911.—Decided May 15, 1911.

When a State recognizes an article to be a subject of interstate commerce it cannot prohibit that article from being the subject of interstate commerce; and so *held* that corporations engaged in interstate commerce cannot be excluded from transporting from a State oil and gas produced therein and actually reduced to possession.

In matters of foreign and interstate commerce there are no state lines; in such commerce instead of the States a new power and a new welfare appears that transcend the power and welfare of any State.

The welfare of the United States is constituted of the welfare of all the States, and that of the States is made greater by mutual division of their resources; this is the purpose and result of the commerce clause of the Constitution.

Natural gas and oil when reduced to possession by the owner of the land are commodities belonging to him subject to his right of sale thereof, and are subjects of both intrastate and interstate commerce.

There is a distinction between the police power of the State to regulate the taking of a natural product, such as natural gas, and prohibiting that product from transportation in interstate commerce. The former is within, and the latter is beyond, the power of the State. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, distinguished.

A State does not have the same ownership in natural gas and oil after the same have been reduced to possession as it does over the flowing waters of its rivers. Riparian owners have no title to the water itself as a commodity. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, distinguished.

The right to engage in interstate commerce is not the gift of a State; nor can a State regulate or restrain such commerce, or exclude from its limits a corporation engaged therein.

Inaction by Congress in regard to a subject of interstate commerce is a declaration of freedom from state interference.

Where a State grants the use of its highways to domestic corporations engaged in intrastate commerce in a commodity it cannot deny the same use, under the same restrictions, to foreign corporations engaged in interstate commerce in the same commodity; and so *held* that the statute of Oklahoma prohibiting foreign corporations from building pipe lines across highways and transporting natural gas therein to points outside the State is unconstitutional as an interference with, and restraint upon, interstate commerce, and as a deprivation of property without due process of law.

172 Fed. Rep. 545, affirmed.

THE facts, which involve the constitutionality of a statute of Oklahoma restricting interstate commerce in oil and natural gas, are stated in the opinion.

Mr. Charles West, Attorney General of the State of Oklahoma, and *Mr. Charles B. Ames* for appellant:

The act of 1907–1908, as well as the supplementary legislation of 1909, is within the proper police power of the State.

The ruling principle is conservation, not commerce, and the due process clause is the single issue. *Consumers' Gas Co.* v. *Harless*, 29 N. E. Rep. 1062; *N. W. Tel. Ex. Co.* v. *St. Charles*, 154 Fed. Rep. 386; *Western Union Tel.*

Co. v. *Penna. R. R. Co.*, 195 U. S. 540; *Wilson* v. *Hudson County W. Co.*, 76 Atl. Rep. 560.

A justifiable taking of property overrules other principles. Peculiar mineralogical character of oil, gas and water, likewise also justify such taking. *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Min. Co.*, 200 U. S. 527; *Offield* v. *N. Y., N. H. & H. R. Co.*, 203 U. S. 372; *Bacon* v. *Walker*, 204 U. S. 311; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *Nat. Carb. Gas Co.*, 220 U. S. 61; *Katz* v. *Walkinshaw* (Cal.), 64 L. R. A. 236; *Hudson Co. W. Co.* v. *McCarter*, 209 U. S. 281; *Kansas* v. *Colorado*, 185 U. S. 125.

Special climatic conditions justify taking for public use, as do also special topographical conditions.

States may restrain the reckless use of natural resources. *Holden* v. *Hardy*, 169 U. S. 397.

For instances of conservation upheld though other rights thereby limited, see *McCready* v. *Virginia*, 94 U. S. 391; *Manchester* v. *Massachusetts*, 139 U. S. 240; *Geer* v. *Connecticut*, 161 U. S. 519; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Kansas* v. *Colorado*, 185 U. S. 125; *Manigault* v. *Springs*, 199 U. S. 473; *Georgia* v. *Tennessee Co.*, 206 U. S. 230; *Hudson Co. W. Co.* v. *McCarter*, 209 U. S. 349; *N. Y. ex rel. Silz* v. *Hesterberg*, 211 U. S. 31; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Mfgs. Co.* v. *Indiana Co.*, 50 L. R. A. 134; *Consumers' Co.* v. *Harless*, 29 N. E. Rep. 1062; *Townsend* v. *State*, 47 N. E. Rep. 19; *Given* v. *State*, 66 N. E. Rep. 750; *State* v. *Ohio Co.*, 49 N. E. Rep. 809; *Jamieson* v. *Indiana Co.*, 128 Indiana, 555; *Wilson* v. *Hudson Co.*, 76 Atl. Rep. 560; *Welch* v. *Swasey*, 193 Massachusetts, 364; *Wadleigh* v. *Gilman*, 12 Maine, 403; *Salem* v. *Maynes*, 123 Massachusetts, 372; *Am. Point. Wks.* v. *Lawrence*, 23 N. J. L. 9; *Mugler* v. *Kansas*, 123 U. S. 623; *Korasek* v. *Peter*, 50 L. R. A. 345; *Smith* v. *Morse*, 148 Massachusetts, 407; *St. Louis* v.

Gault, 179 Missouri, 8; *Summerville* v. *Presley*, 33 S. Car. 56; *Katz* v. *Walkinshaw*, 64 L. R. A. 236; *Ex parte Elam*, 91 Pac. Rep. 811; *Windsor* v. *State*, 64 Atl. Rep. 288; *Questions & Answers*, 103 Maine, 506; *Commonwealth* v. *Tewksbury*, 11 Metc. 55.

There is no right to unlimited use of oil, gas, or water under land except for use connected with land. *Forbell* v. *New York*, 164 N. Y. 522; *Hathorn* v. *Nat. Carb. Co.*, 87 N. E. Rep. 504.

The act is valid as an exercise of the State's police power in its control over the use of its highways for transportation purposes. The State's highways are its public property. *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92, 101; *Atty. Gen.* v. *Shrewsbury Bridge Co.*, 21 Chanc. Div. 752; *Richmond* v. *Southern Bell Tel. Co.*, 174 U. S. 746; *Memphis* v. *Postal Tel. Cable Co.*, 139 Fed. Rep. 707; 3 Elliott on Railroads, 2d ed., § 1076.

The right to use the highways in maintaining a gas pipe line,—a permanent plant,—is a franchise. *Gas Light Co.* v. *Laclede Co.*, 115 U. S. 650; *Foster Lbr. Co.* v. *A. V. & W. Ry. Co.*, 20 Oklahoma, 583; *S. C.*, 100 Pac. Rep. 1110; *State* v. *Cincinnati Gas Light Co.*, 18 Oh. St. 262; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396; *Jersey City Gas Co.* v. *Dwight*, 29 N. J. Eq. 242, 248; *Purnell* v. *McLane*, 56 Atl. Rep. 830; *Pittsburg &c. R. R. Co.* v. *Hood*, 94 Fed. Rep. 618; *Hardman* v. *Cabot*, 55 S. E. Rep. 756; *Ward* v. *Trifle St. Nat. Gas Co.*, 74 S. W. Rep. 709.

This being true the right must either be acquired by grant or by condemnation. *Blair* v. *Chicago*, 201 U. S. 400; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296, 308.

The right has not been granted by the State, and the appellees do not assert any right by grant.

The right of eminent domain is not granted to foreign corporations. This right may be lawfully granted to domestic corporations and withheld from foreign. Beale

on Foreign Corporations, § 115; *State* v. *Scott*, 22 Nebraska, 628; *Trestor* v. *Missouri Pac. R. R. Co.*, 23 Nebraska, 242; *State* v. *C., B. & Q. R. R. Co.*, 25 Nebraska, 156; *Keonig* v. *C., B. & Q. R. R. Co.*, 27 Nebraska, 699; *Holbert* v. *St. L. &c. R. R. Co.*, 45 Iowa, 23; *Evansville &c. Co.* v. *Hudson Bridge Co.*, 141 Fed. Rep. 51; *Foltz* v. *St. L. & S. F. R. R. Co.*, 60 Fed. Rep. 316.

The right of eminent domain for purposes of interstate commerce might be granted by the United States. Beale on Foreign Corporations, § 115, note; *Union Pac. R. R. Co.* v. *B. & M. R. R. Co.*, 3 Fed. Rep. 106. But the United States have not granted it for the purpose here involved.

The right claimed by appellees being a franchise and not having been granted either by the State or the United States cannot be exercised without condemnation and as the power of eminent domain has neither been granted by the State nor by the United States, the right cannot be acquired by condemnation. Therefore the appellees have not the right by the State's volition, nor have they the power to take it without the State's volition.

The appellees claim the right by grant from the owners of the abutting land.

For highway purpose, including all transportation, the State has control regardless of the fee, *Barney* v. *Keokuk*, 94 U. S. 324, and the abutter cannot grant the right to appellees. *State* v. *Kansas Nat. Gas Co.* (Kan.), 80 Pac. Rep. 962; *M. & E. R. Co.* v. *Mayor*, 10 N. J. Eq. 352; *Young* v. *Harrison*, 6 Georgia, 130; *Dyer* v. *Tuskaloosa Bridge Co.*, 2 Porter (Ala.), 296; Lewis on Eminent Domain, §§ 91*c*–91*l*, 3d ed., §§ 117–128.

The State's control of transportation is superior to the right of the abutter. *Sauer* v. *New York*, 206 U. S. 536, 548; *Cheney* v. *Barker*, 84 N. E. Rep. 492; *Snively* v. *Washington*, 218 Pa. 249.

The State having control of the public highways may grant privileges to its own citizens and refuse them to

others, including foreign corporations, the same as it may do in regard to eminent domain. *McCready* v. *Virginia*, 94 U. S. 391; *Consumers' Gas Co.* v. *Harless* (Ind.), 29 N. E. Rep. 1062.

The act is valid as an exercise of the State's police power in creating and controlling its own corporations. *Noble State Bank* v. *Haskell*, 219 U. S. 104.

If banking, which has always been regarded as a common right, can be confined to corporations, it seems clear that constructing a permanent plant in the highway, which has always been regarded as a franchise, can be confined to corporations.

The appellees not being domestic corporations, therefore, have not the right to construct gas pipe lines in Oklahoma, and therefore are not affected by the provisions of the law restricting domestic corporations in the conduct of their business, and therefore have no right to complain of the law or any of its provisions. *Hatch* v. *Reardon*, 204 U. S. 153; *Lee* v. *State*, 207 U. S. 67; *Dolly* v. *Abilene Nat. Bank*, 179 Fed. Rep. 461.

The act does not regulate interstate commerce but only affects it indirectly, just as it might be affected by the denial of the right of eminent domain to foreign corporations or the refusal to grant a city franchise to an interstate pipe line company or an interstate telephone company. *N. W. Tel. Exch. Co.* v. *St. Charles*, 154 Fed. Rep. 386; *Consumers' Gas Co.* v. *Harless* (Ind.), 29 N. E. Rep. 1062; *Wilson* v. *Hudson Co. Water Co.* (N. J.), 76 Atl. Rep. 560, 566, 567.

Mr. John G. Johnson and *Mr. D. T. Watson*, with whom *Mr. E. L. Scarritt* and *Mr. John J. Jones* were on the brief, for appellees:

The police power of a State does not authorize conservation in the sense of prohibiting the sale of lawful articles of private property in the interest of the general

public or the people, who have no proprietary interests therein.

When the legislature prohibits the sale of private property for the sole and only purpose of providing a future supply of fuel for the public, it is appropriating private property for public use and compensation must be made. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417; *Willett* v. *People*, 117 Illinois, 294, 303, 305; *People ex rel. Goff* v. *Kirk*, 136 N. Y. App. Div. 45; *Sweet* v. *Rechel*, 159 U. S. 380, 398, 399.

The Mineral Springs decisions in New York can be distinguished, except as the Court of Appeals applied the rule of the common law in regard to the right of landowners in subterranean waters, and held that prohibitions as such diminished most of the rights which the landowners had at common law, and were unconstitutional. *People* v. *Natural Carbonic Acid Co.*, 196 N. Y. 421.

The owner of natural gas has the constitutional right to sell his gas in the most favorable market. *Slaughter House Cases*, 16 Wall. 36, 127; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Manufacturers' Gas Co.* v. *Indiana Nat. Gas Co.*, 156 Indiana, 679.

The cases cited by appellant, in which statutes deal with game, waters of streams and the atmosphere, proceed upon a wholly different principle.

The right of a citizen of the United States to carry on interstate commerce is a privilege guaranteed by the Federal Constitution, and is enjoyed without distinction by corporations engaged in interstate commerce as well as individuals. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 21; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 455; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 69; *Reid* v. *Colorado*, 187 U. S. 137, 151; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Stockton* v. *Baltimore & New York R. R. Co.*, 32 Fed. Rep. 9, 14; *Pembina Mining Co.* v. *Pennsylvania*, 125

U. S. 181, 190; *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 118; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 314.

Congress has expressly declared that natural gas is a lawful subject of commerce and has made provision authorizing the transportation of the same in pipe lines. Acts of March 11, 1904, c. 505, 33 Stat. 65; June 16, 1906, 34 Stat. 267.

An attempt by a State to select the articles of commerce which may or may not enter into interstate trade, or prohibit any article of commerce located in the State from so doing, is a regulation of commerce which is void. *Leisy* v. *Hardin*, 135 U. S. 100, 108; *Mobile County* v. *Kimball*, 102 U. S. 691, 697; *Welton* v. *State of Missouri*, 91 U. S. 275, 279; *Woodruff* v. *Parham*, 8 Wall. 123, 140; *Railroad Co.* v. *Husen*, 95 U. S. 465, 469, 470; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 12, 13.

A state statute prohibiting the exportation of private property out of the State is void as an attempt to regulate interstate commerce. *Reid* v. *Colorado*, 187 U. S. 137, 151; *Crandall* v. *State of Nevada*, 6 Wall. 35; *Hall* v. *DeCuir*, 95 U. S. 485, 488; Cooke on the Commerce Clause, § 61; *Corwin* v. *Indiana Oil & Gas Co.*, 120 Indiana, 575; *Manufacturers' Gas Co.* v. *Indiana Natural Gas Co.*, 155 Indiana, 545; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 205; *Benedict* v. *Columbus Company*, 49 N. J. Eq. 23; Cooley on Const. Lim., 7th ed., 858; *Jackson Mining Co.* v. *Auditor General*, 32 Michigan, 488; *MacNaughton Co.* v. *McGirl*, 20 Montana, 124.

A State may not exercise its police powers in such a manner as to prohibit or directly interfere with interstate commerce. *Brennan* v. *Titusville*, 153 U. S. 289, 302; *Railroad Co.* v. *Husen*, 95 U. S. 465, 471; *Guy* v. *Baltimore*, 100 U. S. 434, 443; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Leisy* v. *Hardin*, 135 U. S. 100, 108. See to the same effect: *Henderson* v. *Mayor*, 92 U. S. 618, 626; *Schallen-*

berger v. *Pennsylvania*, 171 U. S. 1, 12; *Missouri, Kansas & Texas Ry. Co.* v. *Huber*, 169 U. S. 618, 626; *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Jacobson* v. *Massachusetts*, 197 U. S. 12, 25; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558.

In all commercial regulations the United States form a single nation. *Cohens* v. *Virginia*, 6 Wheat. 264, 413, 414; *The Chinese Exclusion Case*, 130 U. S. 581, 604; *Downes* v. *Bidwell*, 182 U. S. 244, 377; *Legal Tender Cases*, 12 Wall. 533; *Crandall* v. *Nevada*, 6 Wall. 35, 43; *Passenger Cases*, 7 How. 283, 492.

The real purpose of the Oklahoma statute in requiring a charter right to cross a highway is to prevent the transportation of natural gas out of the State—to do indirectly what cannot be done directly. *Collins* v. *New Hampshire*, 171 U. S. 30, 34; Ch. 67, Laws of Oklahoma.

To require as a condition to obtaining the privilege of crossing the highways the surrender of the constitutional right to engage in interstate commerce is in violation of the Federal Constitution, and renders the requirement of permission to cross highways unconstitutional and void. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Barron* v. *Burnside*, 121 U. S. 186, 200; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 62.

The effect of the Oklahoma statute in granting the right to cross the highways freely for intrastate transportation, but denying that right absolutely for interstate transportation, is a direct and positive discrimination against interstate commerce in violation of the Federal Constitution. A State cannot prohibit a corporation, which has acquired the right of way by purchase from abutting owners, from constructing or operating its pipe lines across and beneath its highways for the purpose of interstate commerce. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 26; *Norfolk & Western R. Co.* v. *Pennsylvania*, 136 U. S. 114, 120; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1, 9; *Escanaba* v. *Chicago*, 107 U. S. 678, 689.

The right of Oklahoma in its public highways is a mere easement.

The appellees may lay their pipe lines along the private right of way purchased and cross underneath the surface of the highway adjoining.

Under the common law as declared in the Federal decisions the abutting landowner has title to the soil beneath a public highway, and the public have merely a right of passage. *Olcott* v. *The Supervisors*, 16 Wall. 678, 697; *Martin* v. *Waddell*, 16 Pet. 367, 421; *United States* v. *Harris*, 1 Sumn. 21; *Barclay* v. *Howell*, 6 Pet. 498, 513; *Lyman* v. *Arnold*, 5 Mason, 195.

The common-law rule prevails in Oklahoma. *Mott* v. *Eno*, 181 N. Y. 346, 363; *West. Un. Tel. Co.* v. *Krueger*, 36 Ind. App. 348, 369.

Natural gas is not the property of the State. *Oil Co.* v. *Indiana*, 177 U. S. 190.

An owner of land has not merely the right to reduce to possession, but the actual title to, the natural gas in his lands, so long as the gas does not escape into the lands of other owners. *Brown* v. *Spillman*, 155 U. S. 665, 669.

Oil and gas do not differ in respect of the rights of the public from coal, iron ore and other like substances; they are property when in place and when reduced to possession; they may be sold even while in place and like coal, iron ore and other minerals, and two distinct estates may be created by the owner, both in absolute fee simple, one in the oil and gas in place and the other in the surface and remainder of the earth, in the same manner precisely as title is sometimes acquired by one man in the veins and deposits of coal, limestone, iron ore, lead, zinc and all other like solid substances separate and apart from the remainder of the soil or earth. We submit the correctness of all this is shown conclusively by the following authorities: Thornton on Oil and Gas, §§ 18, 19, 20; White on Mines and Mining Remedies, § 162, p. 223; Snyder on

Mines, § 1170, p. 954; *Funk* v. *Haldeman*, 53 Pa. St. 248; *Stoughton's Appeal*, 88 Pa. St. 198; *Blakeley* v. *Marshall*, 174 Pa. St. 429; *Gill* v. *Weston*, 110 Pa. St. 312; *Gas Co.* v. *DeWitt*, 130 Pa. St. 235; *Chartiers Block Coal Co.* v. *Mellon*, 152 Pa. St. 286; *Hague* v. *Wheeler*, 157 Pa. St. 324; *Murray* v. *Allred*, 100 Tennessee, 100; *Moore* v. *Griffin*, 72 Kansas, 164; *Isom* v. *Rex Crude Oil Co.*, 147 California, 659; *Ontario Natural Gas Co.* v. *Smart*, 19 Ont. Rep. 591; *Ontario Natural Gas Co.* v. *Gossfield*, 18 Ont. App. 666; *Hughes* v. *Pipe Lines*, 119 N. Y. 423; *Williamson* v. *Jones*, 39 W. Va. 231; *South Penn Oil Co.* v. *McIntire*, 44 W. Va. 296; *Carter* v. *Tyler County Court*, 45 W. Va. 806; *Williamson* v. *Jones*, 43 W. Va. 562; *Wilson* v. *Youst*, 43 W. Va. 826; *Preston* v. *White*, 57 W. Va. 278; *Kelley* v. *Ohio Oil Co.*, 57 Oh. St. 317; *Gas Co.* v. *Ullery*, 68 Oh. St. 259; *Nonemaker* v. *Amos*, 73 Oh. St. 163; *Hail* v. *Reed*, 15 B. Mon. 479; *Brown* v. *Spillman*, 155 U. S. 665.

Mr. Justice McKenna delivered the opinion of the court.

This appeal brings up for review the decree entered in the Circuit Court of the United States for the Eastern District of Oklahoma in four suits consolidated by stipulation of the parties.

The suits had the common purpose of attacking the constitutional validity of a statute of Oklahoma, enacted in 1907, which is referred to as chapter 67 of the Session Laws of 1907. It is inserted in the margin in full.[1] All

[1] Chapter 67—Pipe Lines—Regulating Gas and Oil Pipe Lines—Article 1.

An act regulating the laying, constructing, and maintaining and operating of gas pipe lines for the transportation of natural gas within the State of Oklahoma, defining the modes of procedure for the exercise of the right of eminent domain for such purposes, providing for the inspection and supervision of the laying of such pipe lines and limiting the gas pressure therein, and providing penalties for the violation thereof.

of the bills have the same foundation, that is, the right to buy, sell and transport natural gas in interstate commerce notwithstanding the provision of the statute.

The suits were numbered in the court below 856, 857,

Be it Enacted by the People of the State of Oklahoma:

SECTION 1. Any firm, co-partnership, association or combination of individuals may become a body corporate under the laws of this State for the purpose of producing, transmitting or transporting natural gas to points within this State by complying with the general corporation laws of the State of Oklahoma, and with this act.

SEC. 2. No corporation organized for the purpose of, or engaged in the transportation or transmission of natural gas within this State shall be granted a charter or right of eminent domain, or right to use the highways of this State unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this State; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, co-partnership companies or corporations engaged in transporting or furnishing natural gas to points, places or persons outside of this State.

SEC. 3. Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this State.

SEC. 4. No association, combination, co-partnership or corporation shall have or exercise the right of eminent domain within this State for the purpose of constructing, or maintaining a gas pipe line or lines within this State, or shall be permitted to take private or public property for their use within this State, unless expressly granted such power in accordance with this act.

SEC. 5. The laying, constructing, building and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across, or through the highways, roads, bridges, streets, or alleys in this State, or of any county, city, municipal corporation or any other public or private premises within this State is hereby declared an additional burden upon said highway, bridge, road, street or alley, and any other private, or public premises may only be done when the right is granted by express charter from the State and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law.

SEC. 6. All pipe lines for the transportation or transmission of natural gas in this State shall be laid under the direction and inspection

858 and 859. In 856 the Kansas Natural Gas Company was complainant. It is a corporation of the State of Delaware, and is engaged in the business of purchasing and distributing natural gas to consumers. It has a contract

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of proper persons skilled in such business to be designated by the chief mining inspector for such duty, and the expenses of such inspection and supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

SEC. 7. No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than three hundred pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe lines for the transportation or transmission of natural gas or used on or in any gas well within this State.

SEC. 8. Any corporation granted the right under the provisions of this act to exercise the right of eminent domain, or use the highways of this State to construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this State, which shall transport or transmit any natural gas to a point outside of, or beyond this State, or shall connect with or attempt to connect with or threaten to connect with any gas pipe line furnishing, transporting, or transmitting gas to a point outside of, or beyond this State, shall by each or all of said acts, forfeit all right granted it or them by the charter from this State, and said forfeiture shall extend back to the time of the commission of said act or said acts in violation of this act; and such act or acts shall of themselves work a forfeiture of any and all rights of any and every kind and character which may be or may have been granted by the State for the transportation or transmission of natural gas within this State, and all the property of said corporation and all the property at any time belonging to said corporation, at any time used in the construction, maintaining or operation of said gas pipe line or lines shall, in due course of law, be forfeited to and be taken into the possession of the State through its proper officer and in said action there shall be a right to the State of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the State, and the officer taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this State from any pipe line or lines going out of, or beyond the State. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first

for the purchase of all the gas that can be produced from a certain well in Washington County, Oklahoma, and has acquired by purchase the right of way over the land upon which the well is located for the laying of a pipe line for the transportation of the gas, and proposes to extend its trunk pipe lines from the present southern terminus thereof in the State of Kansas southward across the Oklahoma state line to the well. It also proposes to construct lateral and branch lines from the trunk line so extended for the purpose of gathering and receiving such gas as it may be able to purchase from the owners of other wells. Its line will not be used in any way for local traffic, but only for the transportation of the gas from the wells in Oklahoma into the States of Kansas and Missouri.

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to the payment of the cost of such proceeding, and the remainder, if any, paid into the school fund of the State, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall ever be granted to any corporation having among its stockholders any person who was one of the stockholders of said corporation whose charter has or may have been forfeited as aforesaid, and if any such charter shall have been granted, and thereafter a person shall become a stockholder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited, as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forfeited and revoked. Provided, that any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the corporation commission, when such person shows to such commission that he was not a party to the former violation of this act.

SEC. 9. No pipe lines for the transportation or transmission of natural gas shall be laid upon private or public property when the purpose of such line is to transport or transmit gas for sale to the public until the same is properly inspected as provided in this act; and before any gas pipe line company shall furnish or sell gas to the public, it shall secure from the inspector a certificate showing that said line is laid and constructed in accordance with this act, and under the inspection of the proper officer, provided that nothing in this act shall be construed to prevent persons drilling for oil and gas from laying surface

In No. 857 the Marnet Mining Company, a corporation of West Virginia, is complainant. For the purpose of transporting from the producers of gas in the State of Oklahoma to purchasers and consumers in Kansas and Missouri, it has purchased a right of way over certain lands in the State, and proposes to construct a system of pipe lines to be used exclusively in such interstate transportation, and not in any way for local traffic.

In No. 858 A. W. Lewis, a citizen and resident of the State of Ohio, is complainant. He is the owner of an oil and gas lease by which he has acquired the right to construct wells on a certain tract of land in Oklahoma, and to take gas therefrom for the period of fifteen years. He has constructed a well, in accordance with his lease, which

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lines to transport or transmit gas to wells which are being drilled within this State and further provided, that factories in this State may transport or transmit gas through pipe lines for their own use for factories located wholly within this State, upon securing the right of way from the State over or along the highways and from property owners to their lands.

SEC. 10. That no person, firm or association or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this State or in this State construct or operate a pipe line for the transmission of natural gas, except such persons, firms, associations, or corporations be incorporated as in this act provided, except as in section 9 of this act, and provided further that all persons, firms, corporations, associations, and institutions now doing the business of transporting or transmission of natural gas in this State and otherwise complying with this act are hereby permitted to incorporate under the provisions of this act within ten days after the passage and approval of the same.

SEC. 11. All acts and parts of acts in conflict with this act are hereby repealed.

SEC. 12. An existing emergency is hereby declared by the legislature for the preservation of the public peace, health and safety of the State.

SEC. 13. This act shall take effect from and after its passage and approval as provided by law.

Approved December 21, 1907.

is capable of producing many millions of cubic feet of gas per day, which, being in excess of the local demand, he is unable to sell in the State; and he alleges that, being prevented from transporting it from the State, he has suffered great loss and damage and is deprived of his property without compensation.

In No. 859 O. A. Bleakley, a citizen and resident of Pennsylvania, is complainant. He has received from the Secretary of the Interior a right of way over the land of certain Indians over a designated route, paying to the Indian Agent, by law and the rules and regulations of the Interior Department, the value of such right of way and the damages which the owners of the land over which he will pass for the laying and maintaining of a pipe-line for the exclusive purpose of transporting natural gas from Oklahoma to Kansas.

It is alleged in the bills that a great number of wells have been drilled in the State at great expense which are capable of producing more than 1,000,000,000 cubic feet of gas per day, that such amount is more than necessary for the demands of the people of the State, and the excess of supply is required to meet the wants of those residing in Missouri and Kansas. This want, it is alleged, may be supplied through the distributing plants now constructed and those contemplated by complainants, but that under the present conditions the owners are required to cease development work and to keep large and valuable wells capped and inoperative, to their great injury and damage. It is alleged that in constructing lines for such transportation it will not be necessary to go along the highways of the State, but only across or over them, and that the lines to be constructed will be private lines, will endanger the lives and property of no one, and will be constructed in just conformity with all reasonable rules and regulations of the State.

It is averred that each of the defendants is charged, by

virtue of his office, to execute the laws and constitution of the State, and that he has undertaken to enforce the act hereinbefore referred to by proceedings in courts and by force of arms, and it is his intent and avowed purpose to prevent the transportation of gas beyond the limits of the State. The particular acts are set forth.

The bills pray discovery, that the act above referred to be declared void as being in conflict with § 8, Article I, and the Fourteenth Amendment of the Constitution of the United States, and that the defendants be enjoined from the things attributed to them. General relief is also prayed.

Demurrers were filed to the bills which were overruled (172 Fed. Rep. 545), and the defendants answered.

It was subsequently stipulated that the causes be consolidated and that appellant file an amended answer in each of the cases and the answers of the other defendants be withdrawn. It will only be necessary to consider the amended answer, not, however, its details either of denial or averment, but only of certain facts especially relied on. These are: The present daily capacity of the gas wells of the State is approximately 1¼ billion cubic feet, the daily consumption being more than can be safely taken from them "without rapidly destroying their efficiency and depleting this great natural resource of the State." The gas area of the State is found in oil-producing sand, and the experience of all other natural gas fields demonstrates that the gas found in and taken from such sand is of much shorter duration than that found in purely gas sand, and if the acts of complainants be permitted "the field will be exhausted in a very short time." While it is true that the gas in Oklahoma is found in a gas and oil-producing sand which extends underneath large contiguous areas of land, every well takes from this unbroken area and diminishes the producing capacity of every other well and of the entire field, the acts of the complainants if permitted

will greatly damage and injure the entire field and take the property of all other owners therein and "that the act of the legislature of the State of Oklahoma alleged in the bill to be unconstitutional was an effort on the part of the legislature of the State to preserve the natural gas field of the State from destructive waste."

Certain cities of the States, which, by reason of their proximity to the gas field should be supplied with gas, are not now supplied with it, and will never be if complainants are allowed to transport it from Oklahoma without regulation by laws of the State, and the population of the State is now 1,750,000 and is growing more rapidly than that of any other State in the Union. On account of the general prairie character of the State it is without domestic fuel except coal and natural gas. Its supply of coal is growing rapidly more costly to produce, that the petroleum oil produced is practically transported from the State, "and that, substantially, the only natural, practical, usable fuel, both for domestic and industrial use, is natural gas."

The complainants may and are actually in the process of erecting enormous pumping stations outside of the State which "might reasonably and would inevitably render entirely useless all the present lines (gas) in Oklahoma, and take away from the cities and towns of Oklahoma the entire practical use of their sole and natural fuel, because when gas is removed by the limited, prudent and natural rock pressure the nature and formation of the gas and oil sand is not radically changed, but if large pumps to pump out the wells out of proportion to the rock pressure are used, as are now actually threatened, by the complainant, the gas and oil sand is actually broken down as though shot with dynamite and other violence, and the salt water thereunder, always to be found, at once drowns out the wells, where rock pressure has been too greatly or rapidly decreased; that the use of the highways is a portion of the

public property, and the same should be confined to those who supply all alike who may seek to be served, and because of its nature and extent and because the enormous amount of capital needed to make practical investments tends to create monopolies. The business of gas transportation is a public business in interstate trade, over which Congress has never legislated, and to permit complainant to carry out its said attempt and intent to monopolize the natural gas of the State and transport it away without regulation by the state laws over and across the State's highways without the State's consent would be to devote public property to private and exclusive use against the principles of the Constitution of this State and the United States, and deprive the intending purchasers of natural gas in this State from all supply whatsoever."

There are other allegations of the effect of contemplated acts of the complainants upon the gas supply of the State and there are admissions that pipe lines are the only practical means of transportation, but this, it is alleged, is due to its cheapness as compared with other means of transportation considering the price of gas as a fuel as compared with other fuel products and the transportation of gas from other fields. And it is set forth that the highways of the State are open to the transportation of gas by any means which do not "make a permanent appropriation of any part of the highways by placing a plant in the same."

It is further alleged that in order to supply the cities of the State with gas, lines are continually being extended and that there are several other pipe lines which are seeking to carry on business in the State in the same manner as desired by complainant, and if the right exists in complainant it exists in all other foreign corporations, and, if exercised, lines will be extended as one part of the field becomes exhausted to other parts of the field and the lines supplying the cities of the State will also be extended in

like manner and effect and a speedy destruction of the supply of the gas in the State will result.

It is admitted that there are maintained and operated in the State natural gas pipe lines, but, it is alleged, that they are in daily use for the transportation of gas within the State. And it is further admitted that they in many instances and often at great length, run over, along and across the highways of the State and "are operated without hurt, hindrance, damage or inconvenience to the traveling public or to abutting property owners." But it is averred that "they were laid and are operated according to the laws in force at the time and pursuant to the laws of the State."

Appellant admits that it is his duty to execute the laws of the State, and that it is his intention to enforce chapter 67 of the Session Laws of 1907 and 1908, and the acts amendatory and supplementary thereto "in so far as the same must or should be done by litigation in which the State is interested," but that his duties rest solely upon himself and are not controlled by others, and that he intends to prevent solely by actions in competent courts the laying, constructing and operating of gas pipe lines in, on, under, across or along the highways of the State by complainant or by any other person not authorized so to do by the laws of the State. He denies the acts of force charged against him, or that he proposes to use force. The other denials and admissions it is not necessary to set out. A dissolution of the injunction is prayed.

The cases were consolidated, as we have said, and submitted on the bills and the answers "to the end that an immediate determination thereof and final decree therein" might be obtained.

A final decree was entered declaring that the statute referred to "is unreasonable, unconstitutional, invalid and void, and of no force or effect whatever," and a perpetual injunction was awarded against its enforcement.

The basis of the decree of the court was that expressed in its opinion ruling upon the demurrers, to wit, that the statute of Oklahoma was prohibitive of interstate commerce in natural gas, and in consequence was a violation of the commerce clause of the Constitution of the United States, and that being, as the court said, its dominant purpose, it would, if enforced against complainants, "invade their rights as guaranteed by the Fourteenth Amendment of the National Constitution" and also the constitution of the State. *Haskell* v. *Kansas Natural Gas Co.*, 172 Fed. Rep. 545.

These conclusions are contested, and it is asserted that the statute's "ruling principle is conservation, not commerce; that the due process clause is the single issue." And due process, it is urged, is not violated, because the statute is not a taking of property, but a regulation of it under the police power of the State. The provisions of the act, it is further insisted, are but an exercise of the police power to conserve the natural resources of the State, and as means to that end the right of eminent domain is forbidden to foreign corporations engaged in transporting gas from the State and the use of the highways of the State confined to pipe lines operated by domestic corporations in order that gas may be transmitted only between points within the State. And such exercise of power, it is contended, does not regulate interstate commerce, but only affects it indirectly.

A paradox is seemingly presented. Interstate commerce in natural gas is absolutely prevented—prohibited in effect, for we think it is undoubted that pipe lines are the only practical means of gas transportation, and to prohibit interstate commerce is more than to indirectly affect it. Every provision of the statute is directed to such result. Pipe-line construction is confined to corporations organized under the laws of the State, and the condition of their incorporation is that they shall only transmit gas between

points in the State and shall not transport to or deliver to corporations or persons engaged in transporting or furnishing gas to points outside of the State. The right of eminent domain is given alone to such corporations and the use of the highways is confined to them, and that there be no element of control over them omitted, a violation of the statute is punished by a forfeiture of charters and of property. Nor can a new corporation be formed if even one of its stockholders was a stockholder of an offending corporation.

To such stringent subjection foreign corporations could not be brought, so they are absolutely excluded from the State by the following provision: "Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of, transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this State."

The statute presents no embarrassing questions of interpretation. It was manifestly enacted in the confident belief that the State had the power to confine commerce in natural gas between points within the State, and all of the rights conferred on domestic corporations, all of the rights denied to foreign corporations, were means to such end. And the State having such power, it is contended, if its exercise affects interstate commerce it affects such commerce only incidentally. In other words, affects it only, as it is contended, by the exertion of lawful rights and only because it cannot acquire the means for its exercise.

The appellant makes a broader contention. The right to conserve, or rather the right to reserve, the resources of the State for the use of the inhabitants of the State, present and future, is broadly asserted. "The ruling principle of the law," counsel say, "is conservation, not commerce." It is true the means adopted to secure conservation are more insistently brought forward than the right of conser-

vation, and the power of the State over its corporations and over its highways and its right to give or withhold eminent domain are many times put forward in the argument and illustrated by the citation of many cases. It cannot but be observed that these rights need not the support of one another. If the right of conservation be as complete as contended for it could be secured by simple prohibitions or penalties. If the power over highways and eminent domain be as absolute as asserted it will have to be given effect no matter for what purpose exercised. We are, therefore, admonished at the very start in the discussion of the importance of the questions presented and the power which the States may exert against one another, even accepting the concession of appellant that Congress may break down the isolation by granting the right not only to take private property but to subject the highways of the State against the consent of the State to the uses of interstate commerce. With full appreciation of the importance of the questions involved, we pass to their consideration.

As to conservation, appellant says that "the case narrows itself to the single question of whether in any event a State has the right to conserve its natural resources, and, second, has it the right to preserve a common supply for the equal use of all those who may by law resort to it."

The second question is not presented in the case. The provisions of the statute are not directed against waste. They are directed against any use of the gas except in the State. The right of the State "to preserve the common supply for the equal use of all" owners is not denied by appellees. We put the question out of consideration, therefore, except incidentally, and concede the right of the State to preserve the supply of gas as we shall hereafter set forth.

The extent of power which the second question implies a State possesses, challenges serious inquiry. The natural resources of a State may be other than natural gas, for

example may be timber and coal, and iron and other metals, but it is not contended that the right of conservation extends to these, and the broad statement of the first question is qualified in the argument by the properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power of the State which otherwise it would not possess. And such power, as we understand the further contention to be, may determine not only the conservation of the resources of the State but as to what class of persons may use them, as dependent upon their transportation in state, rather than in interstate, commerce. The contention is discussed at length and variously illustrated. Indeed, analogies are adduced of limitations upon the use of property by virtue of the police power under conditions which invoke its exercise for the advancement of the general welfare. We select for review from the cases brought forward, those nearest to our inquiry, which are *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *Natural Carbonic Oil Co.*, 220 U. S. 61; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349.

Ohio Oil Co. v. *Indiana* was a writ of error to the Supreme Court of Indiana to review a judgment of that court which sustained a statute which prohibited any one having the control or possession of any natural gas or oil well to permit the gas or oil therefrom to escape into the open air, and restrained the Oil Company from violating the statute. Against the statute was urged the rights of property assured by the Fourteenth Amendment of the Constitution of the United States. The case is a valuable one and clearly announces the right of an owner to the soil beneath it and the relation of his rights to all other owners of the surface of the soil. The right of taking the gas, it was said, was common to all owners of the surface, and because of such a common right in all land owners an unlimited use (against a wasteful use the statute was directed) by any it was competent for the State to prohibit. This

limitation upon the surface owners of property was justified by the peculiar character of gas and oil, they having the power of self-transmission, and that therefore to preserve an equal right in all surface owners there could not be an unlimited right in any. Gas and oil were likened to, not made identical with, animals *feræ naturæ* and, like such animals, were subject to appropriation by the owners of the soil, but also, like them, did not become property until reduced to actual possession.

But an important distinction was pointed out. In things *feræ naturæ*, it was observed, all were endowed with the power of reducing them to possession and exclusive property. In the case of natural gas only the surface proprietors had such power, and the distinction, it was said, marked the difference in the extent of the State's control. "In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enactment by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer* v. *Connecticut*, *supra* 161 U. S. 519. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right of reducing to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property." And this right, it was further said, was coequal in all of the owners of the surface and that the power of the State could be exerted "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 a like end by preventing waste." And further characterizing the statute, it was said, viewed as one to prevent the waste of the common property of

the surface owners, it protected their property, not divested them of it. And special emphasis was given to this conclusion by the comment that to assert that the right of the surface owner to take was under the Fourteenth Amendment a right to waste, was "to say that one common owner may divest all the others of their rights without wrongdoing, but the law-making power cannot protect all the owners in their enjoyment without violating the Constitution of the United States."

The case, therefore, is an authority against, not in support of, the contention of the appellant in the case at bar.

The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it, a reduction to possession and property, not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession they could not be deprived of any right which attached to it when in possession.

The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it; indeed, selects its market to reserve it for future purchasers and use within the State

on the ground that the welfare of the State will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it

must be done by the authority of another instrumentality than a court.

The case of *State ex rel. Corwin* v. *Indiana & Ohio Oil, Gas and Mining Co.*, 120 Indiana, 575, is pertinent here. A statute of Indiana was considered which made it unlawful to pipe or conduct gas from any point within the State to any point or place without the State. It was assailed on one side as a regulation of interstate commerce, and therefore void under the Constitution of the United States. It was defended, on the other hand, as a provision for the exercise of the right of eminent domain, confining it to those engaged in state business, denying it to those engaged in interstate business, and, further, as imposing restrictions on foreign corporations. It will be observed, therefore, the statute had, it may be assumed, the same inducement as the Oklahoma statute, and the same special justifications were urged in its defense. The court rejected the defenses, and decided that the statute was not a legitimate exercise of the police power, or the regulation of the right of eminent domain or of foreign corporations, but had the purpose "plainly and unmistakably manifested" to prohibit transportation of natural gas beyond the limits of the State, and that this being its purpose it was void as a regulation of interstate commerce. These propositions were announced: (1) Natural gas is as much a commodity as iron ore, coal or petroleum or other products of the earth, and can be transported, bought and sold as other products. (2) It is not a commercial product when it is in the earth, but becomes so when brought to the surface and placed in pipes for transportation. (3) If it can be kept within the State after it has become a commercial product, so may corn, wheat, lead and iron. If laws can be enacted to prevent its transportation, "a complete annihilation of interstate commerce might result." And the court concluded: "We can find no tenable ground upon which the act can be sustained, and we are compelled to

adjudge it invalid." The case was explicitly affirmed in *Manufacturers' Gas &c. Co.* v. *Indiana Natural Gas &c. Co.*, 155 Indiana, 545.

The case is valuable because the court through the same justice who wrote the opinion distinguished between an exercise of the police power to regulate the taking of natural gas and its prohibition in interstate commerce.

Jamieson v. *Indiana Natural Gas Co.*, 128 Indiana, 555, sustained a statute prohibiting the taking of gas under a greater pressure than 300 pounds to the square inch. The court said that natural gas "is, no doubt, so far a commercial commodity that this State cannot prohibit its transportation to another State by direct legislation," citing *State ex rel. Corwin* v. *The Indiana &c. Co., supra.* The court said further: "If it can be taken from the well and transported to another State under a safe pressure the State cannot prohibit its transportation, nor can the State establish one standard of pressure for its own citizens and another standard for the citizens of other States." The court, therefore, discerning in the statute no discrimination and no prohibition but only a regulation universal in its application and justified by the nature of the gas and which allowed its transportation to other States, decided that there was no restriction or burden upon interstate commerce.

Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61, is to the same effect as *Ohio Oil Company* v. *Indiana.* Its similarity to the latter case was pointed out. Indeed, they can be said to be identical in principle. In the one case oil and gas, in the other mineral water and gas, were commingled beneath the surface of the earth and capable of movement and common ownership. In the one case the right was asserted to waste the gas to secure the oil which was the more valuable of the two; in the other case the right was asserted to waste the water to secure the gas as the more valuable of the two. In both cases there was

a statute forbidding the waste. Speaking of the purpose of the statute in *Lindsley* v. *Natural Carbonic Gas Company*, it was said: "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." The statute was sustained upon the reasoning of that case.

Hudson County Water Co. v. *McCarter*, 209 U. S. 349, is urged, we have seen, on our attention. A statute of the State of New Jersey was involved, which made it unlawful for any person or corporation to transport or carry through pipes the waters of any fresh-water lake, river, etc., into any other State for use therein. Two propositions may be said to be the foundation of the decision of the court below sustaining the statute. (1) "The fresh-water lakes, ponds, brooks and rivers, and the waters flowing therein, constitute an important part of the natural advantages of the" State, "upon the faith of which its population has multiplied in numbers and increased in material welfare. The regulation of the use and disposal of such waters, therefore, if it be within the power of the State, is among the most important objects of government." (2) "The common law recognized no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others." It was further declared that the common law authorized the acquisition of water "only by riparian owners, and for purposes narrowly limited. Not that the ownership is common and public." And the contention was rejected that the title of the individual riparian owner was to the water itself—the fluid considered as a commodity—and exclusive against the public and against all persons excepting other riparian owners.

It is clear that neither of these propositions will support the contentions of the appellant in the case at bar. Nor

does any principle announced upon the review of the case here, though the power of the State to enact the statute was put "upon a broader ground than that which was emphasized below." The police power of the State was discussed and the difficulty expressed of fixing "boundary stones between" it and the right of private property which was asserted in the case. There were few decisions, it was said, that were very much in point. But certain principles were expressed, of which *Geer* v. *Connecticut*, 161 U. S. 519, was considered as furnishing an illustration and *Kansas* v. *Colorado*, 185 U. S. 125, and *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, some suggestions.

That principle was that it was for the "interest of the public for a State to maintain the rivers that are wholly within it substantially undiminished, except by such drains upon them as the guardian of the public welfare may permit for the purpose of turning them to more perfect use." And this principle was emphasized as the one determining the case and the opinion expressed that it was "quite beyond any rational view of riparian rights that an agreement of no matter what private owners, could sanction the diversion of an important stream outside of the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of the lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."

It is hardly necessary to say that there was no purpose in the case to take from property its uses and commercial rights or to assimilate a flowing river and the welfare which was interested in its preservation to the regulation of gas wells, or to take from the gas when reduced to possession the attributes of property decided to belong to it in *Ohio Oil Co.* v. *Indiana*, and recognized in *Lindsley* v. *Natural Gas Co.* Indeed, pains were taken to put out of consideration a material measure of the benefits of a great river to

a State. And surely we need not pause to point out the difference between such a river flowing upon the surface of the earth and such a substance as gas seeping invisibly through sands beneath the surface.

We have reviewed the cases at some length as they demonstrate the unsoundness of the contention of appellant based upon the right to conserve (we use this word in the sense appellant uses it) the resources of the State, and that the statute finds no justification in such purpose for its interference with private property or its restraint upon interstate commerce. At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated or restrained by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce. To attain these unauthorized ends is the purpose of the Oklahoma statute. The State through the statute seeks in every way to accomplish these ends, and all the powers that a State is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented. Corporate persons are more subject to control than natural persons. The business is therefore confined to the former, and foreign corporations are excluded from the State. Lest they might enter by the superior power of the Constitution of the United States, the use of the highways is forbidden to them and the right of eminent domain is withheld from them, and the prohibitive strength which these provisions are supposed to carry is exhibited in the fact that the boundary of the State is a highway. If it cannot be passed without the consent of the State, commerce to and from the State is impossible. The situation is not underestimated by appellant, and he says: "If the appellees had the right of way they might engage in interstate commerce, but their desire to engage in interstate commerce is a different thing from the means open to them to procure a right of way." And it is further

said, that "the confusion of the right to engage in interstate commerce with the power to forcibly secure a right of way is the basis of appellees' case."

There is here and there a suggestion that the State not having granted such right the alternative is a grant of it by Congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar. *State ex rel. Corwin* v. *Indiana & Ohio Oil, Gas & Mining Co., supra; Benedict* v. *Columbia Construction Co.*, 49 N. J. Eq. 23, and also in *Haskell, Governor, et al.* v. *Cowham*, United States Circuit Court of Appeals, Eighth Circuit. In the latter case the Oklahoma statute was under review, and in response to the same contentions which are here presented these propositions were announced with citation of cases:

"No State by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

"No State by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

The power of the State of Oklahoma over highways is much discussed by appellant and appellees; the appellant contending for a power practically absolute, as exercised under the statute, making the highways impassable barriers to the pipe lines of appellees. The appellees contend for a more modified and limited right in the State, one not extending beyond an easement of public passage, subject, therefore, to certain rights in the abutting owners, which rights can be transferred; and further contend that even

if the power of the State be not so limited, it cannot be exercised to discriminate against interstate commerce.

The rights of abutting owners we will not discuss, nor the rights derived from them by appellees except to say that whatever rights they had they conveyed to appellees and against them there is no necessity of resorting to the exercise of eminent domain. We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals in the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends.

And, we repeat again, there is no question in the case of the regulating power of the State over the natural gas within its borders. The appellees concede the power, and, replying to the argument of appellant based on the intention of appellees to erect large pumps to increase the natural rock pressure of the gas, appellees say, "Kansas by legislative enactment forbids the use of artificial apparatus to increase the natural flow from gas wells: Chapter 312, Laws of Kansas, 1909, page 520. To this act the Kansas Natural Gas Company has no objection."

Decree affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE LURTON and MR. JUSTICE HUGHES dissent.

JACOBS *v.* BEECHAM.

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

No. 139. Argued April 21, 24, 1911.—Decided May 15, 1911.

Corruptio optimi pessima. Sound general principles should not be turned to support a conclusion manifestly improper.

Even if the burden of proof is on one manufacturing a named article under a secret formula to prove that one selling an article by the same name is not manufacturing under that formula, there is a *prima facie* presumption of difference, which protects the owner without requiring him to give up the secret.

The burden is on a defendant who uses plaintiff's trade-name to justify the using thereof.

Where the name of the originator has not left him to travel with the goods the name remains with the manufacturer, as an expression of source and not of character.

The word "Beecham's" as used in connection with pills manufactured by the party of that name is not generic as to the article manufactured but individual as to the producer; and one calling his product by the same name is guilty of unfair trade even if he states that he, and not Beecham, makes them.

The word "patent" as used in connection with medicines does not mean that the article is patented but that it is proprietary; and there is no fraud on the public in using the word in that sense although the article has not been patented.

The proprietor of a valuable article will not be deprived of protection against unfair trade because of certain trivial misstatements as to place of manufacture and Christian name of manufacturer when both statements were true at one time and it does not appear that the public have been improperly misled.

159 Fed. Rep. 129, affirmed.

THE facts are stated in the opinion.

Mr. George F. Hurd and *Mr. Cornelius W. Wickersham* (by leave of the court), with whom *Mr. Max J. Kohler*,

Mr. Moses Weill and *Mr. Isaac Weill* were on the brief, for appellants:

The right to use the name of Beecham is *publici juris*, and defendant is not guilty of unfair competition. Appellee has no trade-mark. There can be no trade-mark in a proper name. *Canal Co.* v. *Clark*, 13 Wall. 311; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Corbin* v. *Gould*, 133 U. S. 308; *LeClanche Battery Co.* v. *Western Elec. Co.*, 23 Fed. Rep. 276; Hopkins on Trade-marks, 2d ed., §§ 40, 53.

No unfair competition has been shown. There is no evidence that defendant's pills were inferior or dissimilar to complainant's. The burden of proving such inferiority or dissimilarity, had it existed, was on complainant-appellee, and in the absence of evidence thereon an injunction granted upon that ground would be unwarranted. *Baglin* v. *Cusenier Co.*, 164 Fed. Rep. 25 (the *Chartreuse case*); *Hostetter Co.* v. *Comerford*, 97 Fed. Rep. 585; *Goodyear's &c. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598, 604; *LaMont* v. *Leedy*, 88 Fed. Rep. 72.

Appellant has not used the name "Beecham" in any manner whatever calculated to deceive the public into a belief that the goods offered for sale by him are those of the appellee. He sold pills designated as Beecham Pills, manufactured by Mark Jacobs, Maspeth, L. I., N. Y., U. S. A.

If a secret process is unpatented anyone may use it and enter into competition with the original discoverer. *Canham* v. *Jones*, 2 Vesey & B. 218; *Saxlehner* v. *Wagner*, 216 U. S. 375; *Chadwick* v. *Covell*, 151 Massachusetts, 190; *Watkins* v. *Landon*, 52 Minnesota, 389.

This principle is also upheld in *Marshall* v. *Pinkham*, 52 Wisconsin, 572; *Park & Sons Co.* v. *Hartman*, 153 Fed. Rep. 24, 29, 32, 33; *Singleton* v. *Bolton*, 3 Douglas, 293; *Canham* v. *Jones*, 2 Vesey & B. 218; *Burgess* v. *Burgess*, 17 Eng. L. & E. 257; *James* v. *James*, L. R. 13 Eq. Cas. 421; *Massam* v. *Thorley's C. F. Co.*, 6 Ch. Div. 574; and

see where the secret process or formula was originally protected by letters patent, but the patent has expired, *Singer Company* v. *June*, 163 U. S. 169, 185.

The only distinction between the cases where no patent ever existed and where a patent has expired, is in the method by which the right is obtained—in the one case by dedication, and in the other by the acquisition of knowledge of the secret. The resulting right is the same, as was intimated by this court in the *Hunyadi Case*, 216 U. S. 381. *Fowle* v. *Park*, 131 U. S. 88, is distinguishable.

Complainant has no exclusive right to the manufacture and sale of these pills, nor to the use of the word "Beecham" in connection therewith; that word being generic and the only designation of the product, is open to use by anyone who actually engages in the business of manufacturing and selling this commodity, care being taken to state by whom it is in fact manufactured. The false use of the word "patent" disentitles complainant to equitable relief. *Holzapfel's* v. *Rahtjen's Co.*, 183 U. S. 1; *Oliphant* v. *Salem Flouring Mills*, 5 Sawyer, 128; *Consolidated* v. *Dorflinger*, Fed. Cas. No. 3129; *Leather Cloth Co.* v. *Am. Leather Cloth Co.*, 11 H. L. Cas. 523; *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516.

Cases cited in 28 Am. & Eng. Ency. of Law, 356, and *Solez Cigar Co.* v. *Pozo*, 16 Colorado, 388; *Ford* v. *Foster*, L. R. 7 Ch. Div. 611, relate only to where there was a patent which had expired; but see *Cheavin* v. *Walker*, 5 Ch. Div. 850; *Preservaline Mfg. Co.* v. *Heller Chemical Co.*, 118 Fed. Rep. 103; and § 4901, Rev. Stat. The English courts have established a similar doctrine.

In the case at bar, complainant relied on a secret process, and defendant used the name given to the article by the discoverer of the invention, adding, however, that it was manufactured by themselves. *Cheavin* v. *Walker*, 5 Ch. Div. 850; *Pharmaceutical Society* v. *Piper*, 1893, L. R. 1 Q. B. 686; Fulton on Patents, Trade-marks and

Designs (London, 1902), 188; *Consolidated* v. *Dorflinger*, Fed. Cas. No. 3129.

Complainant has been guilty of deceiving the public, and he now attempts to wash the stain of unconscionable conduct from his hands by a denial of misrepresentation. The case is unlike that of patent leather shoes, because the word "patent" as used by him is not descriptive.

The misrepresentation of manufacture in England, and the continued use of the name Thomas Beecham disentitle complainant to equitable relief. A complainant who has deceived the public by a false statement in regard to the place of manufacture of his commodity is not entitled to relief in equity. *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 222; *Worden* v. *California Fig Syrup Co.*, *supra*, at 528; *Palmer* v. *Harris*, 60 Pa. 156.

There is certainly enough in Joseph Beecham's labels to convey to everyone who can read that the pills are still made in England, where the business was solely conducted until about 1890, particularly in view of the express statements on circulars used for years thereafter that the pills were prepared in that country. *Saunion & Co.*, Cox's Manual, case 625; Browne on Trade-marks, 2d ed., § 71, p. 78; *Solez Cigar Co.* v. *Pozo & Suarez*, 16 Colorado, 388, 394; *Wrisley* v. *Iowa Soap Co.*, 104 Fed. Rep. 548. See also *Kenny* v. *Gillet*, 70 Maryland, 574; *Prince M. Co.* v. *Prince's Metallic Paint Co.*, 135 N. Y. 24; *Hobbs* v. *Francis*, 19 How. Pr. (N. Y.) 567; *Millrae Co.* v. *Taylor*, 37 Pac. Rep. 235 (Cal.); *Coleman Co.* v. *Dannenberg Co.*, 103 Georgia, 784; *Raymond* v. *Royal Baking Powder Co.*, 85 Fed. Rep. 231.

Complainant's failure to state in his labels the change of manufacture after the assignment from Thomas Beecham is another element of his inequitable conduct.

The continued use of the name of Thomas Beecham by complainant should, therefore, disentitle him to the relief

sought. Paul on Trade-marks, § 318, p. 543; *Stachelberg* v. *Ponce*, 23 Fed. Rep. 430 (affirmed on other grounds, 128 U. S. 686); *Symonds* v. *Jones*, 82 Maine, 302, 315; *Hegeman & Co.* v. *Hegeman*, 8 Daly (N. Y.), 1, 22; *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. Rep. 376; *S. C.*, aff'd 85 Fed. Rep. 231. See also *Seigert* v. *Abbott*, 61 Maryland, 276; *Alaska Packer's Assn.* v. *Alaska Imp. Co.*, 60 Fed. Rep. 103 (even where labels corrected after suit brought).

The court has jurisdiction of the case at bar under § 6 of the act of March 3, 1891.

Mr. John L. Wilkie for appellee.

The appellee has not represented that his pills are manufactured under letters patent by using the words "Patent Pills."

As to cases where the word "patent" was held not to indicate and did not in fact indicate that the article to which it was applied was in fact patented, see *Cahn* v. *Gottschalk*, 14 Daly, 542; *Cochrane* v. *McNish*, 1896, App. Cas. 225; *Marshall* v. *Ross*, L. R. 8 Eq. 651; *Stewart* v. *Smithson*, 1 Hilton, 119; *Leather Cloth Co.* v. *Am. Leather Cloth Co.*, 11 H. L. 523; *Ins. Oil Tank Co.* v. *Scott*, 33 La. Ann. 946.

The word "patent" is frequently used in combinations not intended to indicate that the article has been in fact patented. See Century Dictionary; Murray's Oxford Dictionary; Encyclopædic Dictionary; Stormonth's Dictionary; Brewer's Etymological and Pronouncing Dictionary of Difficult Words.

In many statutes in this country the word "patent" as applied to medicines is used as interchangeable with "proprietary," and such use of the word has, therefore, obtained a legislative sanction. The citations are so numerous that they can at best be merely classified.

In the following statutes the phrase "patent or proprietary medicines" occurs in provisions regulating their

preparation and sale: Rev. Stat., § 3436; Arkansas Dig. of Statutes, § 5283; Dakota Territory Rev Stat., §§ 228, 229; Hawaii Territory Rev. Stat., § 1095; Illinois Rev. Stat., c. 91, § 30; Indiana Rev. Stat., § 5000*i*; Maine Rev. Stat., c. 30, § 13; Michigan Rev. Laws, § 5312; New Jersey Public Laws, 1895, p. 365, § 8; North Dakota Rev. Stat., § 7281; Ohio Rev. Stat., § 4405; Tennessee Code, § 3635; Vermont Rev. Stat., § 4663; Washington Codes and Statutes, § 2877; Wyoming Rev. Stat., § 2222.

In the following three statutes the phrase is "proprietary and patent medicines." Colorado Rev. Stat., § 4909; Florida Rev. Stat., § 814; Oregon Codes and Statutes, § 3811. See also Massachusetts Rev. Stat., c. 76, § 23; Utah Rev. Stat., § 1725; Kentucky Rev. Stat., § 2631; Delaware, c. 36, Vol. 18, § 1; South Carolina Civil Code, § 1126; Louisiana Laws of 1888, act 66, p. 74, § 3; Pennsylvania Public Laws, 189, § 6 (1887, May 24); Rhode Island Rev. Stat., c. 152, § 8; South Dakota Political Code, § 281; West Virginia Code, c. 150, § 7.

For legal construction see *State* v. *Donaldson*, 41 Minnesota, 74; *Nordyke* v. *Kehlor*, 155 Missouri, 643, 653; *Palmer* v. *McCormick*, 30 Fed. Rep. 82.

The appellee has not been guilty of any false representations either as to the place of manufacture of his product or the person by whom the same is manufactured.

Even if a statement as to place of manufacture were misleading, it has been abandoned for seventeen years and cannot be made the basis of successful piracy of the name "Beecham." The discontinuance of a misstatement when made before suit brought relieves the complainant of the effect of the rule. *Moxie Nerve & Food Co.* v. *Modox Co.*, 153 Fed. Rep. 487; *Johnson & Johnson* v. *Sedbury & Johnson* (N. J.), 67 Atl. Rep. 36; *Symonds* v. *Jones*, 82 Maine, 302.

As to the alleged misstatement that the pills are prepared only and sold wholesale by the proprietor, Thomas

Beecham, Lancashire, England, all of the forms used since 1902 are necessarily objectionable and under the authorities cited appellant cannot rake up the past to find in a long discontinued user, evidence of untrue statements. See "*Moxie*" and other cases, *supra*.

Also the alleged misstatement is that the pills are specially packed for the United States of America, being covered with a quickly soluble, pleasant coating, completely disguising the taste of the pill. This was used while the pills were both packed and made in the United States, and the whole question is whether or not the clause is false, not by virtue of what it says, but of what it suggests. *Wrisley Co.* v. *Iowa Soap Co.*, 104 Fed. Rep. 548, does not apply. The words here do not call for the interpretation that the pills are made in England, although packed for the United States. They are equally true wherever the pills are made. See *Tarrant & Co.* v. *Johann Hoff*, 76 Fed. Rep. 959; *Clark Thread Co.* v. *Armitage*, 74 Fed. Rep. 936; *Société Anonyme* v. *Western Distilling Co.*, 43 Fed. Rep. 416; *Siegert* v. *Gandolfi*, 149 Fed. Rep. 100; *Gluckman* v. *Strauch*, 99 App. Div. 361; aff'd 186 N. Y. 560.

As to alleged misrepresentations as to the persons by whom the pills are manufactured, there was no misrepresentation. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

The real proprietor of the trade-name used in connection with these pills has never been the person of Thomas Beecham as distinguished from Joseph, or any other person, but has always been and is "Thomas Beecham of St. Helens, England," a partnership formerly composed of both Thomas and Joseph to which the latter succeeded as sole surviving partner. The appellee is lawfully continuing the business under the old name, as he has done since 1895, and the statement that the pills were manufactured and sold "by the proprietor Thomas Beecham, St. Helens, England," was strictly speaking as accurate

in point of fact after the transfer of 1895 as it was before. It cannot be regarded as a misrepresentation or a fraudulent statement.

The appellee is not barred from relief because his pills happen to be made under a secret process or formula. The rule that an owner of a secret process, unpatented, may not enjoin another from manufacturing goods under that process and marketing them under the name used to describe them by the original manufacturer, and by which they have come to be known to the public, provided the latter comes to his knowledge of the process in good faith has no application to this case.

Appellee's right to relief does not depend in any way upon the fact of his goods being manufactured under a secret process. His right to relief depends simply upon the fact of the appellant's manufacturing and selling similar goods, calling them by his trade-name.

There is no less right on the part of a manufacturer of goods made under a secret process or formula to protection of his trade-name than on the part of an ordinary manufacturer of goods.

The rule is not that the owner of a valuable trade-name cannot enjoin the manufacturer of similar goods under the same name unless he can show that such goods are manufactured under a secret process other than that used by himself, but rather that he can enjoin such use of his trade-name unless the person attempting to use the same can justify his attempted use by showing similarity of secret process and good faith in the acquisition of knowledge as to the same.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill by the owner of a proprietary or patent medicine, so called, made according to a secret formula and known as Beecham's Pills, to restrain the defendant

from using the same name on pills made by him, and trying to appropriate the plaintiff's good will. The plaintiff had a decree in the Circuit Court enjoining the defendant from using the word Beecham in connection with pills prepared or sold by him, which decree was affirmed by the Circuit Court of Appeals. 159 Fed. Rep. 129. 86 C. C. A. 623.

The present appeal is based on two or three different grounds. The first of these is that anyone who honestly can discover the formula has a right to use it, to tell the public that he is using it, and for that purpose to employ the only words by which the formula can be identified to the public mind. As to the defendant's having discovered the formula, it is said that if he makes a different or inferior article the burden is on the plaintiff to prove the fact. As to the method adopted by the defendant to advertise his wares, which, apart from other imitations, consists in simply marking them Beecham's Pills, it is said that the proper name cannot constitute a trade-mark and has become the generic designation of the thing. The defendant's use of the name is said to be saved from being unfair by the statement underneath that he made the pills.

Corruptio optimi pessima. Sound general propositions thus are turned to the support of a conclusion that manifestly should not be reached. We will follow and answer the argument in the order in which we have stated it. If, in a technical sense, the burden of proof is on the plaintiffs to prove that the defendant's pills are not made by his formula, there is at least a *prima facie* presumption of difference, just as in the case of slander there is a presumption that slanderous words are false. A different rule would prevent the owner of a secret process from protecting it except by giving up his secret. Again, when the defendant has to justify using the plaintiff's trade-name, the burden is on him. Finally, as the case presents what is a fraud on its face, it is more likely that the defendant is

a modern advertiser than that he has discovered the hidden formula of the plaintiff's success.

As to the defendant's method of advertising, he does not simply say that he has the Beecham formula, as in *Saxlehner* v. *Wagner*, 216 U. S. 375, but he says that he makes Beecham's Pills. The only sense in which Beecham's Pills can be said to have become a designation of the article is that Beecham, so far as appears, is the only man who has made it. But there is nothing generic in the designation. It is in the highest degree individual and means the producer as much as the product. It has not left the originator, to travel with the goods, as in *Chadwick* v. *Covell*, 151 Massachusetts, 190, 195, or come to express character rather than source, as it is admitted sometimes may be the case. *Holzapfel's Compositions Co.* v. *Rahtjen's American Composition Co.*, 183 U. S. 1. *Goodyear's India Rubber Glove Manuf. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598. *Thomson* v. *Winchester*, 19 Pick. 214, 216. To call pills Beecham's Pills is to call them the plaintiff's pills. The statement that the defendant makes them does not save the fraud. That is not what the public would notice or is intended to notice, and, if it did, its natural interpretation would be that the defendant had bought the original business out and was carrying it on. It would be unfair, even if we could assume, as we cannot, that the defendant uses the plaintiff's formula for his pills. *McLean* v. *Fleming*, 96 U. S. 245, 252. *Millington* v. *Fox*, 3 My. & Cr. 338, 352. *Gilman* v. *Hunnewell*, 122 Massachusetts, 139, 148.

The other grounds of appeal are charges that the plaintiff's boxes have upon them false statements such as to exclude him from equitable relief. The one most pressed is that certain of the boxes carry the words Beecham's Patent Pills, and that the pills are not patented. The answer is that the word does not convey the notion that they are. To signify that, the proper word is 'patented'

rather than 'patent,' and it commonly is used separately, not prefixed to a noun. On the other hand, the use of the word patent to indicate medicines made by secret formulas is widespread and well known. It is mentioned in the dictionaries, and it occurs in the plaintiff's circulars. We think it clear that there is no danger that anyone would be defrauded by the form of the label on the plaintiff's box, and that it would be wrong to press *Holzapfel's Compositions Co.* v. *Rahtjen's American Composition Co.*, 183 U. S. 1, so far as to cover this case.

It is objected further that the plaintiff's boxes are labelled "Beecham's Patent Pills, price 25 cents, sold by the Proprietor, St. Helens, Lancashire, England," or "Beecham's Patent Pills, St. Helens, Lancashire," or "Beecham's Pills, Saint Helens," and that a circular contains the statement that "The pills accompanying this pamphlet are specially packed for U. S. America, being covered with a quickly soluble pleasant coating" &c. The statement in the circular is true in a literal sense, but suggests the belief that the pills were made in England whereas in fact they now are made in New York. The labels may be said to convey a similar suggestion in a fainter form. With this may be mentioned the remaining object of cavil, that some of the boxes still bear the name of Thomas Beecham, although Thomas Beecham transferred his interest to the plaintiff, his son, in 1895. Both of these matters are small survivals from a time when they were literally true and are far too insignificant when taken with the total character of the plaintiff's advertising to leave him a defenceless prey to the world. The facts are that the business was started by Thomas Beecham, in England, that he made the pills there and got a considerable custom in America, that he took the plaintiff into partnership, continuing the business under the old name, and that in 1895 he retired, turning over his interest to his son. The son went on under the same name for a time, but his boxes now bear his

own name as proprietor, and his circulars show that he is his father's successor. About 1890 they began to make the pills in New York as well as in England, but, as has been seen, not every phrase in the advertisements was nicely readjusted to the change. That is all there is in the whole subject of complaint. There is not the slightest ground for charging the plaintiff with an attempt to defraud the public by these statements, or any reason why the judgment below should not be affirmed, unless it be in a motion of the plaintiff to dismiss. This was met by the fact that the bill seemingly relied upon the registration of the words Beecham's Pills as a trade-mark under the act of Congress as one ground for the jurisdiction of the Circuit Court. *Warner* v. *Searle & Hereth Co.*, 191 U. S. 195, 205, 206; *Standard Paint Co.* v. *Trinidad Asphalt Manuf. Co.*, 220 U. S. 446.

Decree affirmed.

MATTER OF HARRIS, BANKRUPT.

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

No. 165. Argued April 28, 1911.—Decided May 15, 1911.

The right under the Fifth Amendment not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story.

A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized receiver. *Counselman* v. *Hitchcock*, 142 U. S. 547, distinguished.

Under § 2 of the act of 1898, where the bankruptcy court can enforce title against the bankrupt in favor of the trustee, it can enforce possession *ad interim* in favor of the receiver; and so *held* as to books of the bankrupt.

THE facts are stated in the opinion.

Mr. Louis J. Vorhaus, with whom *Mr. Moses H. Grossman* was on the brief, for the bankrupt:

Inasmuch as the books of account contain evidence which would incriminate the bankrupt, their delivery cannot be compelled, for to require such delivery would violate the bankrupt's constitutional privilege against incriminating himself. Fifth Amendment to the Constitution.

The compulsory production of a man's private books and papers to be used in evidence against him is compelling him to be a witness against himself within the meaning of that Amendment. *Boyd* v. *United States*, 116 U. S. 616; *Matter of Kanter*, 9 Am. Bank. Rep. 104; *Re Hess*, 14 Am. Bank. Rep. 559; Wigmore on Evidence, § 2264.

The bankrupt had been threatened with criminal prosecution for having obtained merchandise on credit by means of a false written statement, and it appears that the falsity of the statement referred to would be established by entries in his books of account. Even if no criminal prosecution is pending against him, that fact is no answer to his right to claim this constitutional privilege. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Re Hess*, 14 Am. Bank. Rep. 559.

The Bankruptcy Act of July 1, 1898, does not supplant the constitutional privilege.

There is no provision in the act giving the bankrupt immunity from the use of his books of account against him in case he delivers them to his receiver or trustee. The only provision for immunity to the bankrupt is § 7*a*, subd. 9, which does not meet this situation. But even if it does, it is inadequate, and cannot supplant the privilege.

Under the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. *Counselman* v. *Hitchcock*, *supra*; *Re Feldstein*,

4 Am. Bank. Rep. 321; *Matter of Kanter*, 9 Am. Bank. Rep. 104, and cases cited; *In re Hess*, *supra*; *Taylor* v. *Forbes*, 143 N. Y. 219.

The books of account contain entries which tend to incriminate. It appears that the bankrupt's claim of privilege is well founded and is made in good faith. 1 Burr's Trial, 244, cited in *Counselman* v. *Hitchcock*, *supra*; *Taylor* v. *Forbes*, 143 N. Y. 231; *Matter of Kanter*, 9 Am. Bank. Rep. 104.

The order herein compels the bankrupt to incriminate himself, in violation of his constitutional privilege. *Counselman* v. *Hitchcock*, 142 U. S. 547.

Although the order prohibits the use of the books themselves in any criminal case against the bankrupt, it permits the receiver to inspect them and take extracts therefrom. The production of such secondary evidence ought to be compelled by subpœna. Such evidence, in whatever manner obtained, might be competent and admissible as against the bankrupt. *Adams* v. *New York*, 192 U. S. 585; *Kerrch* v. *United States*, 171 Fed. Rep. 366; *Zotti* v. *Flynn*, 135 App. Div. 276, 284.

If these consequences may follow as a result of this order, the bankrupt is thereby deprived of his constitutional privilege.

The provision of the order forbidding the use of the books in any criminal proceeding against the bankrupt does not afford him absolute immunity against future prosecution for any offense to which said books relate.

The endeavor to aid the receiver in the administration of the bankrupt's estate furnishes no justification for the slightest encroachment upon the bankrupt's privilege. *Boyd* v. *United States*, 116 U. S. 616.

Mr. Abram I. Elkus, with whom *Mr. Carlisle J. Gleason* was on the brief, for the receiver:

The bankrupt's contention involves an impairment

both of efficiency in the administration of the Bankruptcy Act and of the court's power to take possession of the bankrupt estate. *In re Harris*, 164 Fed. Rep. 292, 293.

The more of fraud there has been on the part of the bankrupt the more strongly entrenched he will be against being obliged to turn over his books, and the more impossible will it become for the court to effect an equitable distribution of his assets among his creditors. If the court cannot take the property of the estate it is administering into its control it loses to that extent its jurisdiction and power over that estate.

The Fifth Amendment does not prevent a court from compelling a bankrupt to yield his books for purposes of civil administration of his estate. See *Brown* v. *Walker*, 161 U. S. 591, 596, as to exceptions of the application of the principle, viz.: Where the privilege is waived; where the accused person takes the stand in his own behalf; where the prosecution is barred by the statute of limitations; where the witness has been pardoned; where the answer of the witness will only tend to degrade or disgrace him; and where the danger is not real and appreciable but rather imaginary and unsubstantial. *Counselman* v. *Hitchcock*, 142 U. S. 547, is readily distinguishable by reason of the difference in the nature of the proceeding, and the different object sought thereby. The English law furnishes a limitation of the principle of the Amendment which is a potent consideration here. *Brown* v. *Walker*, *supra*, p. 600; and see *Matter of John Heath*, Court of Review, in Bankruptcy, 1833, 2 Deac. & Chitty, 214.

Under the English rule, particularly as laid down in *Ex parte Joves*, Buck, 337, the English rule has been applied in various courts of the United States. *Re Bromley*, 3 Nat. Bank. Reg. Rep. 686; *Re Sapiro*, 92 Fed. Rep. 340; *Re Hart Bros.*, 136 Fed. Rep., 986; *In re Hess*, 136 Fed. Rep. 988.

The result reached in these cases is that the books must

be produced and if the plea of privilege appears to be well founded in fact the court will enable the receiver to obtain the necessary information from the books and at the same time make an order for the protection of the bankrupt from the discovery of incriminating evidence.

A trustee of a bankrupt estate under § 70 of the Bankrupt Act is vested by operation of law as of the date of the adjudication with the title of the bankrupt to all documents relating to his property. *Babbitt* v. *Dutcher*, 216 U. S. 102.

Title does not vest in a receiver in bankruptcy but a receiver has a right to possession, the property being within the control of the court. Remington on Bankruptcy, §§ 1121, 1128.

The bankrupt's contention that the court cannot take his books because they contain incriminating entries is a direct attack upon the jurisdiction of the court. It impairs that jurisdiction and leaves the court without power through its receiver to take possession of the complete property of his estate.

MR. JUSTICE HOLMES delivered the opinion of the court.

In this case the District Court made an order that the bankrupt should deposit his books of account in the office of the receiver, there to remain in the custody of bankrupt; the latter to afford the receiver free opportunity to inspect the same, but the receiver to use and to permit them to be used only for the purpose of the civil administration of the estate and not for any criminal proceeding. It was ordered further that in case of subpœna or other process to the receiver for their production, he should notify the bankrupt, to the end that the bankrupt might have an opportunity to raise the question of his constitutional privilege. The bankrupt petitioned the Circuit Court of Appeals to revise the order. It appears that he made to a commer-

cial agency a written statement of his assets and liabilities January 4, 1908, but he declined to testify concerning it, as it might tend to criminate him, several creditors having threatened him with prosecution for having obtained merchandise from them by that means. He also made oath that the books contained evidence that might tend to incriminate him; which was confirmed by an affidavit of his attorney. The receiver desired the books in order to ascertain what disposition was made of the assets alleged in the statement to the agency. On the other side the bankrupt was willing to allow an inspection if he could save his right that the books should not be used against him in a criminal trial; but he excepted to the order on the ground that no statute protected him from the knowledge gained from the books being used to find and get evidence that might be used against him in a criminal prosecution. He relied upon the Fifth Amendment and *Counselman* v. *Hitchcock*, 142 U. S. 547. The Circuit Court of Appeals certifies the question whether the order was a proper exercise of the authority of the Bankruptcy Court.

If the order to the bankrupt, standing alone, infringed his constitutional rights, it might be true that the provisions intended to save them would be inadequate and that nothing short of statutory immunity would suffice. But no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of § 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate prop-

erty that may tell one's story. As the bankruptcy court could have enforced title in favor of the trustee, it could enforce possession *ad interim* in favor of the receiver. § 2. In the properly careful provision to protect him from use of the books in aid of prosecution the bankrupt got all that he could ask. The question certified is answered *Yes.*

STRASSHEIM, SHERIFF OF COOK COUNTY, *v.* DAILY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 638. Argued April 3, 4, 1911.—Decided May 15, 1911.

In a *habeas corpus* proceeding in extradition it is sufficient if the count in the indictment plainly shows that the defendant is charged with a crime. *Pierce* v. *Creecy*, 210 U. S. 387.

Where a guaranty goes not to newness but to fitness of articles furnished, it is a material fraud to furnish old articles even if they can meet the test of the guaranty; and the fact that the purchaser may rely on the guaranty does not exclude the possibility that the purchase price was obtained by false representations as to the newness of the articles.

A State may punish one committing crimes done outside its jurisdiction for the purpose of producing detrimental effects within it when it gets the criminal within its power.

Commission of the crimes alleged in this indictment—bribery of a public officer and obtaining public money under false pretenses—warrants punishment by the State aggrieved even if the offender did not come into the State until after the fraud was complete.

An overt act becomes retrospectively guilty when the contemplated result ensues.

One who is never within the State before the commission of a crime producing its results within its jurisdiction is not a fugitive from justice within the rendition provisions of the Constitution, *Hyatt* v. *Cork-*

ran, 188 U. S. 691, but, if he commits some overt and material act within the State and then absents himself, he becomes a fugitive from justice when the crime is complete if not before.

Although absent from the State when the crime was completed in this case, the party charged became a fugitive from justice by reason of his having committed certain material steps towards the crime within the State, and the demanding State is entitled to his surrender under Art. IV, § 2 of the Constitution of the United States and the statutes providing for the surrender of fugitives from justice.

THE facts are stated in the opinion.

Mr. Thomas E. Barkworth, with whom *Mr. Franz C. Kuhn*, Attorney General of the State of Michigan, *Mr. Ferdinand L. Barnett* and *Mr. Charles W. McGill* were on the brief, for appellant.

Mr. William S. Forrest for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from an order on *habeas corpus* discharging the respondent, Daily, from custody under a warrant of the Governor of Illinois directing his extradition to Michigan as a fugitive from justice from that State. Daily, it appears, had been indicted in Michigan for bribery and also for obtaining money from the State by false pretenses, and a requisition had been issued to which the warrant of the Governor of Illinois was the response. The District Judge who issued the *habeas corpus* was of opinion, however, that the facts alleged in the indictment for obtaining money by false pretenses did not constitute a crime against the laws of Michigan and that the evidence showed that Daily was not a fugitive from justice. We will consider these two questions in turn.

The third count of the indictment is the only one that needs to be stated, although all the counts alleged a false representation that certain machinery, to be sold to the State, was new, whereas in fact it was second-hand and

used, and the obtaining from the State of ten thousand dollars by means of such representation. The third count alleges that one Armstrong was warden of the Michigan State prison at Jackson, and, in conjunction with the Board of Control of the prison, authorized to buy machinery for a cordage plant in the prison; that he was authorized to accept the machinery and to pay for it from the funds of the State under his control; that said Board and Armstrong contracted with the Hoover and Gamble Company, acting through Daily, the agent, and one Eminger, the secretary of the company, for the purchase of such machinery, all of which, by the contract, was to be new; that Armstrong, Daily and Eminger had agreed beforehand to substitute old, worn and second-hand machinery, of less value, for that which was contracted for, the Board being ignorant of their intent and being deceived and defrauded by the substitution; that the second-hand machinery having been substituted, Armstrong, Daily and Eminger, with intent to cheat the State, to wit, on the first day of May, 1908, falsely pretended that the machinery so furnished was the new machinery required by the contract, and rendered bills for the same at the contract prices; that the bills were audited and allowed by Armstrong and the machinery paid for as new machinery, and that Armstrong, Daily and Eminger, by means of the false pretenses set up, obtained from the State of Michigan money, to wit, ten thousand dollars, the State and the Board of Control relying upon the false pretenses and being deceived thereby. We sum up the count thus broadly, because, although considerable ingenuity was spent in pointing out defects that would occur to no one outside of the criminal law, yet, whatever may be thought of the criticisms in Michigan, it is plain that the count shows that the defendant 'was substantially charged with a crime,' and upon *habeas corpus* in extradition proceedings, that is enough. *Pierce* v. *Creecy*, 210 U. S. 387, 405.

It would seem, although the record is otherwise, that the judge below really went on the ground that the terms of the contract excluded a reliance upon the false representation alleged. The contract after stating that it was for "all new machinery to be manufactured by the Hoover & Gamble Company," contained a guaranty that the machinery should be "constructed in a thorough manner free from any defects of machinery or workmanship and finished in a first-class manner." It also provided for the retention of the last quarter of the price "until the machinery is all installed and tested, and operating, so as to fulfill the guaranty above given, to the satisfaction and approval of C. G. Wrentmore, Cons. Engr. of the Board of Control." The case is not to be tried on *habeas corpus*. Therefore it is enough to say that the guaranty and testing clauses do not exclude the possibility that the money was obtained by the false pretenses alleged. The guaranty goes, not to newness, but to workmanship and freedom from defects, and the approval of the consulting engineer is required only to show that the guaranty is fulfilled. The guaranty does not exclude other representations and undertakings. As has been seen it was expressed in the contract that the subject-matter of the guaranty was machinery to be manufactured and new. If old machinery was put in and represented to be new it was a material fraud.

We come then to the other question, whether the facts show that the defendant is a fugitive from justice. The bribery is laid under a videlicet as taking place on May 13, 1908; the false pretenses are averred to have been made on May 1, of the same year. On both of these dates the defendant was in Chicago. What happened, in short, was this. Daily had tried to sell second-hand machinery, in which he had an interest, to the State, and it was rejected. At the time of receiving notice, or afterwards, but within ten days before July 22, 1907, he had a conversation with Armstrong in Chicago, in which he said it was

a mistake not to accept his proposition; that he thought it could be arranged, and that there would be a nice present in it for Armstrong, which he said would be 'one thousand dollars anyway.' In the affidavit of Armstrong accompanying the requisition it is stated explicitly that the present was offered if Armstrong would let Daily substitute his old machinery for new in case a contract should be made.

On July 22, 1907, the successful bid of the Hoover and Gamble Company was sent in. It was signed by Daily, and Daily was with the Board of Control in Michigan, accompanying it, when it was considered and accepted. He had made a previous visit to the Board in the spring, and he was there in November to see the machinery and to delay shipment. At the latter date he told Armstrong that Eminger, the Secretary of the Company, had objected to the word 'new' in the contract and was afraid they would have trouble with the Consulting Engineer, but Armstrong replied that he did not think they would have any trouble with him. Finally, in April, 1908, Daily was at the prison again, in further execution of the program arranged by him and Armstrong, as the judge below properly found. Armstrong's affidavit states that Daily did substitute his old machinery, that it was understood that Armstrong was not to communicate the fact to the proper officer of the State or to the Board of Control, that the plant was put in, that the contract price was paid in full, and that thereafter Daily paid Armstrong fifteen hundred dollars, as he had agreed. But it may be assumed, for the moment, that Daily personally did no act in Michigan in any way connected with his plan otherwise than as we have stated above.

If a jury should believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceived the Board of Control, and induced by fraud the payment by the State, the usage of the civilized world would warrant Michigan in punishing him, although he

never had set foot in the State until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power. *Commonwealth* v. *Smith*, 11 Allen, 243, 256, 259. *Simpson* v. *State*, 92 Georgia, 41. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. *Commonwealth* v. *Macloon*, 101 Massachusetts, 1, 6, 18. We may assume therefore that Daily is a criminal under the laws of Michigan.

Of course we must admit that it does not follow that Daily is a fugitive from justice. *Hyatt* v. *Corkran*, 188 U. S. 691, 712. On the other hand, however, we think it plain that the criminal need not do within the State every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before. *In re Cook*, 49 Fed. Rep. 833, 843, 844. *Ex parte Hoffstot*, 180 Fed. Rep. 240, 243. *In re William Sultan*, 115 No. Car. 57. For all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there, *Roberts* v. *Reilly*, 116 U. S. 80, and his overt act becomes retrospectively guilty when the contemplated result ensues. Thus in this case offering the bid and receiving the acceptance were material steps in the scheme, they were taken in Michigan, and they were established in their character of guilty acts when the plot was carried to the end, even if the intent with which those steps were taken did not make Daily guilty before. *Swift* v. *United States*, 196 U. S. 375, 396.

We have given more attention to the question of time than it is entitled to, because of the seeming exactness of

the evidence. But a shorter and sufficient answer is to repeat that the case is not to be tried on *habeas corpus*, and that when, as here, it appears that the prisoner was in the State in the neighborhood of the time alleged it is enough.

Judgment reversed, prisoner remanded.

MARCHIE TIGER *v.* WESTERN INVESTMENT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 60. Argued November 30, December 1, 2, 1910; restored to docket for reargument January 23, 1911; reargued March 1, 2, 1911.—Decided May 15, 1911.

The obvious purpose of § 8 of the act of May 27, 1908, c. 199, 35 Stat. 312, was to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in interpretation of the prior legislation.

In passing the enabling act for the admission of Oklahoma of June 16, 1906, c. 3335, 34 Stat. 267, Congress preserved the authority of the Government of the United States over the Indians, their lands and property, which it had prior to the passage of that act.

The act of April 26, 1906, c. 1876, 34 Stat. 137, providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, while it permitted lands to be conveyed by full-blood Indians, was nevertheless intended to prevent imprudent sales by this class of Indians and made such conveyances valid only when affirmed by the Secretary of the Interior.

Quære whether the constitutionality of an act of Congress limiting a right of conveyance by a class of Indians can be questioned by the

grantee of an Indian of that class on the ground that it deprives the Indian of his property without due process of law.

From the earliest period Congress has dealt with Indians as dependent people and legislated concerning their property with a view to their protection as such.

Congress has full power to legislate concerning tribal property of Indians, and the conferring of citizenship on individual Indians does not prevent Congress from continuing to deal with tribal lands.

It is for Congress, in pursuance of long established policy of this Government, and not for the courts, to determine for itself when, in the interest of the Indian, government guardianship over him shall cease.

The privileges and immunities of Federal citizenship do not prevent such proper governmental restraint upon the conduct or property of citizens as may be necessary for the general good.

When the act of April 26, 1906, was passed, Congress had not by the supplemental Creek agreement of June 30, 1902, c. 1323, 32 Stat. 500, or by any other act, released its control over the alienation of lands of full-blood Creek Indians, and it was within its power to continue to restrict such alienation, notwithstanding the bestowal of citizenship upon the Indians, by requiring the approval of the Secretary of the Interior to conveyances made by them.

As above construed, the act of April 26, 1906, c. 1876, 34 Stat. 137, is not unconstitutional as depriving full-blood Indians upon whom citizenship has been bestowed of their property without due process of law because it places further restrictions upon their right of alienation of lands.

21 Oklahoma, 630, reversed.

THE facts, which involve the construction and constitutionality of the provision of the act of April 26, 1906, c. 1876, 34 Stat. 137, requiring certain conveyances of full-blood Indians to be approved by the Secretary of the Interior, are stated in the opinion.

Mr. W. L. Sturdevant, with whom *Mr. M. L. Mott* and *Mr. W. A. Brigham* were on the brief, for plaintiff in error:

In determining the meaning and application of a statute, the courts will consider the mischief to be prohibited

or the benefits to be conferred, the nature of the subject-matter, the class and condition of the persons to be affected, the necessities and circumstances of its enactment, the system of laws of which it is a part, its necessary relation to, and effect upon, that system, its consistency with other provisions of the same and also prior and subsequent acts, the general policy of legislation upon the same subject and the consequences to result from the construction adopted.

When the purpose and scope of a statute are thus ascertained its language becomes subservient thereto to the extent that what is within the intention of the lawmaker is within the statute whether within its terms or not, and that what is not within such intention is not within the statute although included within its terms.

From the inception of the legislation providing for allotment of these lands to the last act upon the subject no affirmative expression by Congress can be found removing restrictions or governmental control from inherited lands of full-blood Indians.

The authority of the Government, so often asserted and so long exercised over a subject so peculiarly within the province and necessity of that authority, will not be abandoned by such an omission when, upon all positive declaration, the intention has been otherwise.

Sections 19 and 22 of the act of April 26, 1906, when read in connection with § 23 of that act and §§ 8 and 9 of the act of May 27, 1908, show an unmistakable intention on the part of Congress to protect and, in furtherance of that end, to extend the period of restrictions upon the inherited lands of full-blood Indians. Section 7, act of March 1, 1901, 31 Stat. 861; §§ 6, 16, act of June 30, 1902, 32 Stat. 500; §§ 19, 22, 23, 28, 29, act of April 26, 1906, 34 Stat. 137; §§ 8, 9, act of May 27, 1908, 35 Stat. 312; Endlich on the Interp. Stat., §§ 43, 45, 103, 258, 265, 295, 320, 322; Lewis's Sutherland on Stat. Const., 2d ed., §§ 443, 447,

448, 585, 586, 590, 592; Black on Interpretation, § 113; *Alexander* v. *Mayor*, 5 Cranch, 7; *United States* v. *Freeman*, 3 How. 556; *Brewer* v. *Blougher*, 14 Pet. 178; *Brown* v. *Douchesne*, 19 How. 183; *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656; *Kohlsaat* v. *Murphy*, 96 U. S. 153; *McKee* v. *United States*, 164 U. S. 287; *Interstate Drainage Co.* v. *Comes*, 158 Fed. Rep. 273; *Goodrum* v. *Buffalo*, 162 Fed. Rep. 817; *Keeney* v. *McVoy*, 206 Missouri, 42; *Hill* v. *American Surety Co.*, 200 U. S. 203; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *United States* v. *Moore*, 161 Fed. Rep. 518, 519; *United States* v. *Hanson*, 167 Fed. Rep. 893; 26 Op. Atty. Gen. 352.

On the definition and construction of provisos, see Black on Int., § 110; *Georgia Bkg. Co.* v. *Smith*, 128 U. S. 174; *Chesapeake Co.* v. *Manning*, 186 U. S. 239; *United States* v. *Whitridge*, 197 U. S. 135; *United States* v. *Scruggs &c. B.*, 156 Fed. Rep. 940.

The General Government has power to deal with, control and protect the property of the Indians, where not expressly abandoned. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and of judicial sanction.

This power must, in the nature of things, continue until its further exercise is deemed unnecessary by those in whom it rests. *United States* v. *Rickert*, 188 U. S. 439; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 249; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Stephens* v. *Cherokee Nation*, 174 U. S. 484; *United States* v. *Kagama*, 118 U. S. 375; *Worcester* v. *Georgia*, 6 Pet. 515; *Wallace* v. *Adams*, 204 U. S. 420.

When the agreements were entered into between the Government and the Creek tribe of Indians providing for the allotment of their lands, and laws were enacted to carry them into effect, the authority of the Government over these lands, exercised prior thereto, was not wholly

abandoned or intended by either party to the agreements so to be abandoned. But, on the contrary, further restrictions were imposed upon the alienation of the allotments for a given period.

By reason of this reservation of authority, the jurisdiction or power of Congress was continued and maintained over the subject; and this power, limited though it may be, can be exercised whenever in the judgment of Congress its exercise is necessary to protect the subject, that is, the property of the Indian, and to maintain, likewise, the policy of the Government. The restriction is an agency through which a governmental power may be exercised.

The breaking up of tribal interests in the lands and their allotment in severalty ushered in a new policy in dealing with the Indian. This new policy sought to localize and individualize the Indian. And the Government undertook to protect him in an individual property right as it had previously done in a tribal property right.

Congress, having retained authority over the subject by agreement and, acting within the life of the agreement and while the tribal government still exists, may conclude that a longer period of care and supervision is necessary to its policy and in the best interests of both the Government and the Indian and, thereupon, extend the period of restrictions by appropriate legislation. This, of course, comes within the rightful exercise of power reserved over the subject and the act in controversy and all its provisions are, therefore, valid.

This relation of the Government and the Indian is not affected by his citizenship, or by any other rights which he may possess, or by the police power of the State over him, or by any rights which the State of Oklahoma has in the premises; but, on the contrary, it is entirely compatible with all these. *Smith* v. *Stevens*, 10 Wall. 321; *Wiggan* v. *Connolly*, 163 U. S. 60; *In re Heff*, 197 U. S. 488;

Goodrum v. *Buffalo*, 162 Fed. Rep. 817; *United States* v. *Rickert*, 188 U. S. 432; *United States* v. *Hall*, 171 Fed. Rep. 218; *Rainbow* v. *Young*, 161 Fed. Rep. 836; *National Bank of Commerce* v. *Anderson*, 147 Fed. Rep. 87; *United States* v. *Thurston County*, 143 Fed. Rep. 287; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *McKay* v. *Kalyton*, 204 U. S. 458; *Conley* v. *Ballinger*, 216 U. S. 84; §§ 1, 3 (cl. 3), 22, Enabling Act; 34 Stat. 267; § 497, Constitution Oklahoma.

Powers, rights and interests of sovereignty are never relinquished by lapse or implication. Once established and asserted, they are presumed to exist and to continue to exist until abandoned by express terms. This principle applies, alike, to prerogatives of the executive, powers of the legislature and the jurisdiction of courts. All acts derogatory thereof are strictly construed and every doubt resolved in favor of their perpetuity. *United States* v. *Herron*, 20 Wall. 251; *National Bank* v. *Anderson*, 147 Fed. Rep. 90; *Hamilton* v. *Reynolds*, 88 Indiana, 193; *State* v. *Polacheck*, 101 Wisconsin, 430; *Pooler* v. *United States*, 127 Fed. Rep. 519; *United States* v. *Knight*, 14 Pet. 301; *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287; *United States* v. *Shaw*, 39 Fed. Rep. 39; *Mosle* v. *Bidwell*, 130 Fed. Rep. 335.

Mr. George S. Ramsey and *Mr. S. T. Bledsoe*, with whom *Mr. C. L. Thomas*, *Mr. L. J. Roach*, *Mr. Chris. M. Bradley* and *Mr. R. C. Allen* were on the brief, for defendants in error:

The act of Congress, approved April 26, 1906, did not in the Creek Nation operate to extend beyond August 8, 1907, restrictions against alienation by full-blood Indians of lands inherited by them.

The restrictions against the alienation by the allottee are personal to the allottee and do not run with the land. The restrictions against the alienation by the heirs are personal to the heirs and do not pass with the land to a

vendee of the heirs. *Oliver* v. *Forbes*, 17 Kansas, 128; *Clark* v. *Lord*, 20 Kansas, 393, 396; *McMahon* v. *Welch*, 11 Kansas, 290.

The restrictions against alienation imposed by § 7 of the Original Agreement, and § 16 of the Supplemental Agreement were personal to the allottee and his heirs. *Libby* v. *Clark*, 118 U. S. 250; *United States* v. *Payne Lumber Co.*, 206 U. S. 467.

The only restrictions on heirs expired five years from the date of the approval of the Supplemental Agreement, which was on August 8, 1907. The last sentence in § 22 does not extend the restrictions against alienation by heirs who are full-bloods, but simply left such full-bloods under the restrictions already existing, which expired five years from the date of the ratification of the Supplemental Agreement. This last sentence is a proviso or exception. A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent. Black on Interpretation of Laws, 270, 273; 2 Sutherland on Stat. Const., § 352; *United States* v. *Dickson*, 15 Pet. 141, 165.

A proviso should be construed strictly and takes no case out of the enacting clause which does not clearly fall within its terms. *Ryan* v. *Carter*, 93 U. S. 78, 85; *United States* v. *Alston, Newhall & Co.*, 91 Fed. Rep. 529; *Carter* v. *Hobbs*, 92 Fed. Rep. 599; *Wall* v. *Cox*, 101 Fed. Rep. 409; *In re Matthews*, 109 Fed. Rep. 614; *Boston Safe Deposit Co.* v. *Hudson*, 68 Fed. Rep. 760; *United States* v. *Schilerholz*, 137 Fed. Rep. 618; *Gould* v. *New York Life Ins. Co.*, 132 Fed. Rep. 929; *Murray* v. *Beal*, 97 Fed. Rep. 569; *Paxton Lumber Co.* v. *Farmers' Lumber Co.*, 50 Am. St. Rep. 596.

A proviso should be strictly construed and must be construed with reference to the subject-matter of the section of which it forms a part, unless there is a manifest legislative intention that it should limit the operation of other sections of the act. *United States* v. *132 Packages of Spirituous Liquors*, 65 Fed. Rep. 983; *Chattanooga R. & C. R. Co.* v. *Evans*, 66 Fed. Rep. 814; *In re Matthews*, 109 Fed. Rep. 614; *McRae* v. *Holcomb*, 46 Arkansas, 306; *Bragg* v. *Clark*, 50 Alabama, 363.

The act of Congress approved April 26, 1906, in so far as it undertook to place additional restrictions on the alienation of allotted lands to which the allottee held a patent is unconstitutional and void.

On August 8 and 13, 1907, Marchie Tiger had full power to convey, without supervision or restriction of any kind whatever, the lands inherited by him from his deceased ancestors, and his warranty deeds of those dates to the defendants in error were valid conveyances of his inherited lands, because Marchie Tiger and Marchie Tiger's ancestors were citizens of the United States. Act of March 3, 1901, 24 Stat. 390; *Ross* v. *Ellis*, 56 Fed. Rep. 855; *United States* v. *Hall*, 171 Fed. Rep. 214; *United States* v. *Boss*, 160 Fed. Rep. 132; *Dick* v. *United States*, 208 U. S. 352; Rep. Senate Select Committee, Vol. 1, p. v. (1906); *In re Heff*, 197 U. S. 488; *Ex parte Savage*, 158 Fed. Rep. 205; *United States* v. *Saunders*, 96 Fed. Rep. 268; *United States* v. *Kopp*, 110 Fed. Rep. 160; *Ex parte Viles*, 139 Fed. Rep. 68; *United States* v. *Dooby*, 151 Fed. Rep. 697; *United States* v. *Augur*, 153 Fed. Rep. 671; *United States* v. *Allen et al.*, 171 Fed. Rep. 907.

Marchie Tiger's ancestors owned these lands in fee simple absolute, subject only to the condition or limitation, contained in the grant, that the lands should not be alienated by them or their heirs before the expiration of five years from August 8, 1902. *Taylor* v. *Brown*, 147 U. S. 640; Report of Senate Select Committee, Vol. 1,

p. v (1906); Act of March 1, 1901, 31 Stat. 861, § 7; Act of June 30, 1902, 32 Stat. 500, §§ 6, 16.

It is not within the power of Congress to create a condition or limitation, or extend a condition or limitation affecting these lands, after conveyance to the allottees and the acceptance of the conveyance by the allottees, in fee simple, subject only to the definite condition or limitation expressed in the grant. *Jones* v. *Meehan*, 175 U. S. 1; *In re Heff*, 197 U. S. 488; Report of Select Senate Committee, Vol. 1, p. v (1906).

All other cases adjudicated by this court, bearing upon titles to Indian lands and rights therein, are to be distinguished from the case at bar, for the reason that the status of full citizenship and full ownership of property does not occur in any case heretofore presented. *United States* v. *Rickert*, 188 U. S. 433; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Taylor* v. *Brown*, 147 U. S. 640; *Ex parte Savage*, 158 Fed. Rep. 205; *Wiggan* v. *Connolly*, 163 U. S. 56.

Mr. Wade H. Ellis for the United States, by leave of the court:

The United States asks to be heard for the reason that the interests of all Indians of the Five Civilized Tribes, whose welfare the Government is bound to guard, are here involved.

The questions involved in the present case are, Did the act of April 26, 1906, forbid the alienation of inherited lands by full-blood Creek Indians without the approval of the Secretary of the Interior, subsequent to August 8, 1907? and, If the act did forbid such alienation was it constitutional?

The act of April 26, 1906, constitutes a comprehensive and uniform system regulating the alienation of lands by

full-blood Indians of all the Five Tribes and completely supersedes the previous distinctions between Indians of the same degree of blood but members of different tribes.

The statutes *in pari materia* show that § 22 of the act of April 26, 1906, is intended to forbid conveyances by Indian heirs who are full-bloods except with the approval of the Secretary of the Interior.

The history of legislation respecting Indian lands; the special agreements with various tribes and the uniform policy of the Government, make a strong presumption against the claim that Congress intended to permit the alienation of lands by full-blood Indians free from all restraint.

Defendants in error rely on the fact that the Creek Indians were, by an act of March 3, 1901, made citizens of the United States, and that after that date Congress had no power to restrict the alienation of their lands. The plenary power of the United States over the Indian and his land rests upon considerations that are not affected by the grant of citizenship. Const., Art. I, § 8; Art. IV, § 3, provides that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory. There is a moral obligation on the part of a superior and civilized nation to protect a dependent and uncivilized race over whose former domain it has assumed control.

Unallotted tribal Indian lands are always within the control of Congress. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Conley* v. *Ballinger*, 216 U. S. 84.

Even lands allotted to Indians in severalty may be continued under the direct supervision of Congress. *United States* v. *Rickert*, 188 U. S. 432.

Congress may continue, or impose anew, restrictions upon the alienation of allotted Indian lands, even after

the limitations reserved in the original grant have expired. *Stevens* v. *Smith*, 10 Wall. 334; *Jones* v. *Meehan*, 175 U. S. 1.

There is nothing in the grant of citizenship which shows any purpose on the part of Congress to surrender its power to legislate for the Creek Indians and to supervise the disposition of their lands.

The *Heff Case*, 197 U. S. 488, does not sustain defendants in error. In the present case the citizenship granted is Federal only and the Indians are not made subject to local laws with respect to their lands.

The *Celestine Case*, 215 U. S. 278; *Sutton Case*, 215 U. S. 291; *United States* v. *Rickert*, 198 U. S. 432, hold that the grant of citizenship does not deprive Congress of its full power to legislate with respect both to the Indian and his lands unless they have been expressly subjected by Congress to state control; that the intention of Congress to withdraw Federal control over the Indian and his lands must be clearly expressed, and the courts will not assume it. This is explicitly stated in the *Heff Case;* that there is a difference between political rights and property rights in so far as either may be affected by the grant of citizenship and property rights may be controlled by Congress even though political rights are granted.

In the case at bar there can be no conflict between national and state authority for the further reason that the act of April 26, 1906, was passed, and the attempted conveyance in violation of its terms took place before Oklahoma became a State. And see act of June 16, 1906, 34 Stat. c. 3335.

The United States has the right to continue its guardianship over Indians who have been made citizens of the United States. *Wiggan* v. *Connolly*, 163 U. S. 56; *United States* v. *Allen*, 179 Fed. Rep. 13; *United States* v. *Flournoy &c. Co.*, 69 Fed. Rep. 891; *Hitchcock* v. *Bigboy*, 22 App. D. C. 275; *Ross* v. *Eells*, 56 Fed. Rep. 855.

Without regard to citizenship Congress had full power to impose restrictions upon the alienation of land by full-blood Indians, as a class of incompetents. *Rice* v. *Parkman*, 16 Massachusetts, 326; *Mormon Church* v. *United States*, 136 U. S. 1; *Shively* v. *Bowlby*, 152 U. S. 1; *Muller* v. *Oregon*, 208 U. S. 412.

Minors and lunatics may be citizens and yet their property rights may be restricted. That full-blood Indians of the Five Tribes are, as a class, incompetent, must be assumed not only from the legislation of Congress with respect to them but from the findings of the Court of Claims where, in the case of *Brown and Gritts* v. *United States*, 44 C. Cl. 283, it was expressly found that full-blood Cherokees whose right to alienate their lands was forbidden by legislation contemporaneous with that involved in the case at bar, were, as a class, unable to speak the English language and incompetent to guard their interests from designing persons who were constantly attempting to induce them to part with their property at grossly inadequate compensation.

There are now pending many suits brought by the United States to cancel conveyances made in violation of the act of April 26, 1906, and more than 25,000 transactions of this character await the determination of the present case, and of several other cases involving substantially the same questions, which have already reached this court. Both the Government of the United States and the national councils of the several tribes desire to protect these full-blood Indians from their own incompetence. They assume this to be an obligation not alone to the Indian himself, but one arising out of grave consideration of the public welfare, for if the Indians are despoiled of their lands or part with them for an inadequate compensation the hope that they may develop into self-supporting and independent members of the communities in which they live will be destroyed, and they

will become vagrants and wanderers, dependent upon the bounty of the United States or of the States in which they reside and threatening to the good order of society.

Mr. S. T. Bledsoe and *Mr. Evans Browne*, as *amici curiæ*, by leave of the court filed suggestions in support of the contentions of defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the validity of conveyances made by Marchie Tiger, plaintiff in error, a full-blood Indian of the Creek tribe, to the defendants in error, the Western Investment Company, and Ellis H. Hammett, R. C. Allan and J. C. Pinson, copartners under the name of Coweta Realty Company.

The lands in controversy were located in the Indian Territory, were allotted under certain acts of Congress, to which we shall have occasion to refer later, and were inherited by Marchie Tiger during the year 1903 from his deceased brother and sisters, Sam, Martha, Lydia and Louisa Tiger, also members of the Creek nation, and allottees of the lands which passed by inheritance to Marchie Tiger.

According to the law of descent and distribution, which had been put in force in the Indian Territory, Marchie Tiger was the sole heir at law of his deceased brother and sisters. 32 Stat. 500, June 30, 1902, c. 1323; Mansfield's Dig. Arkansas Stat., ch. 49, § 2522.

On August 8, 1907, Marchie Tiger sold and conveyed by warranty deed to the defendant in error, the Western Investment Company, certain of the said lands for the sum of $2,000.00, which was paid by the company. On July 1, 1907, Marchie Tiger sold and conveyed by warranty deed certain other of said lands to the Coweta Realty Company, and likewise sold and conveyed the same, in the same manner on July 26, 1907, on August 8, 1907, and on August 13,

1907, to the Coweta Realty Company, the consideration agreed to be paid by the company was $3,000.00, of which $558.00 was paid. The plaintiff in error offered to return the amounts paid by the respective purchasers, and made tender thereof which was refused, and this suit is brought to have the deeds in question cancelled, and the claim set aside as a cloud upon plaintiff's title.

Each and all of these conveyances were made without the approval of the Secretary of the Interior. The Supreme Court of Oklahoma held the conveyances valid and denied relief to the plaintiff in error. 21 Oklahoma, 630.

Two questions arise in the case. First: Could a full-blood Creek Indian, on and after the eighth day of August, 1907, convey the lands inherited by him from his relatives, who were full-blood Creek Indians, which lands had been allotted to them, so as to give a good title to the purchaser—although the conveyance was made without the approval of the Secretary of the Interior. Second: If the legislation of Congress in question undertook to make such conveyances valid only when approved by the Secretary of the Interior, is it constitutional?

An answer to these questions requires a consideration of certain treaties and legislation concerning title to these lands. In 1833, the United States made a treaty with the Creek nation of Indians, in consideration of which they were to move to a new country west of the Mississippi, and to surrender all the lands held by them east of the Mississippi, and the United States agreed to convey to them a tract of land comprising what is now a part of the State of Oklahoma.

On August 11, 1852, in pursuance of this treaty the United States issued a patent for the tract of country mentioned, in which it was recited that the grantor, "in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, has given

and granted, and by these presents does give and grant unto the Muskogee (Creek) Tribe of Indians the tract of country above mentioned, to have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

Upon this tract of land the Creeks became a settled people, and established a government. In 1893 the United States in pursuance of a policy which looked to the final dissolution of the tribal Government, took steps toward the distribution and allotment of the lands among the members of the tribe. On March 3, 1893, Congress passed an act (27 Stat. 645, chap. 209) which provides:

"SEC. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; . . . and upon the allotment of the lands held by said tribes the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 of the act provides for the appointment of commissioners to enter upon negotiations with the Cherokee, Choctaw, Chickasaw, Creek and Seminole Nations looking to the extinguishment of the tribal title to lands in the territory held by the nations or tribes, whether by cession of the same, or some part thereof, to the United States, or by allotment and division thereof in severalty among the Indians of such nations or tribes, or by such other method as may be agreed upon by such nations or tribes with the United States with a view to such adjustment on the basis of justice and equity, as might, with the consent of such nations or tribes, so far as might be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union, which shall embrace the lands within the Indian Territory.

After negotiations and legislation looking to the enrollment of the tribes entitled to citizenship, an act of Congress known as the Original Creek Agreement was passed. (Act of March 1, 1901, c., 676, 31 Stat. 861.)

Section 7 of that act contains certain restrictions upon the title of individual Indians after the same had been conveyed to them by the Creek Nation, with the approval of the Secretary of the Interior. Section 7 of the act of March 1, 1901, was amended by the act of June 30, 1902, 32 Stat. 500, c. 1323, known as the Supplemental Creek Agreement.

Section 16 of the act superseded § 7 of the first Creek agreement, and, as it contains the restriction on alienation of allotted lands, important to be considered, so much of that section as contains such restrictions is here quoted:

"SEC. 16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

This agreement was ratified by the action of the Creek National Council, and approved by the President of the United States August 8, 1902.

It is thus apparent that the five-year limitation created by § 16 of the act of 1902, upon the alienation of lands by the Creek Indians had expired when the conveyances in controversy were made.

Within that five years, and about fifteen months before the expiration thereof, Congress passed the act of April 26, 1906 (34 Stat. 137, c. 1876), entitled an act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.

Sections 19, 20, 22 and 23 of the act are important to be considered, and are given in full in the margin.[1]

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[1] "SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided, further, that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed, but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

"SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing, and subject to approval by the Secretary of

Section 28 of the act provides for the continuance of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations, but places certain restrictions upon their right of legislation, making the same subject to the approval of the President of the United States.

Section 29 of the act provides that all acts, and parts of acts, inconsistent with the provisions of the act be repealed.

As § 22 of the act is the one upon which the rights of the parties most distinctly turn, we here insert it:

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the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

"SEC. 22. That the adults heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory; and in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

"SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory or a United States Commissioner." 34 Stat. L. 137.

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

It is the contention of the defendants in error that this section, when read in connection with § 16 of the act of 1902, above quoted, has the effect to require conveyances made by full-blood Indian heirs during the period from the passage of the act, of which § 22 is a part, until the expiration of the five years period named in § 16, to be approved by the Secretary of the Interior, but does not interfere with the capacity of such full-blood Indian heirs to convey the inherited lands after the expiration of the five years. This was the view entertained by the Supreme Court of Oklahoma in deciding this case.

In support of that view, it is insisted that the last sentence of § 22 must be read as a proviso, limiting and qualifying that which has gone before in the same section; that without this proviso the first part of the section would enable adult heirs of full blood to convey their inherited lands notwithstanding the five years limitation provided in § 16 had not expired, and that the real purpose of this section was to place such full-blood Indian heirs under

the protection of the Secretary of the Interior, so far as his approval was required, until the expiration of the five-year period named in § 16.

On the other hand, it is contended that the act of April 26, 1906, in the sections referred to, has undertaken to make new provision for the protection of full-blood Indians of the Five Civilized Tribes, and to place them, as to the alienation, disposition, and encumbrance of their lands, under restrictions such as shall operate to protect them, and to require the Secretary of the Interior to approve such conveyances, in order that such Indians shall part with their lands only upon fair remuneration, and when their interests have been duly safe-guarded by competent authority.

Previous legislation upon this subject differed as to the several nations.

As to the Seminoles, at the time of the passage of the act of April 26, 1906, the law forbade alienation prior to the date of the patent. The patent was to be made by the principal chief of the tribe when the tribal government ceased to exist. July 1, 1898, 30 Stat. 567, ch. 542.

The legislation concerning the Creeks we have already recited. Alienation was forbidden until expiration of the five-year period, to-wit: until August 8, 1907.

One section (14) of the Cherokee act provides there shall be no alienation within five years from the ratification of the act: another section (15) provides that Cherokee allotments, except homesteads, shall be alienable in five years after the issue of the patent. July 1, 1902, 32 Stat. 716, ch. 1375.

The Choctaw and Chickasaw act provided (§ 16) that:

"All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issue of patent as follows: One-fourth of the acreage in one year, one-fourth acreage in three years, and the balance in five years—in each case

from the date of the patent; provided, that such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value." Act of July 1, 1902, 32 Stat. 641, 643, ch. 1362.

In this case we are concerned with the construction of the act of April 26, 1906, so far as it involves the Creeks, and other statutes are mentioned with a view to aid in the construction of that act. It is the contention of the plaintiff in error that the act of April 26, 1906, repealed all former legislation upon the subject, and intended to provide, as to full-blood Indians of the tribes, new and important protection in the disposition of their landed interests, and that, as the act provides that previous inconsistent legislation shall be repealed, so far as the same subjects are covered in the new act it was intended to give additional protection to full-blood Indians and to prevent them from being deprived without adequate consideration of their lands and holdings; and that the real purpose of § 22, in so far as the adult heirs of the deceased Indians of the Five Civilized Tribes are concerned, is to subject conveyances of such lands, when made by full-blood Indians, to the approval of the Secretary of the Interior.

We think a consideration of this act and of subsequent legislation *in pari materia* therewith demonstrates the purpose of Congress to require such conveyances by full-blood Indians to be approved by the Secretary of the Interior.

The sections of the act of April 26, 1906, under consideration show a comprehensive system of protection as to such Indians. Under § 19 they are not permitted to alienate, sell, dispose of, or encumber allotted lands within twenty-five years unless Congress otherwise provides. The leasing of their lands, other than homesteads, for more than one year may be made under rules and regulations prescribed by the Secretary of the Interior. And in case of

the inability of a full-blood Indian, already owning a homestead, to work or farm the same, the Secretary may authorize the leasing of such homestead.

Under § 20 leases and rental contracts of full-blood Indians, with certain exceptions, are required to be in writing, subject to the approval of the Secretary of the Interior. Under § 23 authority is given "to all persons of lawful age and sound mind to devise and bequeath all his estate, real and personal, and all interest therein;" but no will of a full-blood Indian, devising real estate and disinheriting parent, wife, spouse, or children of a full-blood Indian, is valid until acknowledged before and approved by a judge of a United States court in the Territory or by the United States Commissioner.

Coming now to § 22, the first part of that section gives the adult heirs of any deceased Indian of either of the Five Civilized Tribes power to sell and convey the inherited lands named, with certain provisions as to joining minor heirs by guardians in such sales. This part of the statute would enable full-blood Indians, as well as others, to convey such lands as adult heirs of any deceased Indian, etc., but the last sentence of the section requires the conveyance made under this provision, that is, conveyances made by adult heirs of the character named in the first part of the section, when full-blood Indians, to be subject to the approval of the Secretary of the Interior. This construction is in harmony with the other provisions of the act, and gives due effect to all the parts of § 22. True, it has the effect to extend the requirement of the approval of the Secretary of the Interior as to full-blood Indians beyond the terms prescribed in § 16 of the act of 1902, and this, we think, was the purpose of Congress, which is emphasized in § 29 of the act wherein all previous inconsistent acts, and parts of acts, are repealed.

As to the argument that the last sentence of § 22 is to be construed as a proviso intended to limit the generality of

the previous part of the section, and not to affect prior legislation upon the subject, it may be observed: the sentence does not take the ordinary character of a proviso, and is not introduced as such, and, even if regarded as a proviso, it is well-known that independent legislation is frequently enacted by Congress under the guise of a proviso. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, and previous cases in this court therein cited.

Had Congress intended not to interfere with full-blood Indian heirs in their right to make conveyances after the expiration of the five years named in § 16 of the act of 1902, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. No reference is made to the prior legislation, but it is broadly enacted that all conveyances of the character named in § 22 made by heirs of full-blood Indians shall be subject to the approval of the Secretary of the Interior.

The construction contended for by the defendant in error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the act of 1906 and the expiration of the period named in the act of 1902, with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress at least, restrictions still existed so far as the inherited lands of full-blood Indians were concerned.

Section 8 of the Act of May 27, 1908, 35 Stat. 312, c. 199, provides:

"SEC. 8. That section 23 of an act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26th, 1906, is hereby amended

by adding, at the end of said section the words, 'or a judge of a county court of the State of Oklahoma.'"

Section 9 of that act provides:

"SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee;" etc., etc. (35 Stat. 312.)

The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. *Cope* v. *Cope*, 137 U. S. 682; *United States* v. *Freeman*, 3 How. 556.

We cannot believe that it was the intention of Congress, in view of the legislation which we have quoted, to leave untouched the five-year restriction of the act of 1902, so far as the inherited lands of full-blood Indians are concerned, or to permit the same to be conveyed without restriction from the expiration of that five-year period until the enactment of the legislation of May, 1908.

In passing the enabling act for the admission of the State of Oklahoma, where these lands are, Congress was careful to preserve the authority of the Government of the United States over the Indians, their lands and property, which it had prior to the passage of the act. June 16, 1906, 34 Stat. 267, c. 3335.

We agree with the construction contended for by the plaintiff in error, and insisted upon by the Government, which has been allowed to be heard in this case, that the

act of April, 1906, while it permitted inherited lands to be conveyed by full-blood Indians, nevertheless intended to prevent improvident sales by this class of Indians, and made such conveyance valid only when approved by the Secretary of the Interior.

The further question arises in this case—In view of the construction we have given the legislation of Congress, is it constitutional? It is insisted that it is not, because the Indian is a citizen of the United States and entitled to the protection of the Constitution, and that to add to the restrictions of the act of 1902 those contained in subsequent acts is violative of his constitutional rights and deprives him of his property without due process of law. It is to be noted in approaching this discussion that this objection is not made by the Indian himself; he is here seeking to avoid his conveyance. It is not made by the Creek Nation or Tribe, for it is stated without contradiction that the act of 1906 has been ratified by the council of that nation.

The unconstitutionality of the act is asserted by the purchasers from an Indian, who are the defendants in error here, and proceeds upon the assumption, that the Indian, at the time of the conveyance, August 8, 1907, had full legal title to the premises, which could not be impaired by legislation of Congress subsequent to the act of June 30, 1902.

Assuming that the defendants in error are in a position to assert such constitutional rights, is there anything in the fact that citizenship has been conferred upon the Indians, or in the changed legislation of Congress upon the subject, which marks a deprivation of such rights? We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as dependent people and to legislate concerning their property with a view to their protection as such. *Chero-*

kee Nation v. *Georgia*, 5 Peters 1, 17; *Elk* v. *Wilkins*, 112 U. S. 94, 99; *Stephens* v. *Choctaw Nation*, 174 U. S. 445, 484. We quote two of the many recognitions of this power in this court:

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes." *United States* v. *Kagama*, 118 U. S. 375, 384.

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565.

Citizenship, it is contended, was conferred upon the Creek Indians by the act of March 3, 1901, 31 Stat. 447, amending the act of February 8, 1887, 24 Stat. 390, c. 119, by adding to the Indians given citizenship under that act "every Indian in the Indian Territory." So amended, the act would read as to such Indian: "He is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizen." Is there anything incompatible with such citizenship in the continued control of Congress over the lands of the Indian? Does the fact of citizenship necessarily end the duty or power of Congress to act in the Indian's behalf?

Certain aspects of the question have already been settled by the decisions of this court. That Congress has full power to legislate concerning the tribal property of the Indians has been frequently affirmed. *Cherokee Nation* v.

Hitchcock, 187 U. S. 294, 308; *United States* v. *Rickert*, 188 U. S. 432; *McKay* v. *Kalyton*, 204 U. S. 458.

Nor has citizenship prevented the Congress of the United States from continuing to deal with the tribal lands of the Indians.

In *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, Mr. Justice White, speaking for the court, said:

"There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In *United States* v. *Rickert*, 188 U. S. 432, Mr. Justice Harlan, speaking for the court, said:

"These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship."

To the same effect have been the decisions of Circuit Courts of Appeals dealing with this subject. In the Circuit Court of Appeals for the Eighth Circuit this apposite language was used by Judge Thayer in speaking for the court:

"We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges and immunities

of citizens, while it retained, for the time being, the title to certain lands, in trust for their benefit, and withheld from them for a certain period the power to sell, lease or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to withhold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the Government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being, of the right to alienate it." *Beck* v. *Flournoy Live Stock Co.*, 65 Fed. Rep. 30, 35.

To the same effect is *Rainbow* v. *Young*, 161 Fed. Rep. 835, in which the opinion was by Circuit Judge, now Mr. Justice Van Devanter. In that case, after referring to the fact that while the members of the Winnebago tribe had received allotments in severalty and had become citizens of the United States and of the State of Nebraska, their tribal relation had not terminated, and they were still unable to alienate, mortgage or lease their allotments without the consent of the Secretary of the Interior, Judge Van Devanter said: "In short, they are regarded as being in some respects still in a state of dependency and tutelage, which entitles them to the care and protec-

tion of the national Government; and when they shall be let out of that state is for Congress alone to determine." The *Rainbow Case* was cited with approval by Mr. Justice Brewer in delivering the opinion in *United States* v. *Sutton*, 215 U. S. 291, 296.

Much reliance is placed upon *Matter of Heff*, 197 U. S. 488. In that case it was held that a conviction could not be had under the Federal statute for selling liquor to an Indian, the sale not being on a reservation, and the Indian having been made a citizen and subject to the civil and criminal laws of the State. In that case the opinion was by Mr. Justice Brewer, who also delivered the opinion in the case of *United States* v. *Celestine*, 215 U. S. 278.

In the *Celestine Case* it was held that although an Indian had been given citizenship of the United States, and of the State in which an Indian reservation was located, the United States might still retain jurisdiction over him for offenses committed within the limits of the reservation. In the opinion the subject was fully reviewed by Mr. Justice Brewer. In the course of it he quoted with approval from the opinion of Mr. Justice McKenna, sitting as a Circuit Judge, in *Eells* v. *Ross*, 12 C. C. A. 205, holding that the act of 1887, conferring citizenship upon the Indians, did not emancipate them from control or abolish the reservation. Mr. Justice Brewer also quoted from the *Heff Case*, commenting upon the change of policy in the Government which looked to the establishment of the Indians in individual homes, free from National guardianship, charged with the rights and obligations of citizens of the United States, and held that it was for Congress to determine when and how the relation of guardianship theretofore existing should be determined; and after quoting from the *Heff Case*, said (215 U. S. 290):

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian

upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of the reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race."

In *United States* v. *Sutton*, *supra*, following *United States* v. *Celestine*, it was held that jurisdiction continued over the Indians as to offenses committed within the limits of an Indian reservation, and that Congress might prohibit the introduction of liquor into the Indian country. In *Matter of Heff*, *supra*, this court said (p. 509): "But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title."

Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

The privileges and immunities of Federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property. The privileges and immunities of citizenship were said, in the *Slaughter-House Cases*, (16 Wall. 36, 76), to comprehend:

"Protection by the Government with the right to ac-

quire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole."

Conceding that Marchie Tiger by the act conferring citizenship obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship unnecessary to here discuss, he was still a ward of the Nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. The inherited lands, though otherwise held in fee, were inalienable without the consent of the Secretary of the Interior, until August, 1907, by virtue of the act of Congress. In this state of affairs Congress, with plenary power over the subject, by a new act permitted alienation of such lands at any time subject only to the condition that the Secretary of the Interior should approve the conveyance.

Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.

As we have construed the statute involved, while it per-

mits the conveyance of inherited lands of the character of those in issue, it requires such conveyance to be made with the approval of the head of the Interior Department.

For the reasons we have stated, we find nothing unconsitutional in the act making this requirement.

The judgment of the Supreme Court of Oklahoma is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

HALLOWELL *v.* UNITED STATES.

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

No. 89. Argued March 16, 1911.—Decided May 15, 1911.

The power of the United States to make rules and regulations respecting tribal lands, the title to which it has not parted with, although allotted, is ample. *Tiger* v. *Western Investment Co.*, *ante*, p. 286.

The mere fact that citizenship has been conferred on allottee Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people; and so held that the prohibitions of the act of January 30, 1897, c. 109, 29 Stat. 506, against introduction of liquor into Indian country, are within the power of Congress.

When, under the act of August 7, 1882, c. 434, 22 Stat. 341, an allotment in severalty has been made to a tribal Indian out of lands in a tribal reservation in the State of Nebraska, and a trust patent therefor has been issued to the allottee, and when the provisions of § 7 of that act and of § 7 of the act of February 8, 1887, c. 119, 24 Stat. 388, have been effective as to such allottee, the fact that the United States holds the lands so allotted in trust for the allottee, or, in case of his decease, for his heirs, as provided in § 6 of the said act of 1882, enables, authorizes and permits the United States to regulate and prohibit the introduction of intoxicating liquors upon

such allotment during the limited period for which the land so allotted is so held in trust by the United States.

THE facts, which involve the authority of Congress to regulate the introduction of liquor into lands of allottee Indians, and the construction of provisions of the acts of August 7, 1882, and February 8, 1887, in regard to Indian allotments, and of the act of January 30, 1897, in regard to introduction of liquor into Indian country, are stated in the opinion.

Mr. Thomas L. Sloan for plaintiff in error.

Mr. Assistant Attorney General Harr for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

Simeon Hallowell, plaintiff in error, was convicted in the District Court of the United States for the District of Nebraska upon the charge of having introduced whiskey into the Indian country in violation of the act of January 30, 1897, c. 109, 29 Stat. 506. After sentence, Hallowell took the case to the Circuit Court of Appeals for the Eighth Circuit, and that court certified to this court the question hereinafter set forth.

The certificate sets forth an agreed statement of facts upon which the case was tried in the District Court, as follows:

"That the defendant, Simeon Hallowell, an Omaha Indian, is and was on the first day of August, 1905, an allottee of land granted to him on the Omaha Indian Reservation, in Thurston County, Nebraska; that the allotment so made to him was made under the provisions of the act of Congress of August 7, 1882 (22 Statutes at Large, 341); that the first or trust patent was issued to him in the year 1884, and that the twenty-five year period of the trust limitation has not yet expired; and that the fee

title of the allotment so made to him is still held by the United States.

"That the defendant, Simeon Hallowell, on the first day of August, 1905, procured at a point outside the said reservation one-half gallon of whiskey which he took to his home, which was within the limits of the Omaha Indian Reservation, and upon an allotment which he had inherited and which allotment was made under the provisions of the act of Congress, of August 7, 1882, and the title of which is held by the Government, as the twenty-five year trust period has not expired. That he took the said whiskey into and upon this allotment for the purpose of drinking and using the same himself, and that he did drink said whiskey and did give some of it to his friends or visitors to drink.

"That the said Omaha Indian Reservation has been allotted practically in whole and that many of the allotments of deceased Omaha Indians have been sold to white people, under the provisions of the Act of Congress of May 27, 1902 (32 Statute at Large, 245, 275); that within the original boundary limits of the Omaha Indian Reservation, there are many tracts of land that have been sold, under the provisions of said act, to white persons who are the sole owners thereof, and that the full title to such lands has passed to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee.

"That all of the Omaha Indians who were living in the year 1884, and by law entitled to allotments, received them.

"That the Omaha Indian Reservation is within and a physical part of the organized territory of the State of Nebraska, as are also the allotments herein referred to, into and upon which the said defendant took said whiskey. That the Omaha Indians exercise the rights of citizenship, and participate in the County and State Government ex-

tending over said Omaha Indian Reservation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been on frequent occasions a Judge and Clerk of election, a Justice of the Peace, an Assessor, and a Director of the public school district in which he lives. That Omaha Indians have taken part in the State and County government, extending over the reservation, and have held the following offices in said county of Thurston, State of Nebraska: County Coroner, County Attorney, County Judge, Justice of the Peace, Constable, Road Overseer, Election Officers, and have also served as jurors in the county and district Courts. Defendant is self-supporting, as are most of said Indians. Some of them are engaged in business and most of them engaged in farming."

Upon this statement the Circuit Court of Appeals certified to this court the following question:

"When, under the act of August 7, 1882 (c. 434, 22 Stat. 341), an allotment in severalty has been made to a tribal Indian out of lands in a tribal reservation in the State of Nebraska, and a trust patent therefor has been issued to the allottee, and when the provisions of section 7 of the said act of August 7, 1882, and of section 6 of the act of February 8, 1887 (c. 119, 24 Stat. 388), have become effective as to such allottee, does the fact that the United States holds the land so allotted in trust for the allottee, or, in case of his decease, for his heirs, as provided in section 6 of the said act of August 7, 1882, enable, authorize or permit the United States to regulate or prohibit the introduction of intoxicating liquors upon such allotment during the limited period for which the land so alloted is so held in trust by the United States?"

Under the act of August 7, 1882, first mentioned in the certificate, provision was made for the allotment of lands in severalty among the Indians. Section 6 of the act provides in part:

"SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever."

As appears from the certificate upon which this case is submitted the trust period named in the section had not expired at the time the alleged offense was committed.

Section 7 of the act of August 7, 1882, provides:

"SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of, and be subject to, the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

Section 6 of the act of February 8, 1887, c. 119, 24 Stat. 388, referred to in the question propounded, provides:

"SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been

made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It is apparent that at the time of the commission of the alleged offense the place wherein it was alleged to have been committed was a part of lands allotted to an Indian; that the title to the lands allotted was still held in trust by the United States for the benefit of the Indian to whom the allotment had been made; that the plaintiff in error had been declared to be a citizen of the United States, and entitled to the rights, privileges and immunities of such citizenship, and entitled to the benefit of the laws, civil and criminal, of the State of Nebraska, in which the Indian allotment was situated, and upon which the offense is alleged to have been committed.

The act under which the conviction was had was passed January 30, 1897, c.109, 29 Stat. 506, and provides in part:

"That any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by fine of not less than one hundred dollars for the first of-

fense and not less than two hundred dollars for each offense thereafter."

Obviously this act in terms embraced the acts stated in the agreed statement of facts, which we have set forth above. The liquor was introduced into the Indian country and into an Indian allotment, while the title to the same was still held in trust by the Government.

The contention of the plaintiff in error is that the act cannot be applied to him because at the time charged he had become a citizen and not subject to such regulation as a ward of the Government; and furthermore that the territory in question had become subject to the jurisdiction of the State of Nebraska, to whose police regulations upon the subject of the liquor traffic he was alone amenable.

When this case was certified here, *Matter of Heff*, 197 U, S. 488, had been decided, but the subsequent cases of the *United States* v. *Celestine*, 215 U. S. 278, and *United States* v. *Sutton*, 215 U. S. 291, were yet undetermined. We had occasion to consider these cases in *Tiger* v. *Western Investment Company*, *ante*, p. 286, and need not here repeat what was there said concerning them.

In *United States* v. *Sutton*, 215 U. S. *supra*, it was held that a conviction could be had under the act of January 30, 1897, 29 Stat., *supra*, for the offense of introducing liquor into an Indian reservation. It is true that in the *Sutton Case* the reservation was within the limits of the State of Washington, and that State had disclaimed jurisdiction over Indian lands which were to remain under the absolute jurisdiction and control of the Congress of the United States, and, it was held, that while this fact did not deprive the State of the right of punishing crimes committed on such reservation by other than Indians or against Indians (*Draper* v. *United States*, 164 U. S. 240), that where jurisdiction and control over Indian lands remained in the United States, Congress had the right to forbid the intro-

duction of liquor into such territory, and to provide for the punishment of those found guilty thereof. *Couture, Jr.* v. *United States*, 207 U. S. 581, was cited where a conviction for introducing liquor into the Indian country was affirmed.

In the case at bar, the United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 167; *Gibson* v. *Choteau*, 13 Wall. 92, 99; *Light* v. *United States*, 220 U. S. 523.

It is a result of the recently decided cases in this court, *Couture, Jr.* v. *United States*, 207 U. S. 581; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Sutton*, 215 U. S. 291, and *Tiger* v. *Western Investment Company*, *ante*, p. 286, that the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people. A discussion of the matter in those cases renders further comment unnecessary now. Furthermore, in the present case liquor was introduced into an allotment the title to which was still held by the United States, and concerning which it had the power to make rules and regulations under the authority of the Constitution of the United States. While for many purposes the jurisdiction of the State of Nebraska had attached, and the Indian as a citizen was entitled to the rights, privileges, and immunities of citizenship, still the United States within its own territory and in the interest of the Indians, had jurisdiction to pass laws protecting such Indians from the evil results of intoxicating liquors as was done in the act of January 30, 1897, which made it an offense to introduce intoxicating liquors into such Indian country, including an Indian allotment. In this view, the question certified will be answered in the affirmative, and

It is so ordered.

DOWDELL *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 131. Argued April 20, 1911.—Decided May 15, 1911.

Under § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691, unless action taken by the Supreme Court of the Philippine Islands to supply omissions in the record violates the Constitution or a statute of the United States, this court cannot disturb the judgment.

There is no valid objection based on the Constitution of the United States to the practice of the Supreme Court of the Philippine Islands adopted in this case for determining in what form it will accept the record of the court below.

The provision in § 5 of the Philippine act of July 1, 1902, c. 1369, 32 Stat. 691, that in all criminal prosecutions the accused shall meet the witnesses face to face is substantially the provision of the Sixth Amendment; is intended thereby that the charge shall be proved only by such witnesses as meet the accused at the trial face to face and give him an opportunity for cross-examination. It prevents conviction by *ex parte* affidavits.

The "face to face" provision of the Philippine Bill of Rights does not prevent the judge and clerk of the trial court from certifying as additional record to the appellate court what transpired on the trial of one convicted of a crime without the accused being present when the order was made.

Although due process of law requires the accused to be present at every stage of the trial, it does not require accused to be present in an appellate court where he is represented by counsel and where the only function of the court is to determine whether there was prejudicial error below.

Objections as to form and verification of pleading must be taken by accused before pleading general issue.

The Bill of Rights of the Philippine Islands does not require convictions to be based on indictment; nor does due process of law require presentment of an indictment. *Hurtado* v. *California*, 110 U. S. 516.

In the absence of legislation by Congress, there is no right in the Philippine Islands to require trial by jury in criminal cases. *Dorr* v. *United States*, 195 U. S. 138.

11 Philippine Islands, 4, affirmed.

THE facts are stated in the opinion.

Mr. Charles F. Consaul, with whom *Mr. Charles C. Heltman* and *Mr. Frank B. Ingersoll* were on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Fowler for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Philippine Islands to review a proceeding in which the plaintiffs in error, Louis A. Dowdell and Wilson W. Harn, together with one Charles H. MacIlvaine, were convicted in the Court of First Instance of the Philippine Islands upon an amended complaint which charged that the three persons named, as Inspectors and Lieutenants of the Philippine Constabulary, in the Province of Samar, Philippine Islands, conspired together to abstract, steal and convert to their own use certain public funds in the custody and control of Dowdell as supply officer, and guarded by Harn as officer of the day; that in pursuance of the conspiracy the three defendants, with the intent and purpose of stealing, and converting the same to their own use, unlawfully, feloniously and willfully removed the same from the office of the Philippine Constabulary to the residence of the said Harn in Catbalogan in said Province, and did there conceal the same, and during the night, in pursuance of said conspiracy, and for the purpose of concealing the evidence of their crime and of deceiving their superior officers concerning the disappearance of said public funds, did take and remove the safe, in which said funds had been kept in the office of the Philippine Constabulary, and caused the same to be taken and conveyed out into the bay adjacent, and there sunk in the waters of

the bay. The public funds abstracted and taken consisted of Philippine coin and paper currency of the value of nine thousand, nine hundred and seventy-one pesos and twenty-six centavos, equivalent in value to forty-nine thousand, eight hundred and fifty-six pesetas, in violation of paragraph three of article three hundred and ninety of the Philippine Penal Code.

The accused were convicted, and the present plaintiffs in error sentenced to imprisonment for six years and a day. Plaintiffs in error thereupon took an appeal to the Supreme Court of the Philippine Islands. In that court they were sentenced to eight years and one day imprisonment.

The case is brought here under § 5 of the act of July 1, 1902, 32 Stat. 691, c. 1369, giving this court the right to review, revise, reverse, modify or affirm final judgments or decrees of the Supreme Court of the Philippine Islands in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved.

In the Supreme Court of the Philippine Islands the Attorney General asked that the case be sent back to the Court of First Instance for a new trial, because it did not appear that defendants had pleaded to the complaint, but the court overruled this application, and thereupon the court made the following order:

"*Resolved*, That the clerk of the Court of First Instance of Samar be, and he is hereby, directed to send forthwith to this court a certified copy of all entries in any book in his office referring to the case of *The United States* v. *Louis A. Dowdell and Wilson W. Harn*, and particularly of any entry relating to the arraignment of the defendants and to their plea. He is further directed to at once send to this court a certificate as to whether he was present at the separate trial of each of the defendants, Dowdell and Harn, and, if so, whether each or both of them were present at such trial, and the Hon. W. F. Norris, the judge who

tried the case, is hereby directed to send to this court a certificate showing whether the defendants and each of them were present during the trial of said cause against Louis A. Dowdell and Wilson W. Harn."

To this order Judge Norris, judge of the Court of First Instance, made return, in which he stated that each of the defendants, now plaintiffs in error, was present in open court during the entire time of trial from the calling of the case until after sentence was pronounced. The judge said he was unable to say whether there had been a formal arraignment or not. The clerk of the Court of First Instance certified a record of the proceedings in court, in which it appears that the defendants were asked whether they pleaded guilty or not guilty of the crime of which they were charged, and answered that they pleaded not guilty.

The official reporter of the court certified that his notes of the proceedings showed that the plaintiffs in error were arraigned, waived reading of the complaint and pleaded not guilty. The certificate of the reporter was signed by him as court reporter of the Twelfth Judicial District, and the judge of that district certified that the reporter was the duly appointed, qualified and acting reporter of the district. The reporter's certificate adds nothing to that which the clerk certified.

The first six assignments of error cover objections to this action of the court in amending its record, and to the want of presence of the accused, and the failure to show by the record the arraignment of the accused, their plea to the complaint and their presence during the trial.

If the Supreme Court of the Philippine Islands in taking the action referred to for supplying the record of omissions did not violate the Constitution, or any statute of the United States, then we cannot disturb the judgment below on these assignments of error. It is contended that the court erred in taking the statement of the judge of the

Court of First Instance without the knowledge or consent of the plaintiffs in error, that the statement was not sworn to; that the appellants were not given the opportunity to meet the witnesses face to face, or to be confronted with the witnesses, and, therefore, such statement was received in violation of Article Six of the Amendments to the Constitution of the United States, and § 5 of the act of Congress of July 1, 1902, 32 Stat. 691.

A like objection is made to the statement certified by the Clerk of the Court of First Instance, and because his statement is not a certified copy of the minutes, or any part thereof of the court, was not sworn to, and had no seal of the court attached.

As to the objection of the lack of oath to the certificates of the judge and clerk, and absence of a seal on the clerk's certificate of the proceedings—questions of that kind, where the court is correcting a record before it as an appellate tribunal, are addressed to the court making the order which may determine for itself in what form it will accept such record. At least there is no valid objection to such practice based on the Constitution or statutes of the United States.

It is averred that the order of the Supreme Court of the Philippine Islands was made without the knowledge or consent of the accused, and that the appellants had not the opportunity to meet the witnesses face to face, in violation of Article Six of the Amendments of the Constitution of the United States, and § 5 of the act of Congress of July 1, 1902, c. 1369, 32 Stat. 691, embodying the so-called Philippine Bill of Rights, which is substantially taken from the Bill of Rights of the Federal Constitution. *Kepner* v. *United States*, 195 U. S. 100. Section 5 of that act provides: "That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, . . . to have a speedy and public trial, to meet the witnesses face to face, etc." This is substan-

tially the provision of the Sixth Amendment to the Constitution of the United States which provides that the accused shall enjoy the right to a speedy and public trial, and to be confronted with the witnesses against him. This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination. *Mattox* v. *United States*, 156 U. S. 237, 242; *Kirby* v. *United States*, 174 U. S. 47, 55; Wigmore on Evidence, Vol. 2, §§ 1396, 1397.

But this general rule of law embodied in the Constitution, and carried by statute to the Philippines, and intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him, has always had certain well recognized exceptions. As examples are cases where the notes of testimony of deceased witnesses, of which the accused has had the right of cross-examination in a former trial, have been admitted. Dying declarations, although not made in the presence of the accused, are uniformly recognized as competent testimony. *Mattox* v. *United States*, 156 U. S. *supra*. Documentary evidence to establish collateral facts, admissible under the common law, may be admitted in evidence. Cooley, Constitutional Limitations, 2d ed., 450 note; *People* v. *Jones*, 24 Michigan, 224.

In the present case, the judge, clerk of the court, and the official reporter were not witnesses against the accused within the meaning of this provision of the statute. They were not asked to testify to facts concerning their guilt or innocence,—they were simply required to certify, in

accordance with a practice approved by the Supreme Court of the Philippine Islands, as to certain facts regarding the course of trial in the Court of First Instance. The taking of such certification involved no inquiry into the guilt or innocence of the accused, it was only a method which the court saw fit to adopt to make more complete the record of the proceedings in the court below, which it was called upon to review. Where a court, upon suggestion of the diminution of the record, orders a clerk of the court below to send up a more ample record, or to supply deficiencies in the record filed, there is no production of testimony against the accused, within the meaning of this provision as to meeting witnesses face to face, in permitting the clerk to certify the additional matter. We think the court acted within its authority in this respect, and did not violate the Philippine Bill of Rights, embodied in the act of July, 1902, in the respects suggested.

If the assignments of error can be taken to cover the objection that the accused were not present when the court ordered the additional record to be made we think there is no merit in this objection. In *Hopt* v. *Utah*, 110 U. S. 574, this court held that due process of law required the accused to be present at every stage of the trial. And see *Howard* v. *Kentucky*, 200 U. S. 164. In *Schwab* v. *Berggren*, 143 U. S. 442, this court held that due process of law did not require the accused to be present in an appellate court, where he was represented by counsel and where the only function of the court is to determine whether there is error in the record to the prejudice of the accused.

As we understand the procedure in the Supreme Court of the Philippine Islands, it acts upon the record sent to it upon the appeal and does not take additional testimony, although it has power to modify the sentence. In any event, the record before us does not show that any

additional testimony was taken against the accused in the Supreme Court of the Philippine Islands bearing upon their guilt or innocence of the crime charged. The assignment of error is, in this respect, that the court made the order for the corrections of its record when the accused was absent from the court, and upon its own motion. For the reasons we have stated we think this was within the power of the court, and there was no lack of due process of law in making the order as the court did in this case.

Objections are made as to the want of proper arrest and preliminary examination of the accused before a magistrate, and that the information was not verified by oath or affidavit. If tenable at all, no objections of this character appear to have been made in due season in the Court of First Instance. Objections of this sort must be taken before pleading the general issue by some proper motion or plea in order to be available to the accused. 1 Bish. Crim. Pro., § 730.

As to the objection that no indictment was found by a grand jury as required by Article Five of the Amendments of the Constitution, there is no such requirement in the Philippine act of July 1, 1902, § 5, c. 1369. It is therein provided that "no law shall be enacted which shall deprive any person of life, liberty or property without due process of law." This court has held that due process of law does not require presentment of an indictment found by a grand jury. *Hurtado* v. *California*, 110 U. S. 516.

The objection that the accused was not tried by a petit jury is disposed of in *Dorr* v. *United States*, 195 U. S. 138, in which it was held that in the absence of congressional legislation to that end there was no right to demand trial by jury in criminal cases in the Philippine Islands. It is unnecessary to repeat the reasons for that conclusion announced in the *Dorr Case*.

Other assignments of error are made, an examination of which satisfies us that no violation of the Constitution or statutes of the United States in the proceedings had in the Supreme Court of the Philippine Islands warrants a disturbance of the judgment of that court.

Affirmed.

Dissenting, MR. JUSTICE HARLAN.

MERILLAT *v.* HENSEY.

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

No. 107. Argued March 17, 1911.—Decided May 15, 1911.

Both courts below having found that no actual fraud was intended in this case, this court considered only the question of constructive fraud.

Where, as in the District of Columbia, the assignment of a chose in action does not have to be recorded and there is no way in which constructive notice can be given, the assignment, if valid upon its face, is ineffective only in case of actual bad faith established by the facts.

Knowledge of one's own insolvency, except in cases provided by statute, does not render it illegal or criminal to prefer one creditor above another. *Huntley* v. *Kingman*, 152 U. S. 527.

The fact that the amount alleged to be due on an unliquidated chose in action is greater than the amount of the debt in payment of which it is assigned is not necessarily evidence of fraud against other creditors; and where the amount actually recovered is less than the amount of the debt this court will not disturb the finding of both courts below that there was no fraud.

Reservation to the assignor of surplus of a chose in action given in payment of a debt does not of itself constitute fraud in law. To be fraud in law the reservation must be of some pecuniary benefit to the as-

signor at the expense of creditors and a prime purpose of the conveyance. Section 1120, Code of the District of Columbia.

The assignment of a mere chose in action, not subject to legal process and of uncertain value, given to secure an honest debt, will not be set aside by this court as fraudulent in law because the surplus, if any (there actually being a deficit), was reserved to the assignors by a separate instrument, for the recording of which there was no provision, after two courts have held that the assignment was not made with intent to hinder and defraud creditors and as matter of law had no such result.

34 App. D. C. 398, affirmed.

THE facts are stated in the opinion.

Mr. Chas. H. Merillat and *Mr. Mason N. Richardson* for appellants:

While the Federal rule and those of many States permit a debtor honestly to prefer a special creditor, aside from the effect of recent statutory enactments, the Federal rule is equally well settled that a secret reservation of a benefit to a known failing debtor is fraudulent *per se* and vitiates the preference. *Lukins* v. *Aird*, 6 Wall. 79; *Means* v. *Dowd*, 128 U. S. 282; *Dent* v. *Ferguson*, 132 U. S. 67; *Huntley* v. *Kingman*, 152 U. S. 527; *Crawford* v. *Neal*, 144 U. S. 585; *Bamberger* v. *Schoolfield*, 160 U. S. 150; *In re Robertshaw Mfg. Co.*, 133 Fed. Rep. 556.

It is the secrecy of the trust which constitutes its illegality. *Greenleve* v. *Blum*, 59 Texas, 126; *Rice* v. *Cunningham*, 116 Massachusetts, 469; *Campbell* v. *Davis*, 85 Alabama, 56; *Dean* v. *Skinner*, 42 Iowa, 418; *Connelly* v. *Walker*, 45 Pa. St. 454; *Neubert* v. *Maesman*, 37 Florida, 97; *Moore* v. *Wood*, 100 Illinois, 451; *Beidler* v. *Crane*, 135 Illinois, 98; *Jones* v. *Gott*, 10 Indiana, 242; *Clark* v. *French*, 23 Maine, 228; *Sidensparker* v. *Doe*, 52 Maine, 481, 490; *Malcolm* v. *Hodges*, 8 Maryland, 418; *Whedbee* v. *Stewart*, 40 Maryland, 420; *Franklin* v. *Claflin*, 49 Maryland, 24; *Smith* v. *Conkwright*, 28 Minnesota, 23; *Molaska Co.* v. *Steele*, 36 Mo. App. 496; *Wooten* v. *Clark*, 23 Mississippi,

77; *Walpole Platen Co.* v. *Law*, 10 U. S. App. 704; *Coolidge* v. *Melvin*, 42 N. H. 510; *Winkley* v. *Hill*, 9 N. H. 31; *Scott* v. *Hartman*, 26 N. J. Eq. 89, 92; *Moode* v. *Williamson*, 44 N. J. Eq. 496, 505; *Newell* v. *Wagner*, 1 N. Dak. 69; *Mendenhall* v. *Elwert*, 36 Oregon, 375; *Bentz* v. *Rockey*, 69 Pa. St. 71, 77; *Edwards* v. *Dickson*, 66 Texas, 614; *Humphries* v. *Freeman*, 22 Texas, 45; *Young* v. *Heermans*, 66 N. Y. 382.

The text books are to the same effect. See Bump. on Fraud. Conv., § 201; Wait, Fraud. Conv., § 272; Ency. Law, 2d ed., Vol. 14, p. 248; Cyc., Vol. 20, pp. 463, 464; Story, Eq., Jur., Vol. 1, §§ 361, 362; Kerr on Fraud and Mistake, §§ 206, 207.

The proviso of § 1120 of the District Code that in suits to set aside conveyances or assignments as made with the intent to hinder, delay or defraud creditors "the question of fraudulent intent shall be deemed a question of fact and not of law" does not alter the Federal rule when applied to the instant case. The proviso does not abolish the cardinal rule that parties shall be deemed to intend the natural and probable consequences of their acts. *Crawford* v. *Neal*, 144 U. S. 585.

In Maryland, from whose laws most of the Code of the District of Columbia is taken, there is a statute similar to section 1120. In *Franklin* v. *Claflin*, 49 Maryland, 24, the court held: "Nothing can be more truly inconsistent with a contract of sale of chattels purporting to be absolute than the existence of a right or interest in or a secret reservation to be evidence of collusion"; and see *Farrow* v. *Hayes*, 51 Maryland, 505; *Main* v. *Lynch*, 54 Maryland, 671, 672, 673; *Whedbee* v. *Stewart*, 40 Maryland, 414.

New York State has a statute identical with the last proviso of § 1120 and, construing it, the highest courts of that State have held that every party must be deemed to have intended the natural and inevitable consequences of

his acts, and where his acts are voluntary and necessarily operate to defraud others, he must be deemed to have intended the fraud. *Coleman* v. *Burr*, 93 N. Y. 17; *Edgell* v. *Hart*, 9 N. Y. 13; *Thompson* v. *Crane*, 73 Fed. Rep. 327, 329.

Minnesota's code provides that fraudulent intent shall be deemed a question of fact, and not of law (see *Vase* v. *Stickney*, 19 Minnesota, 370), but see *Hathaway* v. *Brown*, 18 Minnesota, 414; see also *Moore* v. *Wood*, 100 Illinois, 455; *Palmour* v. *Johnson*, 84 Georgia, 99.

Even if the secret trust made the assignment only presumptively fraudulent and the court below was correct in holding the transaction susceptible of explanation, its conclusion was error, for the explanation must be one of fact and a bare denial of intent to defraud does not overcome the presumption of fraud. The denial is not even competent evidence as to the intent.

Secret trusts have been denounced, and while a creditor may seek to have his own claim preferred, he must do no more than by fair methods to obtain payment of his own claim; as if he goes further and secure a benefit to the failing debtor this will taint the whole transaction. *Crawford* v. *Kirksey*, 55 Alabama, 282; *Seaman* v. *Nolan*, 68 Alabama, 466; *Story* v. *Agnew*, 2 Ill. App. 358; *Sidensparker* v. *Doe*, 52 Maine, 481, 490.

These cases apply to choses in actions as well as other species of property. Code of D. C., § 1120; *Insurance Co.* v. *Sears*, 109 Massachusetts, 383; *Green* v. *Tantum*, 19 N. J. Eq. 105; *Hitt* v. *Ormsbee*, 14 Illinois, 236; *Savings Bank* v. *McLean*, 84 Michigan, 628; Bump on Fraud. Conv., 239, 240.

Mr. Arthur A. Birney and *Mr. Henry F. Woodard* for appellee:

There was no purpose in Mertens and Agnew to cheat, defraud or hinder Hensey's other creditors.

With these facts found the decree below should be affirmed and the bill dismissed, and the complainants should not be heard upon the claim of constructive fraud, or fraud in law. False charges of the moral turpitude involved in fraud in fact are discouraged in equity, and a complainant having failed to establish such charge will not be permitted to shift his ground and obtain relief on the claim of constructive fraud. *Eyre* v. *Potter*, 15 How. 41, 56; *Dashiell* v. *Grosvenor*, 27 L. R. A. 67; *Tillinghast* v. *Champlin*, 4 R. I. 173; *Fisher* v. *Boody*, 1 Curt. C. C. 206.

Section 1120, Code of Dist. of Col., has abolished constructive fraud, and made it necessary that fraud in fact, or dishonesty, shall be found in order to vacate a transfer.

There are similar provisions in the laws of California, New York, Michigan, Indiana, Wisconsin, and other States, and wherever construed, the courts have denied the right of the judge to rule a conveyance fraudulent, unless upon its face the instrument was inconsistent with an honest purpose. The question of fraud is for the jury, not for the court. . *McFadden* v. *Mitchell*, 54 California, 628; *Babcock* v. *Eckler*, 24 N. Y. 623; *Howe Machine Co.* v. *Claybourn*, 6 Fed. Rep. 438; *Hooser* v. *Hunt*, 65 Wisconsin, 71. And it would seem that if any effect is to be given the proviso of section 1120, it must be held to reject the contention that a transaction perfectly honest, may, by construction of law only, be found dishonest.

The reservation of a surplus to Hensey after the payment of expenses and the debt due Mertens and Agnew was not even constructively fraudulent. *Huntley* v. *Kingman*, 152 U. S. 527; *Etheridge* v. *Sperry*, 139 U. S. 267, 271; *Leitch* v. *Hollister*, 4 N. Y. 211; and see *Curtis* v. *Leavitt*, 15 N. Y. 127, 146, 204; *Durham* v. *Whitehead*, 21 N. Y. 131; *Camp* v. *Thompson*, 25 Minnesota, 175; *Didier* v. *Patterson*, 93 Virginia, 534.

There is on the face of the papers no fraudulent pro-

vision, and if this be conceded, the plaintiffs must claim to have proved fraud *dehors* the writings, or the wicked purpose and intention—the moral turpitude, which their bill alleges; and this is disproved.

The fact that the assignment was filed while the agreement as to application of the proceeds was not filed, is not only not conclusive evidence of fraud, but, alone, is of no probative force. They were under no obligation to other creditors so to file it. *Fechheimer* v. *Baum*, 43 Fed. Rep. 719, 726; *Blanks* v. *Klein*, 53 Fed. Rep. 436; *Blennerhassett* v. *Sherman*, 105 U. S. 100. This will not be held to be fraud if the conveyance is only for security; the deed will be enforced to the extent of the secured debt. *Chickering* v. *Hatch*, 3 Sumner's R. 474; *Gaffney's Assignee* v. *Signaigo*, 1 Dillon, 158; *Worten* v. *Clark*, 23 Mississippi, 77. Complainant cites many cases, but they do not give support to complainant's theories, except so far as general expressions may appear to do so; they are simply inapplicable. They apply only where the court does not find that an honest debt was intended to be secured, and can find either motive or purpose in the creditor secured to cheat or defraud others.

A special assignment of a particular part of a debtor's property, the possession whereof is surrendered by the debtor, will be regarded as valid in the absence of convincing proof of fraudulent design. The property passes by delivery, or the equivalent thereof. A pledge is complete without any writing.

If it be shown that the conveyance, though absolute in form, was given in good faith to secure a real debt, it will be quite immaterial that the right to redeem was not expressed but rests in parol. The conveyance will be upheld to the extent of the debt proved. Cases *supra* and *Muchmore* v. *Budd*, 53 N. J. Law, 369; *Didier* v. *Patterson*, 93 Virginia, 534; Bump on Fraud. Conv., 4th ed., § 55; *Smith* v. *Onion*, 19 Vermont, 427; *Oriental Bank* v. *Haskins*,

3 Met. 332; *Howe Machine Co.* v. *Claybourn*, 6 Fed. Rep. 438; 20 Cyc. 474, 475, 476.

If an absolute conveyance be found constructively fraudulent, it will yet be sustained to the extent of the debt it was given to secure. *Boyd* v. *Dunlap*, 1 Johns. Ch. 478; *Lobstein* v. *Lehn*, 120 Illinois, 549; *Bates* v. *McConnell*, 31 Fed. Rep. 588; *Stamy* v. *Laning*, 58 Iowa, 662; *Brock* v. *Hudson &c. Bank*, 48 N. J. Eq. 615; *Short* v. *Tinsley*, 1 Metc. (Ky.) 397; *Bartlett* v. *Cheesbrough*, 23 Nebraska, 767; *Ball* v. *Phenicie*, 94 Michigan, 355; *Waterbury* v. *Sturdevant*, 18 Wend. 353.

Mr. Justice Lurton delivered the opinion of the court.

This is a bill filed by a creditor of the defendant Hensey attacking as fraudulent an assignment by him of a certain cause of action against the defendant, the Mercantile Trust Company. The bill upon final hearing was dismissed by the trial court, and this judgment was affirmed in the Court of Appeals of the District of Columbia. From that decree an appeal has been perfected to this court.

The thing assigned was a claim for damage under an indemnity bond made by the Mercantile Trust Company upon which an action was at the time pending. The assignment was in these words:

"Washington, D. C., October 21, 1903.

For value received, I hereby sell, assign, transfer and set over to Frederick Mertens and Park Agnew my cause of action in the above entitled suit, and all the proceeds which may be derived from the prosecution thereof and from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact.

In witness whereof, I have hereunto set my hand, this twenty-first day of October, 1903.

(Signed) Melville D. Hensey."

The assignor took from the assignees an agreement to return to him any balance after paying the debt due to the assignees. This defeasance was in these words:

"This agreement, entered into this twenty-first day of October, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part.

"Whereas, the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company, At Law No. 44,822, in the Supreme Court of the District of Columbia:

"Now, therefore, it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same issue, that there shall first be paid costs and attorneys' fees, secondly the claim of Mertens and Agnew against Melville D. Hensey, and any balance then remaining over to the said Hensey.

"Witness the signatures and seals of the parties, this twenty-first day of October, 1903.

(Signed) Frederick Mertens,
Park Agnew,
Melville D. Hensey."

The assignment was filed with the clerk of the court, and the defeasance was delivered to Messrs. Birney and Woodard, the attorneys conducting the action for Hensey.

In June, 1905, there was judgment for Hensey for $8,468, which was finally affirmed by this court some two years later. Thereupon, this bill was filed by the appellants, who are judgment creditors, charging that the assignment of October 21, 1903, was made for the purpose of hindering, delaying and defrauding creditors. Both the Supreme Court and the Court of Appeals concurred in holding that the appellants had failed to show fraud, actual or constructive, and that the single purpose of the

assignment was to secure the payment of a just indebtedness to the assignees, the defendants Mertens and Agnew. After paying the attorneys' fees and court costs, the surplus is not enough to pay the debt secured in full.

In view therefore of the concurrence of both courts in finding that no actual fraud was intended, we shall pass at once to the question of constructive fraud.

Fraud in law is predicated upon the fact that the assignor took from the assignees the agreement above set out, and did not file it with the clerk of the court as he did the assignment itself.

It has been argued that the assignment was misleading as not indicating the consideration or purpose, and because not accompanied by the defeasance. But the assignment of a chose in action was not required to be recorded, and there was no way in which constructive notice might be given. The filing with the clerk was, of course, not constructive notice; the obvious purpose being to protect the assignees against the dismissal of the suit by the assignor, or the payment of the proceeds of the suit to him. Indeed on the day before the clerk was directed to "enter the case as to the use of Mertens and Agnew."

That the assignment upon its face is valid is clear. If it is ineffective as to the appellants it must be because of something behind it constituting evidence of bad faith. Are the inferences to be drawn from that evidence consistent with good faith, or do the facts indubitably establish fraud as matter of law? What are the facts from which we are to conclude as matter of law that the purpose was to hinder, delay or defraud? It is said that the assignment was not absolute, but was a transfer to secure a debt, with a reservation, by an unpublished agreement, of any balance. The honesty of the debt intended to be secured was attacked, but that this was a baseless charge is hardly doubtful, especially after two courts have adjudged the debt just. It is then said that the assignor was

at the time insolvent and intended to prefer the assignees, and that they knew it. This would be effective if bankruptcy had ensued within four months, and the trustee had sought to set it aside as a preference; but that on one side, it is neither immoral nor illegal for a failing debtor to prefer one creditor over another. *Huntley* v. *Kingman Co.*, 152 U. S. 527.

But it is said that the value of the claim assigned was far beyond the amount of the debt secured. Here again we find both lower courts disagreeing with this contention.

The thing assigned was of uncertain value. It was an action for damages upon an indemnity bond. The plaintiff made a large claim and doubtless had some of the enthusiasm usual to plaintiffs seeking damages. One jury said he should have $18,000. The court said it was too much, and set the verdict aside. Another jury said he would be compensated by a little more than $8,000. The defendant thought this a monstrous sum, and carried the case first to the Court of Appeals of the District and then to this court before the judgment stuck. The costs, attorneys' fees and interest upon the debt due the assignees more than consumed the whole, and the only question now is whether the assignees shall get a part of their debt or none.

But, it is said, that they have agreed to pay back any surplus, if any there should be after paying their debt, and that this is a reservation by the assignor of an interest in the subject assigned, which operates not as a circumstance of fraud, but as that kind of indubitable evidence which makes fraud in law.

Let us look at it. It did not show fraud in fact or law that this assignment was not an absolute sale or transfer of the chose assigned, but a mere security for an honest debt. If the claim came to nothing, the debt was unpaid. If, as proved to be the case, enough was realized to pay a part, the rest is a debt to be paid. But if there should be a

surplus, what then? If nothing had been agreed about the surplus, is there any doubt that the law would have implied a promise to account to the assignor for that surplus? Is it, then, the law that a promise made to do that which, without the promise, the law would have compelled the assignee to do, constitutes such evidence of fraud as to be fraud in law?

There are some cases which seem to hold that if one makes a general assignment to secure creditors, and inserts a clause reserving to himself any surplus, that he thereby delays his creditors who might seek that surplus until the trust should be wound up, and therefore comes under the condemnation of the statute against conveyances to hinder, delay or defraud creditors, however innocent his purpose, or the existence of a surplus. There are New York cases which seem to go so far, and perhaps others. *Goodrich* v. *Downs*, 6 Hill (N. Y.) 438; *Barney* v. *Griffin*, 2 N. Y. 365; *Curtis* v. *Leavitt*, 15 N. Y. 9, 124; *Collomb* v. *Caldwell*, 16 N. Y. 486. But the same court, in *Leitch* v. *Hollister*, 4 N. Y. 211, held that the principle did not apply to assignments in good faith "of a part of a debtor's property to creditors themselves for the purpose of securing particular demands." "The conveyance," said the New York court, "whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument or left to implication, is immaterial. The assignee does not acquire the legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity. The creditor attaches that interest as the property of the debtor, and is not obliged to postpone action until the determination of any trust. He is,

therefore, neither delayed, hindered or defrauded in any legal sense."

That the mere reservation of a balance under an assignment to pay debts, one or many, is enough as matter of law to make the transaction void, whether the reservation be in or out of the instrument, has not been generally accepted. *Muchmore* v. *Budd*, 53 N. J. Law, 369, where many cases are cited, among them being *Rahn* v. *McElrath*, 6 Watts (Pa.), 151; *Floyd & Co.* v. *Smith*, 9 Oh. St. 546; *Eli* v. *Hair et al.*, 16 B. Monroe, 230; *Didier* v. *Patterson*, 93 Virginia, 534. In *Huntley* v. *Kingman Co.*, 152 U. S. 527, the New York rule is impliedly disapproved. The assignment in that case was of a stock of merchandise to a third person as trustee, to sell and pay a particular debt and "hold the remainder subject to the order of the assignor." The instrument was attacked as fraudulent in law by reason of this reservation, and the trial court instructed the jury to find for the plaintiff on account of this reservation. This court reversed the judgment, holding the charge erroneous. Mr. Justice Brown, for the court, after saying that the agreement to account to the assignor for any surplus was no more than the law would have implied, said:

"Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that, in cases of chattel mortgages (and the instrument in question, by whatever name it may be called, is in reality a chattel mortgage), the reservation of a surplus to the mortgagor is only an expression of what the law would imply without a reservation, and is no evidence of a fraudulent intent. This was the ruling of the Court of Appeals of New York in *Leitch* v. *Hollister*, 4 N. Y. 211, 216, where the assignment was to the creditors themselves for the purpose of securing their demands. 'A trust,' said the court, 'as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the

assignment. Whether expressed in the instrument or left to implication, is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity.' "

The reservation which the law pronounces fraudulent is of some pecuniary benefit at the expense of creditors, especially when secretly secured—such benefit to the assignor being presumed a prime purpose of the conveyance. *Lukins* v. *Aird*, 6 Wall. 79. Other cases are considered and reviewed in *Huntley* v. *Kingman*, *supra*.

Section 1120 of the District of Columbia Code provides that in suits to set aside transfers or assignments as made with intent to hinder, delay or defraud creditors, "the question of fraudulent intent shall be deemed a question of fact and not of law."

Counsel have argued, as courts have ruled, that no amount of evidence will assign to an instrument an operation which the law does not assign to it. Thus a mere deed of gift which actually deprives existing creditors of property which was subject to their claims, or a transfer of property grossly disproportioned to a debt secured under a conveyance apparently absolute, but subject to a secret agreement that the surplus should be held for the assignor, could not be saved, for the necessary legal effect would be to hinder, delay or defraud creditors, and the law could but assign to such conveyance the intent which must indubitably appear from the facts. *Edgell* v. *Hart*, 9 N. Y. 213, 217.

But the assignment here was of a mere chose in action, not subject to legal process, but to be reached through equity only. There was no requirement of law that such an assignment should be recorded and no legal way to give constructive notice. The debt secured was an honest

one, and the security was of uncertain value and character, involving great expense and delay in collection. The fact that the reservation of any surplus after paying the debt secured was not disclosed in the assignment itself was a circumstance of suspicious character, but not as matter of law inconsistent with an honest intent. Two courts have held that under all the circumstances the assignment was not made to hinder, delay or defraud creditors, and as matter of law had no such result.

We are content to affirm this judgment.

Affirmed.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY *v.* BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 92. Argued April 18, 19, 1911.—Decided May 15, 1911.

Credits on open account are incorporeal and have no actual situs, but they constitute property and as such are taxable by the power having jurisdiction.

The maxim of *mobilia sequuntur personam* yields to the fact of actual control; and jurisdiction to tax intangible credits exists in the sovereignty of the debtor's domicile, such credits being of value to the creditor because of the power given by such sovereignty to enforce the debt. *Blackstone* v. *Miller*, 188 U. S. 205. Such taxation does not deny due process of law.

The jurisdiction of the State of the domicile over the creditor's person does not exclude the power of another State in which he transacts his business to tax credits there accruing to him from resident debtors, and thus, without denying due process of law, to enforce contribution to support the government under whose protection his affairs are conducted.

Credits need not be evidenced in any particular manner in order to render them subject to taxation.

Premiums due by residents to a non-resident insurance company and which have been extended, but for which no written obligations have been given, are credits subject to taxation by the State where the debtor is domiciled; and so *held* that the statute of Louisiana to that effect is not unconstitutional as denying due process of law.

In a suit for cancellation of an entire assessment as unconstitutional the plaintiff cannot ask for a reduction of amount if there is a proceeding under the state statute for that purpose and which he has not availed of.

122 Louisiana, 98, affirmed.

THE facts, which involve the power of a State to tax premiums of insurance due by residents to a non-resident insurance company which have been extended but not evidenced by written instrument, and the constitutionality of a statute of Louisiana to that effect, are stated in the opinion.

Mr. Monte M. Lemann and *Mr. Alexander C. King*, with whom *Mr. Harry H. Hall* and *Mr. J. Blanc Monroe* were on the brief, for plaintiffs in error:

A State cannot legally impose an assessment and tax upon premiums due under open account by local policy holders to non-resident or foreign insurance companies. Such assessment and tax would be a taking of property without due process of law, in violation of the Fourteenth Amendment. *St. Louis* v. *Ferry Co.*, 11 Wall. 429; *Louisville &c.* v. *Kentucky*, 188 U. S. 385, 398; *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *United States* v. *Erie*, 106 U. S. 327; *Hagan* v. *Reclamation*, 111 U. S. 701; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Erie R. R.* v. *Pennsylvania*, 153 U. S. 628; *Savings Society* v. *Multnomah*, 169 U. S. 421; *Dewey* v. *Des Moines*, 173 U. S. 193; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Blackstone* v. *Miller*, 188 U. S. 189; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388; *Metropoli-*

tan Life v. *New Orleans*, 205 U. S. 395; *Buck* v. *Beach*, 206 U. S. 407; *Barber Asphalt Co.* v. *City*, 41 La. Ann. 1015; *L. & L. & G. Insurance Co.* v. *Assessors*, 44 La. Ann. 760; *Railey* v. *Assessors*, 44 La. Ann. 766; *Clason* v. *City*, 46 La. Ann. 1; *State* v. *Assessors*, 47 La. Ann. 1545; *Bluefields Banana Co.* v. *Assessors*, 49 La. Ann. 43; *Parker* v. *Strouse*, 49 La. Ann. 1173; *L. & L. & G. Insurance Co.* v. *Assessors*, 51 La. Ann. 1028; *Comptoir National* v. *Assessors*, 52 La. Ann. 1319; *Williams* v. *Triche*, 107 Louisiana, 92; *Monongahela* v. *Assessors*, 115 Louisiana, 566; *Metropolitan Life* v. *Assessors*, 115 Louisiana, 698.

A plain distinction can be drawn between a premium due on open account to a non-resident, or foreign, insurance corporation, by a local policy holder, on the one hand, and on the other, an open account resulting from the sale of merchandise to a local purchaser from a local stock of goods belonging to a non-resident owner. *General Electric Co.* v. *Assessors*, 121 Louisiana, 116.

Assessments admittedly the result of mere guesswork, and so excessive as to exceed from ten to one hundred times the admitted value of the thing assessed, are absolute nullities. 27 Am. & Eng. Ency. of Law, 660; 26 La. Ann. 694; 30 La. Ann. 261; 40 La. Ann. 371; 42 La. Ann. 374; 130 U. S. 177; Cooley on Taxation, 2d ed., 2; *Merchants' Insurance Co.* v. *Assessors*, 40 La. Ann. 372; *Natalbany Lumber Co.* v. *Assessors*, 123 Louisiana, 174; *Union Oil Co.* v. *Campbell*, 48 La. Ann. 1350; *Waggoner* v. *Maumus*, 112 Louisiana, 232; *Swift* v. *Assessors*, 115 Louisiana, 321.

The denial by the assessors of the statutory right of the owners to be heard, renders the assessment null, and would amount to a taking of petitioner's property without due process of law. Louisiana Acts, 1898, p. 360; 1906, p. 96; Cooley on Taxation, 2d ed., 361; 27 Am. & Eng. Ency. of Law, 660, 704; 21 Fed. Rep. 99; 111 U. S. 708; 49 La. Ann. 1350; *Johnson* v. *Tax Collector*, 39 La. Ann. 538;

Shattuck v. *New Orleans*, 39 La. Ann. 209; 2 Cooley on Taxation, 2d ed., 362, 363.

Assessors have no right arbitrarily to refuse to believe the evidence of the taxpayers. 1 Desty on Taxation, 543.

The statutory limitation does not apply to suits contesting the validity of the tax, *Oteri* v. *Parker*, 42 La. Ann. 374; *Railroad Co.* v. *Sheriff*, 50 La. Ann. 737; the decision that the failure to file these suits prior to the first of November, 1905–1907, barred averring the nullity or excessive character of the assessments amounts to a deprivation of plaintiff's property, without judicial action and without due process of law. *Central of Georgia* v. *Wright*, 207 U. S. 138; *Travelers'* v. *Assessors*, 122 Louisiana, 129, 136.

Mr. George H. Terriberry, *Mr. H. Garland Dupré* and *Mr. Harry P. Sneed* for defendants in error.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought by the Liverpool & London & Globe Insurance Company of New York, a foreign corporation doing business in the State of Louisiana, to cancel an assessment made by the Board of Assessors for the Parish of Orleans for the year 1906.

The assessment itself is not shown by the record, but from the testimony the Supreme Court of the State concluded "that the property intended to be assessed was the amount due plaintiff by its policy holders in this State for premiums on which credit of thirty and sixty days had been extended." Dealing with the case from this standpoint, that court affirmed a judgment dismissing the suit, giving as its reasons "that the said credits are due in this State and have arisen in the course of the business of the plaintiff company done in this State, and are therefore part and parcel of the said business in this State, and as a consequence are taxable here." 122 Louisiana, 98.

The Insurance Company brings this writ of error, insisting that the premium accounts did not constitute property taxable in Louisiana and that in consequence the assessment violated the Fourteenth Amendment to the Constitution of the United States in depriving the Company of its property without due process of law.

The assessment was laid under Act 170 of 1898. Section 1 of this act in defining property subject to taxation includes "all rights, credits, bonds, and securities of all kinds; promissory notes, open accounts, and other obligations . . . and all movable and immovable, corporeal and incorporeal articles or things of value, owned and held and controlled within the State of Louisiana by any person in any capacity whatsoever." Section 7 makes it the duty of the tax assessors to place upon the assessment list all property subject to taxation, and provides as follows:

"Provided further, that in assessing mercantile firms the true intent and purpose of this act shall be held to mean, the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average of the capital, both cash and credit, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared assessable within this State, and at the business domicile of said non-resident, his agent or representative."

In construing this statute, the Supreme Court of Loui-

siana in *Metropolitan Life Insurance Company* v. *Board of Assessors*, 115 Louisiana, 708, said: "There can be no doubt that the seventh section of the act of 1898, . . . announced the policy of the State touching the taxation of credits and bills of exchange representing an amount of the property of non-residents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the State of Louisiana. The evident object of the statute was to do away with the discrimination theretofore existing in favor of non-residents as against residents, and place them on an equal footing." Again, in *General Electric Company* v. *Board of Assessors*, 121 Louisiana, 116, where open accounts arising on the sale of merchandise were the subject of the assessment, the court said: "There can be no serious question but that the legislature has provided that credits due upon open accounts arising out of business done in this State by non-residents, shall be taxed; . . . The State imposes this tax because of her need of the revenue to be derived from it; she extends to the business the protection of her laws, and seeks to make the business bear its just proportion of the burden of taxation. The situation would be, we repeat, unfortunate,—not to say deplorable—if the State were left no choice between having to forego this needed revenue, or else handicapping with this tax the business of her own citizens and home corporations in their competition with foreigners for the business to be done here." And this decision was followed in the present case.

This court has had repeated occasion to consider the validity of taxes imposed under the Louisiana act. The case of *New Orleans* v. *Stempel*, 175 U. S. 309, arose under Chapter 106 of the statutes of 1890, but the pertinent features of the act were the same. There it appeared that the assessed credits were evidenced by notes secured by mortgages on real estate in New Orleans; that these

notes and mortgages were in that city, in the possession of an agent, who collected the proceeds and the interest as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff, the guardian of infant owners who like herself were domiciled in the State of New York. The tax was sustained. In *Board of Assessors* v. *Comptoir National*, 191 U. S. 388, the question arose under the statute of 1898. In that case, a foreign banking company did business in New Orleans and there made loans through a local agent. The loans were made upon collateral security, the customer drawing his check which was treated as an overdraft and held as a memorandum of the indebtedness. The court decided that the credits so evidenced, created in the Louisiana business, were taxable in that State. In *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395—also arising under the act of 1898—the validity of a similar tax was upheld. That case was one of loans made through the local agent of the Insurance Company, a New York corporation doing business in Louisiana, to its policy holders upon the security of their policies. The course of business was that on the approval of a loan at the home office of the Company, the Company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed and forwarded both note and policy to the home office. The agent collected and transmitted the interest, and when the notes were paid it was to the agent to whom they were sent to be delivered back to the makers. At all other times the notes and the policies securing them were kept at the home office in New York. In *Orleans Parish* v. *New York Life Insurance Company*, 216 U. S. 517, the so-called credit consisted, in fact, of a payment to the policy holder of a portion of the amount for which the Company was bound by its policy. It was found that despite the fact that notes were given there was no per-

sonal liability, but simply a deduction in account. As there was no loan, there was no credit to be taxed; and a decree in the Circuit Court restraining the collection of the tax was affirmed.

Here an indebtedness actually existed. This is assumed in the objections to the assessment. The indebtedness had its origin in the course of business transacted by the foreign corporation in Louisiana under the laws of that State. If the Louisiana policy holders had given notes for the premiums, which were to be collected through the local agents, there could be no question as to the validity of the tax. The difference between notes given for loans on policies, and notes given for premiums, could not be regarded as a material one so far as the taxing power of the State is concerned. In both cases, the obligations to pay would represent returns to the corporation upon business conducted within the State; in the one, for the moneys loaned with compensation for their use; in the other, for the contracts of insurance. Nor would the power to tax depend on the presence of the notes within the State. *Metropolitan Life Insurance Company* v. *New Orleans, supra; Bristol* v. *Washington County*, 177 U. S. 133. The notes, in these cases, had been removed to the creditor's home; and, despite this removal, they were attributed to the place of origin. Further, if there had been no notes but the premium accounts had been otherwise evidenced by written instruments, they would have been equally taxable. The "checks" in *Board of Assessors* v. *Comptoir National, supra*, were only memoranda of indebtedness or vouchers. "While called 'checks,' and so referred to in the record and by the parties in their dealings, the instrument delivered to the Comptoir, in form an ordinary check as though drawn for payment on presentation from moneys deposited, had no such function. The money was paid to the customer upon the security of the collateral, and the so-called check taken and held as a memo-

randum of the indebtedness to the Comptoir" (pp. 400, 401).

But it is said that the State of Louisiana had no power to tax the credits here in question because they were not evidenced by written instruments. The contention is thus stated in the petition of the Insurance Company in the state court. "Premiums due on open account to a foreign corporation cannot be taxed. The legislature has not the power to localize an abstract credit away from the domicile of the creditor, the State's power of taxation being limited to persons, property or business within its jurisdiction. The levying of a tax upon incorporeal things, such as abstract credits, not in so-called 'concrete' form and without tangible shape violates the Fourteenth Amendment of the United States Constitution."

The asserted distinction cannot be maintained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction.

The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. *Blackstone* v. *Miller*, 188 U. S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no exist-

ence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there.

The decision in *State Tax On Foreign-held Bonds*, 15 Wall. 300, is not in point. There the tax was on the interest on bonds made and payable out of the State, and issued to and held by non-residents of the State. See *Savings Society* v. *Multnomah County*, 169 U. S. 428; *New Orleans* v. *Stempel, supra*, 319, 320; *Blackstone* v. *Miller, supra*, p. 206. Nor was the question determined in *Murray* v. *Charleston*, 96 U. S. 432, where a city attempted to tax its corporate stock, or public debt, owned by non-residents, and the court limited its opinion to the holding "that no municipality of a State can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors" (p. 448).

In *Kirtland* v. *Hotchkiss*, 100 U. S. 491, it was held that the Federal Constitution does not prohibit a State from taxing her own citizens upon bonds belonging to them, although they were made by debtors resident in other States and secured by mortgage on real estate there situated. The sole inquiry was with respect to the validity of the statute of Connecticut where the creditor was domiciled. As the court said in *New Orleans* v. *Stempel, supra* (p. 321), in referring to the *Kirtland Case*, "It was assumed that the situs of such intangible property as a debt evidenced by bond was at the domicile of the owner. There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs. On the contrary, the legislature of the State of Connecticut,

from which the case came, plainly reaffirmed the rule, and the court in its opinion summed up the case in these words (p. 499): 'Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States) is a matter which concerns only the people of that State, with which the Federal Government cannot rightfully interfere.' " See also *Kidd* v. *Alabama*, 188 U. S. 730.

But, as we have seen, the jurisdiction of the State of his domicile, over the creditor's person, does not exclude the power of another State in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors and thus to enforce contribution for the support of the government under whose protection his affairs are conducted. And that the jurisdiction of the latter State rests upon considerations which are more fundamental than that notes have been given, or that the credits are evidenced in any particular manner, was clearly brought out in the concluding statement of the opinion in the case of the *Metropolitan Life Insurance Company*, *supra*. There the court said: "Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth. *Blackstone* v. *Miller*, 188 U. S. 189. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business

precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the State evidences of credits in the form of notes. Under such circumstances, they have a taxable situs in the State of their origin." Equally, then, had the State the power to tax the premium accounts here involved. They were not withdrawn from its constitutional authority, either by reason of the fact that they were payable in consideration of insurance, instead of loans or goods sold, or by the circumstance that the credits were not evidenced by written instruments. They were none the less enforceable credits arising in the local business.

It is also urged that the assessment was excessive. This question was not suitably presented in the state court, for the suit was brought for the cancellation of the entire assessment upon the ground that, as a whole, it was without warrant of law, or if within the statute was beyond the power of the legislature to authorize. It is said that so far as the assessment was in excess of the actual credits it was a nullity, as one of property not in existence. The subject of the assessment, however, was a class of credits which was within the taxing power and the question is one of amount. Proper opportunity was afforded for its correction if it was too great; and if the plaintiff in error had seasonably sought a reduction, availing itself of the remedy that was open to it under the state law, it could have obtained appropriate relief. *Orient Insurance Company* v. *Board of Assessors*, 124 Louisiana, 872. In no aspect of the case, can it be said that there was want of due process of law.

The judgment is

Affirmed.

ORIENT INSURANCE COMPANY *v.* BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 397. Argued April 18, 19, 1911.—Decided May 15, 1911.

Liverpool & London & Globe Insurance Co. v. *Assessors, ante*, p. 346, followed and applied as to right of State to tax insurance premiums due and extended by residents to non-resident companies although such premiums were due from local agents and not from policy holders.

Quære whether any Federal question was raised on this record as to excessive valuation of taxable credits; but the assessments not being nullities, plaintiffs in error have not been deprived of their property without due process of law.

A State has power to fix a reasonable time within which actions for reduction of assessments must be taken. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 156.

Where a state statute prescribes a method for review and reduction of excessive valuation for taxes the remedy must be availed of within the prescribed period; and one not availing thereof in time cannot attack the assessment as depriving him of property without due process of law.

124 Louisiana, 872, affirmed.

THE facts, which involve the constitutionality and validity of tax assessments on a foreign insurance company in Louisiana, are stated in the opinion.

Mr. Monte M. Lemann and *Mr. Alexander C. King*, with whom *Mr. Harry H. Hall*, *Mr. J. Blanc Monroe* were on the brief, for plaintiff in error.

Mr. George H. Terriberry, *Mr. H. Garland Dupré* and *Mr. Harry P. Sneed*, for defendants in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment in a consolidated suit brought by a number of foreign insurance corporations, doing business in Louisiana, to cancel assessments made by the Board of Assessors for the Parish of Orleans for the years 1906, 1907 and 1908, and in the alternative for their reduction as excessive.

The assessments, so far as they are in question here, were for premiums due on open account. In the course of the suit, a stipulation was made setting forth the true amount of these premiums. By the judgment of the Supreme Court of the State, the assessments for the year 1908 were reduced to the amount shown by the stipulation, but those for the years 1906 and 1907 were sustained on the ground that the suit for reduction had not been brought within the time prescribed by law. 124 Louisiana, 872.

With respect to the taxability of the premium accounts owing by Louisiana debtors, the question is the same as that presented in the case of *Liverpool & London & Globe Insurance Company* v. *Board of Assessors for the Parish of Orleans*, decided this day, *ante*, p. 346.

But it is said, upon the testimony in this record, that the debts were not due to the corporations by the policy holders, but by their Louisiana agents; that the premiums were charged to the agents, and that the corporations themselves gave no credit to the policy holders. In their petition in the state court the plaintiffs alleged that the only credits of any kind for money due to them were "uncollected premiums, due, under open account." They also set forth that, protesting against the legality of the tax, they had made reports under the statute showing the "uncollected premiums" for the years in question. And in their stipulation "the actual amounts of outstanding premiums" were stated. If, however, it can be said that

these accounts were due from the agents, still this would not avail the plaintiffs. The premiums were the consideration for the insurance contracts; they were the returns from the local business. Charging the premiums to the local agents did not withdraw the credits accruing to the corporations in the business transacted within the State from its taxing power.

It is also insisted that the assessments must be adjudged invalid upon the ground that they were shown to be grossly excessive and to have been the result of mere guesswork; and, further, that the assessors disregarded the reports made by the plaintiffs, and that their applications to be heard were refused because a test case was pending. Whether, with respect to these contentions, any Federal question can be said to have been raised in the state court is open to serious doubt. But it does not appear that the constitutional rights of the plaintiffs have been violated. It would be going too far to say that the assessments were nullities, or that the plaintiffs had been deprived of their property without due process of law. *People ex rel. Brooklyn City Railroad Co.* v. *New York State Board of Tax Commissioners,* 199 U. S., pp. 51, 52. The assessments were in fact made by the officers charged with that duty under the statute; if excessive, there was opportunity for review and correction. The plaintiffs have not been held bound by the assessment by reason of finality in the action of the assessors. See *Central of Georgia Railway Co.* v. *Wright,* 207 U. S. 127, p. 139. They had right of recourse to the courts of the State. If they are compelled to pay more than the amounts admitted by the stipulation, it is because they did not sue in time. They have procured a suitable reduction of the assessment for the year 1908; and a similar result could have been reached for the years 1906 and 1907, had action been taken within the period prescribed. It was competent for the legislature to fix a reasonable time within which actions for reductions

should be instituted, and there was no violation of the Federal Constitution in adjudging the rights of the plaintiffs accordingly. *Kentucky Union Co.* v. *Kentucky*, 219 U. S., pp. 156, 157; *Terry* v. *Anderson*, 95 U. S. 628.

The judgment of the Supreme Court of Louisiana is affirmed.

Judgment affirmed.

WILSON *v.* UNITED STATES.

SAME *v.* SAME.

SAME *v.* SAME.

ERROR TO, AND APPEALS FROM, THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 759, 760, 788. Argued March 2, 3, 1911.—Decided April 15, 1911.

Hale v. *Henkel*, 201 U. S. 43, followed to effect that a witness properly subpœnaed cannot refuse to answer questions propounded by the grand jury on the ground that there is no cause or specific charge pending.

The *ad testificandum* clause is not essential to the validity of a subpœna *duces tecum*, and the production of papers by one having them under his control may be enforced independently of his testimony.

Where the subpœna *duces tecum* contains the usual *ad testificandum* clause it is not necessary to have the person producing the papers sworn as a witness. The papers may be proved by others.

The right of one responding to a subpœna *duces tecum* to show why he need not produce does not depend on the *ad testificandum* clause, but is incidental to the requirement to produce.

Corporate existence implies amenability to legal powers, and a subpœna *duces tecum* may be directed to a corporation.

A corporation is under a duty to produce records, books and papers in its possession when they may be properly required in the administration of justice.

A corporation is not relieved from responding to a subpœna *duces tecum* or from producing the documents required by reason of the provisions of §§ 877 and 829, Rev. Stat., or those of the Sixth Amendment to the Constitution.

A subpœna *duces tecum*, which is suitably specific and properly limited in its scope, and calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced, does not violate the unreasonable search and seizure provisions of the Fourth Amendment, and the constitutional privilege against testifying against himself cannot be raised for his personal benefit by an officer of the corporation having the documents in his possession.

A lawful command to a corporation is in effect a command to its officers, who may be punished for contempt for disobedience of its terms.

An officer of a corporation is protected by the self-incrimination provisions of the Fifth Amendment against the compulsory production of his private books and papers, but this privilege does not extend to books of the corporation in his possession.

An officer of a corporation cannot refuse to produce documents of a corporation on the ground that they would incriminate him simply because he himself wrote or signed them, and this even if indictments are pending against him.

Physical custody of incriminating documents does not protect the custodian against their compulsory production. The privilege which exists as to private papers cannot be maintained.

Under the visitatorial power of the State, and the authority of Congress over corporate activities within the domain subject to Congress, a corporation must submit its books and papers whenever properly required so to do and cannot resist on the ground of self-incrimination, even if the inquiry may be to detect and prevent violations of law. *Hale* v. *Henkel*, 201 U. S. 43, 74.

An officer of a corporation cannot withhold its books to save it, or if he is implicated in its violation of law, to protect himself, from disclosures, although he may decline to utter on the witness stand any self-incriminating word.

An officer cannot withhold from a grand jury corporate documents in his possession because the inquiry was directed against the corporation itself.

Notwithstanding English views as to the extent of protection against self-incrimination the duties of corporations and officers thereof are to be determined by our laws.

THE facts, which involve the validity of a subpœna *duces tecum* issued to a corporation, and the right of an officer thereof to refuse to produce the documents required by such subpœna on the ground that they tended to incriminate him, are stated in the opinion.

Mr. John B. Stanchfield, with whom *Mr. Louis S. Levy* and *Mr. William M. Parke* were on the brief, for plaintiff in error and appellant:

The disclosure of the contents of the letter press copy book, produced by appellant before the grand jury, would tend to incriminate plaintiff in error; the contents of the letter press copy book would form a link in the chain of evidence exposing him to indictment and to conviction on the two indictments previously found against him in the same court. *In re Chapman,* 153 Fed. Rep. 371; *In re Hale,* 139 Fed. Rep. 496; *S. C.,* aff'd 201 U. S. 439; *Fort* v. *Buchanan,* 113 Fed. Rep. 156.

The privilege of a witness against producing books and papers under a subpœna *duces tecum* when the production thereof would tend to incriminate him, is even more fully protected than his privilege of refusing to make answer orally under an ordinary subpœna, when his oral answer would tend to incriminate him; because the former privilege is protected by both the Fourth and Fifth Amendments, while the latter is protected by the Fifth Amendment only. *Boyd* v. *United States,* 116 U. S. 616; *United States* v. *Collins,* 146 Fed. Rep. 555; *United States* v. *Armour,* 142 Fed. Rep. 808.

An officer of a corporation who actually holds the physical possession, custody and control of books or papers of the corporation which he is required by a subpœna *duces tecum* to produce, is entitled to the same protection against exposing the contents thereof which would tend to incriminate him, as if the books and papers were absolutely his own. *In re Hale,* 139 Fed. Rep. 496; *S. C.,*

aff'd, 201 U. S. 43; *Ex parte Chapman*, 153 Fed. Rep. 371.

The principles above set forth have long been upheld by the courts of England. The Fourth and Fifth Amendments merely continued the right which was guaranteed by the common law, a right which has always been jealously guarded when properly claimed. See *King* v. *Dr. Purnell*, 1 W. Blackstone, 37; *Green* v. *Granatelli*, 7 State Trials (N. S.), 979.

The rights guaranteed to every natural person by the Fourth and Fifth Amendments are substantial, not merely formal and technical, and cannot be defeated by any fictional distinction by which the single and indivisable natural person is deemed to act or to be proceeded against in a representative capacity, and not in an individual capacity.

An officer of a corporation who is in possession of a book of the corporation containing a record made under his direction of his own acts and statements and tending to incriminate him, cannot be compelled in a criminal proceeding against himself to produce and permit the inspection of such books (either directly or by being forced to turn the book over to some other officer of the corporation) by means of a subpœna *duces tecum* addressed to the corporation directing the production of the book in question.

A subpœna *duces tecum* is a possessory writ. It searches all books and papers in the possession of the witness at the time of the service of the subpœna and in the eye of the law seizes such as are specified in the subpœna and are then in the possession of the witness. *Bank* v. *Hilliard*, 5 Cowen (N. Y.), 153, 158; *Nelson* v. *United States*, 201 U. S. 92, 115, 116; *Hall* v. *Young*, 37 N. H. 134.

The subpœna *duces tecum* addressed to the corporation only was unauthorized and void. *Hale* v. *Henkel*, 201 U. S. 43; *Wertheim* v. *Continental Trust Co.*, 15 Fed. Rep.

716; *Crowther* v. *Appleby*, L. R. 9 C. P. 27; *Nelson* v. *United States*, 201 U. S. 92, 115; Wigmore on Evidence, § 2200; *United States* v. *Ralston*, 17 Fed. Rep. 903; *Re Shaw*, 172 Fed. Rep. 520. The cases cited by the Government do not sustain its contention.

A subpœna addressed to a corporation merely would be entirely subversive of the right guaranteed by the Constitution and the English Bill of Rights.

The dictum of Judge Lacombe in *United States* v. *American Tobacco Co.*, 146 Fed. Rep. 557, and the decision of the same judge in *In re American Sugar Co.*, 178 Fed. Rep. 109, upholding the validity of a subpœna addressed to a corporation, and not to any officer thereof, are not in accord with the spirit of Federal decisions, the Constitution of the United States, and the rights of an individual guaranteed since the English Bill of Rights.

The Solicitor General, with whom *Mr. Henry E. Colton*, Special Assistant to the Attorney General, was on the brief, for the United States:

The grand jury was engaged in an inquiry which gave it authority to summon witnesses, and to call for the production of books and papers. *Hale* v. *Henkel*, 201 U. S. 43.

The subpœna *duces tecum* was a valid process. *United States* v. *Am. Tobacco Co.*, 146 Fed. Rep. 557; *In re Am. Sugar Co.*, 178 Fed. Rep. 109; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541.

No objection to the subpœna having been made at any prior stage of the proceedings, such objection cannot be made for the first time in this court.

The search and seizure involved in the subpœna *duces tecum* were not unreasonable, since the subpœna was specific as to the person to whom it was directed and what was to be produced thereunder, and it was issued for the lawful purpose of securing material testimony in an

investigation in which the grand jury were then engaged. *Hale* v. *Henkel*, 201 U. S. 43; *McAlister* v. *Henkel*, 201 U. S. 90; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *United States* v. *Am. Tobacco Co.*, 146 Fed. Rep. 557.

Wilson was not required by the subpœna, nor by any of the proceedings thereon, "to be a witness against himself." The subpœna called for a book which belonged to the United Wireless Telegraph Company, which had come into his physical custody simply as an officer of that company, and had been recalled from such custody by formal action of the board of directors. He was not protecting himself in the possession of his own books nor refusing to be a witness against himself, but was obstructing the company and its representatives, other than himself, in the performance of an order of the court for the production of books of the company, which they were willing to perform. *State* v. *Davis*, 108 Missouri, 666; *State* v. *Donovan*, 10 N. Dak. 203; *People* v. *Henwood*, 123 Michigan, 317; *State* v. *Farnum*, 73 S. Car. 165; *State* v. *Davis*, 69 S. E. Rep. (W. Va.), 639; *L. & N. R. R. Co.* v. *Commonwealth*, 21 Ky. Law Rep. 239; *McElree* v. *Darlington*, 187 Pa. St. 593; *Pray* v. *Blanchard Co.*, 95 App. Div. (N. Y.) 423; *People* v. *Coombs*, 158 N. Y. 532; *Ex parte Hedden*, 90 Pac. Rep. (Nev.) 737; *Langdon* v. *People*, 133 Illinois, 382; *Bradshaw* v. *Murphy*, 7 Car. & Paine, 612; *Evans* v. *Moseley* 2 Dowling's P. C. 364; *Perry* v. *Gibson*, 1 Adolphus & Ellis, 48; *Sherman* v. *Barrett*, 1 McMullan (S. Car.), 96; *United States* v. *Armour & Co.*, 142 Fed. Rep. 808.

Mr. Justice Hughes delivered the opinion of the court.

These three cases involve the same question. The first is a writ of error to the Circuit Court to review a judgment committing the plaintiff in error for contempt. The second is an appeal from an order of the Circuit Court dismissing a writ of *habeas corpus* sued out after such com-

mitment. The third is an appeal from an order dismissing a writ of *habeas corpus* by which a discharge was sought from a later commitment for a similar contempt.

The contempt consisted in the refusal of the plaintiff in error and appellant, Christopher C. Wilson, to permit the inspection by a grand jury of letter press copy books in his possession. The books belonged to a corporation of which he was president and were required to be produced by a subpœna *duces tecum*.

The circumstances were these: The grand jury empannelled in the Circuit Court for some time had been inquiring into alleged violations of §§ 5440 and 5480 of the United States Revised Statutes by Wilson and others. Wilson was the president of the United Wireless Telegraph Company, a corporation organized under the laws of the State of Maine. On August 3, 1910, the grand jury found two indictments against him and certain officers, directors and stockholders of this corporation, the one charging fraudulent use of the mails and the other a conspiracy for such use. The grand jury continued its investigations and on October 7, 1910, a subpœna *duces tecum* was issued (set forth in the margin [1]), which was directed to the

[1] The President of the United States of America to United Wireless Telegraph Company, 42 Broadway, New York, N. Y., Greeting:

[SEAL]

We command you, That all business and excuses being laid aside you appear before the Grand Inquest of the Body of the People of the United States of America for the Southern District of New York, at a Circuit Court to be held in the United States Court House and Post Office Building, Borough of Manhattan, City of New York, on the 10th day of October, 1910, at 11 o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

Letter press copy books of United Wireless Telegraph Company containing copies of letters and telegrams signed or purporting to be signed by the President of said company during the months of May and June, 1909; in regard to an alleged violation of the statutes of the United States by C. C. Wilson.

And for a failure to produce the aforesaid documents you will be

United Wireless Telegraph Company, requiring its appearance before the grand jury and the production by it of the letter press copy books of the company "containing copies of letters and telegrams signed or purporting to be signed by the President of said company during the month of May and June, 1909; in regard to an alleged violation of the statutes of the United States by C. C. Wilson."

Service was made upon the company by service upon Wilson, as president, and upon its secretary and two directors. On the return day Wilson appeared before the grand jury, and in response to questions, when not under oath, stated that he answered the call of the United Wireless Telegraph Company and declined to answer further questions until he was sworn; and having been sworn, and being asked whether or not the company produced the letter press copy books called for, he filed a written statement in which, after describing the subpœna, he said:

"III. Said letter press copy books for the months of May and June, 1909, in said subpœna mentioned during said months of May and June, 1909, were kept regularly in my office as President of said corporation, and were regularly used by me and for the most part, if not entirely, by me only, and contained copies of my personal and other correspondence, as well as copies of the correspondence relating to the business and affairs of said corporation. For the greater part of the time during and since May and June, 1909, and all the time during the last month and

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deemed guilty of a contempt of Court, and liable to the penalties of the law.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the United States, at the Borough of Manhattan, City of New York, the 7th day of October, 1910.

JOHN A. SHIELDS,
Clerk.

HENRY WISE,
U. S. Attorney.

more, said letter press copy books have been and still are in my possession, custody and control, and as against any other officer or employé of said corporation, or any other person, I have been entitled to such possession, custody and control. I did not secure and have not at any time held possession of said letter press copy books in anticipation that any subpœna for their production would be served upon me or said corporation, or for the purpose of evading any subpœna or other legal process which might be served upon me or said corporation."

He alleged that he was the "C. C. Wilson" mentioned in the subpœna as the one against whom the inquiry was directed, and described the pending indictments. He stated that the letter press copy books were essential to the preparation of his defense and that he was using them for that purpose; that he believed that the matters therein contained would tend to incriminate him; and that he "should not be compelled, directly or indirectly, to furnish or produce said letter press copy books as called for by said subpœna," nor to testify in regard to their contents, nor permit them to be used against him. He added that he had the books with him, but that he declined to deliver them to the grand jury, insisting that his refusal was in entire good faith.

The grand jury presented the matter to the court and Wilson was adjudged to be in contempt and was committed to the custody of the marshal "until he shall cease to obstruct and impede the United Wireless Telegraph Company from complying with the subpœna *duces tecum* attached to the above mentioned presentment, or otherwise purge himself from this contempt." This is the judgment which is the subject of review in the first case (No. 759).

Wilson then petitioned for a writ of *habeas corpus* alleging that the commitment was illegal for the reasons (1) that the court was without jurisdiction to entertain

the charge of contempt, (2) that there was no "cause" or "action" pending in the court between the United States and any party mentioned in the subpœna, in which the petitioner could be required to testify or give evidence, (3) that the grand jury was not in the exercise of its legitimate authority in prosecuting the investigation set out in the presentment, its powers being limited to the investigation of specific charges against particular persons, and (4) that the subpœna was illegal, unauthorized and void because it did not comply with § 877 of the United States Revised Statutes in that it required the person addressed to appear and not to attend, and did not require the person addressed "to testify generally" in behalf of the United States; and because it was not issued pursuant to an order of court, was addressed to the corporation without mention of any individual or officer, and would not apprise the defendant in the prosecution which might follow of the name of the precise witness who might have appeared against him.

It was further urged, reiterating in substance what had been said to the grand jury, that the petitioner should not be held in contempt as the subpœna was not directed to him, but merely to the corporation; and generally that the proceedings were in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The writ was issued and on return being made of the commitment was dismissed and the petitioner remanded, and from this order an appeal was taken to this court (No. 760).

Later, on October 28, 1910, another subpœna *duces tecum* was issued in the same form, addressed to the United Wireless Telegraph Company, and calling for the same books. It was served on the appellant Wilson and also on the secretary and five directors of the company. On the return day, they appeared before the grand jury,

the appellant Wilson then having in his possession a letter press copy book which the subpœna described, but upon demand being made it was not produced before the grand jurors for their inspection. The foreman then directed the production of the books on the following day, when the same persons again appeared, Wilson still having the book above mentioned, and the demand and refusal were repeated.

Thereupon the grand jury through the District Attorney made an oral presentment to the court, in the presence of Wilson and the others who had been served with the subpœna, that the corporation and its officers and directors were in contempt, and specifically with respect to Wilson that he was "preventing the corporation from complying with the process." On behalf of the directors before the court it was stated that they had made efforts to obtain the books for production before the grand jury, but that Wilson had declined to surrender them. They presented the minutes of a meeting of the board of directors held on that day at which these directors, constituting a majority of the board, had passed a resolution demanding of Wilson the possession of the letter press copy books called for by the subpœna "for the production of the same before the Federal Grand Jury." The court again adjudged Wilson to be in contempt and ordered his commitment "until he delivers to the United Wireless Telegraph Company the said books called for by said subpœna, and ceases to obstruct and impede the process of this Court, or otherwise purge himself of this contempt." A writ of *habeas corpus* was then issued upon a petition alleging the same objections to the subpœna and commitment which had been set forth in the petition for the former writ. On return the writ was dismissed and the petitioner appealed (No. 788).

We may first consider the objections to the validity of the subpœna and then the claim of privilege.

The objections to the jurisdiction on the ground that there was no "cause" or "specific charge" pending before the grand jury were made and answered in *Hale* v. *Henkel*, 201 U. S. 43, and require no further examination.

But the question is also presented whether the subpœna was unauthorized, and hence void, because it was not directed to an individual, but to a corporation. It is urged that its form was unusual and unwarranted, in that it did not require any one to attend and to testify, but simply directed a corporation, which could not give oral testimony, to produce books.

While a subpœna *duces tecum* ordinarily contains the *ad testificandum* clause, this cannot be regarded as essential to its validity. The power to compel the production of documents is, of course, not limited to those cases where it is sought merely to supplement or aid the testimony of the person required to produce them. The production may be enforced independently of his testimony, and it was held long since that the writ of subpœna *duces tecum* was adquate for this purpose. As was said by Lord Ellenborough in *Amey* v. *Long*, 9 East, 484, "The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them." Where the subpœna *duces tecum* contains the usual *ad testificandum* clause, still it is not necessary for the party requiring the production to have the person producing the documents sworn as a witness. They may be proved by others. 3 Wigmore on Evidence, §§ 1894, 2200; *Davis* v. *Dale*, M. & M. 514; *Summers* v. *Moseley*, 2 Cr. & M. 477; *Rush* v. *Smith*, 1 C. M. & R. 94; *Perry* v. *Gibson*, 1 A. & E. 48; *Martin* v. *Williams*, 18 Alabama, 190; *Treasurer* v. *Moore*, 3 Brev. (S. Car.), 550;

Sherman v. *Barrett*, McMull. (S. Car.), 163; *Aiken* v. *Martin*, 11 Paige, 499; *Note*, 15 Fed. Rep. 726.

"I always thought," said Parke, J., in *Perry* v. *Gibson*, *supra*, "that a subpœna *duces tecum* had two distinct objects, and that one might be enforced without the other." In *Summers* v. *Moseley*, *supra*, the function of the writ was carefully considered and the judgment was rendered after consultation with the judges of the other courts. It was argued that "the *duces tecum* part of the writ is only compulsory as ancillary to the *ad testificandum* part." But the reasoning of the court negatived the contention; and it was ruled that the person subpœnaed was "compellable to produce the document in his possession without being sworn, the party calling upon him to produce it not having occasion to ask him any question." Bayley, B., said: "The origin of the *subpœna duces tecum* does not distinctly appear. It has been said on the part of the defendant that it was not introduced or known in practice till the reign of Charles the Second, and it may be that in its present form the *subpœna duces tecum* was not known or made use of until that period; but no doubt can be entertained that there must have been some process similar to the *subpœna duces tecum* to compel the production of documents, not only before that time, but even before the statute of the 5th of Elizabeth. Prior to that statute, there must have been a power in the crown (for it would have been utterly impossible to carry on the administration of justice without such power) to require the attendance in courts of justice of persons capable of giving evidence, and the production of documents material to the cause, though in the possession of a stranger. The process for that purpose might not be called a *subpœna duces tecum*, but I may call it a *subpœna* to produce; the party called upon in pursuance of such a process not as a witness, but simply to produce, would do so or not, and if he did not, I can entertain no doubt that

it would have been open to the party for whom he was called to make an application to the court in the ensuing term to punish him for his contempt in not producing the document in obedience to such *subpœna*. Whether he could require to be sworn not *ad testificandum*, but true answer to make to such questions as the court should demand of him touching the possession or custody of the document, is not now the question. *Perhaps* he might; but we are clearly of opinion that he has no right to require that a party bringing him into court for the mere purpose of producing a document should have him sworn in such a way as to make him a witness in the cause, when it may often happen that he is a mere depository, and knows nothing of the documents of which he has the custody."

Treating the requirement to produce as separable from the requirement to testify generally what one knows in the cause, it follows that the latter may be omitted from the subpœna without invalidating the former. This course does not impair any right either of the opposing party or of the person responding to the subpœna. The latter may still have the opportunity to which he has been held entitled (*Aiken* v. *Martin, supra*), of showing under oath the reasons why he should not be compelled to produce the document. For this right does not depend upon the *ad testificandum* clause, but is incident to the requirement to produce.

Where the documents of a corporation are sought the practice has been to subpœna the officer who has them in his custody. But there would seem to be no reason why the subpœna *duces tecum* should not be directed to the corporation itself. Corporate existence implies amenability to legal process. The corporation may be sued; it may be compelled by mandamus, and restrained by injunction, directed to it. Possessing the privileges of a legal entity, and having records, books and papers, it is under

a duty to produce them when they may properly be required in the administration of justice.

There is no merit in the appellant's contention with respect to the application of § 877 of the United States Revised Statutes. The provision of the section that witnesses required on the part of the United States shall be subpœnaed "to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney," is in the interest of convenient and economical administration and has no bearing upon the questions here involved. It is said that, under the form of writ used in this case, the defendant in the prosecution which might follow an indictment by the grand jury would not be apprised of the name of the precise witness who might have appeared against him, and § 829 of the Revised Statutes and the Sixth Amendment of the Federal Constitution are invoked. The contention ignores the fact that the writ calls for books and not for oral testimony; and, aside from this, neither the constitutional provision nor the statute accords the right to be apprised of the names of the witnesses who appeared before the grand jury. Even in cases of treason and other capital offenses, under § 1033 of the Revised Statutes, the required list of witnesses is only of those who are to be produced on the trial. *Logan* v. *United States*, 144 U. S. 263, 304; *United States* v. *Curtis*, 4 Mason, 232; *Balliet* v. *United States*, 129 Fed. Rep. 692.

Nor was the process invalid under the Fourth Amendment. The rule laid down in the case of *Boyd* v. *United States*, 116 U. S. 616, is not applicable here. In that case, an information for the forfeiture of goods under the Customs Act of June 22, 1874, c. 391, 18 Stat. 187, it was held that the enforced production "of the private books and papers" of the owner of the goods sought to be forfeited, under the provisions of § 5 of that act, was "compelling him to be a witness against himself within the

meaning of the Fifth Amendment" and was also "the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." But there is no unreasonable search and seizure, when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced. In the present case, the process was definite and reasonable in its requirements, and it was not open to the objection made in *Hale* v. *Henkel*, *supra* (pp. 76, 77). Addressed to the corporation, and designed to enforce its duty, no ground appears upon which the corporation could have resisted the writ. And the corporation made no objection of any sort. The appellant did not attempt to assert any right on its part; his conduct was in antagonism to the corporation, so far as its attitude is shown. A majority of the directors, not including the appellant, appeared before the court and urged their solicitude to comply with the writ. They presented their formal action, taken at a meeting of the board, in which they demanded of the appellant the delivery of the books for production before the grand jury.

Concluding, then, that the subpœna was valid and that its service imposed upon the corporation the duty of obedience, there can be no doubt that the appellant was likewise bound by it unless, with respect to the books described, he could claim a personal privilege. A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt. The applicable principle was thus stated by Chief Justice

Waite in *Commissioners* v. *Sellew*, 99 U. S. 624, 627, where a peremptory mandamus was directed against a municipal board: "As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. . . . While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation." See also *Leavenworth* v. *Kinney*, 154 U. S. 642; *People* v. *Sturtevant*, 9 N. Y. 277.

The appellant asserts his privilege against self-crimination. There is no question, of course, of oral testimony, for he was not required to give any. Undoubtedly it also protected him against the compulsory production of his private books and papers. *Boyd* v. *United States, supra; Bollman* v. *Fagin*, 200 U. S. 195. But did it extend to the corporate books?

For there can be no question of the character of the books here called for. They were described in the subpœna as the books of the corporation, and it was the books so defined which, admitting possession, he withheld. The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books. It was said in the appellant's statement before the grand jury that the books contained copies of his "personal

and other correspondence as well as copies of the correspondence relating to the business and affairs" of the corporation. But his personal letters were not demanded; these the subpœna did not seek to reach; and as to these no question of violation of privilege is presented. Plainly he could not make these books his private or personal books by keeping copies of personal letters in them. Had the appellant merely sought to protect his personal correspondence from examination, it would not have been difficult to have provided, under the supervision of the court, for the withdrawal of such letters from scrutiny. Indeed, on the hearing of the second presentment, the court suggested their removal from the books. But the appellant was not content with protection against the production of his private letters; he claimed the privilege to withhold the corporate books and the documents which related to corporate matters and with respect to which he had acted in his capacity as the executive officer of the corporation. And that is the right here asserted.

It is at once apparent that the mere fact that the appellant himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person. And where an officer of a corporation has possession of corporate records which disclose his crime, there is no ground upon which it can be said that he will be forced to produce them if the entries were made by another, but may withhold them if the entries were made by himself. The books are no more his private books in the latter case than in the former; if they have been held pursuant to the authority of the corporation, that authority is subject to termination. In both cases production tends to criminate; and if requiring him to produce compels him to be a witness against himself in the one case it does so equally in the

other. There are other facts which serve to sharpen the claim of privilege, but are not determinative. Thus, there were two indictments pending against the appellant, and the inquiry before the grand jury was also directed against him. If, however, the privilege existed with respect to these books in his hands, it would have been likewise available had there been no prior indictments and had the immediate investigation concerned violations of law by others. The privilege holds although the pursuit of the person required to produce has not yet begun; it is the incriminating tendency of the disclosure and not the pendency of the prosecution against the witness upon which the right depends. *Counselman* v. *Hitchcock*, 142 U. S. 562, 563.

We come then to the broader contention of the appellant,—thus stated in the argument of his counsel: "An officer of a corporation who actually holds, the physical possession, custody and control of books or papers of the corporation which he is required by a subpœna *duces tecum* to produce, is entitled to the same protection against exposing the contents thereof which would tend to incriminate him, as if the books and papers were absolutely his own." That is, the power of the courts to require their production depends not upon their character as corporate books and the duty of the corporation to submit them to examination, but upon the particular custody in which they may be found. If they are in the actual custody of an officer whose criminal conduct they would disclose, then, as this argument would have it, his possession must be deemed inviolable, and, maintaining the absolute control which alone will insure protection from their being used against him in a criminal proceeding, he may defy the authority of the corporation whose officer or fiduciary he is and assert against the visitatorial power of the State, and the authority of the Government in enforcing its laws, an impassable barrier.

But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd Case* where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

There are abundant illustrations in the decisions. Thus in *Bradshaw* v. *Murphy*, 7 C. & P. 612, it was held that a vestry clerk who was called as a witness could not on the ground that it might incriminate himself object to the production of the vestry books kept under the statute, 58 George III, chapter 69, § 2. In *State* v. *Farnum*, 73 S. Car. 165, it appeared that a legislative committee had been appointed to investigate the affairs of the State Dispensary, and it was provided that it should have access to

all books of the institution or of any officer or employé thereof. In anticipation the state dispenser removed certain books from the files, defending his action on the plea that they contained private matter which the committee had no right to inspect. The court ruled that it was the "obvious duty of any officer to keep books, letters and other documents relating to the business of his office and to the manner in which he has discharged or failed to discharge its duties in the place where the public business with which he is charged is conducted, subject to examination by any of the committees appointed by the General Assembly, and upon an application for mandamus to compel him to perform this obvious public duty, it is essential for the court to ascertain the facts and inform itself whether there has been an actual removal of public documents or other public property and a refusal to restore them for examination." In *State* v. *Donovan*, 10 N. Dak. 203, the defendant was a druggist who was required by statute to keep a record of all sales of intoxicating liquors made by him, which should be subject to public inspection at reasonable times. It was held that the privilege against self-crimination was not available to him with respect to the books kept under the law, for they were "public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection." On similar grounds in *State* v. *Davis*, 108 Missouri, 666, the court sustained a statute requiring druggists to preserve the prescriptions they compounded and to produce them in court when required. See also *State* v. *Davis*, 69 S. E. Rep. (W. Va.) 639; *People* v. *Coombs*, 158 N. Y. 532; *L. & N. R. R. Co.* v. *Commonwealth*, 51 S. W. Rep. (Ky.) 167; *State* v. *Smith*, 74 Iowa, 580; *State* v. *Cummins*, 76 Iowa, 133; *People* v. *Henwood*, 123 Michigan, 317; *Langdon* v. *People*, 133 Illinois, 382.

The fundamental ground of decision in this class of

cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

What then is the status of the books and papers of a corporation, which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.

This view, and the reasons which support it, have so

recently been stated by this court in the case of *Hale* v. *Henkel, supra,* that it is unnecessary to do more than to refer to what was there said (pp. 74, 75):

"Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate

its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

". . . Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations tions." See also *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, pp. 348, 349.

The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in

its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.

Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection, despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused. The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize.

We have not overlooked the early English decisions to

which our attention has been called (*Rex* v. *Purnell*, 1 W. Bl. 37; *Rex* v. *Granatelli*, 7 State Tr. N. S. 979; see also *Rex* v. *Cornelius*, 2 Stra. 1210), but these cannot be deemed controlling. The corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws. Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody and should produce the books which he holds in his official capacity in accordance with the requirements of the subpœna. None of his personal papers are subject to inspection under the writ and his action, in refusing to permit the examination of the corporate books demanded, fully warranted his commitment for contempt.

The judgment and orders of the Circuit Court are

Affirmed.

Mr. Justice McKenna dissenting.

I am unable to concur with my brethren, and if the application of a constitutional provision, indeed a constitutional provision whose purpose is the protection of personal liberty, were not involved I might not even signify opposition. The application of the Constitution of the United States, especially as it may affect personal privileges, is the most serious duty of the court. It is sure to have consequence beyond the instance, and justifies the expression of the views a member of the court may have about it.

The facts are stated in the opinion, but they are not all of equal significance, indeed may confuse unless distinguished. I put to one side, therefore, all consideration of the process by which the letter-press books were brought into court or before the grand jury. They were taken there, of course, in deference—in submission, it may be better to say—to the command of the law expressed in the sub-

pœna. Resistance to that was not offered by Wilson, nor was it necessary. *Boyd* v. *United States*, 116 U. S. 616. His constitutional right was asserted afterwards. With Wilson then and the books in his possession we have to deal and the rights he had in such situation, and let us keep in mind that it was his guilt under the law that was under investigation and which the books were sought for the purpose of exposing. Three indictments had already been found against him. Crime, therefore, had been formally charged, and further crime was being investigated—not crime by the corporation, but crime by him, and the proof, it was supposed, lay in the books. They were sought for no other reason. They were demanded of him to convict him. To the demand he answered that the Constitution of his country protected him from producing evidence against himself. And he was certainly asked to produce such evidence. The books were in his possession in an assertion of right over them against everybody. In the transactions they recorded he was a participant, and, it may be, the only doer. It is made something of in the opinion that the corporation was willing to have the books surrendered. The more unmistakable, therefore, was the claim of Wilson a personal privilege. And let it be kept in mind that it was his own privilege that he claimed, not that of the corporation; and I pass by as irrelevant a consideration of what disclosures could have been required of it, even if it had been accused of crime and there had been pending an inquiry against it.

Upon what ground was the privilege denied? Upon the ground that the books were not his property but that of the corporation, and they are assimilated in the opinion to public documents, a consideration I pass for the present. How far, as affecting the privilege, is the rule of the title to property to be carried? Every rule may be tested by what can be done under it. Whenever a privilege is claimed against the production of books, or, of course other

property, may an issue be raised as to title and upon its decision by the court the right to the privilege be determined, or shall the rule only be applied when such issue is not made? And what of partnership property, or property otherwise owned in common? Does the degree of interest affect the rule? In the case at bar Wilson asserted the right to hold the books against the corporation. However, such considerations are, in my view, of minor importance, and I instance them only to show to what uncertainties we may go when we leave the clear and simple directness of the privilege against self-incrimination. As the privilege is a guaranty of personal liberty it should not be qualified by construction and a distinction based on the ownership of the books demanded as evidence is immaterial. Such distinction has not been regarded except in the case of public records, as will be exhibited by a review of the authorities.

In *Rex.* v. *Granatelli,* Reports of State Trials, New Series, 979, 986, Prince Granatelli was prosecuted for breach of the Foreign Enlistment Act in fitting out certain vessels to be used in hostilities against the King of the Two Sicilies. A witness was subpœnaed to produce an agreement whereby Granatelli agreed to buy the vessels of a certain navigation company of which the witness was the secretary. The witness refused to produce it, on the ground that it might contain matter that might criminate himself or other parties for whom he was interested. It was ruled that he could not be compelled to produce the agreement.

In *Rex* v. *Cornelius,* 2 Strange, 1210, an information was granted against the defendants, who were justices of the peace, for taking money for granting licenses to alehouse keepers. A rule was applied for to inspect the books of the corporation. It was refused, on the ground that it would in effect oblige a defendant indicted for misdemeanor to furnish evidence against himself.

In *Rex* v. *Purnell*, 1 W. Bl. 37, an information was exhibited against the defendant, who was the Vice Chancellor of Oxford, for neglect of his duty in not punishing certain persons who had spoken treasonable words in the streets of Oxford. The Attorney General moved for a rule directed to the proper officers of the university to permit their books and archives to be inspected to furnish evidence against the defendant. The motion was attempted to be supported "on a suggestion that the King, being a visitor of the university, had a right to inspect their books whenever he thought proper." It was argued besides that "when a man is a magistrate, and as such has books in his custody, his having the office shall not secrete those books which another Vice Chancellor must have produced." The rule was refused, the court saying: "We know no instance wherein this court has granted a rule to inspect books in a criminal prosecution nakedly considered." The corporations in those cases were considered as private, as observed by Wigmore on Evidence, notes to § 2259. For the same reason, in *Rex* v. *Worsenham*, 1 Ld. Raym. 705, the production of custom-house books in an information against custom-house officers for forging a custom-house bond were not compelled. And in *Regina* v. *Mead*, 2 Ld. Raym. 927, books of the defendant who, with eight others, were incorporated as highway surveyors, being considered of a private nature, were not required to be produced. Such corporations would, no doubt, be regarded to-day as public, as observed by Wigmore, and he cites cases in which certain records were deemed public, as follows: In a libel suit a parish vestry book required by statute to be kept; registered pharmacist's reports filed as required by law; in a criminal prosecution for unlawful railroad charges, a tariff sheet publicly posted; a druggist's record of sales kept under a statute to charge him with illegal liquor selling. By a statute in Massachusetts, "no official paper

or record" produced by a witness at a legislative hearing is to be within the privilege against self-crimination.

As a deduction from the cases I have cited the rule is laid down in Wigmore on Evidence to be: "Where the corporation's misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, the disclosures are virtually his own, and to that extent his privilege protects him from producing them."

It would unduly extend this opinion to review the cases which are said to oppose Wigmore's deduction, but as *Hale* v. *Henkel*, 201 U. S. 43, is cited in the opinion of the court, I will refer to it briefly.

It was there held that an officer of a corporation could not refuse to produce its books on the ground that they would criminate the corporation. What privilege an officer of the corporation had from producing the books on the ground that they might criminate him was not necessary to decide, as immunity from prosecution was given by statute for any matter as to which he should testify. It may be contended that it is a natural inference from the decision that but for the immunity granted he could have claimed such privilege. See also *Nelson* v. *United States*, 201 U. S. 92. Circuit Judge Gilbert, in a well-considered opinion in *Ex parte Chapman*, 153 Fed. Rep. 153, made such deduction from *Hale* v. *Henkel*, and discharged Chapman from custody to which he had been committed for refusing to produce for the inspection of a grand jury the books and papers belonging to a corporation of which he was an officer.

The weight of authority, therefore, is against the power of a court to compel the production of books of a private corporation by any one whom they would criminate. And the cases seem right on principle. The spirit of the privilege is that a witness shall not be used in any way to his crimination. When that may be the effect of any evidence

required of him, be it oral or documentary, he may resist. He cannot be made use of at all to secure the evidence. This must necessarily be the extent of the privilege. *Rex* v. *Purnell, supra,* is specially in point. The Solicitor General for the crown, replying to the objection that no one was bound to furnish evidence against himself, said, "Agreed, but a distinction may be made. When a man is a magistrate, and as such has books in his custody, his having the office shall not secrete those books, which another Vice Chancellor must have produced. Besides, the statutes are not in the Vice Chancellor's custody only, but also in the hands of the *Custos Archivorum.*"

And the constitutional protection is not measured by the effect, great or small, on the prosecution. It may be invoked even though the prosecution may be defeated. It is the contemplation of the provision of the Constitution that such may be the result and that it is less evil than requiring a person to aid in his conviction of crime.

Neither plausible arguments therefore nor considerations of expediency should prevail against or limit a principle deemed important enough to be made constitutional. Such a principle should be adhered to firmly. It is said in *Boyd* v. *United States,* 116 U. S. 616, 635, that "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

In a case of seizure and forfeiture of certain property under the customs-revenue laws for fraudulent invoicing, Boyd entered a claim for the property. Before the trial it became important to know the quantity and value of the property. In obedience to an order issued by the court

under a statute of the United States, Boyd produced the invoice of the property, but objected to inspection, on the ground that in a suit for forfeiture no evidence can be compelled from the claimants, and also that the statute, so far as it compelled production of the evidence to be used against him, was unconstitutional and void. It was held that the order of the court and the statute violated both the Fourth and Fifth Amendments of the Constitution of the United States, notwithstanding that the statute could trace its purpose back to one passed in 1863, which had been sustained by decisions in the Circuit and District Courts, and notwithstanding it also had been sustained by such decisions. The case has been criticised, but it has endured and has become the foundation of other decisions. Indeed, eminent legal names may be cited in criticism, if not ridicule, of the policy expressed by the Fifth Amendment, that is, the policy of protection against self-crimination. It is declared to have no logical relation to the abuses that are said to sustain it, and that the pretense for it, so far as based on hardship, is called an "old woman's reason," (also a "lawyer's reason,") and a "double distilled and treble refined sentimentality." So far as based on unfairness it is called "the fox hunter's reason," its basis being that a criminal and a fox must have a chance to escape, the subsequent pursuit being made thereby more interesting. And it is asked, supposing a witness upon the stand in a prosecution for robbery, "a question is put, the effect of which were he to answer it, might be to subject him to conviction in respect to another robbery, attended with murder (such high offenses give emphasis to the argument), on the ground of public utility and common sense is there any reason why the collateral advantage thus proffered by fortune to justice should be foregone?" Bentham on Judicial Evidence, vol. 5, page 229 *et seq.* A reply would be difficult if government had no other concern than the punishment of crime.

If the Government had no other concern, short-cuts to conviction would be justified and commendable in proportion to their shortness. The general warrants which John Wilkes resisted were such a cut; so were writs of assistance issued in Colonial times. Their inducement was the detection of crime, and yet popular rights were vindicated in the resistance to the first, and the "child Independence was born" by resistance to the second.

I will not pause to vindicate the privilege of the Fifth Amendment against considerations of expediency nor to inquire whether it is a well-reasoned principle, one logically following from abuses, properly adapted to the facts of life when it was adopted, or if so then, not now. It has passed from polemics and has secured the sanction of constitutional law. Courts cannot change it, or add to it or take from it to suit the "condition of modern civilization," as it was suggested in a case submitted with this. It is as vital now as when ordained and is not uncertain. It is plain and direct as to the source of criminating evidence. The accused person cannot be made the source. What Lord Camden denominated "an argument of utility" should not prevail now as it did not in Westminster Hall when he pronounced his great judgment against general warrants. Indeed English courts, as I have shown, have never wavered nor felt constrained by the demands of criminal justice to depart from or qualify in any way the strength of the privilege. Is it possible that a written constitution is more flexible in its adaptations than an unwritten one, and that the spirit of English liberty is firmer or more consistent than that of American liberty, or discerns more clearly the danger of relaxing the strictness of any of the guarantees of personal rights?

A limitation by construction of any of the constitutional securities for personal liberty is to be deprecated. A people may grow careless and overlook at what cost and through what travail they acquired even the least of their liberties.

The process of deterioration is simple. It may even be conceived to be advancement, and that intelligent self-government can be trusted to adapt itself to occasion, not needing the fetters of a predetermined rule. It may come to be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power and that passion will not sway more than reason. But what of the end when the lessons of history are ignored, when the barriers erected by wisdom gathered from experience are weakened or destroyed? And weakened or destroyed they may be when interest and desire feel their restraint. What then of the end; will history repeat itself? And this is not a cry of alarm. "*Obsta principiis*" was the warning of Mr. Justice Bradley in *Boyd* v. *United States* against the attempt of the Government to break down the constitutional privilege of the citizen by attempting to exact from him evidence of fraud against the customs laws. I repeat the warning. The present case is another attempt of the same kind and should be treated in the same way.

DREIER *v.* UNITED STATES.

DREIER *v.* HENKEL, UNITED STATES MARSHAL.

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

Nos. 358, 359. Argued March 2, 3, 1911.—Decided May 15, 1911.

Wilson v. *United States, ante,* p. 361, followed to effect that an officer of a corporation cannot refuse to produce books and papers of the corporation in response to a subpœna *duces tecum* on the ground that the contents thereof would tend to incriminate him personally.

Quære whether if a privilege to refuse to produce documents of a cor-

poration in response to a subpœna *duces tecum* does exist the person entitled to claim it may not waive it by his conduct.

THE facts, which involve the validity of a subpœna *duces tecum* issued to the custodian of the books of a corporation, and the right of such custodian to refuse to produce the documents required by such subpœna on the ground that they would incriminate him, are stated in the opinion.

Mr. W. Wickham Smith, with whom *Mr. John K. Maxwell* was on the brief, for plaintiff in error and appellant:

Dreier had an absolute right to refuse to produce books for the consideration of the grand jury or to give testimony upon the ground that to do so might tend to incriminate him. Burr's Trial, 244; *Counselman* v. *Hitchcock*, 142 U. S. 547.

The witness could no more be compelled to produce books for the examination of the grand jury than to testify orally before them. *Bollman* v. *Fagin*, 200 U. S. 186; *Boyd* v. *United States*, 116 U. S. 616.

The authorities, both state and Federal, upholding the privilege of a witness to refuse to answer questions that he claims would tend to incriminate him, are innumerable. Among them are the following in addition to those already cited: *Ex parte Chapman*, 153 Fed. Rep. 371; *In re Kanter*, 117 Fed. Rep. 356; *In re Hess*, 134 Fed. Rep. 109; *Foot* v. *Buchanan*, 113 Fed. Rep. 156.

The same rule has been applied in bankruptcy cases. *In re Nachman*, 114 Fed. Rep. 995; *In re Smith*, 112 Fed. Rep. 509; *In re Shera*, 114 Fed. Rep. 207; *Edelstein* v. *United States*, 149 Fed. Rep. 636, at 642; *United States* v. *Goldstein*, 132 Fed. Rep. 789.

A witness who claims privilege is not required to admit that he is guilty. The protection of the Constitution is for the innocent as well as for the guilty. *People* v. *Forbes*,

143 N. Y. 219; *Lamsen* v. *Boyden*, 160 Illinois, 613; *Emery's Case*, 107 Massachusetts, 172.

There was no waiver by the defendant of his right to refuse to produce books or give testimony. 29 Am. & Eng. Ency. of Law, 2d ed., 1093.

Where a witness has testified to certain facts having an apparent tendency to incriminate him and a question is asked, an affirmative answer to which, in connection with the other facts testified to, would furnish criminating evidence, witness may assert his privilege. *Wallace* v. *State*, 41 Florida, 547.

It is the duty of the court when the witness is brought before it and shown that his answer would incriminate him to entertain the witness's objection notwithstanding he had stated to the grand jury that his answer would not criminate him. *Ex parte Wilson*, 47 S. W. Rep. 996; see also *Lamsen* v. *Boyden*, 160 Illinois, 613; *Blum* v. *State*, 94 Maryland, 375; *Wilson* v. *State*, 57 S. W. Rep. 916.

The Solicitor General, with whom *The Attorney General*, *Mr. Wm. S. Kenyon*, Assistant to the Attorney General, and *Mr. O. E. Harrison*, Special Assistant to the Attorney General, were on the brief, for the United States:

The order to produce the books and papers did not infringe the Fourth Amendment.

The search and seizure clause of the Fourth Amendment does not interfere with the power of the courts to compel production of documentary evidence through a subpœna *duces tecum*. The writ of subpœna *duces tecum* to compel the production of documentary evidence has come down to us through centuries, and without it the administration of justice would be impossible. *Summers* v. *Moseley*, 2 Cr. & M. 477; *Wertheim* v. *Continental R. & T. Co.*, 15 Fed. Rep. 718; *Amey* v. *Long*, 9 East, 473; *Bull* v. *Loveland*, 10 Pick. 9; *United States Express Co.* v. *Henderson*, 69 Iowa, 40; Greenleaf on Evidence, § 469*a*.

This court has settled the question in *Boyd* v. *United States*, 116 U. S. 616; *Interstate Com. Comm.* v. *Baird*, 194 U. S. 25; *Hale* v. *Henkel*, 201 U. S. 43.

The books belonged to the corporation, and its officer having custody of them was bound to produce them under a subpœna *duces tecum*.

A corporation can be compelled to furnish information upon the order of a proper judicial tribunal concerning the conduct of its business, even though such information might be incriminatory. This is settled by *Hale* v. *Henkel*, 201 U. S. 43; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 348, 349; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 553, and *Am. Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 302.

It must appear to the court that the evidence sought could reasonably have a tendency to criminate the witness and it is then for the witness to say that such evidence would have such a tendency. See *Irvine Case*, 74 Fed. Rep. 954; citing Burr Trial Case, 14692*e*; *Regina* v. *Boyes*, 1 Best & Smith, 329; *Ex parte Reynolds*, 20 Ch. Div. 294; and see *Richmond* v. *The State*, 2 Greene, 532; *Stevens* v. *The State*, 50 Kansas, 712; *Minters* v. *The People*, 139 Illinois, 363; *United States* v. *McCarthy*, 18 Fed. Rep. 87; *The People* v. *Mather*, 4 Wend. 229; *Commonwealth* v. *Willard*, 22 Pick. 476; *Commonwealth* v. *Kimball*, 24 Pick. 366; *Ex parte Senior*, 37 Florida, 1; *LaFontaine* v. *Southern Underwriters*, 83 N. Car. 132, 141; *Floyd* v. *The State*, 7 Texas, 215; *Miskimmins* v. *Shaver*, 8 Wyoming, 392, 418.

It is the province of the court to determine whether or not the witness could be incriminated by truthfully answering, and it is then for the witness to determine whether the answers would incriminate him.

The cases in which the privilege was claimed and allowed show that it was apparent from the question asked that a direct answer would incriminate the witness. *Rex* v. *Gordon*, 2 Doug. K. B. Rep. 593; *Paxton* v. *Douglas*, 19

Ves. Ch. 224; *Malony* v. *Bartley*, 3 Campb. 210; *Cates* v. *Hardacre*, 3 Taunt. 424; *Rex* v. *Pegler*, 5 C. & P. 687; *Fisher* v. *Ronalds*, 16 Eng. Law & Eq. Rep. 417; *Emery's Case*, 107 Massachusetts, 172; *In re Graham*, 8 Ben. 419; *Bank* v. *Henry*, 2 Den. 155; *People ex rel. Taylor* v. *Seaman*, 8 Misc. (N. Y.) 152; *Cullen* v. *Commonwealth*, 24 Gratt. 624; *Smith* v. *Smith*, 116 N. Car. 386; *Lester* v. *Boker*, 6 Blatch. (Ind.) 439.

It is apparent from the record that the witness did not invoke the protection of the Constitution in good faith.

The cautionary words used by the court in *Brown* v. *Walker*, 101 U. S. 591, seem to describe the situation that was before the court below. 'The plea of privilege is personal to the witness and must be made in good faith on behalf of himself, and not to shield a corporation or a third person. *Hale* v. *Henkel*, 201 U. S. 43, 69.

The privilege has become deeply fixed in our system of jurisprudence and will never be abolished, and every consideration of a proper protection of the body politic demands that the privilege should not be extended beyond the limits which are to be fixed by reference to its historical origin. This means that it must be confined to the beneficent protection of the privilege to witnesses in their personal and not their representative capacity. Wigmore on Evidence, pp. 3101, 3107.

Every consideration that arises from conditions of modern civilization requires that the rule should not be extended further than is necessary to accomplish its original purpose of caring for the personal rights of individuals. Greenleaf on Evidence, 16th ed. 469*d*; *Commonwealth* v. *Shaw*, 4 Cush. 594; Phillips on Evidence, 4th Am. ed., p. 935; *Reynolds* v. *Reynolds*, 1882, 15 Cox, Cr. 108, 115; Wigmore, pp. 2967, 2968, and on page 3102, quoting Bentham.

The witness had waived his privilege.

If a witness discloses a part of a transaction with which

he was criminally concerned, without claiming his privilege, he must disclose the whole. *People* v. *Freshour,* 55 California, 375; *Coburn* v. *Odell,* 10 Fost. (N. H.) 540; *Foster* v. *Pierce,* 65 Massachusetts, 439; *Chamberlain* v. *Wilson,* 12 Vermont, 491; *Commonwealth* v. *Nichols,* 114 Massachusetts, 285.

A witness who has voluntarily testified in part on a matter tending to criminate cannot afterwards decline to answer a question upon the ground that it will criminate him. *Commonwealth* v. *Pratt,* 126 Massachusetts, 462; *Commonwealth* v. *Price,* 10 Gray, 472; *People* v. *Carroll,* 3 Park. (N. Y. Cr.) 83; *Low* v. *Mitchell,* 18 Maine, 372; *Evans* v. *O'Connor,* 174 Massachusetts, 287; *State* v. *Nichols,* 29 Minnesota, 357; *State* v. *Foster,* 23 N. H. 348; *State* v. *Kansas,* 4 N. H. 562; *Brown* v. *Walker,* 161 U. S. p. 591 and cases cited on p. 597.

The writ of *habeas corpus* was properly dismissed.

Mr. Justice Hughes delivered the opinion of the court.

The plaintiff in error and appellant, William Dreier, was subpœnaed to produce before the grand jury in the Circuit Court certain books and papers of the Lichtenstein Millinery Company, a New York corporation, of which he was the secretary. The grand jury was conducting an inquiry with respect to alleged violations of the customs laws by N. Hayes and others. The subpœna contained the *ad testificandum* clause, but the only question presented is with respect to the demand for the corporate documents. For his refusal to produce them for the inspection of the grand jury, Dreier was committed for contempt. The first case (No. 358) is a writ of error to the Circuit Court to review the judgment holding him to be in contempt and directing his commitment; and the second (No. 359) is an appeal from an order dismissing a writ of *habeas corpus.* The contention of Dreier in both cases is

that the contents of the books and papers would tend to incriminate him and that the proceedings to compel their production were in violation of the Fifth Amendment of the Constitution of the United States.

It is urged that if he had a privilege, his conduct was such as to constitute a waiver. But it is not necessary to consider the case in this aspect. Dreier was not entitled to refuse the production of the corporate records. By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under obligation to produce them when called for by proper process. *Wilson* v. *United States*, decided this day, *ante*, p. 361. In that case the writ was directed to the corporation and here it was addressed to the custodian. As he had no privilege with respect to the corporate books and papers it was his duty to obey.

Affirmed.

MR. JUSTICE MCKENNA concurs in the result upon the ground of waiver.

GRAND TRUNK WESTERN RAILWAY COMPANY *v.* RAILROAD COMMISSION OF INDIANA.

ERROR TO THE APPELLATE COURT OF THE STATE OF INDIANA.

No. 138. Submitted April 19, 1911.—Decided May 15, 1911.

A legislative act by an instrumentality of the State exercising delegated authority is of the same force as if made by the legislature and is a law of the State within the meaning of the contract clause of the Constitution.

A contract cannot be impaired, within the meaning of the contract clause of the Constitution, by a law which relates to matters beyond

the scope of the contract as construed according to the usual meaning of the words used.

A contract between two railroads for maintaining the physical cost of a crossing and guarding it by good and substantial semiphores or other signals is not impaired by a subsequent act requiring an interlocking system and apportioning the expense in a different manner than provided in the contract. The contract did not embrace such a system.

THE facts, which involve the constitutionality of an order of the Railroad Commission of Indiana directing installation and use of interlocking plant at a railroad crossing and apportioning the expense of executing the order, are stated in the opinion.

Mr. Samuel Parker for the plaintiff in error:

Under the contract, the Monon Railway Company is obligated to protect and guard the crossing; and the fact that the means and methods of protecting and guarding railroad crossings have changed since the contract was entered into can make no difference and does not lessen or change the obligation. Neither does it make any difference that the means and method of protecting and guarding the crossing are prescribed by act of the state legislature or by the State's agent, the Railroad Commission, to which, in the given case, the power to prescribe the ways and means, is delegated.

This contention must stand or fall in accordance with the construction given to the contract by this court. The contract should be considered in view of the positions of the parties to it at the time of its execution, the occasion which gave rise to it, the designs and purposes of the parties in making it and the obvious object desired to be accomplished by it. Addison on Contracts, § 182; *Torrence* v. *Shedd*, 156 Illinois, 194; *Chicago &c. R. Co.* v. *Denver &c. R. Co.*, 143 U. S. 596; *New York &c. R. Co.* v. *Grand Rapids &c. R. Co.*, 116 Indiana, 60; *Cravens* v. *Eagle &c. Co.*, 120 Indiana, 6, 11.

The obligation to guard the crossing is to continue for all time. The parties to the contract must be presumed to have had it in mind that the sovereign power, the State, might require that other means than semaphores be used to guard the crossing. The obligation to efficiently guard the crossing, imposed and assumed by the contract, cannot be removed by the requirements of careful and skillful railroading as the same may be developed by invention or by the requirements of the State. Otherwise the words "or other signals," as used in the contract, may come to have no meaning. The fact that the interlocking device involves more than mere signals can make no difference. The intent of the parties, as disclosed by the contract, should govern. That intent was that the Air Line Company and its successors should guard the crossing. The interlocker is required because it will more effectively guard the crossing than it could be guarded by semaphores.

Mr. E. C. Field and *Mr. H. R. Kurrie* for defendants in error.

Mr. Justice Van Devanter delivered the opinion of the court.

This is a suit to secure the annulment or modification of an order of the Railroad Commission of Indiana directing the installation and use of an interlocking plant at the crossing of two railroads in that State and apportioning between them the expense of executing the order. The suit proceeds upon the theory that a contract between the owners of the roads, entered into before the enactment of the statute upon which the order rests, imposes upon the junior road all the expense of maintaining and guarding the crossing, in whatever manner may be essential to make its use safe and convenient, and that the order, by imposing a part of the expense of its execution upon

the other road, impairs the obligation of the contract, and therefore is void.

The Appellate Court of the State, having regard to the terms of the contract and to the conditions existing when it was made, twenty-five years before, held that it did not provide for or contemplate any such elaborate system of protecting and guarding the crossing as is involved in the use of an interlocking plant, and therefore that the expense entailed by the order was not within the purview of the contract. And that court, after observing that the statute invested the Commission with the authority to make a just, but not an arbitrary, apportionment of the expense and that the apportionment as made did not appear to be unjust or arbitrary, sustained the order. 40 Ind. App. 168.

Observing first, that the order is a legislative act by an instrumentality of the State exercising delegated authority (*Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226), is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution (*New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 31; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 590), we come to consider whether it does impair the obligation of the contract. Obviously it does not, if the contract creates no obligation respecting the expense which the order entails.

The contract is set forth at length in the state court's opinion and need not be reproduced here. It declares explicity that the duty of constructing and properly maintaining the physical crossing of the two roads and bearing the expense incident thereto, shall rest with the junior road, but its only provision respecting what shall be done in the way of guarding the crossing is that "good and substantial semaphores or other signals, and . . . the requisite watchmen to take charge of and operate the same" shall be provided and maintained by that road at

its "individual expense." There is no reference to an interlocking plant, nor any general language that would include one. The words "semaphores or other signals" do not do so. An interlocking plant is so much more than a signalling device that it is quite beyond their usual meaning. That meaning has been applied to them during twenty-five years of practice under the contract, and another ought not to be substituted now.

We conclude, as did the state court, that the contract does not embrace the expense which the order entails, and therefore that the order does not, by apportioning that expense, impair the obligation of the contract.

But to avoid any misapprehension that otherwise might arise, we deem it well to observe that we do not, by what is here said, suggest or imply that the contract, if its terms were broad enough to include the expense in question, would be an obstacle to the apportionment of that expense under the state statute. See *Chicago, Burlington and Quincy R. R. Co.* v. *Nebraska*, 170 U. S. 57, 71-74; *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556, 567.

Affirmed.

SARGENT & LAHR *v.* HERRICK & STEVENS.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 149. Argued April 25, 1911.—Decided May 15, 1911.

The mere location of a land warrant does not operate as a payment of the purchase price and does not operate to pass the equitable title from the United States.

A State is without power to tax public lands which have been located under warrant until the equitable title has passed from the United States.

Although if the locator had been the lawful owner of the warrant

location would have entitled him to patent, if the Land Office found him not to be the lawful owner, location does not operate to pass the title until he substitutes and pays the Government price, and meanwhile the United States has such an interest in the land as renders its taxation by the State invalid.

140 Iowa, 590, reversed.

THE facts, which involve the right of a State to tax public lands located under warrant before substitution and payment of government price, are stated in the opinion.

Mr. Robert Healy, with whom *Mr. M. F. Healy* and *Mr. Charles A. Clark*, were on the brief, for plaintiff in error.

No brief was filed for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to quiet the title to 80 acres of land in the State of Iowa, and the facts, in so far as they are material here, are these: In 1857, Hartzell I. Shaffer located upon the land a military bounty land warrant, issued to Jacob Hutson under the act of Congress of March 3, 1855, 10 St. 701, ch. 207, and received from the local land office a certificate of location. Shortly thereafter he transferred the certificate and his right to the warrant and to the land to Amos Stanley. When the location was reported to the General Land Office, that office suspended it because Hutson had made two assignments of the warrant, the first to William Maltby and the second to Shaffer, and because there was no relinquishment by Maltby. In 1875, Stanley, or a transferree of his, surrendered the certificate of location to the General Land Office and withdrew the warrant for the purpose of straightening out the difficulty arising from its double assignment, if

that could be done. But apparently nothing was accomplished in that direction for the warrant never was returned. The suspension continued until 1904, when Sargent and Lahr, who had succeeded to the rights of Stanley, perfected the location by substituting the government price of the land for the warrant. This was done under Rule 41 of the circular of the Land Department relating to such locations, which reads as follows (27 L. D. 225):

"When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of a patent by filing in the office for the district in which the lands are situate an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry."

At the time of the substitution Sargent and Lahr received from the local land office a certificate of purchase issued in Stanley's name, and later in the same year received a patent issued in his name and reciting that it was predicated upon the substitution of the purchase price for the warrant. In 1875 the land was sold for the nonpayment of taxes levied upon it by the officers of Clay County, Iowa, two years before, and whatever title passed under that sale is held by Herrick and Stevens, who were the plaintiffs in the trial court. Sargent and Lahr, who were the defendants, claim under the warrant location as ultimately perfected through the substitution of the purchase price and then passed to patent. The trial court sustained the tax title and entered a decree for the plaintiffs, which was affirmed by the Supreme Court of the State. 140 Iowa, 590.

As the State was without power to tax the land until the equitable title passed from the United States, and as

that title did not pass until there was a full compliance with all the conditions upon which the right to a patent depended (*Wisconsin Central R. R. Co.* v. *Price Co.*, 133 U. S. 496, 505), it is apparent that the validity of the tax title depends upon the question whether the location of the warrant in 1857, without more, gave a right to a patent.

Among the conditions, upon compliance with which such a right depends, none has been deemed more essential than the payment of the purchase price, which in this instance could have been made in money or by a warrant like the one actually used. The warrant was assignable and was usable at a rate which made it the equivalent of the price of the land. And had Shaffer been the lawful owner and holder of the warrant, there could be no doubt that its location by him would, without more, have entitled him to a patent. But as the General Land Office found, in effect, that he was not the lawful owner or holder of the warrant, and as that finding is conclusive in the circumstances in which it is brought into this case, it is perfectly plain that the location of the warrant did not, without more, give a right to a patent. In other words, that location did not operate as a payment of the purchase price and so did not operate to pass the equitable title from the United States. Besides, until the payment in 1904, it was wholly uncertain that the location ever would be perfected, there being no obligation upon any one to perfect it. It follows that during the intervening years the United States had such an interest in the land as to make its taxation by the State void.

The case of *Hussman* v. *Durham*, 165 U. S. 144, is like this in all material respects, the most noticeable difference being that there the assignment to the locator was forged while here it was ineffectual because of a prior assignment. In that case this court, after holding, in substance, that the doctrine of relation cannot be invoked to give effect

to a title resting upon the wrongful taxation of land while both the legal and the equitable title were in the United States, said:

"Confessedly, though a formal certificate of location was issued in 1858, there was then in fact no payment for the land and the government received nothing until 1888. During these intervening years whatever might have appeared upon the face of the record the legal and the equitable title both remained in the government. The land was, therefore, not subject to state taxation. Tax sales and tax deeds issued during that time were void. The defendant took nothing by such deeds. No estoppel can be invoked against the plaintiff. His title dates from the time of payment in 1888. The defendant does not hold under him and has no tax title arising subsequently thereto."

For these reasons we hold that the Supreme Court of the State erred in sustaining the tax title.

Reversed.

TEXAS & NEW ORLEANS RAILROAD COMPANY *v.* MILLER.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 831. Submitted April 17, 1911.—Decided May 15, 1911.

The protection of charter rights by the contract clause of the Federal Constitution is subject to the rule that a legislature cannot bargain away the police power, or withdraw from its successors the power to guard the public safety, health and morals.

A provision in its charter exempting a railroad company from liability for death of employés, even if caused by its own negligence, does not

amount to an irrevocable contract within the protection of the Federal Constitution, but is as much subject to future legislative action as though embodied in a separate statute.

Provisions in a corporate charter which are beyond the power of the legislature to grant are not within the protection of the contract clause of the Federal Constitution.

Where there is no allegation or proof that the highest court of a State has construed a statute of that State, it becomes the duty of the courts of another State, which do not take judicial knowledge of decisions of other States, to construe the statute and its effect upon prior statutes according to their independent judgment. *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36.

The decision of a state court construing a statute of another State under such circumstances is not subject to review by this court if no Federal right is involved. *Eastern Building & Loan Assn.* v. *Ebaugh*, 185 U. S. 114.

This court will not disturb the decision of the courts of Texas that the act of Louisiana of 1884, giving a right of action to relatives of persons killed by negligence of another, repealed the provisions in the charter of a railroad company granted in 1878 exempting it from liability for a person killed by its negligence; and the act of 1884 is not unconstitutional as impairing any contract obligation in such charter.

An omission in the complaint can be cured by an allegation in the answer. *United States* v. *Morris*, 10 Wheat. 246.

Where an action is commenced in the courts of one State, based on a right given by the statute of another State provided it be commenced within a specified period, which has not expired, the omission of the plaintiff to plead the statute may be cured by the defendant pleading the statute, although the answer may not be filed until after the period of limitation has expired; and the decision of the state court to that effect does not violate the full faith and credit clause of the Federal Constitution, and involves no Federal question.

128 S. W. Rep. 1165, affirmed.

THE facts, which involve the construction of certain acts of Louisiana, and their constitutionality under the contract clause of the Constitution and whether the courts of Texas, in construing them, had failed to give them full faith and credit as required by the Constitution, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. H. M. Garwood* and *Mr. A. L. Jackson* were on the brief, for plaintiffs in error:

The immunity provision in § 17 of the incorporating act of the Louisiana Western Railroad Company was specially set up by plaintiffs in error as a valid public act of the State of Louisiana, and the decisions of the state courts of Texas were adverse to this contention and necessarily failed to give full faith and credit to that portion of a public act, within the meaning of the Constitution of the United States.

The refusal to consider a controlling Federal question is equivalent to a decision against the Federal right involved. *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552.

The state court by its decision necessarily adjudicated the defense which was claimed under the state act. *El Paso & N. E. Ry. Co.* v. *Gutierrez*, 215 U. S. 90; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 44; *A., T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55; *Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 179; *Philadelphia Fire Assn.* v. *New York*, 119 U. S. 110, 139; *Murdock* v. *Memphis*, 20 Wall. 590; *Mallett* v. *North Carolina*, 181 U. S. 588.

The immunity provision contained in § 17 was a contract within the meaning of the impairment clause of the Constitution. *Pennsylvania Railroad Co.* v. *Miller*, 132 U. S. 75; *Southwestern Railroad Co.* v. *Paulk*, 24 Georgia, 356; *Duncan* v. *Pennsylvania Railroad Co.*, 94 Pa. St. 443.

The fact that the Texas court took cognizance of this case and undertook to apply the Louisiana statute conferring this right of action for injuries resulting in death implies the conception of that court that the Louisiana act was not in the nature of a police regulation, for the statutory right of action in Texas for injuries resulting in death awards damages only to certain designated relatives and strictly as compensation, and not upon principles

of public policy. *I. & G. N. Ry. Co.* v. *McDonald*, 75 Texas, 46; *Hays* v. *Railway Co.*, 46 Texas, 272; *Railway Co.* v. *Moore*, 69 Texas, 157; *Railway Co.* v. *Garcia*, 62 Texas, 292; *Railway Co.* v. *Cowser*, 57 Texas, 293; *Railway Co.* v. *Kindred*, 57 Texas, 491. Assuming that the Louisiana act did not award damages on the same principles and theory of the Texas act there would have been an insurmountable obstacle to the recognition and enforcement of the Louisiana act by the courts of Texas on principles of comity. *Railway Co.* v. *Jackson*, 89 Texas, 107; *DeHarn* v. *Railway Co.*, 86 Texas, 71; *Railway Co.* v. *McCormick*, 71 Texas, 660. If the Louisiana act of 1884 was penal, it would not be transitory and therefore not enforcible in the courts of other States. *Boston & Maine R. R. Co.* v. *Hurd*, 108 Fed. Rep. 116; *Higgins* v. *Central N. E. & W. Ry. Co.*, 155 Massachusetts, 176; *Nelson* v. *Chesapeake & Ohio Ry. Co.*, 88 Virginia, 971.

Article 2315 of the Civil Code of Louisiana, as amended by the act of 1884, created a right of action for injuries resulting in death and by its own language made it enforcible only for the period of one year from the death.

The transition from the case in plaintiffs' petition as fixed by its allegations alone, to the case made by a declaration upon the Louisiana statutory right of action in favor of the survivors mentioned for injuries resulting in death, as claimed to be the effect of the filing of the answers of defendants more than two years after the death, involved such a departure from law to law as to amount to the institution of a new and different cause of action. *Railway Co.* v. *Wyler*, 158 U. S. 285, 298; *Lumber Co.* v. *Water Works Co.*, 94 Texas, 456; *Whalen* v. *Gordon*, 95 Fed. Rep. 314; *Anderson* v. *Wetter*, 15 L. R. A. (N. S.) 1003; *Boston & Maine R. R. Co.* v. *Hurd*, 108 Fed. Rep. 116; 1 Ency. of Pl. & Pr., pp. 569, 570.

In this case the right of action in favor of the survivors under the Louisiana statute obtained for a period of one

year from the death and the right of action therefor lapsed and terminated without the commencement of an action upon it within that period, and could not thereafter exist as a right potential or enforcible anywhere. *Boyd* v. *Clark*, 8 Fed. Rep. 849; *Whalen* v. *Gordon*, 95 Fed. Rep. 319; *Theroux* v. *Railway Co.*, 64 Fed. Rep. 84; *Munos* v. *So. Pac. Co.*, 51 Fed. Rep. 188; *The Harrisburg*, 119 U. S. 199; *Davis* v. *Mills*, 194 U. S. 451, 457.

In fact there is no longer even a *prima facie* right of action as basis for recovery and the rule requiring the ordinary statute of limitation to be pleaded in order to avail as a defense is not called for and does not apply. 19 Am. & Eng. Ency. of Law, 2d ed., 150, 151; 13 Ency. of Pl. & Pr., 186, 187, and note 1; 25 Cyc. 1020, 1403.

The state courts having considered and adopted the Louisiana statute as the indispensable basis for the judgment and this solely through the medium of the defendant's pleading which was filed more than two years after the death, on the theory that such pleading when so filed became available as a declaration in behalf of the plaintiffs below, could not ignore the provision of that same act fixing and limiting the period of the right created without involving necessarily a refusal to give full faith and credit to the act. *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 179–181; *Philadelphia Fire Assn.* v. *New York*, 119 U. S. 110, 129.

Mr. J. W. Parker for defendants in error.

Mr. Justice Van Devanter delivered the opinion of the court.

In that view of it which must be accepted here, this case may be stated as follows: It was an action to recover damages for the death of a locomotive engineer, resulting

from the derailment of an engine which he was driving while in the service of two railroad companies which were jointly operating a line of railroad through the States of Louisiana and Texas. The derailment and ensuing death occurred in Louisiana, June 1, 1905, and proximately were caused by the negligence of the two companies. One of the companies was incorporated by a Louisiana statute of March 30, 1878, which contained a provision exempting the company from liability for the death of any person in its service, even if caused by its negligence. Laws of Louisiana, 1878, No. 21, § 17, p. 267. Another Louisiana statute, enacted July 10, 1884, and still in force, conferred upon designated relatives a right to recover the damages sustained by them through the death of a person negligently caused by another, but subjected the right to the limitation that the action to enforce it should be begun within one year from the death. Laws of Louisiana, 1884, No. 71, p. 94. Merrick's Revised Civil Code, Art. 2315. Within the time so prescribed the relatives so designated commenced in the District Court of Harris County, Texas, an action to recover from the two railroad companies the damages sustained by the engineer's death. The complaint, although stating all the facts essential to a recovery under the statute, was defective as a complaint in the Texas court, because it did not conform to the rule prevailing in that State that statutes of other States cannot be noticed judicially, but must be pleaded. More than a year after the death the defendants answered the complaint, and in their answers recognized the existence of the statute upon which the plaintiffs' action was founded, made allegations respecting it, and sought to enforce the one year limitation therein. At the trial the statutes of 1878 and 1884 were both duly proved, and upon all the evidence the finding and judgment were for the plaintiffs. The defendants appealed to the Court of Civil Appeals of the State, where the judgment was affirmed (128 S. W.

Rep. 1165), and then sued out this writ of error. In the trial court, and again in the Court of Civil Appeals, it was held (1) that the exempting provision in the statute of 1878 was repealed by the statute of 1884, and (2) that what appeared in the answers respecting the statute of 1884 cured the defect in the complaint and required that it be treated as an adequate and timely assertion of a right under that statute. In the assignments of error here these rulings are challenged upon the theory, which also was advanced in the state courts, that the exempting provision in the statute of 1878 was a contract and could not be repealed consistently with the contract clause of the Federal Constitution, and that, if that provision was validly repealed by the statute of 1884, the answers filed more than a year after the death could not be treated as curing the defect in the complaint without disregarding the one year limitation and thereby violating the full faith and credit clause of the Constitution.

The case is now before us on a motion to dismiss, with which is united a motion to affirm.

The doctrine that a corporate charter is a contract which the Constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, *Id.* 659; *Stone* v. *Mississippi*, 101 U. S. 814; *Douglas* v. *Kentucky*, 168 U. S. 488. In the first of these cases it was said:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the

protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

The fact that the provision in question was embodied in the statute incorporating the Louisiana company does not suffice to show that it became a part of the charter contract, for obviously nothing became a part of that contract that was not within the contracting power of the legislature. Such of the provisions of the statute as were within that power became both a law and a contract and were within the protection of the contract clause of the Constitution, but such of them as were not within that power became a law only and were as much subject to amendment or repeal as if they had been embodied in a separate enactment. As was said by this court in *Stone* v. *Mississippi, supra,* "It is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain."

The subject to which the provision in question relates is the civil liability of a railroad company for the death of its employés resulting from its negligence. That is a matter of public concern, and not of mere private right. It is closely connected with the safety of the employés and undoubtedly belongs to that class of subjects over which the legislature possesses a regulatory but not a contracting power. Manifestly, therefore, the charter contract did not embrace that provision and the contract clause of the Constitution did not prevent its repeal.

There is some discussion in the briefs as to whether the

provision was repealed by the statute of 1884, which was in apparent conflict with it, but upon this record that is not a Federal question. There was neither allegation nor proof that the court of last resort in Louisiana had considered the question or made any ruling upon it, and so it became the duty of the Texas courts, which do not take judicial notice of decisions of courts of other States, to decide the question according to their independent judgment. *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 52. This they did and, no Federal right being involved, their decision is not subject to review by this court. *Eastern Building and Loan Assn.* v. *Ebaugh*, 185 U. S. 114.

Of the ruling that the defect in the complaint was cured by the answers little need be said. While recognizing that the right created by the Louisiana statute was qualified by the one year limitation and that the Texas courts could not disregard the qualification without impinging upon the full faith and credit clause of the Constitution, we think the claim that they did disregard it is quite untenable. The action was begun within the time prescribed, and what the Texas courts really held was that the omission from the complaint of an essential allegation was cured by its inclusion in the answers. In so holding they but gave effect to a generally recognized rule upon the subject. *United States* v. *Morris*, 10 Wheat. 246, 286. There was no shifting from one right of action to another, as in *Union Pacific Railway Co.* v. *Wyler*, 158 U. S. 285, and *United States* v. *Dalcour*, 203 U. S. 408, 423, but, on the contrary, an adherence to the right originally asserted. In these circumstances nothing more was involved than a question of pleading and practice in the Texas courts, and its decision by them is final.

Although regarding the question presented under the contract clause of the Constitution as sufficiently substantial to sustain our jurisdiction, we think it is so mani-

fest that it was decided rightly by the Texas courts that the case ought not to be retained for further argument. See *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Richardson* v. *Louisville & Nashville R. R. Co.*, 169 U. S. 128; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 49.

The motion to dismiss is denied, and that to affirm is granted.

Affirmed.

TEXAS & NEW ORLEANS RAILROAD COMPANY *v.* GROSS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 832. Submitted April 17, 1911.—Decided May 15, 1911.

Decided on authority of *Texas & New Orleans R. R. Co.* v. *Miller*, *ante*, p. 408.

THE facts are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. H. M. Garwood* and *Mr. A. L. Jackson* were on the brief, for plaintiff in error.

Mr. J. W. Parker for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a companion case with *Texas & New Orleans R. R. Co.* v. *Miller*, just decided, *ante*, p. 408, and arose out of the derailment of the same engine. It took substantially the same course in the state courts, (128 S. W. Rep. 1173) and presents substantially the same questions.

For the reasons given in the other case, the motion to dismiss is denied, and that to affirm is granted.

Affirmed.

GOMPERS *v.* BUCKS STOVE & RANGE COMPANY.

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

No. 372. Argued January 27, 30, 1911—Decided May 15, 1911.

An order of a court of equity, restraining defendants from boycotting complainant by publishing statements that complainant was guilty of unfair trade, does not amount to an unconstitutional abridgment of free speech; the question of the validity of the order involves only the power of the court to enjoin the boycott.

Quære as to what constitutes a boycott that may be enjoined by a court of equity; but, in order that it may be enjoined, it must appear that there is a conspiracy causing irreparable damage to complainant's business or property.

Where conditions exist that justify the enjoining of a boycott, the publication and use of letters, circulars and printed matter, may constitute the means of unlawfully continuing the boycott and amount to a violation of the order of injunction.

The Anti-trust Act of 1890 applies to any unlawful combination resulting in restraint of interstate commerce including boycotts and blacklisting whether made effective by acts, words or printed matter. *Loewe* v. *Lawlor*, 208 U. S. 274.

The court's protective powers extend to every device whereby property is irreparably damaged or interstate commerce restrained; otherwise the Anti-Trust Act would be rendered impotent.

Society itself is an organization and does not object to organizations for social, religious, business, and all other legal, purposes.

On appeal against unlawfully exercising power of organizations it is the duty of government to protect the one against the many as well as the many against the one.

An agreement to act in concert on publication of a signal makes the words used as the signal amount to verbal acts, and, when the facts justify it, the court having jurisdiction can enjoin the use of the words in such connection; and so *held* as to words "unfair" and "we don't patronize" as used in this case for the purpose of continuing a boycott.

Civil and criminal contempts are essentially different and are governed by different rules of procedure.

A proceeding, instituted by an aggrieved party to punish the other

party for contempt for affirmatively violating an injunction in the same action in which the injunction order was issued, and praying for damages and costs, is a civil proceeding in contempt, and is part of the main action, and the court cannot punish the contempt by imprisonment for a definite term; the only punishment is by fine measured by the pecuniary injury sustained.

In criminal proceedings for contempt the party against whom the proceedings are instituted is entitled to the protection of the constitutional provisions against self-incrimination.

There is a substantial variance between the procedure adopted and punishment imposed, when a punitive sentence appropriate only to a proceeding for criminal contempt is imposed in a proceeding in an equity action for the remedial relief of an injured party.

Where the main suit in which an injunction order has been granted is settled and discontinued, every proceeding which is a part thereof, or dependent thereon, is also necessarily settled as between the parties; and so held as to a proceeding instituted by the party aggrieved against the other party for violation of an injunction.

The fact that the party aggrieved by the violation of an injunction deprives himself, by settling the main case, of the right to pursue the violator for contempt does not prevent the court, whose order was violated, from instituting proceedings to vindicate its authority; and in this case the dismissal of the civil contempt proceeding is without prejudice to the power and right of the court whose injunction was violated to punish for contempt by proper proceedings.

33 App. D. C. 516, reversed.

THIS is a proceeding to reverse a judgment, finding that Samuel Gompers, John Mitchell and Frank Morrison were guilty of contempt in violating the terms of an injunction restraining them from continuing a boycott, or from publishing any statement that there was or had been a boycott against the Bucks Stove & Range Company. The contempt case grew out of litigation reported in 33 App. D. C. 83, 516. It will only be necessary to briefly refer to the facts set out in that record.

The American Federation of Labor is composed of voluntary associations of labor unions with a large membership. It publishes the American Federationist, which has a wide circulation among the public and the Federa-

tion. Samuel Gompers is president and editor of the paper. John Mitchell is vice president of the Federation and President of the United Mine Workers, one of the affiliated unions. Frank Morrison has charge of the circulation of the paper. The Federation had a difference as to the hours of labor with the Bucks Stove & Range Company, of which J. W. Van Cleave was president, who was also president of the American Manufacturers' Association. This controversy over the hours of work resulted in a boycott being declared against the Bucks Stove & Range Company, and it was thereupon declared "Unfair" and was published in the American Federationist on the "Unfair" and "We don't patronize" lists. The company filed in the Supreme Court of the District of Columbia its bill against the Federation, the defendants above named and other officers, alleging that the defendants had entered into a conspiracy to restrain the company's state and interstate business, in pursuance of which they had boycotted it, published it on the unfair lists, and had by threats also coerced merchants and others to refrain from buying Bucks' products for fear that they themselves would be boycotted if they continued to deal with that company. The result of the boycott had been to prevent persons from dealing with it and had greatly lessened its business and caused irreparable damage.

After a lengthy hearing, the court on December 18, 1907, signed a temporary injunction, which became effective when the bond required was given on December the 23d. The order is published in the margin.[1]

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[1] Ordered that the American Federation of Labor, Samuel Gompers, Frank Morrison, . . . John Mitchell, . . . their and each of their agents, servants, attorneys, confederates, and any and all persons acting in aid of or in conjunction with them or any of them be, and they hereby are, restrained and enjoined until the final decree in said cause from conspiring, agreeing or combining in any manner to restrain, obstruct or destroy the business of the complainant, or to

Thereafter testimony was regularly taken, and on March 23, 1908, the injunction was made permanent, with provisions almost identical with the temporary order of December 17, 1907.

From this final decree the defendants appealed, but be-

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prevent the complainant from carrying on the same without interference from them or any of them, and from interfering in any manner with the sale of the product of the complainant's factory or business by defendants, or by any other person, firm or corporation, and from declaring or threatening any boycott against the complainant, or its business, or the product of its factory, or against any person, firm or corporation engaged in handling or selling the said product, and from abetting, aiding or assisting in any such boycott, and from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copies or copy of the American Federationist, or any other printed or written newspaper, magazine, circular, letter or other document or instrument whatsoever, which shall contain or in any manner refer to the name of the complainant, its business or its product in the "We don't patronize," or the "Unfair" list of the defendants, or any of them, their agents, servants, attorneys, confederates, or other person or persons acting in aid of or in conjunction with them or which contains any reference to the complainant, its business or product in connection with the term "Unfair" or with the "We don't patronize" list or with any other phrase, word or words of similar import, and from publishing or otherwise circulating, whether in writing or orally, any statement or notice of any kind or character whatsoever, calling attention to the complainant's customers, or of dealers or tradesmen, or the public, to any boycott against the complainant, its business or its product, or that the same are, or were, or have been declared to be "unfair," or that it should not be purchased or dealt in or handled by any dealer, tradesman, or other person whomsoever, or by the public, or any representation or statement of like effect and import, for the purpose of, or tending to, any injury to or interference with the complainant's business, or with the free and unrestricted sale of its product, or of coercing or inducing any dealer, person, firm or corporation, or the public, not to purchase, use, buy, trade in, deal in, or have in possession stoves, ranges, heating apparatus, or other product of the complainant, and from threatening or intimidating any person or persons whomsoever from buying, selling, or otherwise dealing in the complainant's product, either directly or through orders, directions or suggestions to committees, associations, officers, agents or others, for the

fore a decision was had, the Bucks Stove & Range Company began contempt proceedings, by filing in the Supreme Court of the District a petition entitled "Bucks Stove & Range Company, plaintiff, vs. The American Federation of Labor *et al.*, defendants, No. 27,305, Equity," alleging that petitioner had "filed in this cause its original bill of complaint, naming as defendants, among others, Samuel Gompers, Frank Morrison and John Mitchell." All of the record and testimony in the original cause was made a part of the petition as follows:

"Reference is hereby made to the original bill and exhibits filed in support of the same, the answer and amended answer of the defendants, the testimony taken on both sides, the original order restraining and enjoining the dedefendants *pendente lite*, and the final decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this

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performance of any such acts or threats as herein above specified, and from in any manner whatsoever impeding, obstructing, interfering with or restraining the complainant's business, trade or commerce, whether in the State of Missouri or in other States and Territories of the United States, or elsewhere wheresoever, and from soliciting, directing, aiding, assisting or abetting any person or persons, company or corporation to do or cause to be done any of the acts or things aforesaid.

And t is further ordered by the court that this order shall be in full force, obligatory and binding upon the said defendants and each of them and their said officers, members, agents, servants, attorneys, confederates, and all persons acting in aid of or in conjunction with them, upon the service of a copy thereof upon them or their solicitors or solicitor of record in this cause: *Provided*, The complainant shall first execute and file in this cause, with a surety or sureties to be approved by the court, or one of the justices thereof, an undertaking to make good to the defendants all damage by them suffered or sustained by reason of wrongfully and inequitably suing out this injunction, and stipulating that the damages may be ascertained in such manner as the justice of this court shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

petition, and it is prayed that the same may be taken and read as a part hereof at any and all hearings upon this petition, whether in this court or on appeal from its decision herein rendered."

Some of the publications were charged to be in violation of the terms of the temporary injunction, dated December 23, 1907, and others were alleged to be in violation of the final decree dated March 23, 1908.

The petition set out in nine distinct paragraphs, the speeches, editorials and publications made at different times by the several defendants, charging that in each instance they continued and were intended to continue the boycott, and to republish the fact that the complainant was or had been on the "unfair list." It concluded by alleging that by the devices, means, speeches and publications set forth, and in contempt of court the defendants had disobeyed its orders and violated the injunction. The prayer was (1) that the defendants be required to show cause why they should not be attached for contempt, and adjudged by the court to be in contempt of its order and its decree in this cause and be punished for the same. (2) And that petitioner may have such other and further relief as the nature of its case may require. (Signed: Bucks Stove & Range Company, by J. W. Van Cleave, President.) It was also sworn to by the President of the company and signed by its solicitors.

A rule to show cause issued, requiring each of the defendants to show cause why they should not be adjudged to be in contempt and be punished for the same. Each of the defendants answered under oath, and, as treating the contempt proceeding as a part of the original cause, admitted the allegations as to the history of the litigation in paragraphs 2, 3, 4 and 5 of the petition, but "for greater accuracy refer to the record in this cause." Publications were admitted but explained. Each of the defendants denied under oath that he had been in disregard or

contempt of the court's order and denied that any of the acts and charges complained of constituted a violation of the order. There were several issues of fact on which much evidence was taken. This related to the question of intent, and whether there had been a purpose and plan to evade any injunction which might be granted. There was also an issue as to whether John Mitchell had put a resolution to the convention of the United Mine Workers; whether Samuel Gompers and Frank Morrison had rushed the mailing of the January issue of the American Federationist, on December 22, so as to avoid the injunction dated December 17, which became operative on giving bond by complainant on December 23; and also whether they had thereafter sold and circulated copies of this issue containing the Bucks Stove Company on the "Unfair" and "We don't patronize" list. Evidence was taken partly by deposition, partly before an Examiner in Chancery.

Each of the defendants was called as a witness by the complainant, and each testified as to facts on which the allegation of intent or evasion was based, and as to the publications, speeches and resolutions which he was accused of having made, and which the petition alleged constituted an act of disobedience and contempt of court.

The court made a special finding as to two of the nine charges, and then found that all three of the defendants were guilty of the several acts charged in paragraphs 17 and 26; that respondents Gompers and Morrison were guilty of the several acts charged in the sixteenth and twentieth paragraphs; that respondent Morrison was guilty of the acts charged in the twenty-fifth paragraph, and that respondent Gompers was guilty of the several acts charged in the paragraphs 19, 21, 22 and 23. The finding concluded: "The court being fully advised in the premises, it is by it, this twenty-third day of December, A. D. 1908, considered that the said respondents, Samuel

Gompers, Frank Morrison and John Mitchell, are guilty of contempt in their said disobedience of the plain mandates of the said injunctions; and it is, therefore ordered and adjudged that the said respondent, Frank Morrison, be confined and imprisoned in the United States jail in the District of Columbia for and during a period of six months; that the said respondent, John Mitchell, be confined and imprisoned in the said jail for and during a period of nine months, and that the respondent, Samuel Gompers, be confined and imprisoned in the said jail for and during a period of twelve months, said imprisonment as to each of said respondents to take effect from and including the date of the arrival of said respective respondents at said jail."

On the same day the defendants entered an appeal, which was allowed, and bail fixed. After notice to the defendants the complainant moved "the court to amend or supplement its decree by awarding to it its costs against the defendants under the proceedings in contempt against them." This motion was granted in an order which recited that "upon consideration of the motion of complainant, filed in the above cause for award of its costs in the contempt proceedings in said cause against the defendants Samuel Gompers, John Mitchell and Frank Morrison, and after argument by the solicitors of the respective parties, the motion is granted, and it is ordered that the complainant the Bucks Stove & Range Company do recover against the defendants named, its costs in the said contempt proceeding, to be taxed by the clerk, and that it have execution therefor as at law."

The parties also entered into a stipulation, the material portions of which are as follows:

"For the purpose of avoiding unnecessary cost in the matter of the appeal by the defendants Samuel Gompers, John Mitchell and Frank Morrison from the judgment against them under the contempt proceedings in the above entitled cause, it is stipulated that, . . . with

the approval of the Court of Appeals, the record in the above cause [*Bucks Stove & Range Co.* v. *American Federation of Labor et al.*] . . . may be read from by either party to the appeal in said contempt proceedings, in so far as the same may be relevant and material, with like effect as if the said record of the original cause were embraced in the transcript, in the appeal from the said contempt proceedings."

This stipulation was signed by counsel for the defendants and for the Bucks Stove & Range Co.

The petition in the contempt proceeding, the answer, orders, final decree, amended decree and stipulation were all entitled in the original cause, "Buck's Stove & Range Company *v.* The American Federation of Labor, Samuel Gompers, John Mitchell, Frank Morrison, *et al.*" The appeal papers in the Court of Appeals of the District were, and those here on certiorari are entitled "Samuel Gompers, John Mitchell and Frank Morrison, appellants, *v.* The Buck's Stove & Range Company."

On December 23, 1908, the defendants were found guilty of contempt, and on the same day they appealed. On March 26, 1909, the Court of Appeals rendered its decision in favor of the Bucks Stove Company on the appeal from the decree of March 23, 1908, and found that the decree was, in some respect, erroneous, and modified it accordingly. From that decision both parties appealed to this court—the Bucks Stove Company contending that it was error to modify in any respect; the American Federation of Labor *et al.*, contending that the Court of Appeals erred in not reversing and setting aside as a whole the decree granting the injunction.

There subsequently came on to be heard in the Court of Appeals of the District of Columbia the appeal from the decree in the contempt proceeding. On that hearing the Bucks Stove & Range Company moved to dismiss the appeal, because the evidence had not been incorporated

in a bill of exceptions, claiming that it was a criminal proceeding and was governed by the practice applicable to law cases. This motion was resisted by the defendants, who contended that the contempt proceedings were a part of the equity cause and that the case was to be governed by equity practice, in which the whole record could be examined on appeal.

The Court of Appeals held that the proceeding was for criminal contempt and that for want of a bill of exceptions it could not examine the testimony but must treat the findings of fact by the judge as conclusive and limit its consideration to the question whether as a matter of law the petition charged and the finding found acts which amounted to a violation of the injunction. It held that some of the facts alleged did constitute a good charge of contempt, and as each of the defendants were found to be guilty of at least one of such acts of disobedience constituting a violation of the injunction and a contempt of court, it held that the conviction must be sustained. This ruling was put on the ground that on a general verdict of guilty, the conviction and sentence on an indictment containing several counts, some of which were bad must stand, if those which were good would sustain the sentence. It therefore not only refused to examine the evidence, to determine whether the proof was sufficient to sustain the conviction, but it also declined to consider the sufficiency of the other charges in the petition, of which the defendants were also found guilty. It affirmed the judgment of the Supreme Court of the District. The defendants thereupon applied for and obtained a writ of certiorari.

The appeal and cross appeal in the original cause of the *Bucks Stove and Range Company* v. *The American Federation of Labor et al.* were heard here together. During the argument it appeared that the parties had settled their differences and, on the ground that the questions were moot,

this court dismissed both appeals. 219 U. S. 581. Following this disposition of those appeals, and on the same day, the contempt case was called, and was argued by counsel for the Bucks Stove and Range Company and counsel for Samuel Gompers, Frank Morrison and John Mitchell.

Mr. Alton B. Parker and *Mr. Jackson H. Ralston*, for petitioner, with whom *Mr. F. L. Siddons*, *Mr. W. E. Richardson* and *Mr. John T. Walker* were on the brief, for plaintiff in error:

Proceedings for contempt are of two classes,—those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature and the Government, the court and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature and the parties generally interested in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *In re Nevitt*, 117 Fed. Rep. 448, 460, and cases cited.

This classification of, or distinction between, civil and criminal contempts was quoted with approval by this court in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 328. The court adds that it may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other, quoting approvingly from *In re Debs*, 158 U. S. 564.

The case at bar is clearly within the definitions of a

civil contempt as set forth in these controlling authorities. It was instituted by a petition made by the Bucks Stove & Range Company; was entitled in the action which had resulted in the order and decree which the petitioner claimed the defendants Gompers, Mitchell and Morrison had disobeyed; asked that all the pleadings, testimony and proceedings in the action be deemed incorporated in the petition and taken and read as a part thereof; prayed that the defendants be punished for a violation of the order and decree and that petitioner should have such other and further relief as the nature of its case may require. The petition was presented to the Supreme Court, sitting as a court of equity, before one of the justices thereof, acting as a chancellor; it was entitled in the equity cause and marked "In Equity"; it was conducted from its beginning to its conclusion according to equity rules; all the testimony was taken before examiners as in chancery practice; it was all taken down in writing and reported to the court; there was never an opportunity or occasion to except to any ruling of the court in the rejection or the admission of testimony; the hearing was had upon the testimony thus reported and it was upon that testimony that the decree or judgment or sentence was based.

The courts below erred, therefore, in holding the proceeding to be one for the presentation of a criminal contempt, and hence a reversal should follow.

The Court of Appeals also fell into error in refusing to consider the evidence which the defendants contend shows that there was no violation of either the order or decree. The reason assigned by it for its action was that exceptions were necessary to bring up the record. But exceptions are neither necessary nor permissible according to the course and practice in equity, and, as we have seen, this was a proceeding in equity and conducted according to its rules from beginning to end by both court and counsel. Hence a reversal is required.

If the court should conclude that it is nevertheless its duty to examine into the merits to see whether a different result would have been required, and examination be made by the Court of Appeals, we urge that the record does not disclose a violation of either the order or decree by these defendants. On the appeal from the final decree in the action the Court of Appeals held that certain provisions of the decree were in excess of the power of the court because it deprived the defendants of the constitutional guarantees of freedom of the press and of speech, and modified it accordingly. It is settled in this court that in a case or proceeding within its jurisdiction as to parties and subject-matter, if the court makes an order in excess of its power it is void. *Ex parte Rowland*, 104 U. S. 604; *Ex parte Harding*, 120 U. S. 782; *In re Ayres*, 123 U. S. 243; *Ex parte Terry*, 128 U. S. 289.

We urge that the provisions the court held to be void were so interwoven with the valid provisions that they cannot be separated without destroying the general scheme and purpose of the decree, and hence that the entire decree should be held to be void.

If, however, this position should not meet with the approval of the court, we claim that the conduct of the defendants must be tested by the decree as modified by the Court of Appeals and not as made by the trial court. Thus tested it will appear that these defendants did not offend against either the letter or spirit of the decree. It is true that the name of the Bucks Stove & Range Company did appear in the "We don't patronize" list of the American Federationist after the order was made forbidding it. But it also appears that this was before the date when the order became effective by its very terms. Certainly the defendants cannot be held to have violated the order before it became operative. Moreover, it should be noted that never after the order went into effect was such a publication made. None of the other publica-

tions and speeches complained of offend against the decree as modified by the Court of Appeals.

If this court finds otherwise, the decrees of contempt should nevertheless be vacated because they embrace findings of which contempt was, but cannot lawfully be predicated. It cannot be said that the learned justice did not base this unusual and excessive punishment in part upon these findings, for he says necessarily, that he did when he presents them as a portion of the foundation of his sentence.

Mr. Daniel Davenport and *Mr. J. J. Darlington* for respondent:

The willful violation of an injunction by a party to a cause is a contempt of court constituting a specific criminal offense. *Bullock* v. *Westinghouse Co.*, 129 Fed. Rep. 107; *Ex parte Kearney*, 7 Wheat. 38, 42; *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392; *Hayes* v. *Fischer*, 102 U. S. 121.

The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be only punishment of the party for the insult to the court, or whether a part of the punishment is by way of a fine payable to the party injured as compensation for the damages inflicted upon him by the contemptuous act. The fact that the punishment operates remedially does not alter the nature of the proceeding. Punishment for doing an act forbidden by the injunction is entirely different from punishment as a means of coercion to compel the doing of something commanded. The latter proceeding is properly speaking one for a civil contempt, the former one for a criminal contempt. The nature of the proceeding can readily be determined by an examination of the charge made. If it is for the doing of an act forbidden it is clearly a criminal proceeding, and not one for a civil contempt. It is perfectly apparent from the allegations of

the complaint, the answers of the defendants and the punishment the court inflicted, that the parties concerned all regarded the proceeding as one for the punishment of the accused for doing what they were commanded not to do. The prayer annexed to the complaint was that they be punished for their contempt. It is true that the complainant asked for such further relief as the court might allow as the nature of its case may require. Inasmuch as the thing complained of was an act forbidden to be done, the only relief possible was a fine payable to it as a part of the punishment for the contempt. Many cases sanctioned by this court approve of such joint punishment. *In re Christensen Engineering Co.*, 194 U. S. 458, and cases cited.

In a criminal proceeding to punish for a contempt for the violation of an injunction, no particular method is necessary to be pursued in bringing the matter to the attention of the court. Any sworn statement setting forth the facts is sufficient to authorize the court to proceed to investigate the charge. A rule to show cause why he should not be punished for his contempt is sufficient to bring him before the court, although an attachment may be granted in the first instance, where the case is urgent and the contempt flagrant. The trial may be had on answers, counter-affidavits or some other form of pleading presented as a defense. The defendant must be given opportunity to make explanation or defense. The court may adopt such mode of trial as, in its discretion it sees fit, in order to determine the fact of the contempt, provided due regard is had to the essential rules that obtain in the matter of contempts. Particular questions or issues, upon which to take testimony, may be referred to a referee, master or other designated person. The accusations must be supported by evidence sufficient to convince the mind of the trier beyond a reasonable doubt of the actual guilt of the accused. If satisfied of the guilt of the

accused the court can find him guilty and inflict the punishment either wholly by way of fine or imprisonment for the public offense, or partially for the benefit of the complainant. And in such proceeding it is perfectly proper and not unusual as a part of the punishment to award his costs to the complainant.

The record in this case shows that all these requirements of the law were duly observed and the rights of the accused properly safeguarded. The court properly found the accused guilty of contempt of its authority and sentenced them to jail. Although it might have done so in this proceeding it did not, however, fine the defendants as a part of the punishment a sum payable to the complainant, except by way of costs.

Although the contempt consists in a violation of an injunction granted by a court of equity, since the proceeding for its punishment is one of law, review can be had only by writ of error, and not by appeal, and as in other law cases, a bill of exceptions is necessary to review any claimed error not otherwise apparent on the face of the record. *Continental Gin Co.* v. *Murray,* 162 Fed. Rep. 873.

Since there is no bill of exceptions here this court is confined therefore to a review of the sufficiency of the averments of the complaint, the answers, and the judgment of the court thereon. It cannot undertake to determine the fact of guilt or innocence, nor undertake to review rulings on questions of evidence. But it can properly review the two questions about which there is serious controversy here: Was the original order of the injunction void, for want of authority in the court to grant the injunction which was violated, and did the court exceed its authority in punishing them for its violation?

The injunction which the defendants violated was valid. It forbade the defendants to carry on a boycott against the complainant by any means whatever, and particularly,

by putting its name on an unfair list, publishing it as unfair, sending out boycott circulars, or by any act whatever, verbal or otherwise, inciting others to engage in or carry it on. This was a perfectly legitimate exercise of power by the court, frequently exercised by it, sanctioned by numerous precedents and not interfering in the least with any legitimate use of speech or of the press.

That the boycott was illegal; that a person threatened with irreparable injury to his business or property by a boycott has the right to go into a court of equity for protection from it; that the court has the right and power to enjoin the prosecution of the boycott; that the court, in thus enjoining the boycott can enjoin every act that may be resorted to in carrying it out, including all verbal and written acts, and particularly putting the victim on an unfair list, sending out boycott notices and circulars, making speeches for the purpose of prosecuting the boycott, etc., for without this power to prevent such publications it could not stop the boycott; and that the constitutional right of free speech and free press does not extend to secure immunity to the boycotter in such cases, is so well settled and declared by the courts as to render citations unnecessary.

If the injunction in this case had been erroneous, it would have been the duty of the accused to obey it and for the disobedience they would have been properly punished. It is only void injunctions which parties are at liberty to disobey. An injunction erroneous but not void must be as scrupulously obeyed as one entirely valid. There is not the slightest ground for contention here that this injunction was void. The court confessedly had jurisdiction of the parties and of the subject-matter of the cause, and in granting the injunction it exercised its power in conformity with the well settled practice of equity courts.

The court did not exceed its authority in the punish-

ment it inflicted. It was not excessive. *Savin, Petitioner*, 131 U. S. 270; *United States* v. *Sweeny*, 95 Fed. Rep. 452, 457.

And though the proceeding was begun at the instance of the Bucks Company, and the procedure thereafter was such as the record shows it to have been, the precedents clearly show that the court was well within its authority in proceeding to inflict the punishment it did in vindicating its dignity. It was a proceeding on its face looking towards punishment, only punishment. There was absolutely nothing in the case which could suggest to the court or the accused that the party was seeking coercion of the accused into doing something which they had been commanded to do. It can only be by a forced construction, violating the plain provisions of the whole record, that even a plausible contention can be made that this was a proceeding for a civil contempt. To reach such a conclusion it would be necessary to ignore the manifest difference between punishing the accused by a fine payable to the complainant by way of reparation for the violation of the injunction, and fining or imprisoning him to compel the performance of an act he had been ordered to do.

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

The defendants, Samuel Gompers, John Mitchell and Frank Morrison, were found guilty of contempt of court in making certain publications prohibited by an injunction from the Supreme Court of the District of Columbia. They were sentenced to imprisonment for twelve, nine and six months respectively, and this proceeding is prosecuted to reverse that judgment.

The order alleged to have been violated was granted in the equity suit of the "*Bucks Stove & Range Company* v.

The American Federation of Labor and others," in which the court issued an injunction restraining all the defendants from boycotting the complainant, or from publishing or otherwise making any statement that the Bucks Stove & Range Company was, or had been, on the "Unfair" or "We don't patronize" lists. Some months later the complainant filed a petition in the cause, alleging that the three defendants above-named, parties to the original cause, in contempt of court and in violation of its order, had disobeyed the injunction by publishing statements which either directly or indirectly called attention to the fact that the Bucks Stove & Range Company was on the "Unfair" list, and that they had thereby continued the boycott which had been enjoined.

The defendants filed separate answers under oath, and, each denied: (1) That they had been in contempt or disregard of the court's orders: (2) That the statements complained of constituted any violation of the order; and, on the argument, (3) contended that if the publication should be construed to amount to a violation of the injunction they could not be punished therefor, because the court must not only possess jurisdiction of the parties and the subject-matter, but must have authority to render the particular judgment. Insisting, therefore, that the court could not abridge the liberty of speech or freedom of the press, the defendants claim that the injunction as a whole was a nullity, and that no contempt proceeding could be maintained for any disobedience of any of its provisions, general or special.

If this last proposition were sound it would be unnecessary to go further into an examination of the case or to determine whether the defendants had in fact disobeyed the prohibitions contained in the injunction. *Ex parte Rowland*, 104 U. S. 612. But we will not enter upon a discussion of the constitutional question raised, for the general provisions of the injunction did not, in terms,

restrain any form of publication. The defendants' attack on this part of the injunction raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage.

Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant, by a combination of persons not immediately connected with him in business, can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do they themselves will be boycotted. Others hold that no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of physical violence.

But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue; when these facts exist, the strong current of authority is that the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction. *Reynolds* v. *Davis*, 198 Massachusetts, 300; *Sherry* v. *Perkins*, 147 Massachusetts, 212; *Codman* v. *Crocker*, 203 Massachusetts, 150; *Brown* v. *Jacobs*, 115 Georgia, 452, 431; *Gray* v. *Council*, 91 Minnesota, 171; *Lohse Co.* v. *Fuelle*, 215 Missouri, 421, 472; *Thomas* v. *Railroad Co.*, 62 Fed. Rep. 803, 821; *Continental Co.* v. *Board of Underwriters*, 67 Fed. Rep. 310; *Beck* v. *Teamsters' Union*, 118 Michigan, 527; *Pratt Food Co.* v. *Bird*, 148 Michigan, 632; *Barr* v. *Essex*, 53 N. J.

Eq. 102. See also *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 156; *Bitterman* v. *L. & N. R. R.*, 207 U. S. 206; *Board of Trade* v. *Christie*, 198 U. S. 236; *Scully* v. *Bird*, 209 U. S. 489.

While the bill in this case alleged that complainant's interstate business was restrained, no relief was asked under the provisions of the Sherman anti-trust act. But if the contention be sound that no court under any circumstances can enjoin a boycott if spoken words or printed matter were used as one of the instrumentalities by which it was made effective, then it could not do so, even if interstate commerce was restrained by means of a blacklist, boycott or printed device to accomplish its purpose. And this, too, notwithstanding § 4 (act of July 2, 1890, c. 647, 26 Stat. 209) of that act provides, that where such commerce is unlawfully restrained it shall be the duty of the Attorney General to institute proceedings in equity to prevent and enjoin violations of the statute.

In *Loewe* v. *Lawlor*, 208 U. S. 274, the statute was held to apply to any unlawful combination resulting in restraint of interstate commerce. In that case the damages sued for were occasioned by acts which, among other things, did include the circulation of advertisements. But the principle announced by the court was general. It covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter.

The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the

restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent.

Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association. By virtue of this right, powerful labor unions have been organized.

But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words "Unfair," "We don't patronize," or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called "verbal acts," and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction.

Passing then to the consideration of the question as to whether the defendants disobeyed the injunction and were

therefore guilty of contempt, we are met with the objection that for want of a bill of exceptions we must treat the decree as conclusive as to the fact of disobedience, and can only examine the petition and the finding to determine whether one charges and the other finds acts which constitute a contempt of court. This view was adopted by the majority of the Court of Appeals, which treated this as a criminal proceeding, refused to examine the testimony and affirmed the judgment in analogy to the rule that on a general verdict of guilty upon an indictment containing several counts, some of which were bad, the conviction would not be reversed if there was one good count warranting the judgment.

That rule originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction.

But there is no room for such presumption here. The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

But in making such investigation it is again insisted that this is a proceeding at law for criminal contempt, where the findings of fact by the trial judge must be treated as conclusive, and that our investigation must be limited solely to the question whether, as a matter of law, the acts of alleged disobedience set out in the finding constitute contempt of court.

This contention, on the part of the Bucks Stove & Range Company, prevents a consideration of the case on its merits, and makes it necessary to enter into a discussion of questions more or less technical, as to whether this was a proceeding in equity or at law. Where results so controlling depend upon proper classification, it becomes necessary carefully to consider whether this was a case at law for criminal contempt where the evidence could not be examined for want of a bill of exceptions; or a case in equity for civil contempt, where the whole record may be examined on appeal and a proper decree entered.

Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." *Bessette* v. *Conkey*, 194 U. S. 329. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also

in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless these were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *In re Nevitt*, 117 Fed. Rep. 451, "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its

nature, but solely as punishment for the completed act of disobedience.

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*.

The fact that the purpose of the punishment could be examined with a view to determining whether it was civil or criminal, is recognized in *Doyle* v. *London Guarantee Co.*, 204 U. S. 599, 605, 607, where it was said that "While it is true that the fine imposed is not made payable to the opposite party, compliance with the order relieves from payment, and in that event there is no final judgment of either fine or imprisonment. . . . The proceeding is against a party, the compliance with the order avoids the punishment and there is nothing in the nature of a criminal suit or judgment imposed for public purposes upon a defendant in a criminal proceeding." *Bessette* v. *Conkey*, 194 U. S. 328; *In re Nevitt*, 117 Fed. Rep. 448; *Howard* v. *Durand*, 36 Georgia, 359; *Phillips* v. *Welch*, 11 Nevada, 187.

The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.

In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required,

but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. Rapalje on Contempt, §§ 131–134; *Wells* v. *Oregon Co.*, 19 Fed. Rep. 20; *In re North Bloomfield Co.*, 27 Fed. Rep. 795; *Sabin* v. *Fogarty*, 70 Fed. Rep. 483.

But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine and twelve months, no relief whatever was granted to the complainant, and the Bucks Stove & Range Company took nothing by that decree.

If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal. *Bessette* v. *Conkey*, 194 U. S. 324. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. *Boyd* v. *United States*, 116 U. S. 616; *United States* v. *Jose*, 63 Fed. Rep. 951; *State* v. *Davis*, 50 W. Va. 100; *King* v. *Ohio Ry.*, 7 Biss. 529; *Sabin* v. *Fogarty*, 70 Fed. Rep. 482, 483; *Drakeford* v. *Adams*, 98 Georgia, 724.

There is another important difference. Proceedings for

civil contempt are between the original parties and are instituted and tried as a part of the main cause. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. The Court of Appeals recognizing this difference held that this was not a part of the equity cause of the *Bucks Stove & Range Company* v. *The American Federation of Labor et al.*, and said that: "The order finding the defendants guilty of contempt was not an interlocutory order in the injunction proceedings. It was in a separate action, one personal to the defendants, with the defendants on one side and the court vindicating its authority on the other."

In this view we cannot concur. We find nothing in the record indicating that this was a proceeding with the court, or, more properly, the Government, on one side and the defendants on the other. On the contrary, the contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original cause in equity. The Bucks Stove & Range Company was not only the nominal, but the actual party on the one side, with the defendants on the other. The Bucks Stove Company acted throughout as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting a case of criminal contempt. It appears here also as the sole party in opposition to the defendants; and its counsel, in its name, have filed briefs and made arguments in this court in favoring affirmance of the judgment of the court below.

But, as the Court of Appeals distinctly held that this was not a part of the equity cause it will be proper to set out in some detail the facts on this subject as they appear in the record.

In the first place the petition was not entitled "United States *v.* Samuel Gompers, *et al.*" or "*In re* Samuel Gompers, *et al.*," as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit. *United States* v. *Cruikshank*, 92 U. S. 542, 559.

Inasmuch, therefore, as proceedings for civil contempt are a part of the original cause, the weight of authority is to the effect that they should be entitled therein. But the practice has hitherto been so unsettled in this respect that we do not now treat it as controlling, but only as a fact to be considered along with others as was done in *Worden* v. *Searls*, 121 U. S. 25, in determining a similar question. Thus considering it we find that the petition instituting the contempt proceeding was entitled in the main cause "*Bucks Stove & Range Company, plaintiff*, v. *The American Federation of Labor, et al., defendants, No. 27,305, Equity*," and that the answers of the defendants, every report by the examiner in chancery, every deposition, motion and stipulation, every order—including the final decree and the amended decree, were all uniformly entitled in the equity cause. Not only the pleadings in the original cause but all the testimony, oral and written, was, by reference in the petition, made a part of the contempt proceedings. The trial judge quoted largely from this oral testimony thus introduced in bulk, and the severity

and character of the sentence indicate that he was largely influenced by this evidence which disclosed the great damage done to the complainant's business by the boycott before the injunction issued.

It is argued the defendants' answers concluded with a statement that as questions of criminal and quasi-criminal intent were involved, a jury was better qualified to pass on the issues than a judge, and in the event he should be of opinion that the charges had not been sworn away, they moved that issues of fact should be framed and submitted to a jury. Such a motion was not inconsistent with the theory that this was a proceeding for civil contempt in equity, but was in strict accord with the practice under which questions of fact may be referred by the chancellor to a jury for determination.

In proceedings for civil contempt the complainant, if successful, is entitled to costs. Rapalje on Contempt, § 132. And evidently on the theory that this was a civil proceeding and to be governed by the rules applicable to an equity cause, the Bucks Stove & Range Company moved the court to amend the decree so as to award to it "its costs." After argument by solicitors for both parties, the motion was granted, and the court adjudged that the complainant do recover against the defendants its costs in said contempt proceeding. This ruling was no doubt correct as this was a civil case, but could not have been granted in a proceeding for criminal contempt, where costs are not usually imposed in addition to the imprisonment. Where they are awarded they go to the Government, for the use of its officers, as held by Justice Miller, on circuit. *Durant* v. *Washington County*, 4 Woolw. 297.

In another most important particular the parties clearly indicated that they regarded this as a civil proceeding. The complainant made each of the defendants a witness for the company, and, as such, each was required to tes-

tify against himself—a thing that most likely would not have been done, or suffered, if either party had regarded this as a proceeding at law for criminal contempt—because the provision of the Constitution that "no person shall be compelled in any criminal case to be a witness against himself" is applicable, not only to crimes, but also to quasi-criminal and penal proceedings. *Boyd* v. *United States*, 116 U. S. 616.

Both on account of the distinct ruling to the contrary by the Court of Appeals, and the importance of the results flowing from a proper classification, we have with some detail discussed the facts appearing in the record, showing that both parties treated this as a proceeding which was a part of the original equity cause. In case of doubt this might, of itself, justify a determination of the question in accordance with the mutual understanding of the parties, and the procedure adopted by them. But there is another and controlling fact, found in the brief but sufficient prayer with which the petition concludes. We have already shown that in both classes of cases there must be allegation and proof that the defendant was guilty of contempt, and a prayer that he be punished. The classification then depends upon the question as to whether the punishment is punitive, in vindication of the court's authority, or whether it is remedial by way of a coercive imprisonment, or a compensatory fine payable to the complainant. Bearing these distinctions in mind, the prayer of the petition is significant and determinative. After setting out in detail the acts of alleged disobedience, the petition closes with the following prayers: (1) "that the defendants show cause why they should not be adjudged in contempt of court and be punished for the same," and (2) "that petitioner may have such other and further relief as the nature of its case may require."

"Its case,"—not the Government's case. "That petitioner may have relief"—not that the court's authority

may be vindicated. The Bucks Stove & Range Company was not asserting the rights of the public, but seeking "such other and further relief as the nature of its case may require." If it had asked that the defendants be forced to pay a fine to the Government, or be punished by confinement in jail, there could have been no doubt that punishment pure and simple was sought.

On the other hand, if it had prayed that the court impose a fine payable to the Bucks Stove & Range Company, the language would have left no doubt that remedial punishment was sought. It is not different in principle, if, instead of praying specifically for a fine payable to itself, it asks generally for "such relief as the nature of its case may require." In either event such a prayer was appropriate to a civil proceeding, and under it the court could have granted that form of relief to which the petitioner was entitled. But as the act of disobedience consisted not in refusing to do what had been ordered, but in doing what had been prohibited by the injunction, there could be no coercive imprisonment, and therefore the only relief, if any, which "the nature of petitioners case" admitted, was the imposition of a fine payable to the Buck's Stove & Range Company.

There was therefore a departure—a variance between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief, in the equity cause, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of "A. *vs.* B. for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months.

If then this sentence for criminal contempt was erroneously entered in a proceeding which was a part of the equity cause, it would be necessary to set aside the order of imprisonment, examine the testimony and thereupon

make such decree as was proper, according to the practice in equity causes on appeal. And, if upon the examination of the record it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

This power "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors." *Bessette* v. *Conkey,* 194 U. S. 324, 333.

There has been general recognition of the fact that the courts are clothed with this power and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants. *Bessette* v. *Conkey,* 194 U. S. 337.

Congress in recognition of the necessity of the case has

also declared (Rev. Stat., § 725) that the courts of the United States "shall have power to punish by fine or imprisonment contempts of their authority . . . " including "disobedience . . . by any party to any lawful order . . . of the said courts." But the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper. For that reason we can proceed no further in this case because it is both unnecessary and improper to make any decree in this contempt proceeding.

For on the hearing of the appeal and cross appeal in the original cause in which the injunction was issued, it appeared from the statement of counsel in open court that there had been a complete settlement of all matters involved in the case of *Bucks Stove & Range Company* v. *The American Federation of Labor et al.* This court therefore declined to further consider the case, which had become moot, and those two appeals were dismissed. 219 U. S. 581. When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled—of course without prejudice to the power and right of the court to punish for contempt by proper proceedings. *Worden* v. *Searls*, 121 U. S. 27. If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.

But, as we have shown, this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant. The company prayed "for such relief as the nature of its case may require," and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any

compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part. *Bessette* v. *Conkey*, 194 U. S. 328, 333; *Worden* v. *Searls*, 121 U. S. 27; *State* v. *Nathans*, 49 S. Car. 207. The criminal sentences imposed in the civil case, therefore, should be set aside.

The judgment of the Court of Appeals is reversed, and the case remanded with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the case to that court with direction that the contempt proceedings instituted by the Bucks Stove & Range Company be dismissed, but without prejudice to the power and right of the Supreme Court of the District of Columbia to punish by a proper proceeding, contempt, if any, committed against it.

Reversed.

MONTELLO SALT COMPANY *v.* STATE OF UTAH.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 136. Argued April 21, 1911.—Decided May 29, 1911.

The words "and including" following a description do not necessarily mean "in addition to," but may refer to a part of the thing described.

The words "110,000 acres of land . . . and including all the saline lands in the State" as used in § 8 of the Utah Enabling Act are not to be construed as a grant of such salines in addition to the 110,000 acres, but simply as conferring on the State the right, which it would not otherwise have, of including saline lands within its selections for the 110,000 acres.

This construction is in harmony with the uniform policy of Congress in connection with grants to the States of saline lands.

34 Utah, 458, reversed.

THE facts, which involve the construction of § 8 of the

Utah Enabling Act and the effect to be given to the words "and including all saline lands in the State" in connection with the grant of public lands for the University of Utah, are stated in the opinion.

Mr. S. T. Corn and *Mr. Jesse R. Barton,* with whom *Mr. James N. Kimball* was on the brief, for plaintiff in error:

The State did not take title to the saline lands in question by virtue of the Utah Enabling Act of July 16, 1894, without any act upon its part by way of selecting the same.

As unoccupied saline lands they were subject to location by defendant's grantors under the act of January 31, 1901, 31 Stat. 145.

The grant in § 8 of the Enabling Act did not by the words "and including" carry all saline lands in said State, besides the 110,000 acres originally granted.

Had that been the intention of Congress it was only necessary after the grant of the 110,000 acres to add the words, "and all saline lands in said State now known or hereafter to be discovered." To so construe the statute would be in direct violation of established rules of construction. Suth. Stat. Const., § 387; *Leavenworth R. R. Co.* v. *United States,* 92 U. S. 733, 740; *Dubuque and Pacific R. R. Co.* v. *Litchfield,* 23 How. 66.

All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. *Barden* v. *Nor. Pac. R. R. Co.,* 154 U. S. 288. To strike out the word "including" would be to extend the grant by implication and construe the act most strongly against the grantor.

The construction of the Enabling Act insisted on by defendant in error would be to create an endowment for the university many times greater than Congress ever conferred upon any other state university and also out of line with the legislation of Congress in regard to saline

land. See statutes on the subject of saline lands. 1 Stat. 466; Ohio Enabling Act of April 30, 1802; 2 Stat. 175. As to Ohio see also 4 Stat. 79; in Missouri, 3 Stat. 547; in Michigan, 5 Stat. 60; in Iowa, 5 Stat. 790; in Arkansas, 1836, 5 Stat. 58; 4 Stat. 505; 4 Stat. 304; in Illinois, 4 Stat. 305, 496. See also special act as to Michigan, Illinois and Arkansas, 9 Stat. 181, 182. Congress has carefully guarded the saline lands in the Indian Territory. 2 Stat. 280. See as to Alabama, 3 Stat. 491; and as to Mississippi, 2 Stat. 5, 48.

Saline lands or salt springs have never been granted to any State by blanket provisions. In 30 Stat. 484, all saline lands in its territory were granted to New Mexico, but the language employed was entirely different, the wording being, "together with all saline lands."

In general grants, unless otherwise clearly stated, neither mineral nor saline nor salt springs are granted. *Morton* v. *Nebraska*, 21 Wall. 660; *United States* v. *N. P. Ry. Co.*, 170 Fed. Rep. 498; 176 Fed. Rep. 706; *Garrard* v. *Silver Peak Mines*, 82 Fed. Rep. 578; *Mullan* v. *United States*, 118 U. S. 271; *Mining Co.* v. *Mining Co.*, 102 U. S. 167; *Newhall* v. *Sanger*, 92 U. S. 761; *L. L. & G. R. R. Co.* v. *United States*, 92 U. S. 733.

The word "and" does not add to the word "including." It is a principle of construction that "and" and "or" are considered of less importance in construing statutes and their direct meaning is more readily departed from than other words; and, if necessary to give effect to the intention of the parties to an instrument, will be excluded or disregarded altogether. *Railroad Co.* v. *Bartlett*, 11 N. E. Rep. (Ill.) 867; *Witherspoon* v. *Jarrigan*, 76 S. W. Rep. (Texas), 445, 447; *People* v. *Lyte*, 40 N. Y. Supp. 153, 161; *Boyle* v. *McMurphy*, 55 Illinois, 236; *Simpson* v. *Morris*, 3 Yeates, 104.

In the connection in which it is used in the act it should be excluded or disregarded as meaningless.

Omitting the word "and," as was done in all the reports and debates in Congress, the grant is "one hundred and ten thousand acres of land, including all saline lands in said State" and means that the saline lands granted are a part of and to be included in the one hundred and ten thousand acres. If the salines were to be in addition to the 110,000 acres it would make the precise acreage of the total grant uncertain, as the number of acres of salines is unknown. The grant was treated as consisting of a definite number of acres. See Vol. 26, Cong. Rec., p. 209.

Where the language is ambiguous, the applicable rule of construction compels a construction favorable to the grantor.

The ordinary signification of the term, as defined by the dictionaries, both Webster and the Standard, is "to confine within; to hold; to contain; to shut up; embrace, and involve." For its definition, the Supreme Court of Utah relies on *In re Goetz*, 75 N. Y. Supp. 750; *Hiller* v. *United States*, 106 Fed. Rep. 63; and *United States* v. *Pierce*, 147 Fed. Rep. 199. For cases defining "including" see "Words and Phrases"; *In re Goetz*, 75 N. Y. Supp. 750; *United States* v. *Pierce*, 147 Fed. Rep. 199; *S. C.*, 140 Fed. Rep. 962; *Hiller* v. *United States*, 106 Fed. Rep. 73.

"Include" or the participial form thereof, is defined "to comprise within"; "to hold"; "to contain"; "to shut up"; and synonyms are "contain"; "enclose"; "comprise"; "comprehend"; "embrace"; and "involve." And see for definition applicable to this case, *Neher* v. *McCook Co.*, 11 S. Dak. 422; *Brainard* v. *Darling*, 132 Massachusetts, 218; *Henry's Ex.* v. *Henry's Ex.*, 81 Kentucky, 342.

Under the language in the Enabling Act, Congress only meant to grant the State of Utah, for university purposes, one hundred and ten thousand acres of land, any part or the whole whereof could be saline lands.

To hold otherwise would render every title granted to

a homesteader or other claimant under the United States laws, of lands in this State, uncertain and of little value; for, under the broad claim made by the State, if a homesteader, after he secured his patent from the United States, should discover a bed of salt under his land, the State could eject him therefrom. *Barden* v. *Nor. Pac. R. R. Co.*, *supra; Shaw* v. *Kellogg*, 170 U. S. 312; *Deffenback* v. *Hawk*, 115 U. S. 392; *Morton* v. *Nebraska*, 21 Wall. 660, and cases therein cited; *Steele* v. *St. Louis Smelting & Refining Co.*, 106 U. S. 360; *Davis* v. *Wiebold*, 139 U. S. 507.

Mr. William D. Riter, with whom *Mr. Albert R. Barnes*, Attorney General of the State of Utah, *Mr. Waldemar Van Cott* and *Mr. Edward M. Allison, Jr.*, were on the brief, for defendant in error:

In the Utah Enabling Act Congress used the word (1) in its true and proper sense, as defined by the lexicographers; or (2) in the sense of "also."

The word "include" is derived from the Latin verb *includo*, which means to shut up, to enclose. "Include" has two meanings, one of which is the same as that of the word "embrace." See Webster. Congress used the word "including" in the sense thus defined by the dictionaries. For similar use in some appropriation acts passed by the Fifty-eighth Congress, see 33 Stat. 834, 836, 838, 840, 876, 1092, 1114, 1173, 1174, 1187, 1188.

For other illustrations, see 18 Stat. 274.

In none of these sentences is "including" used in strict accordance with its dictionary meaning, but in the sense of "also." Similar expressions are constantly heard; see *United States* v. *Pierce*, 147 Fed. Rep. 199; *Hiller* v. *United States*, 106 Fed. Rep. 73; *In re Goetz's Will*, 75 N. Y. Supp. 750.

If it was the intention of Congress to include the saline lands in the 110,000 acres, then the phrase "and including all saline lands in said State" is awkwardly and un-

grammatically placed. The lawmaker is presumed to know the rules of grammar. *United States* v. *Goldenberg*, 168 U. S. 95, 103.

It is a significant fact that Congress used the word "all" in the phrase "and including all saline lands." Of still greater significance is the use of the conjunction "and" in the phrase "and including all saline lands." No ambiguity can ever arise from the use of "and." That word is always employed to express the relation of addition.

Upon the admission of other States to the Union, Congress made large grants of saline lands or salt springs. As to Minnesota, see 11 Stat. 166; as to Kansas, 12 Stat. 126. A similar grant was made to Colorado, 18 Stat. 474; to Iowa, 5 Stat. 789; to Wisconsin, 9 Stat. 56.

The failure to fix any limit in Utah's Enabling Act is proof that Congress intended to give to this State all saline lands within its boundaries. See 1 Lindley on Mines, §§ 513–515.

Effect must be given, if possible, to every word in a statute. *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; *Allen* v. *Louisiana*, 103 U. S. 80, 84; *Montclair* v. *Ramsdell*, 107 U. S. 147, 152; *United States* v. *Fisher*, 109 U. S. 143, 145; *Murphy* v. *Utter*, 186 U. S. 95, 111.

Congress intended to give all saline lands then known or to be thereafter discovered. See *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288.

The rule of construction invoked by the plaintiff in error, that a public grant is construed strictly against the grantee, can come into play only where there is a real and substantial doubt as to what Congress intends. Where the meaning of Congress is fairly and reasonably apparent, the grant cannot be defeated by invoking the rule that a legislative grant is construed strictly against the grantee. *United States* v. *D. & R. G. R. Co.*, 150 U. S. 1, 14; *Richmond &c. R. Co.* v. *Louisa R. Co.*, 13 How. 71, 86.

In the construction of an enabling act the land grants therein made are not to receive at the hands of this court the strict construction which is followed with respect to legislative grants to railroad companies or to States to aid in the construction of railroads.

In none of the following cases involving the construction of land grants as contained in the enabling acts of several of the States, did this court invoke the strict rule of construction. *Ham* v. *Missouri*, 18 How. 126; *Cooper* v. *Roberts*, 18 How. 173; *Morton* v. *Nebraska*, 21 Wall. 660; *Heydenfeldt* v. *Mining Co.*, 93 U. S. 634; *Beecher* v. *Wetherby*, 95 U. S. 517; *Mining Co.* v. *Mining Co.*, 102 U. S. 167; *Mullan* v. *United States*, 118 U. S. 271; *Missouri &c. R. Co.* v. *Roberts*, 152 U. S. 114; *Hitchcock* v. *Minnesota*, 185 U. S. 373; *Johnson* v. *Washington*, 190 U. S. 179; *Mining Co.* v. *Mining Co.*, *supra*.

The Enabling Act being a compact between the United States and the State of Utah, it should receive the same construction as an ordinary contract. *Tennessee* v. *Whitworth*, 117 U. S. 129, 137. Where a State is the grantee a more liberal rule of construction prevails. *Indiana* v. *Milk*, 11 Fed. Rep. 389.

Mr. Justice McKenna delivered the opinion of the court.

The question in the case is whether § 8 of the Enabling Act of the State of Utah granted to the State all of the saline lands within the State or only enabled them to be selected as part of other lands granted and not specifically located.

Section 8 reads as follows (act of July 16, 1894, c. 138, 28 Stat. 107, 109):

"That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be re-

served for the establishment of the University of Utah, are hereby granted to the State of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portion of said lands that may not have been selected by said Territory may be selected by said State. *That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all the saline* lands in said State, are hereby granted to said State, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely held and invested by said State, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively."

We have italicized the clause upon which the answer to the question turns. The special stress of it comes on the words "and including" and whether they carry a grant of all the saline lands or permit merely the selection of such lands as part of the 110,000 acres.

Construing the statute as granting all of the saline lands the State brought suit against the Montello Salt Company, herein called the Salt Company, in the District Court of the Third Judicial District, alleging that the Salt Company was in possession of certain of the lands, specifically describing them, claiming title under certain placer mining locations, and was threatening to take up and remove valuable deposits of salt therefrom. It was prayed that the Salt Company be adjudged to have no right, title, or interest in the lands and that the State be decreed their owner. An injunction pending the trial was also prayed, and general relief.

A preliminary injunction was issued. The answer of the Salt Company admitted that the lands were saline and alleged that it was the equitable owner of them by

virtue of conveyance from the original owners, about 1500 in number, all of whom were qualified to enter mineral claims under the land laws of the United States, including saline lands, and that such persons in groups of 8 entered upon 160 acres of the lands, discovered salt thereon, and did all that was necessary for the location of the same, including the filing of a notice of location, to be recorded in the office of the recorder within and for Tooele County, where the lands were situated. And it is alleged that thereafter, for the purpose of more economically developing the property, the locaters conveyed by quitclaim deeds their interest to the company and became stockholders of it.

It alleged that on July 16, 1894, date of the passage of the Enabling Act, the lands were not known to be saline, but were so covered with soil and other earthy substances that their true character was concealed, and were not discovered to be saline until November, 1906; "whereas, it is alleged, in truth and fact that under such substances and soil the said lands are covered by a deposit of salt varying from four to eight feet deep;" that prior to the discovery of their character the State had selected and received grants from the United States for the full amount of the 110,000 acres selected and located as provided in §§ 7 and 8 of the Enabling Act, and the grant by the United States for the University satisfied. It is further alleged that at the time of the passage of the Enabling Act only
acres had been classified by the Surveyor General of the United States within and for the then Territory of Utah, as saline lands, and that said amount was in the contemplation of Congress when it passed the act, and that the same was duly approved.

The lands, it is alleged, were subject to location under the placer laws of the United States.

A demurrer by the State to the answer was sustained, and, the Salt Company refusing to proceed further, judg-

ment was entered for the State in accordance with the prayer of the complainant and the injunction was made perpetual. The judgment was affirmed by the Supreme Court of the State.

Three interpretations of the act are presented. The State insists that all of the saline lands were granted, known and unknown. The Salt Company presents two views, either of which, it is contended, determines in its favor. (1) If there is a grant of saline lands in addition to the grant of 110,000 acres, it is only of lands known to be saline at the date of the act. (2) There is no grant of saline lands except as they may be selected as part of the grant of the 110,000 acres.

The State puts its reliance on the word "including," and urges that Congress used the word—(1) "in its true and proper sense, as defined by lexicographers; (2) in the sense of 'also.' "

In support of the first ground, the following definitions are given from Webster: "1. To confine within; to hold; to contain; to shut up, as, the shell of a nut *includes* the kernel; a pearl is *included* in the shell. 2. To comprehend, as a genus the species, the whole a part, an argument or reason the inference; to contain; to embrace; to relate to; to pertain to; as Great Britain *includes* England, Scotland and Wales."

And then the argument is that Congress grants, first, two townships in a county (this was an affirmation of a prior grant to the Territory) and in addition 110,000 acres of land, to be selected and located in legal subdivisions (§ 7 referred to in § 8 for the manner of selection) within the State in such manner as the legislature may provide, with the approval of the Secretary of the Interior (§ 6 referred to in § 7 for the manner of selection). It is hence argued that the 110,000 acres was a grant of an undesignated portion of the public domain, and provision for its selection was necessary and was made, but no pro-

vision was made for the selection and location of saline lands because all were granted "irrespective of their area or 'locality.'" They are determined by their character, it is said, and "when the grant is of all and not of a part, selection and location become superfluous terms." It is further urged that if Congress intended to make the saline lands subject only to be selected as part of the 110,000 acres, the phrase "including all saline lands" is awkwardly and ungrammatically placed, but properly and grammatically placed if an independent grant is intended, and that Congress is supposed to know the rules of grammar, citing *United States* v. *Goldenberg*, 168 U. S. 95, 103.

The argument is further developed by pointing out that the word "all" is comprehensive and excludes the idea of a limitation of quantity or the selection of a part. If such limitation or selection had been intended, it is said, the word "any" would have been used, not "all," and it cannot be supposed that Congress again used a word inappropriate to its purpose.

"Of still greater significance," it is urged, "is the use of the conjunction 'and' in the phrase 'and including all saline lands,'" and that from its frequent use and ready understanding no ambiguity can ever arise from its employment, it being "always employed to express the *relation of addition.*"

The State further urges that the word "including" may be taken as signifying "also," and illustrations are given, some from the statutes, some from decisions, Federal and state.

In *United States* v. *Pierce*, 147 Fed. Rep. 199, a provision in a tariff act was considered which provided as follows: "Wood: Logs and round manufactured timber, including pulp woods. . . ." The court (United States Circuit Court of Appeals, Second Circuit) said: "We think the word 'including' was used as the equivalent of 'also,' a sense in which it is frequently employed in tariff acts."

Hiller v. *United States*, 106 Fed. Rep. 73, was referred to. The latter case was also concerned with a tariff act. The provision passed upon was "embroideries, and all trimmings, including braids," etc. The construction given to the provision by the importer was that it covered "all trimmings, including braids" used for that purpose. The Government, on the other hand, contended that it meant "all trimmings, among which are included braids," etc., and that the word "including" was not used by way of specification but by way of addition. The court said: "It would be somewhat difficult to infer the legislative intention from the language of the paragraph without reference to the history of this part of the cotton schedule, because in the tariff acts the word 'including' is sometimes used merely to specify particularly that which belongs to the genus, and is sometimes used to add to the general class a species which does not naturally belong to it." The court resorted for explanation to the cotton schedule and decided in favor of the Government's contention, one member of the court dissenting.

In re Goetz's Will, 75 N. Y. Supp. 750, a testator bequeathed to his wife all of his "personal property, including furniture, plate and household effects." The court held the bequest was of all the personal property, saying " 'including' is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it." The State in the case at bar concedes that the definition is too broad and says that what the court probably meant was that as commonly used the word had such meaning.

The State reinforces its interpretation of the words of § 8 by other considerations. It is urged that if Congress intended the saline lands to be a part of another grant it is the first instance of the kind. Fourteen States are enumerated to which all of the salt springs within them re-

spectively were granted. In twelve of the States there was a limitation of the number of springs. To Illinois the grant was of "all springs within such State; to New Mexico the grant was of 65,000 acres of non-mineral lands, "together with all the saline lands in said Territory." To eighteen States no saline lands or salt springs were given.

The Enabling Act of Utah, it is suggested, was the guide to the grant to New Mexico. The latter, it is said, is more explicit, but indicates the same purpose to convey to each all of the saline lands within their respective borders.

The Salt Company opposes the contentions of the State and invokes against the meaning attributed to § 8 the rule of strict construction of grants by the Government. The purpose of the grant is, it is urged, to constitute a fund by the sale of the lands the income from which is to be used exclusively for a university and agricultural college, and that the result of the grant as construed by the State would be to endow them as no other educational institution is endowed. And so construed, it is said, even by the decision in this case, the grant of 110,000 acres will be increased 40,000 acres, and as the demurrer concedes the deposit of salt is from four to eight feet thick, there will be the further increase of two or three million tons of salt, worth in the aggregate an almost fabulous sum. Future discoveries, it is suggested, will increase the grant still more.

Such consequences of the State's contention at once challenges its soundness, and we recall that counsel for the State asserted at the oral argument that its title attached to all lands having salt deposits, no matter what thickness of arable soil lay above the deposits, and as it is insisted that no selection of saline lands is necessary, embarrassment in the administration of the land laws and serious conflicts of title may arise. However, let us consider the words of § 8. The determining word is, of course, the word "including." It may have the sense of addition,

as we have seen, and of "also;" but, we have also seen, "may merely specify particularly that which belongs to the genus." *Hiller* v. *United States*, 106 Fed. Rep. 73, 74. It is the participle of the word "include," which means, according to the definition of the Century Dictionary, (1) "to confine within something; hold as in an inclosure; to inclose; to contain." (2) "To comprise as a part, or as something incident or pertinent; comprehend; take in; as the greater includes the less; the Roman Empire included many nations." "Including" being a participle is in the nature of an adjective and is a modifier. What, then, does it modify as used in § 8? Necessarily, we think the preceding substantive phrase "one hundred and ten thousand acres of land," and we have the meaning of the section to be that the saline lands are to be contained in or comprise a part of the 110,000 acres of land. We see no particular awkwardness in the expression of the purpose, and it well may be contended that it needs not for its support the rule of strict construction. And such purpose is in harmony with grants of saline lands to other States. It is also sustained by the reports of the committees of the House and Senate.

In the case of *Barnard* v. *Darling*, 132 Massachusetts, 218, it was held that a legacy of $100, "including money trusteed at a certain bank," could not be construed as meaning that the sum of $100 was in addition to the sum in bank.

In *Henry's Executor* v. *Henry's Executor*, 81 Kentucky, 342, a bequest of $14,000, "including certain notes," was held to mean that the notes formed a part of the $14,000 and were not in addition thereto.

In *Neher* v. *McCook County*, 11 S. Dak. 422, it was held that a certain section of the laws of the State which provided that the sheriff's fees should be $16 for summoning a jury, "including mileage," did not entitle him to mileage in addition to the $16.

We have seen that the State urges that the word "and" is always employed to express the relation of addition, and it is said, with words of emphasis, that Congress cannot be supposed to have been ignorant of its meaning. The Supreme Court of the State also gave special significance to the use of "and," as adding something to that which preceded. The court also considered that the word "including" was used as a word of enlargement, the learned court being of opinion that such was its ordinary sense. With this we cannot concur. It is its exceptional sense, as the dictionaries and cases indicate. We may concede to "and" the additive power attributed to it. It gives in connection with "including" a quality to the grant of 110,000 acres which it would not have had—the quality of selection from the saline lands of the State. And that such quality would not exist unless expressly conferred we do not understand is controverted. Indeed, it cannot be controverted. Under the applicable statutes and uniform policy of the Government saline lands would not have been subject to selection in satisfaction of the 110,000 acre grant in the absence of a special provision authorizing their selection. Rev. Stat., § 2318; Act of January 12, 1877, 19 Stat. 221, c. 18; *Morton* v. *Nebraska*, 21 Wall. 660; *Cole* v. *Markley*, 2 L. D. 847; *Salt Bluff Placer*, 7 L. D. 549; *Southwestern Mining Co.*, 14 L D. 597; *Jeremy* v. *Thompson*, 20 L. D. 299; *A. H. Geissler*, 27 L. D. 515.

Something is attempted to be made of the fact as militating against the selection of saline lands as part of the grant of 110,000 acres that no time limit was fixed, as in grants of such lands in other States. The fact has some force, and giving it and the other contentions of the State proper weight, they cannot prevail against the considerations to which we have adverted.

It is finally contended that if the saline lands are included in the 110,000 acres the State has the right to select

all of them, and that until it declares its intention no rights can be acquired by others under the mining laws. We are not called upon to discuss the contention. It is alleged in the answer that the State has selected and received grants from the United States for the full amount of 110,000 acres, "selected and located as provided in §§ 7 and 8 of the Enabling Act." As the State demurred to the answer, the truth of the allegation must be considered as admitted.

Judgment reversed and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE HARLAN dissents.

FIFTH AVENUE COACH COMPANY *v.* CITY OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 159. Argued April 27, 28, 1911.—Decided May 29, 1911.

The courts of a State are competent to construe the laws of the State and to determine what powers a corporation derives thereunder, and the use to which such corporation may employ its necessary property; and so *held* as to uses to which stages may be put by a transportation company.

Whatever the general rights as to corporate property may be, a State, in granting a charter, may define and limit the use of property necessary to the exercise of the granted powers.

The rights of one to do that which if done by all would work public harm and injury are not greater because others refrain from exercising such rights.

Classification based on reasonable distinctions is not an unconstitutional denial of equal protection of the laws; and so *held* that an

ordinance of the city of New York prohibiting advertising vehicles in a certain street is not unconstitutional as denying equal protection to a transportation company operating stages on such street either because signs of the owners may be displayed on business wagons, or because another transportation company may display advertising signs on its structure. There is a purpose to be achieved, as well as a distinction, which justifies the classification.

This court may take judicial notice of the density of traffic on a well known thoroughfare.

Where rights exist to one they exist to all of the class to which that one belongs.

The charter of this transportation company *held* not to contain any provisions giving it such contract right to use its vehicles for advertising purposes as rendered a subsequent ordinance prohibiting such use unconstitutional under the contract clause of the Constitution.

A contract with a corporation is subject to the limitations of the charter rights of the corporation and is not impaired within the meaning of the contract clause of the Constitution by subsequent legislation that does not extend such limitations.

194 N. Y., 19, affirmed.

THE facts, which involve the validity of an ordinance of the city of New York prohibiting the display of advertisements under certain conditions, are stated in the opinion.

Mr. William H. Page, with whom *Mr. Gilbert H. Crawford* was on the brief, for plaintiff in error:

Plaintiff in error possesses a vested property right to rent space for the display of advertisements upon its stages, which is incidental to the ownership of the stages. The doctrine of *ultra vires* has no application.

The renting of space to be used for the display of advertisements is a property right belonging to the plaintiff in error, incidental to its ownership of the Fifth Avenue stages. *Foster* v. *London &c. Ry. Co.* (Ct. of App.), L. R. (1895) 1 Q. B. D. 711, 720; *Nantasket Beach Steamboat Co.* v. *Shea,* 182 Massachusetts, 147; *Louisiana* v. *Warehouse Co.,* 109 Louisiana, 64; *Benton* v. *City of Elizabeth,* 61 N. J. L. 411; *Coal Creek Co.* v. *Tenn. &c. Co.,* 106 Tennessee, 651; *French* v. *Quincy,* 3 Allen, 9; see also

Spaulding v. *City of Lowell*, 23 Pick. 71; *Worden* v. *City of New Bedford*, 131 Massachusetts, 23; *People* v. *City of Platteville*, 71 Wisconsin, 139; *Forrest* v. *Manchester Ry. Co.*, 30 Beav. 40; *Brown* v. *Winnisimmet Co.*, 11 Allen, 326.

All the corporations, whose rights were considered in the cases cited, were alike subject to the rule that corporations have no powers except those expressly granted by the legislature, and in every case the particular power sustained was not given expressly by charter, but was upheld as an implied incidental or appurtenant property right. *Jacksonville Railway & Navigation Co.* v. *Hooper*, 160 U. S. 514, 525; *N. Y. M. & N. Trans. Co.* v. *Shea*, 30 App. Div. (N. Y.) 266; *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. R. R. Co.*, 51 Fed. Rep. 309; aff'd 163 U. S. 564; *Interborough Co.* v. *New York*, 47 Misc. 221; *S. C.*, 53 Misc. 126. *City* v. *Interborough R. T. Co. and N. Y. City Interborough R. Co.*, 125 App. Div. (N. Y.) 437; *S. C.*, 194 N. Y. 528, upheld the right of the Interborough Rapid Transit Company to use ducts forming part of the construction of the subway, for the transmission of electric current sold by it to a surface railway company.

The right asserted by the plaintiff in error is an incidental right of property, which is independent of the question of corporate powers or franchises. *Foster* v. *London &c. Railway Co.*, *supra.*

When an intrinsically harmless, natural and ordinary use of property is forbidden by law, the owner is deprived of his property within the meaning of the constitutional provision. *People* v. *Green*, 85 App. Div. 400, 406. An obvious, ordinary use of property, as is the renting it to advertisers, is within the protection of the constitutional provision. *People* v. *Otis*, 90 N. Y. 48. See also *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 179; *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544; *Myer* v. *Adams*, 63 App. Div. (N. Y.) 540, 544; *Re Grade Commissioners*, 6 App. Div. 327, 334; *Belleville* v. *Turnpike Co.*, 234 Illinois, 428, 434.

The doctrine of *ultra vires* has no application. *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 173. Defendant in error has no right to raise the question.

The ordinance as construed by the Court of Appeals is an unlawful exercise of an assumed police power and operates to deprive the plaintiff in error of its property without due process of law in contravention of the Fourteenth Amendment.

A common carrier of passengers cannot be lawfully deprived of the incidental right to increase its income by leasing space on the exterior of screens, forming a necessary structural part of its stages, for the exhibition of advertisements which in no way affect the welfare, comfort, safety, health, convenience or morals of passengers or of the public.

The reasonableness of the ordinance is to be determined from the evidence contained in the record and from the findings based thereon which sustain unqualifiedly the contention of the plaintiff in error. *Egan* v. *Hart*, 165 U. S. 188, 189; *Stanley* v. *Schwalby*, 162 U. S. 255, 278; *Bement* v. *Nat. Harrow Co.*, 186 U. S. 71, 83; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 97.

The unreasonable character of the ordinance appears further from the scope of its provisions, as construed by the Court of Appeals.

This court is not bound by the determination of the state courts either as to the lawfulness of the ordinance or as to its effect upon the rights of the plaintiff in error. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

A municipal ordinance which prohibits the exercise of a property right which is not a nuisance, and which in no way affects the well-being, health, physical comfort, convenience, safety or morals of the community is, to the extent of such prohibition, unlawful under the Fourteenth Amendment.

As to limits upon the police power precluding the lawfulness of the ordinance, see *Yick Wo Case, supra; Lawton* v. *Steele,* 152 U. S. 133, 136, 138; in this case the court refers to various cases in which so-called police regulations had been declared illegal. *Rockwell* v. *Nearing,* 35 N. Y. 302; *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Mugler* v. *Kansas,* 123 U. S. 623, 661.

If there be any presumption it is to the contrary. The omnipresence of advertisements upon private property adjacent to highways along the principal thoroughfares of our large cities and trunk lines of railroads in or adjacent to every great city and even small ones bears forceful testimony to this effect. See *Yates* v. *Milwaukee,* 10 Wall. 497.

When an intrinsically harmless use of private property is prohibited by law, it must appear clearly that the prohibition accomplishes some purpose which is of benefit to the community. *Fisher Co.* v. *Woods,* 187 N. Y. 90; *Matter of Jacobs,* 98 N. Y. 98; *People* v. *Gillson,* 109 N. Y. 389; *People* v. *Armstrong,* 73 Michigan, 288; *People* v. *Rochester,* 44 Hun, 166.

The display of advertisements made by the advertising company under contract with the plaintiff, or the lease of space by the latter to the former, is not a nuisance and in no way injures or affects the welfare, health, physical comfort, safety, convenience or morals of passengers, or of the public.

This section has no application to the advertisements in question in this case. Wood on Nuisances, 3d ed., § 801, p. 1177.

The advertisements in question cannot be judicially condemned on æsthetic grounds. *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 251; *Commonwealth* v. *Boston Advertising Co.,* 188 Massachusetts, 348, 352 (1905); and see also *Passaic* v. *Paterson Advertising Co.,* 72 N. J. L. 285; *Bryan* v. *City of Chester,* 212 Pa. 259,

262. The ordinance cannot be sustained as a proper exercise of the police power as a regulation covering the use of the streets.

The ordinance creates a favored sub-class of vehicles which are permitted to display advertisements, it being self-evident that the term "business notices" includes "advertisements." *Gulf &c. Co.* v. *Ellis*, 165 U. S. 150, 165.

The ordinance clearly discriminates between two classes of passenger carriers, both having chartered rights to use the streets. *Soon Hing* v. *Crowley*, 113 U. S. 709.

The ordinance impairs the obligation of the contract between the plaintiff in error and the Railway Advertising Company. *Delmas* v. *U. S. Insurance Co.*, 14 Wall. 661, 668; *N. Y., N. H. & H. R. R. Co.* v. *Interstate Com. Comm.*, 200 U. S. 361, 401; *Chicago* v. *Sheldon*, 9 Wall. 50, 55.

The ordinance also operates to impair the obligation of the contract between the State of New York and the plaintiff.

This court has jurisdiction and will determine for itself the question of whether or not such a contract exists and whether the ordinance complained of impairs its obligation. *Mobile & Ohio R. R.* v. *Tennessee*, 153 U. S. 486, 493; *Society &c.* v. *Town of Pawlet*, 4 Pet. 480, 502.

Mr. Terence Farley, with whom *Mr. Theodore Connoly* was on the brief, for defendant in error:

A common carrier has no common-law right to use the public highways for advertising, not its own, but somebody's else business. Such purposes are absolutely and entirely foreign to the objects of its incorporation. *Armstrong* v. *Murphy*, 65 App. Div. 123; *Schwab* v. *Grant*, 126 N. Y. 473, 481, 482; *Palmer* v. *Larchmont Electric Co.*,

158 N. Y. 231; *Osborne* v. *Auburn Telephone Co.*, 189 N. Y. 393.

The highway may only be used for municipal or street purposes. The display of advertisements upon the stages of the plaintiff in error is neither a municipal nor a street purpose. *Hatfield* v. *Straus*, 189 N. Y. 208; *Callanan* v. *Gilman*, 107 N. Y. 360; *Hoey* v. *Gilroy*, 129 N. Y. 132; *Jorgensen* v. *Squires*, 144 N. Y. 280. See also *Ackerman* v. *True*, 175 N. Y. 353.

It is doubtful whether the city itself could sanction these displays. *Belt* v. *St. Louis*, 161 Missouri, 371.

Grants of franchises to public corporations are to be strictly construed. Nothing passes by intendment, and the only powers vested in them are those which are either expressly conferred or are necessarily implied for the purpose of enabling them to transact their public duties. *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550; *Water Co.* v. *Knoxville*, 200 U. S. 22; *Blair* v. *Chicago*, 201 U. S. 400.

A corporation has no powers whatever excepting those given by its charter or the law under which it is incorporated, either directly or as incidental to its purposes and existence. *Plank Road Co.* v. *Douglass*, 9 N. Y. 444; *Ren. & Sar. Ry.* v. *Davis*, 43 N. Y. 137; *N. Y. & H. R. R. Co.* v. *Kip*, 46 N. Y. 546; *Mohawk Bridge Co.* v. *Utica &c. Co.*, 6 Paige, 554; *Thomas* v. *Railroad Co.*, 101 U. S. 71, 82.

The private business of advertising tobacco, cigarettes, soap and toilet articles, is not incidental to the exercise of a public franchise to operate stage coaches for hire. It is not even an "incidental power." *First M. E. Church* v. *Dixon*, 178 Illinois, 260.

An "incidental power" is one which is directly and immediately appropriate to the execution of the specific power granted, and not one which has only a slight or remote relation to it. *Hood* v. *New York & N. H. R. Co.*,

22 Connecticut, 1, 16; *People ex rel. Peabody* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 283; 8 L. R. A. 497; *Burke* v. *Mead*, 159 Indiana, 252; 64 N. E. Rep. 880, 883; *State ex rel. Jackson* v. *Newman*, 51 La. Ann. 833; 25 So. Rep. 408; *Franklin Co.* v. *Lewiston Sav. Bank*, 68 Maine, 43, 45; 28 Am. Rep. 9.

An incidental power exists only for the purpose of enabling a corporation to carry out the powers expressly granted to it. *Moloney* v. *Pullman's Palace Car Co.*, 175 Illinois, 125; *Alton Mfg. Co.* v. *Garrett Biblical Institute*, 243 Illinois, 298; *Marshalltown Stone Co.* v. *Des Moines Brick Co.*, 126 N. W. Rep. 190; *State* v. *Morgan's L. & T. R. & S. S. Co.*, 106 Louisiana, 513.

The exercise of a power which might be beneficial to the principal business is not necessarily incidental to it. *Gause* v. *Commonwealth Trust Co.*, 196 N. Y. 134, 144; *Healy* v. *Illinois C. R. Co.*, 233 Illinois, 378; *Burke* v. *Mead*, 159 Indiana, 252; *Nicollet Bank* v. *Frisk-Turner Co.*, 71 Minnesota, 413; *Victor* v. *Louise Cotton Mills*, 148 N. Car. 107; *Curtis* v. *Leavitt*, 15 N. Y. 9, 165; *Peabody* v. *Chicago Gas Trust Co.*, 130 Illinois, 268; *Chewacla Lime-Works* v. *Dismukes*, 87 Alabama, 344; *Moloney* v. *Pullman's Palace Car Co.*, 175 Illinois, 125; *Hood* v. *N. Y. & N. H. R. Co.*, 22 Connecticut, 502; *Mutual Sav. Bank* v. *Meridan Agri. Co.*, 24 Connecticut, 159; *Naugatuck R. Co.* v. *Waterbury Button Co.*, 24 Connecticut, 468; *Elmore* v. *Naugatuck R. Co.*, 23 Connecticut, 457; *Penna. & Del. Nav. Co.* v. *Dandridge*, 8 Gill & J. (Md.) 248; *Orr* v. *Lacey*, 2 Doug. (Mich.) 230; *Hoagland* v. *Hannibal & St. Jo. R. Co.*, 39 Missouri, 451; *Root* v. *Godard*, 3 McLean (U. S. C. C.), 102; *Jacksonville &c. Ry. Co.* v. *Hooper*, 160 U. S. 514. See also the discussions of this subject in 2 Beach, Private Corpns., § 406 (c); 2 Cook, Corporations, 6th ed., § 681; 1 Elliott on Railroads, 2d ed., § 379; Field, Private Corporations, §§ 53, 54; 4 Thompson, Corporations, § 5638; 1 Wood on Railroads (Minor's ed.), § 170; *Davis* v. *Old*

Colony R. R. Co., 131 Massachusetts, 258, 272; *Pears* v. *Manhattan R. R. Co.*, N. Y. L. J., Jan. 3, 1890; *Pittsburg Traction Co.* v. *Seidell*, 6 Pa. Dist. (C. P.) 414; *National Car Adv. Co.* v. *L. & N. R. R. Co.*, 110 Virginia, 413.

The attempted exercise of powers which are not incidental to those which are either expressly granted or necessarily implied, is *ultra vires*. *Pearce* v. *Madison &c. R. R. Co.*, 21 How. (U. S.) 441; *Wiswall* v. *Plank Road Co.*, 56 N. Car. 183; *Downing* v. *Mt. Wash. Road Co.*, 40 N. H. 230; *Penna. Co.* v. *Dandridge*, 8 Gill & J. (Md.) 248. See also *Abbott* v. *Baltimore Packet Co.*, 1 Md. Ch. Dec. 542; *N. O., Florida & H. S. Co.* v. *Ocean Dry Dock Co.*, 28 La. Ann. 173.

The advertisements in question constitute a violation of the city ordinances. *Dry Dock, E. B. & B. R. R. Co.* v. *The Mayor &c.*, 47 Hun, 221.

The automobile stages of the plaintiff in error are vehicles of some description. They were attempted to be employed in a dual capacity, as stage coaches for the transportation of passengers; and as advertising wagons. *Luce* v. *Hassam*, 76 Vermont, 450.

The ordinance in question is a valid exercise of the legislative power of the city. The subject-matter of the legislation is within the powers of the corporation adopting it; it is in proper form; and it is perfectly reasonable. *Ringelstein* v. *Chicago*, 128 Ill. App. 483; McQuillan on Municipal Ordinances, § 186; *Wettengel* v. *City of Denver*, 20 Colorado, 552; *Commonwealth* v. *McCafferty*, 145 Massachusetts, 384; *Commonwealth* v. *Plaisted*, 148 Massachusetts, 375; *Commonwealth* v. *Ellis*, 158 Massachusetts, 555; *Philadelphia* v. *Brabender*, 201 Pa. St. 574; *Rochester* v. *West*, 164 N. Y. 510.

The validity of a statute or ordinance is not to be determined from its effect in a particular case, but from its general purpose and its efficiency to effect that end. *Gunning System* v. *City of Buffalo*, 75 App. Div. 31;

Chicago v. *Gunning System*, 214 Illinois, 628; *S. C.*, 2 Am. & Eng. Ann. Cases, 897.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error, which was also plaintiff in the court below, and we shall so refer to it, brought suit against the city in the Supreme Court of the County of New York. It alleged the following: It is a corporation duly formed and organized under the laws of the State of New York, and engaged in the operation of automobile stages upon routes extending along Fifth Avenue and other streets in the city of New York under and in pursuance of certain acts of the legislature of the State, having acquired, under various acts, all the property rights and franchises of the Fifth Avenue Transportation Company, Limited.

The city is a municipal corporation, organized under the laws of the State, and exercises its powers through officers and departments.

The plaintiff has operated stages upon its routes, and has used the interior of them for the display of advertising signs or matter, for many years. In May, 1905, with the complete substitution of automobile stages for horse stages, which was effected in July, 1907, it began to utilize and now utilizes, the exterior of its stages for such purposes, which it is able to do by reason of the necessary difference in form of the new vehicle and in the consequent increase of space adapted to use in the display of advertising matter, and from such use it is enabled to secure a substantial income from portions of its property not susceptible of being used otherwise for the purpose of its business.

The city, through its various officials, has interfered with such advertising, and intends to interfere with the operations of plaintiff's stages; and to prevent it from maintaining advertising signs upon the exterior thereof,

which will materially impair plaintiff's business, reduce its income, interfere with the exercise of its rights and franchises under the laws of the State, and "infringe its constitutional right to freedom in the use of its property." The damage to plaintiff will be irreparable, and no adequate compensation therefor can be obtained at law.

A permanent injunction was prayed.

The city answered, denying some allegations and admitting others, and set out a number of ordinances which precede that in controversy and set out the latter as follows:

"No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan, under a penalty of ten dollars for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising."

And it alleged that it was its duty to prevent "the display of the advertisements on the outside of the stages operated by complainant on Fifth Avenue."

After hearing, a judgment was entered dismissing the complaint. It was affirmed successively by the Appellate Division and by the Court of Appeals.

The trial court found that plaintiff had succeeded to all of the "rights, privileges, franchises and properties" of the Fifth Avenue Transportation Company, having the right to use automobile power instead of horses. The franchises of the transportation company were to carry passengers and property for hire; to establish, maintain and operate stage routes for public use in the conveyance of persons and property and to receive compensation therefor. It had other franchises not material to mention.

The court also found the following facts:

"The automobile omnibuses now operated over the routes of the plaintiff herein have two decks, on the lower of which are longitudinal seats for sixteen passengers, and

on the upper deck there are transverse seats for eighteen passengers. There is a stairway leading from the rear platform of the lower deck to the upper deck. Said stairway has a screen extending from the top to the bottom.

"The space used for advertising purposes on the vehicles of the plaintiff herein, is leased to the Railway Advertising Company, under an agreement dated May 11, 1907, from which the plaintiff herein receives the sum of $10,000 per annum, plus the sum of $200 per bus for exterior advertising. There was an agreement dated May 15, 1905, relating to interior advertising."

Advertising signs of various colors are upon the stairs of the elevated railways, in places on the elevated structures in the city of New York, and on the walls of the underground stations of the subway railroad company.

The advertising signs on plaintiff's coaches have no relation to their operation or to the physical comfort, convenience or health of the passengers or the public, and are merely an incident to the use of the stages in the operation of the franchise belonging to it for the transportation of passengers.

The findings of fact are very descriptive as to the size and character of the signs used. There are two, 13 feet by 2 feet 7 inches; another, 2 by 6½ feet; another, 4 by 2 feet; another, 8 feet by 20 inches; another, 2 feet 4 inches square; and others, 2 feet in length. And the signs or the pictures painted on them were in pink, blue, black, bright yellow, drab and red.

It was concluded from the facts found that the advertisements were not a nuisance; could not be judicially condemned on æsthetic grounds; that the health, safety or comfort of passengers and the public are not injured by them; that plaintiff failed to prove that their display was a necessary incident to the operation of the stages; that by its franchise it did not acquire the right to display advertisements for hire, and that such display was

ultra vires, being neither incidental to nor implied by the powers conferred by plaintiff's charter or by law. It was further concluded that the streets of New York could only be used for street purposes and that the display of advertising signs by plaintiff was not a street use.

The Appellate Division affirmed the judgment. The court said: "The complaint was properly dismissed and the judgment would be affirmed without opinion were it not for the fact that we do not concur in the reasons assigned by the learned justice at Special Term for making this disposition of the case. From the facts proved, and the findings made, a case is not presented to a court of equity which calls for the exercise of its powers." The court further expressed the view that plaintiff had a right under its charter to operate its stages, but whether it could or not, as an incident to such right, display signs or advertisements must be determined when the question arose and not, as in the pending case, upon a supposition which had for its foundation a mere threat which might never be carried into effect. And the court intimated that it was the concern of the State and not of the city if plaintiff was violating its charter; and further intimated that the advertisements did not violate the ordinance.

The Court of Appeals, however, agreed with the trial court. It reviewed the laws which constituted the charter powers of the Fifth Avenue Transportation Company and the laws by which plaintiff succeeded to the transportation company and its powers, and decided that the franchise of plaintiff "does not expressly include the right to use the public streets mentioned therein for advertising purposes or to carry or maintain exterior advertisements on its stages and the carrying of such advertisements is not a necessary or essential incident to its express franchise rights. Such exterior advertising is in no way related to the carrying of passengers for hire." The court also decided that the city had the power to pass the ordinance

which is in question and that plaintiff offended against its provisions, and, after discussing at some length the powers of the city, among other things, said:

"Fifth Avenue is an important and much-used street. At certain times of the day slow-moving trucks are barred therefrom on account of the congestion in such street. The plaintiff's contract with the advertising company allows the advertisements on its stages to become the conspicuous part of their exterior, and the business of advertising for the purpose of revenue is of such value to the plaintiff that the gross income therefrom exceeds six per cent upon its entire capital stock."

* * * * * * * *

"It appears that the right to display garish advertisements in conspicuous places has become a source of large revenue. If the plaintiff can cover the whole or a large part of the exterior of its stages with advertisements for hire, delivery wagons engaged by the owners in their usual business or regular work can rightfully be covered with similar advertisements. Cars and vehicles of many descriptions, although not engaged exclusively in advertising, and thus not incumbering the street exclusively for advertising purposes, may be used for a similar purpose. The extent and detail of such advertisements when left wholly within the control of those contracting therefor would make such stages, wagons or cars a parade or show for the display of advertisements which would clearly tend to produce congestion upon the streets upon which they were driven or propelled. The exaggerated and gaudy display of advertisements by the plaintiff is for the express purpose of attracting and claiming the attention of the people upon the streets through which the stages are propelled."

The court cited *Commonwealth* v. *McCafferty*, 145 Massachusetts, 384, in which an ordinance was sustained which prohibited the placing or carrying on sidewalks,

show-boards, placards or signs for the purpose of there displaying the same. It was said in this case that the tendency and effect of such signs might be to collect crowds and thus interfere with the use of the sidewalks by the public and lead to disorder, and that such a provision applicable to the crowded streets of a populous city was not unreasonable. The Court of Appeals, therefore, concluded that the ordinance of the city of New York was "not wholly arbitrary and unreasonable," and that the plaintiff "had failed to show that the maintenance of such exterior advertisements is within its express franchise rights or that such ordinance prohibiting their maintenance on its stages is not a proper exercise of the authority vested in the city to regulate the business conducted in the streets thereof, and the trial court was, therefore, right in dismissing the plaintiff's complaint."

To this conclusion complainant urges (1) it has a property right to rent space on its stages for advertisements, and the doctrine of *ultra vires* has no application; (2) the ordinance, as construed by the Court of Appeals, deprives plaintiff in error of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States; (3) denies to it the equal protection of the laws; (4) impairs the obligation of the contract between plaintiff and the Railway Advertising Company, and that between the State of New York and plaintiff.

To sustain the first proposition plaintiff cites a number of cases which are not in point. It may be that in other jurisdictions it has been decided, construing the charters granted, that under the local laws particular uses of property may be merely incident to its ownership, and not *ultra vires*. A sufficient answer to the cases is that the law is held to be different in New York.

It is surely competent for the courts of New York to construe the laws of the State and decide what powers a

corporation derives under them, or to what uses it may employ its property necessary for the exercise of those powers. And the stages used on the streets of the city transporting passengers is the very exercise of the franchise granted to plaintiff, and is not like the instances of the cited cases where property was not intimately used in the exercise of charter rights. The right of property contended for in its full breadth would make property intended for corporate use as absolute as property not so committed or not limited by charter conditions. And this, we think, is enough for the decision of the case. No matter what may be the general rights of corporate property, it cannot be contended that a State granting a charter may not strictly define and limit the uses of the property necessary to the exercise of the powers granted. And this is what the Court of Appeals has decided the laws of New York have done, and that the Fifth Avenue Transportation Company was, and the plaintiff, as the successor of its rights, is subject to the limitations imposed by those laws. When plaintiff went beyond the limitations, it became subject to the ordinance as construed by the Court of Appeals. "General advertising for hire," the court said, "is by the ordinance prohibited, whether carried on wagons wholly used for advertising or in connection with the ordinary or usual business in which wagons are engaged." Plaintiff's stages are therefore brought under even a broader principle than that of its charter. The same rule is applied to that as to other wagons and within the exercise of the police power illustrated in *Commonwealth* v. *McCafferty*, *supra*. We concur with the Court of Appeals, for we cannot say that it was an arbitrary exercise of such power. The density of the traffic on Fifth Avenue we might take judicial notice of, but it is represented to us as a fact by the Court of Appeals, and we find from the opinion of the trial court and the exhibits in the record that "the signs advertised in various glaring

colors and appropriate legends divers articles," for example, Duke's Mixture Smoking Tobacco, Bull Durham Smoking Tobacco, and Helmar Turkish Cigarettes. There were painted figures of animals, men in oriental costume, busts of men and women, all made conspicuous by contrasted coloring. Describing the signs, the court said: "The colors used—green, dark blue, white, light blue, yellow, drab, and various brilliant shades of red—are contrasted so as to attract attention and are not blended so as to produce a harmonious or artistic effect, and the resulting painting constitutes a disfigurement rather than an ornament." If plaintiff be right, however the advertisements may be displayed is immaterial. There can be no limitation of rights by degrees of the grotesque. If such rights exist in plaintiff they exist in all wagon owners, and there might be such a fantastic panorama on the streets of New York that objection to it could not be said to have prompting only in an exaggerated æsthetic sense. That rights may not be pushed to such extremes does not help plaintiff. Its rights are not greater because others may not exercise theirs.

This discussion of plaintiff's first contention answers in effect its other contentions. Necessarily, if plaintiff had no right under its charter to use its stages for advertising purposes, or if the ordinance of the city was a proper exercise of the police power, plaintiff was not deprived of its property without due process of law, which is the basis of its second contention.

We pass, therefore, to the third and fourth contentions. The third contention is that the ordinance denies plaintiff the equal protection of the laws, and to support the contention it is urged that "no advertising wagons are allowed in the streets, but 'ordinary business wagons' when 'engaged in the usual business or work of the owner, and not used merely or mainly for advertising,' are permitted to exhibit 'business notices.' " It is argued that the ordi-

nance "thus creates a favored sub-class of vehicles which are permitted to display advertisements." In view of the power of the State and the city acting with the authority of the State, to classify the objects of legislation, we will not discuss the contention. The distinction between business wagons and those used for advertising purposes has a proper relation to the purpose of the ordinance and is not an illegal discrimination. The same comment may be made as to the charge that the ordinance discriminates between two classes of passenger carriers having charter rights to use the streets. As an instance of this charge plaintiff adduces the findings of the trial court that advertising is allowed on the stairs of the elevated railways and on elevated structures. This difference, too, is within the power of classification which the city possesses.

The fourth and last contention of plaintiff is that the ordinance impairs the obligations of the contract between plaintiff and the Railway Advertising Company and the contract between it and the State of New York.

This contention was made in the trial court, as follows: "Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles, will impair the obligation of plaintiff's contract with the State."

It is doubtful if the point was properly raised in the courts below, but granting that it was, there are obvious answers to it. At the time of the contract of plaintiff with the Advertising Company there existed an ordinance almost identical in terms with that in controversy, and, besides, the contract was necessarily subject to the charter of plaintiff. And if we should exercise the right to construe the charter as a contract with the State we should be unable to discern in it a right in plaintiff to use its stages for advertising purposes in the manner shown by this record.

Judgment affirmed.

BEAN v. MORRIS.

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

No. 122. Argued April 11, 12, 1911.—Decided May 29, 1911.

Where streams flow through more than one State, it will be presumed, in the absence of legislation on the subject, that each allows the same rights to be acquired from outside the State as could be acquired from within.

The doctrine of appropriation has always prevailed in that region of the United States which includes Wyoming and Montana; it was recognized by the United States before, and by those States since, they were admitted into the Union and the presumption is that the system has continued.

In this case an appropriation validly made under the laws of Wyoming is sustained as against riparian owners in Montana.

159 Fed. Rep. 651, affirmed.

THE facts are stated in the opinion.

Mr. T. J. Walsh, with whom *Mr. George W. Pierson* and *Mr. Cornelius B. Nolan* were on the brief, for petitioners.

Mr. William M. Ellison, with whom *Mr. Alexander M. McCoy* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought by the respondent, Morris, to prevent the petitioners from so diverting the waters of Sage Creek in Montana as to interfere with an alleged prior right of Morris, by appropriation, to two hundred and fifty inches of such waters in Wyoming. Afterwards the other respondent, Howell, was allowed to intervene

and make a similar claim. Sage Creek is a small creek, not navigable, that joins the Stinking Water in Wyoming, the latter stream flowing into the Big Horn, which then flows back northerly into Montana again, and unites with the Yellowstone. The Circuit Court made a decree that Morris was entitled to 100 inches miner's measurement, of date April, 1887, and that, subject to Morris, Howell was entitled to one hundred and ten inches, of date August 1, 1890, both parties being prior in time and right to the petitioners. 146 Fed. Rep. 423. On appeal the findings of fact below were adopted and the decree of the Circuit Court affirmed by the Circuit Court of Appeals. 159 Fed. Rep. 651; 86 C. C. A. 519.

It was admitted at the argument that but for the fact that the prior appropriation was in one State, Wyoming, and the interference in another, Montana, the decree would be right, so far as the main and important question is concerned. It is true that some minor points were suggested, such as laches, abandonment, the statute of limitations, &c., but the findings of two courts have been against the petitioners upon all of these, and we see no reason for giving them further consideration. So we pass at once to the question of private water rights as between users in different States.

We know no reason to doubt, and we assume, that, subject to such rights as the lower State might be decided by this court to have, and to vested private rights, if any, protected by the Constitution, the State of Montana has full legislative power over Sage Creek while it flows within that State. *Kansas* v. *Colorado*, 206 U. S. 46, 93–95. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line. *Missouri* v. *Illinois*, 200 U. S. 496, 521. *Rickey Land & Cattle Co.* v. *Miller & Lux*,

218 U. S. 258, 260. But with regard to such rights as came into question in the older States, we believe that it always was assumed, in the absence of legislation to the contrary, that the States were willing to ignore boundaries, and allowed the same rights to be acquired from outside the State that could be acquired from within. *Mannville Co.* v. *Worcester*, 138 Massachusetts, 89. *Thayer* v. *Brooks*, 17 Ohio, 489. *Slack* v. *Walcott*, 3 Mason, 508, 516. *Stillman* v. *White Rock Manuf. Co.*, 3 Woodb. & M. 538. *Rundle* v. *Delaware & Raritan Canal Co.*, 1 Wall. Jr. 275, 14 How. 80. *Foot* v. *Edwards*, 3 Blatchf. 310. See *Wooster* v. *Great Falls Manuf. Co.*, 39 Maine, 246, 253. *Armendiaz* v. *Stillman*, 54 Texas, 623; *State* v. *Lord*, 16 N. H. 357. *Howard* v. *Ingersoll*, 17 Alabama, 780, 793. There is even stronger reason for the same assumption here. Montana cannot be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage Creek, flows back into that State. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory, Rev. Stat., §§ 2339, 2340, p. 429, Act of March 3, 1877, c. 107, 19 Stat. 377, and is recognized by both States now. Before the state lines were drawn of course the principle prevailed between the lands that were destined to be thus artificially divided. Indeed, Morris had made his appropriation before either State was admitted to the Union. The only reasonable presumption is that the States upon their incorporation continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or

expressed. See *Willey* v. *Decker*, 11 Wyoming, 496; *Smith* v. *Denniff*, 24 Montana, 20.

It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper State, if it should seek to do all that it could. The grounds upon which such limits would stand are referred to in *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U. S. 258, 261. So it is unnecessary to consider whether Morris is not protected by the Constitution; for it seems superfluous to fall back upon the citadel until some attack drives him to that retreat. Other matters adverted to in argument, so far as not disposed of by what we have said, have been dealt with sufficiently in two courts. It is enough here to say that we are satisfied with their discussion and confine our own to the only matter that warranted a certiorari or suggested questions that might be grave.

Decree affirmed.

UNITED STATES *v.* JOHNSON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 433. Argued April 13, 1911.—Decided May 29, 1911.

The term "misbranded" and the phrase defining what amounts to misbranding in § 8 of the Food and Drugs Act of June 30, 1906, 34 Stat. 768, c. 3915, are aimed at false statements as to identity of the article, possibly including strength, quality and purity, dealt with in § 7 of the act, and not at statements as to curative effect; and so *held* that a statement on the labels of bottles of medicine that the contents are effective as a cure for cancer, even if misleading, is not covered by the statute.

177 Fed. Rep. 313, affirmed.

THE facts are stated in the opinion.

The Solicitor General, with whom *Mr. Assistant Attorney General Denison*, *Mr. George P. McCabe* and *Mr. Loring C. Christie*, Special Assistants to the Attorney General, were on the brief, for the United States:

The acts charged in the indictment fall within the letter of the statute, and the matters charged are not to be carved out of the statute as being not within its purposes. They are both injurious to health and frauds on the public.

Even if the public health had been the sole concern of the statute the matters charged in the indictment would have fallen within its intendment.

Cheats and frauds were, however, among the principal mischiefs denounced by the act. See committee reports, congressional debates, and the other acts *in pari materia*.

Reference is made to debates in order to show what the evil was which the legislature intended to remedy. *Jennison* v. *Kirk*, 98 U. S. 459; *Holy Trinity Church* v. *United States*, 143 U. S. 465; *American Net. &c. Co.* v. *Worthington*, 141 U. S. 473; *Binns* v. *United States*, 194 U. S. 486, 495, 496; *Blake* v. *National Banks*, 23 Wall. 307, 319; and see 59 Cong., 1st sess., H. Rept. No. 2118, to accompany S. 88; 58 Cong., 2d sess., Sen. Rept. No. 1209, to accompany H. R. 6295; Sen. Bill, 198, 58th Cong., 2d sess.; 57 Cong., 1st sess., S. Rept. No. 972, to accompany S. 3342.

Other statutes *in pari materia* indicate the same policy to deal not only with health but with frauds. See Act of July 1, 1902, 32 Stat. 632; Rev. Stat., § 2934; Act of March 3, 1905, 33 Stat. 87.

The legislative history of the enactment affirmatively shows that this very evil was considered and discussed and intended to be covered.

As soon as it was proposed to extend the definition of the word "drug" so as to include patent medicines, opposition arose on this very ground, that misrepresentations of curative properties would be covered. The discussion affirmatively showed that this was intended, and the

opposition failed. House bill No. 6295, § 5, 58th Cong., 2d sess., p. 34; bill No. 3342, 57th Cong., 1st sess; Sen. Rep. No. 972, 58th Cong., 2d sess., Sen. Rep. No. 1209, pp. 4–68; 58th Cong., 2d sess.; Id. pp. 97–100.

The amendment to the bill changing the definition of misbranding so as to cover not merely "any statement regarding the ingredients or substances contained in the article," but statements regarding the article itself, was made as a result of doubt whether this sort of thing would otherwise be covered. A substitute bill which was urged as preferable because it excluded misstatements of curative properties was rejected.

The practice of patent-medicine concerns to make extravagant "cure-all claims" was one of the principal evils denounced in the public agitation contemporaneous with the progress of the bill. The facts of this agitation being part of the history of the times can be examined as indicating the nature of the evils attacked. *United States* v. *Pac. R. R. Co.*, 91 U. S. 72, 79; *Church of the Holy Trinity* v. *United States, supra*, p. 464; *Smith* v. *Townsend*, 148 U. S. 490; *Aldridge* v. *Williams*, 3 How. 1, 24; *United States* v. *Freight Assn.*, 166 U. S. 290; *McKee* v. *United States*, 164 U. S. 287, 292; *Mobile R. R.* v. *Tennessee*, 153 U. S. 486, 502; *Preston* v. *Browden*, 1 Wheat. 115, 121; *Ex parte Milligan*, 4 Wall. 2, 114; *Hamilton* v. *Rathbone*, 175 U. S. 419; *Pac. Coast S. S. Co.* v. *United States*, 33 Ct. Cl. 36, 56.

From the first enforcement of the act the officers charged by it with the duty to put it in operation have construed and applied it to include fraudulent labels of the character here involved, and this construction was uniformly acquiesced in except that the present defendant has contested it. *United States* v. *Moore*, 95 U. S. 760, 763; *Heath* v. *Wallace*, 138 U. S. 573, 582; *Hastings Co.* v. *Whitney*, 132 U. S. 357, 366; *Five Per Cent Cases*, 110 U. S. 471; *Edwards* v. *Darby*, 12 Wheat. 206; *Brown* v. *United States*,

113 U. S. 568; *Union Insurance Co.* v. *Hoge*, 21 How. 35; *Smyth* v. *Fiske*, 23 Wall. 374.

See also Notices of Judgment, published by the Department of Agriculture, Nos. 16, 25, 29, 54; see also *United States* v. *Munyon's Remedy Co.*, U. S. Dist. Ct., E. D. Pennsylvania, Dec. 14, 1910.

The similar provisions of various state statutes have been construed by the administrative officers as covering false statements as to curative properties.

Practically the general definition of misbranding would have no application to the second class of drugs unless it applies to the sort of thing here involved.

The cure-all evil is the one great misbranding evil of the patent-medicine trade. In using the unlimited language which it did use Congress cannot have intended not to exclude this evil, thereby practically leaving the misbranding provisions without application to this great branch of the subject of the act.

Nor are these affirmative indications of the intent of Congress to be overruled on the theory advanced in the argument below that such statements of curative properties of patent medicines are matters of scientific opinion and that Congress has no power to control them.

As the bill passed the Senate it contained the word "knowingly." Cong. Rec., vol. 40, pt. 1, p. 897. But that word was eliminated by the House amendment (H. R. Rep. 2118, 59th Cong., 1st sess.), and without the word the bill became a law.

Our jurisprudence does not place matters beyond legal control merely because their correct solution may depend upon opinion. See *Buttfield* v. *Stranahan*, 192 U. S. 470; Act of July 1, 1902, c. 1378, 32 Stat. L. 728, and see also annual appropriation acts for the Department of Agriculture, June 30, 1906, 34 Stat. 674; Mar. 4, 1907, 34 Stat. 1260; May 23, 1908, 35 Stat. 254; Mar. 4, 1909, 35 Stat. 1043; May 26, 1910, 36 Stat. 419; August 30, 1890 (ch.

839, 26 Stat. 414); *Crossman* v. *Lurman*, 192 U. S. 189; acts of August 3, 1888, c. 376, 22 Stat. 214; March 3, 1891, c. 551, 26 Stat. 1084; and see *State* v. *Board of Examiners*, 32 Minnesota, 324; *People* v. *McCoy*, 125 Illinois, 289; *Dent* v. *West Virginia*, 129 U. S. 114.

The law of malpractice holds a physician to that degree of skill and learning which is possessed by the average member of his profession. *Pike* v. *Housinger*, 155 N. Y. 201; *Logan* v. *Field*, 75 Mo. App. 594; *Jackson* v. *Burnham*, 20 Colorado, 532; *Patten* v. *Wiggin*, 51 Maine, 594; *Nelson* v. *Harrington*, 72 Wisconsin, 591.

The laws for the determination of insanity and the segregation of the insane, and in general all health and quarantine laws, stand entirely upon matters of scientific opinion. *Edgington* v. *Fitzmaurice*, 29 L. R. Ch. Div. 459.

Even in this class of cases matters which may theoretically be matters of opinion or state of mind are not exempt from the notice of the law. *Durland* v. *United States*, 161 U. S. 306; *Butler* v. *Watkins*, 13 Wall. 456; *Mo. Drug Co.* v. *Wyman*, 129 Fed. Rep. 623; *Rogers* v. *Va. Car. Chem. Co.*, 149 Fed. Rep. 1, 78 C. C. A. 615; *Ten Mile Coal & Coke Co.* v. *Burt*, 170 Fed. Rep. 332; *Kohler Mfg. Co.* v. *Beeshore*, 59 Fed. Rep. 572; *Fenwick* v. *Grimes*, 8 Fed. Cases, 4734, 5 Cranch C. C. 603; *Hedin* v. *Minn. Medical Institute*, 62 Minnesota, 146; *Olston* v. *Oreg. Water Power Co.* (Ore.), 96 Pac. Rep. 1095; *Walters* v. *Rock* (N. Dak.), 115 N. W. Rep. 511; *McDonald* v. *Smith*, 139 Michigan, 211; *Nowlin* v. *Snow*, 40 Michigan, 699; *Totten* v. *Burhans*, 91 Michigan, 495; *Stoney Creek Woolen Co.* v. *Smalley*, 111 Michigan, 321; *Johnson* v. *Monell* (N. Y.), 2 Keyes, 655; *Stewart* v. *Emerson*, 52 N. H. 301; *Bugham* v. *Bank*, 159 Pa. 94; *Ayres* v. *French*, 41 Connecticut, 142; *Down* v. *Tucker*, 41 Connecticut, 197; *Laing* v. *McKee*, 13 Michigan, 124; *Sweet* v. *Kimball*, 166 Massachusetts, 333; *Adams* v. *Gillig*, 139 App. Div. (N. Y.) 494; *Smith* v. *Smith* (Ala.), 45 So. Rep. 168; *Brady* v. *Elliott*, 146 N. Car. 578; *Carr* v.

Craig (Iowa), 116 N. W. Rep. 720; *City Deposit Bank* v. *Green* (Iowa), 115 N. W. Rep. 893; *Wolfe* v. *Burke*, 56 N. Y. 115, 122; *Edgington* v. *Fitzmaurice*, 29 L. R. Ch. Div. 459, *supra*. *Am. School of Healing* v. *McAnnulty*, 187 U. S. 94, distinguished.

From the point of view necessary to be taken by a legislature, these statements of cure-all properties of patent medicines are not in any real scientific sense matters of opinion. They are charlatanic and their falseness is generally demonstrable without real dispute. See the code of the American Medical Association, 1883, Art. 1, § 3.

The constitutional power of Congress to prohibit use of the instruments of interstate commerce to the injury of the public is no longer open to question. *Reid* v. *Colorado*, 187 U. S. 137, 146; *The Lottery Case*, 188 U. S. 321; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492–493; *Crossman* v. *Lurman*, 192 U. S. 189, 199, 200; *St. L. & I. M. Ry.* v. *Taylor*, 210 U. S. 281, 287.

And see the following cases upholding the constitutionality of this act. *United States* v. *Seventy-four Cases of Grape Juice*, 181 Fed. Rep. 629; *Shawnee Milling Co.* v. *Temple*, 179 Fed. Rep. 517.

This power does not exist in the States because delegated to the Federal authority. *Bowman* v. *Railway Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100, 108. See *Re Rahrer*, 140 U. S. 545.

The statute is remedial, and should not be narrowly construed. In this respect it is like the Interstate Commerce Act—a remedial statute with penal incidental features. *N. H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361, 391; *Taylor* v. *United States*, 3 How. 191.

Mr. James H. Harkless, with whom *Mr. Charles S. Crysler* and *Mr. Clifford Histed* were on the brief, for defendant in error:

The purpose of the statute is to secure pure food and drugs.

As related to drugs the term "misbranded" used in § 8 is confined to representations concerning the identity of the drug, its physical constituents, or chemical ingredients. It does not refer to claims for curative properties of such drugs.

A claim that certain beneficial results will follow the use of a prescribed drug or medicine obviously is not a statement of an existing fact, but is a forecast concerning a future event and is in the nature of things an expression of an opinion.

The court will take judicial notice that there are many different schools of medicine whose methods of treatment, and whose opinions concerning the curative properties of drugs and medicines, radically differ—some refusing to ascribe any medicinal virtue to any drug under any circumstances. No method has yet been devised by finite man to harmonize these warring factions, and indeed, it cannot be said that the truth lies entirely with any one of them. Congress cannot under the circumstances be deemed to have intended by this legislation to invade a field so speculative and conjectural—certainly not in the absence of apt language clearly and irresistibly evincing such a purpose.

The drug is the subject-matter of the commerce. The brand or label which it bears is but an incident to the commodity itself and forms a part of the commerce in the article only in so far as it deals with the identity of the commodity contained in the package. But a statement which gives no information concerning the commodity itself, its physical constituents, or its chemical ingredients is not so related to the commodity as to form a part of the commerce in the article and is not, therefore, a part and parcel of the commerce within the regulating power contemplated by this statute.

This is a criminal statute creating and denouncing a new offense. All matters of doubtful interpretation are

to be resolved in favor of the defendant and he should not be subjected to its pains and penalties except upon clear and undoubted warrant from the plain and inevitable language of the statute.

The construction sought by the Government that this statute extends to claims concerning the curative properties of medicines or drugs would render the statute void as being beyond the power of Congress to enact.

By not giving to the statute an extreme and strained construction, grave and doubtful constitutional questions are avoided, and at the same time it is susceptible to such reasonable interpretation as to make it a vital and effective instrument in curing the manifest evils which prompted its enactment. Under such circumstances, therefore, there is no occasion for resorting to such doubtful and forced interpretation.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment for delivering for shipment from Missouri to Washington, D. C., packages and bottles of medicine bearing labels that stated or implied that the contents were effective in curing cancer, the defendant well knowing that such representations were false. On motion of the defendant the District Judge quashed the indictment (177 Fed. Rep. 313), and the United States brought this writ of error under the Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The question is whether the articles were misbranded within the meaning of § 2 of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, making the delivery of misbranded drugs for shipment to any other State or Territory or the District of Columbia a punishable offense. By § 6 the term drug includes any substance or mixture intended to be used for the cure, mitigation or prevention of disease. By § 8, c. 3915, 34 Stat., p. 770, the

term misbranded "shall apply to all drugs, or articles of food, . . . the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced. . . . An article shall also be deemed to be misbranded: In case of drugs: First. If it be an imitation of or offered for sale under the name of another article. Second. [In case of a substitution of contents,] or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein."

It is a postulate, as the case comes before us, that in a certain sense the statement on the label was false, or, at least, misleading. What we have to decide is whether such misleading statements are aimed at and hit by the words of the act. It seems to us that the words used convey to an ear trained to the usages of English speech a different aim; and although the meaning of a sentence is to be felt rather than to be proved, generally and here the impresson may be strengthened by argument, as we shall try to show.

We lay on one side as quite unfounded the argument that the words 'statement which shall be misleading in any particular' as used in the statute do not apply to drugs at all—that the statements referred to are those 'regarding such article,' and that 'article' means article of food, mentioned by the side of drugs at the beginning of the section. It is enough to say that the beginning of the sentence makes such a reading impossible, and that article expressly includes drugs a few lines further on in what we have quoted, not to speak of the reason of the

thing. But we are of opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality and purity, dealt with in § 7. In support of our interpretation the first thing to be noticed is the second branch of the sentence: 'Or the ingredients or substances contained therein.' One may say with some confidence that in idiomatic English this half, at least, is confined to identity, and means a false statement as to what the ingredients are. Logically it might mean more, but idiomatically it does not. But if the false statement referred to is a misstatement of identity as applied to a part of its objects, idiom and logic unite in giving it the same limit when applied to the other branch, the article, whether simple or one that the ingredients compose. Again, it is to be noticed that the cases of misbranding, specifically mentioned and following the general words that we have construed, are all cases analogous to the statement of identity and not at all to inflated or false commendation of wares. The first is a false statement as to the country where the article is manufactured or produced; a matter quite unnecessary to specify if the preceding words had a universal scope, yet added as not being within them. The next case is that of imitation and taking the name of another article, of which the same may be said, and so of the next, a substitution of contents. The last is breach of an affirmative requirement to disclose the proportion of alcohol and certain other noxious ingredients in the package—again a matter of plain past history concerning the nature and amount of the poisons employed, not an estimate or prophecy concerning their effect. In further confirmation, it should be noticed that although the indictment alleges a wilful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all. It was natural enough to throw this risk on

shippers with regard to the identity of their wares, but a very different and unlikely step to make them answerable for mistaken praise. It should be noticed still further that by § 4 the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns ingredients and kind, but hardly so as to medical effects.

To avoid misunderstanding we should add that, for the purposes of this case, at least, we assume that a label might be of such a nature as to import a statement concerning identity, within the statute, although in form only a commendation of the supposed drug. It may be that a label in such form would exclude certain substances so plainly to all common understanding as to amount to an implied statement of what the contents of the package were not; and it may be that such a negation might fall within the prohibitions of the act. It may be, we express no opinion upon that matter, that if the present indictment had alleged that the contents of the bottles were water, the label so distinctly implied that they were other than water, as to be a false statement of fact concerning their nature and kind. But such a statement as to contents, undescribed and unknown, is shown to be false only in its commendatory and prophetic aspect, and as such is not within the act.

In view of what we have said by way of simple interpretation we think it unnecessary to go into considerations of wider scope. We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matter of fact, so that food and drugs should be what they professed to be, when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart. See *School of*

Magnetic Healing v. *McAnnulty*, 187 U. S. 94. As we have said above, the reference of the question of misbranding to the Bureau of Chemistry for determination confirms what would have been our expectation and what is our understanding of the words immediately in point.

Judgment affirmed.

MR. JUSTICE HUGHES, with whom MR. JUSTICE HARLAN and MR. JUSTICE DAY concurred, dissenting:

I am unable to concur in the judgment in this case, for the following reasons:

The defendant was charged with delivering for shipment in interstate commerce certain packages and bottles of drugs alleged to have been misbranded in violation of the Food and Drugs Act of June 30, 1906, chapter 3915, 34 Stat. 768.

The articles were labeled respectively "Cancerine tablets," "Antiseptic tablets," "Blood purifier," "Special No. 4," "Cancerine No. 17," and "Cancerine No. 1,"—the whole constituting what was termed in substance "Dr. Johnson's Mild Combination Treatment for Cancer." There were several counts in the indictment with respect to the different articles. The labels contained the words "Guaranteed under the Pure Food and Drugs Act, June 30, 1906;" and some of the further statements were as follows:

"Blood Purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed.

"Special No. 4. . . . It has a strong stimulative and absorptive power; will remove swelling, arrest development, restore circulation, and remove pain. Is indicated in all cases of malignancy where there is a tendency of the disease to spread, and where there is considerable hardness surrounding the sore. Applied thoroughly to a lump or to an enlarged gland will cause it to soften, become smaller, and be absorbed.

"Cancerine No. 1. . . . Tendency is to convert the sore from an unhealthy to a healthy condition and promote healing. Also that it destroys and removes dead and unhealthy tissue."

In each case the indictment alleged that the article was "wholly worthless," as the defendant well knew.

In quashing the indictment the District Court construed the statute. The substance of the decision is found in the following words of the opinion: "Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of 'the ingredients or substances contained therein which shall be false or misleading,' by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it." And the question on this writ of error is whether or not this construction is correct. *United States* v. *Keitel*, 211 U. S. 370.

What then is the true meaning of the statute?

Section 8 provides:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any

particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

The words "such article" in this section, as is shown by the immediate context, refer to "drugs" as well as to "food."

"Drugs" are thus defined in § 6:

"SEC. 6. That the term 'drug,' as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, *and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.*"

Articles, then, intended to be used for curative purposes, such as those described in the indictment, are within the statute, though they are not recognized in the United States Pharmacopœia or the National Formulary. And the offense of misbranding is committed if the package or label of such an article bears any statement regarding it "which shall be false or misleading in any particular."

But it is said that these words refer only to false statements which fix the identity of the article. According to the construction placed upon the statute by the court below in quashing the indictment, if one puts upon the market, in interstate commerce, tablets of inert matter or a liquid wholly worthless for any curative purpose as he well knows, with the label "Cancer Cure" or "Remedy for Epilepsy," he is not guilty of an offense, for in the sense attributed by that construction to the words of the statute he has not made a statement regarding the article which is false or misleading in any particular.

I fail to find a sufficient warrant for this limitation, and on the contrary, it seems to me to be opposed to the intent of Congress and to deprive the act of a very salutary effect.

It is strongly stated that the clause in § 8,—"or the ingredients or substances contained therein,"—has reference to identity and that this controls the interpretation of the entire provision. This, in my judgment, is to ascribe an altogether undue weight to the wording of the clause and to overlook the context. The clause, it will be observed, is disjunctive. If Congress had intended to restrict the offense to misstatements as to identity, it could easily have said so. But it did not say so. To a draftsman with such a purpose the language used would not naturally occur. Indeed, as will presently be shown, Congress refused, with the question up, so to limit the statute.

Let us look at the context. In the very next sentence, the section provides (referring to drugs) that an article shall "*also*" be deemed to be misbranded if it be "an imitation of or offered for sale under the name of another article," or in case of substitution of contents or of failure to disclose the quantity or proportion of certain specified ingredients, if present, such as alcohol, morphine, opium, cocaine, etc.

It is a matter of common knowledge that the "substances" or "mixtures of substances" which are embraced in the act, although not recognized by the United States Pharmacopœia or National Formulary, are sold under trade names without any disclosure of constituents, save to the extent necessary to meet the specific requirements of the statute. Are the provisions of the section to which we have referred, introduced by the word "*also*," and the one relating to the place of manufacture, the only provisions as to descriptive statements which are intended to apply to these medicinal preparations? Was it supposed that with respect to this large class of compositions, nothing being said as to ingredients except as specifically required, there could be, within the meaning of the act, no false or misleading statement in

any particular? If false and misleading statements regarding such articles were put upon their labels, was it not the intent of Congress to reach them? And was it not for this very purpose that the general language of § 8 was used?

The legislative history of the section would seem to negative the contention that Congress intended to limit the provision to statements as to identity. The provision in question as to misbranding, as it stood in the original bill in the Senate (then § 9) was as follows:

"If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular."

The question arose upon this language whether or not it should be taken as limited strictly to statements with respect to identity. It was insisted that the words had a broader range and the effort was made to procure an amendment which should be so specific as to afford no basis for the conclusion that any thing but false statements as to identity or constituents was intended. An amendment was then adopted in the Senate making the provision read:

"any statement as to the *constituent* ingredients, or the substances contained therein, which statement shall be false or misleading in any particular."

With this amendment the bill was passed by the Senate and went to the House. There the provision was changed by striking out the word "constituent" and inserting the word "regarding," so that it should read:

"any statement regarding the ingredients or substances contained in such article, which statement shall be false or misleading in any particular."

Finally, it appears, that in conference the bill was amended by inserting the words "*design, or device,*" and also the words "*such article, or;*" and thus the section be-

came a part of the law in its present form—containing the words:

"any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular."

It is difficult to suppose that, with the question distinctly raised, Congress would have rejected the provision of the Senate bill and broadened the language in the manner stated if it had been intended to confine the prohibition to false statements as to identity. Reading the act with the sole purpose of giving effect to the intent of Congress, I cannot escape the conclusion that it was designed to cover false and misleading statements of fact on the packages or labels of articles intended for curative purposes, although the statements relate to curative properties.

It is, of course, true, that when Congress used the words "false or misleading statement" it referred to a well defined category in the law and must be taken to have intended statements of *fact* and not mere expressions of opinion.

The argument is that the curative properties of articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But, granting the wide domain of opinion, and allowing the broadest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers.

The construction which the District Court has placed upon this statute is that it cannot be extended to any case where the substance labeled as a cure, with a description of curative properties, is "wholly worthless" and is known by the defendant to be such. That is the charge of the indictment.

The question then is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when on a showing of the facts there would be a unanimous agreement that it was absolutely worthless and an out and out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. One or two hypothetical illustrations have been given above. Others may readily be suggested. The records of actual prosecutions, to which I am about to refer, shows the operation the statute has had and I know of no reason why this should be denied to it in the future.

Our attention has been called to the construction which was immediately placed upon the enactment by the officers charged with its enforcement in the Department of Justice and the Department of Agriculture. It is true that the statute is a recent one, and, of course, the question is one for judicial decision. But it is not amiss to note that the natural meaning of the words used in the statute, reflected in the refusal of Congress to adopt a narrower provision, was the meaning promptly attributed to it in the proceedings that were taken to enforce the law. And this appears to have been acquiesced in by the defendants in many prosecutions in which the defendants pleaded guilty. We have been referred to the records of the Department of Agriculture showing nearly thirty cases in which either goods had been seized and no defense made, or pleas of guilty had been entered. Among these are found such cases as the following:

"No. 29. Hancock's Liquid Sulphur, falsely represented, among other things, to be 'Nature's Greatest Germicide. . . . The Great Cure for . . . Diptheria.' Investigation begun November 22, 1907. Plea of guilty."

"No. 180. Gowan's Pneumonia Cure, falsely represented, among other things, that it 'Supplies an easily

absorbed food for the lungs that quickly effects a permanent cure.' Investigation begun November 22, 1907. Criminal information. Plea of guilty."

"No. 181. 'Eyelin,' falsely represented, among other things, that it 'Repairs and Rejuvenates the Eye and Sight.' Investigation begun February 13, 1908. Plea of guilty."

"No. 261. 'Sure Thing Tonic,' falsely represented, among other things, to be 'Sure Thing Tonic. . . . Restores Nerve Energy. Renews Vital Force.' Investigation begun June 3, 1909. Pleaded guilty."

"No. 424. 'Tuckahoe Lithia Water,' falsely represented, among other things, to be 'a sure solvent for calculi, either of the kidneys or liver, especially indicated in all diseases due to uric diathesis, such as gout, rheumatism, gravel stone, incipient diabetes, Bright's Disease, inflamed bladder, eczema, stomach, nervous, and malarial disorders.' Investigation begun July 9, 1908. Plea of guilty."

"No. 427. 'Cancerine,' falsely represented, among other things, to be 'A remarkably curative extract which if faithfully adhered to will entirely eradicate cancerous poison from the system. . . . A specific cure for cancer in all its forms.' Investigation begun about April 12, 1909. Criminal information. Plea of guilty."

I find nothing in the language of the statute which requires the conclusion that these persons who have confessed their guilt in making false and misleading statements on their labels should be privileged to conduct their interstate traffic in their so-called medicines, admittedly worthless, because Congress did not intend to reach them.

Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to strength, quality and purity. But so long as the statement is not as to matter of opinion, but consists of a false

representation of fact—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless—there would appear to be no basis for a constitutional distinction. It is none the less descriptive—and falsely descriptive—of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce,—as well as lottery tickets? *Champion* v. *Ames*, 188 U. S. 331.

I entirely agree that in any case brought under the act for misbranding,—by a false or misleading statement as to curative properties of an article,—it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless and hence the label demonstrably false; but in such case it seems to me to be fully authorized by the statute.

Accordingly, I reach the conclusion that the court below erred in the construction that it gave the statute, and hence in quashing the indictment, and that the judgment should be reversed.

I am authorized to say that MR. JUSTICE HARLAN and MR. JUSTICE DAY concur in this dissent.

GLUCKSMAN *v.* HENKEL, UNITED STATES MARSHAL.

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

No. 944. Argued April 6, 7, 1911.—Decided May 29, 1911.

While a person is not to be sent from this country on mere demand or surmise, this Government should respond to a request for extradition if there is reasonable ground to suppose the accused to be guilty of an extraditable crime, even if presented in untechnical form; good faith demands this much in carrying out an extradition treaty.

Courts are bound by the existence of an extradition treaty to assume that the trial in the demanding State will be fair.

Where a magistrate of a demanding State certifies of his own knowledge to the identity of photographs, the courts of this country will presume in extradition proceedings that he had reason for so doing.

In this case *held* that although the presentation was untechnical it was sufficient to justify surrender.

Where the complaint calls the instruments alleged to have been forged bills of exchange and the evidence showed they were promissory notes the variance will not defeat surrender where the instruments are identified and there is a plain charge of forgery.

If an extraditable crime under the law of the State where the accused is found is sufficiently charged, the effect of variance between complaint and proof is a matter to be decided on general principles irrespective of the law of that State. *Wright* v. *Henkel*, 190 U. S. 40; *Petit* v. *Walshe*, 194 U. S. 205, distinguished.

Even though the complaint be sworn to on information and belief, if it is supported by testimony of witnesses stated to have deposed, the court will presume that they were sworn and the complaint is sufficient. *Rice* v. *Ames*, 180 U. S. 371.

THE facts are stated in the opinion.

Mr. Chas. Dushkind for appellant:

A writ of *habeas corpus* cannot perform the functions of

a writ of error; nevertheless this court will go behind the commitment to ascertain whether there was any legal evidence to give the Commissioner jurisdiction, since in the absence of some legal proof the Commissioner has no jurisdiction. Art. 1, Treaty with Russia; *Terlinden* v. *Ames*, 184 U. S. 541.

The laws of the State where the fugitive is found and not the acts of Congress are to govern in such cases. *Wright* v. *Henkel*, 190 U. S. 61; *Pettit* v. *Walshe*, 194 U. S. 205.

In New York the magistrate has no jurisdiction and cannot act unless there is some competent legal proof to establish a probable cause. *People* v. *Wells*, 57 App. Div. 140; Church, Hab. Corp. p. 319; *Ex parte Jenkins*, Fed. Cas. No. 7259; *In re Henry*, 35 N. Y. Supp. 210; *Perkins* v. *Moss*, 187 N. Y. 410; *Ex parte Swartwout*, 4 Cranch, 75.

The prisoner traversed the return and hence the court can properly review the evidence to ascertain whether there was any legal evidence upon which the Commissioner could act. There is no legal evidence in the case at bar to show that a crime has been committed.

There is no legal proof in the case at bar establishing the identity of the prisoner, but on the contrary the evidence shows affirmatively that the prisoner is not the man who is alleged to have committed the crime.

The photographs were not properly authenticated as evidence by certificates of the consul. *In re Henrich*, 5 Blatchf. 414; *In re McPhun*, 30 Fed. Rep. 60.

Assuming that the evidence as to the criminality is sufficient the prisoner must be discharged because the complaint charges the accused with having forged and offered forged bills of exchange whereas the proof shows that he had forged notes. *Wright* v. *Henkel*, 190 U. S. 40, and *Pettit* v. *Walshe*, 194 U. S. 205. This case is to be governed by the laws of New York; and *People* v. *Geyer*, 196 N. Y. 367, is controlling on this point. See also *People* v.

Poucher, 30 Hun (N. Y.), 576; *Besck* v. *State*, 44 Texas, 620; Bishop on Statutory Crimes, 3d ed., § 346; *Hamilton* v. *State*, 28 Am. Rep. 653; *State* v. *Jim*, 3 Murph. 3; *Commonwealth* v. *Sweeney*, 1 Va. Cas. 151; *McAuly* v. *State*, 7 Yerg. 526; *Johnston* v. *State*, Mart. & Yerg. 129; *Johnson* v. *State*, 11 Oh. St. 324; *State* v. *Carr*, 16 So. Rep. 155; *State* v. *Cullins*, 72 N. Car. 144.

Under the treaty that requires an offense to be a crime in both countries, it is of course necessary that the laws of Russia should be proven to show that the forging or passing of a forged bill of exchange is a crime.

The complaints in extradition cases must describe the crime with some degree of accuracy in order that the accused may avail himself of the benefit of the rule of law that he cannot be tried for any other offense than that charged in the extradition proceedings. *United States* v. *Rauscher*, 119 U. S. 407; *Ex parte Hibbs*, 26 Fed. Rep. 431; Field, Extra., 107.

The complaint is likewise bad because it fails to set forth facts sufficient to constitute a crime. The complaint is insufficient and defective and should be dismissed under authority of *Rice* v. *Ames*, 180 U. S. 371; *Ex parte Lane*, 6 Fed. Rep. 38. *Grin* v. *Shine*, 187 U. S. 181, in no way qualifies or modifies the rule laid down. *Rice* v. *Ames*, *supra*. See *Ex parte M'Cabe*, 46 Fed. Rep. 368.

Without a sufficient complaint on oath there is no jurisdiction to issue the warrant. *In re Heilbonn*, 1 Parker, Crim. R. 436. See also *In re Farez*, 7 Blatchf. 345; *In re Henrich*, 5 Blatchf. 414; *Ex parte Lane*, *supra*; *In re Roth*, 15 Fed. Rep. 507; Whart., Confl. Law, § 848; Spear, Extradition, 250; 7 Am. & Eng. Ency. of Law, 623, and note.

The marshal's return to the writ is insufficient because it shows that both the warrant and the final commitment are of no legal force inasmuch as no crime is recited therein. *People* v. *Drayton*, 168 N. Y. 12.

This is an extraordinary proceeding and before a person within the jurisdiction of the United States is to be deprived of his liberty and sent four thousand miles away as a prisoner to stand trial upon a criminal charge the greatest caution should be exercised. *In re Extradition of Wedge*, 15 Fed. Rep. 866.

The papers in this case show that the real purpose of this proceeding is not the forgery charge, but that it had been instituted by creditors as a matter of personal spite, malice and vengeance. *Grin* v. *Shine*, 187 U. S. 133, 134.

The interpretation of statutes has always in modern times been highly favorable to the personal liberty of the subject, and should always remain so. *Murray* v. *Reg.*, 7 Q. B. 707; *United States* v. *Wiltberger*, 5 Wheat. 95.

Mr. Frederic R. Coudert, with whom *Mr. Charles A. Conlon* was on the brief, for appellees.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding by *habeas corpus* and certiorari to test the validity of a commitment of the appellant, Glucksman, for extradition to Russia. The Circuit Court dismissed the writs and remanded the prisoner, who thereupon appealed to this court. The complaint three times charges the forgery of the signature of one Tugendriach to bills of exchange for one hundred roubles, and following each such charge alleges the fraudulent utterance of bills for the same sum to merchants named Bierenzweig, Traidenraich and Selinsky, and obtaining goods from them of that value. This last is alleged to constitute the crime of uttering forged paper, although it is not expressly alleged that the bills fraudulently uttered were forged, as pretty plainly is meant. The ground of the appeal is that there is no sufficient evidence to warrant extradition on the charge.

It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. *Grin* v. *Shine*, 187 U. S. 181, 184. See *Pierce* v. *Creecy*, 210 U. S. 387, 405. We are bound by the existence of an extradition treaty to assume that the trial will be fair. The evidence in this case seems to us sufficient to require us to affirm the judgment of the Circuit Court.

According to the translation of the Russian documents accompanying the demand, Birenzweig, a merchant, 'deposed' on July 7, 1910, that the Lodz merchant, Leiba Glikeman, in the previous June endorsed to him in payment for goods a note for one hundred roubles purporting to be drawn by a Tugendreich who resides in Ozorkov; that a few days later he learned that Glikeman had left those parts and that he was confirmed by Tugendreich in his suspicion that the note was spurious. Fraidenreich, a merchant, deposed to like effect, giving the name of the purported drawer of the note as Moschek-Leiba Tugendreich. And so did Zelinsky. Birenzweig and Fraidenreich produced their notes. Moschek-Leiba Jakubov-Maerov Tugendreich deposed that he was a merchant in Ozorkov, that he never drew any notes in Glikeman's favor, that the signatures on the notes produced by Birenzweig and Fraidenreich represented a kind of imitation of his signature, and that the text of his notes was written by Glikeman, (with whom he had had dealings). There is no rational doubt that the evidence tends to show that Leiba Glikeman, a leather merchant of Lodz, forged notes of the above-named Tugendreich

and disappeared before July 7, 1910. The prisoner by his own admission was a leather merchant and came from Lodz, arriving in New York on or about August 3, 1910. When first arrested he said that he had enemies on the other side who were bringing these charges against him, and, as we think it appears, tried to bribe the officers to let him go. He also said that the spelling of his name Glucksman was a typographical error, that his name was Lewek Glicksman. The Russian magistrate sends a description of Leiba-Levek Pinkusov Glikeman, which is worthless, as such descriptions generally are, but adds certainty to the correspondence of the name of the person referred to in the proceedings in Russia, with that of the prisoner, and after the description the magistrate adds: "A photograph of Glikeman is hereto attached," with his seal on the card, and the photograph represents the prisoner. It is objected that there is no deposition that the photograph represents the party accused, and it may be that in other circumstances we should require further proof. But the magistrate in certifying as if of his own knowledge, presumably had some reason for doing so, and taking the convergence of the other facts mentioned toward the prisoner as the party accused, we cannot say that the Commissioner was wrong in finding the identity made out.

One or two subordinate matters need but a bare mention. The complaint speaks of bills of exchange, the evidence shows the forged instruments to have been promissory notes. The instruments are identified sufficiently and for this purpose no more is needed. Neither *Wright* v. *Henkel*, 190 U. S. 40, nor *Pettit* v. *Walshe*, 194 U. S. 205, indicates that because the law of New York in this case may determine whether the prisoner is charged with an extraditable crime, it is to determine the effect of such a variance between evidence and complaint. That is a matter to be decided on general principles, irrespec-

tive of the law of the State. The complaint is sworn to upon information and belief, but it is supported by the testimony of witnesses who are stated to have deposed and whom therefore we must presume to have been sworn. That is enough. *Rice* v. *Ames*, 180 U. S. 371, 375.

Judgment affirmed.

APSEY, RECEIVER OF THE FIRST NATIONAL BANK OF CHELSEA, *v.* KIMBALL.

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

SAME *v.* WHITTEMORE.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

Nos. 132, 133. Argued April 20, 1911.—Decided May 29, 1911.

Shareholders who have complied, so far as steps required to be done on their part are concerned, with the provisions of the act of July 12, 1882, 22 Stat. 162, c. 290, in regard to withdrawing from a national banking association, two-thirds of the shareholders whereof have asked for a renewal of the charter, cease to be members of the association, even if, through no fault of their own, the final action is not taken; and such shareholders are not liable for assessments subsequently made by the Comptroller of the Currency under § 5151, Rev. Stat.

164 Fed. Rep. 830, and 199 Massachusetts, 65, affirmed.

THE facts, which involve the construction of § 5151, Rev. Stat., and the liability of shareholders in national banks thereunder, are stated in the opinion.

Mr. George L. Wilson for plaintiff in error.

Mr. Wilbur H. Powers, with whom *Mr. Henry H. Folsom* and *Mr. Walter Powers* were on the brief, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases are practically alike. No. 132 is a writ of error to the United States Circuit Court of Appeals for the First Circuit; No. 133 is a writ of error to the Superior Court of Massachusetts. The suits were originally brought by Albert S. Apsey, receiver of the First National Bank of Chelsea, Massachusetts, against George E. Kimball and Anna G. Whittemore, respectively, under § 5151 of the Revised Statutes of the United States, making the shareholders of a national banking association individually responsible in a sum equal to the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

In each of the cases the courts whose judgments are here for review reached the conclusion that the shareholder sued was not liable to the receiver on account of such statutory obligation. In the case from Massachusetts, while the final judgment was entered in the Superior Court of that State, the decision was in the Supreme Judicial Court of Massachusetts, and is reported in 199 Massachusetts, 65.

As originally organized, national banks had a corporate existence of twenty years. By the act of July 12, 1882, 22 Stat. 162, c. 290, such banks were authorized to continue their corporate existence for another twenty years. As pointed out in § 2 of the act, such extension must be authorized by consent in writing of shareholders owning not less than two-thirds of the capital stock of the association. Before granting a certificate of approval of such extension the Comptroller of the Currency is required to cause a special examination of the bank to be made, and

if after such examination, or otherwise, it appears to him that the association is in a satisfactory condition, he is required to grant his certificate of approval, or if it appear that the condition of the association is not satisfactory, he shall withhold the same.

Section 5, which is the important one in this case, provides:

"That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section."

Except as to the number of shares held by the shareholders sued in the two cases, and the times at which the same were acquired, the facts in both cases are essentially the same. Case No. 132 was tried upon an agreed statement of facts, as follows:

"The First National Bank of Chelsea was, prior to August 16, 1906, a banking association duly organized and existing under the provisions of the National Banking Act and amendments, with a capital of $300,000 divided into 3000 shares of the par value of $100 each; that on said August 16, 1906, the said bank closed its doors and suspended business; that on August 25, 1906, the plaintiff was duly appointed by the Comptroller of the Currency, receiver of said bank; that on September 25, 1906, the Comptroller of the Currency ordered an assessment of $100 per share on each share of stock in said bank, payable by the stockholders, according to their respective holdings, on or before October 25, 1906, and ordered the plaintiff to collect and recover the same by proper proceedings; that the defendant received from said receiver a copy of said order of assessment and a separate notice and demand for payment, all of which were in the following form:

* * * * * * * *

"The defendant, on November 18, 1901, became the owner of twenty (20) shares of the capital stock of said bank, and on said date received two certificates, each for ten (10) shares; on November 20, 1901, he became the owner of fifteen (15) shares and received a certificate therefor; and on August 31, 1904, he became the owner of five (5) shares, and received a certificate therefor. Said four certificates were each and all in the following form, *mutatis mutandis*, and their numbers were respectively 1235, 1236, 1237 and 1238.

Massachusetts

The First National Bank of Chelsea.

No. 1235. 10 Shares.

"This certifies that George E. Kimball of Boston, Mass., is the proprietor of ten (10) shares of the capital stock of the First National Bank of Chelsea, transferable only on the books of the bank in person or by attorney, on the surrender of this certificate. 'No transfer of the stock of

this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise.'

Chelsea, Nov. 18, 1901.

S. B. HINCKLEY, *President.*

WALTER WHITTLESEY, *Cashier.*

Shares $100 each.

"The defendant held said certificates from the respective dates of their issuance, as above specified, down to and after the date of the suspension of the bank, and he had them in his possession and produced them at the trial.

"The twenty year period of succession of said bank under the provisions of the National Bank Act expired on September 5, 1904, and on or before said date proper proceedings were taken under the Act of July 12, 1882 (one of the amendments to the National Bank Act), to amend the articles of association so as to extend the period of succession for a period of twenty years from said September 5, 1904, and said articles were so amended.

"The defendant did not assent to said amendment, but, acting in pursuance of the provisions of Section 5 of said Act of July 12, 1882, and within the time therein named, he gave to the bank directors due notice of his desire to withdraw from the association, and afterwards appointed one William R. Dresser as one member of the appraisal committee under said Section 5, and gave due notice of such appointment to the directors of the bank, and said directors appointed Sylvester B. Hinckley as a second member of said committee of appraisal, but these two never appointed the third member, and no appraisal was ever made. The said Sylvester B. Hinckley was at said time a director of said bank, its president, and a large stockholder therein.

"The defendant, after waiting some months subsequent to the appointment of said Dresser and Hinckley, during which time he made all reasonable efforts in good faith to

have said third member appointed, but without result, in September, 1905, retained an attorney, who at once communicated with said Hinckley, urging him to join in the making of such appointment, and the said Hinckley, or the bank, also retained counsel, and the two counsel conducted a correspondence on the question of such appointment, which correspondence, however, failed to result in such appointment.

"On January 1, 1905, at the time of declaring its regular semi-annual dividend, the bank declared a regular dividend of three (3) per cent to the defendant on said forty (40) shares and sent him a dividend check therefor, which the defendant promptly returned, declaring that he was not a stockholder in the bank, and declining to accept or to use the check. Further regular dividends were declared to him by the bank on July 1, 1905, January 1, 1906, and July 1, 1906, the latter being the last dividend declared by the bank prior to the suspension.

"None of the said last-mentioned dividends were sent to or received by the defendant. The defendant was also credited on the bank's ledger with said forty (40) shares. The bank never refused the defendant or withheld from him any of the rights or privileges of a stockholder, but the defendant never used or asserted any of said rights or privileges of a stockholder after September 5, 1904. The following extract from the bank's by-laws was introduced in evidence:

"'SECTION 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the Act; and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfer of stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision.

Transfers of stock shall not be suspended preparatory to a declaration of dividends and except in cases of agreement to the contrary expressed in the assignments, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

"'SECTION 16. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred the certificates thereof shall be returned to the bank and cancelled and new certificates issued.'"

The question, then, is: Did the shareholders, defendants in error, cease to be such, or were they still shareholders when the bank failed and liable to assessment for the benefit of creditors? It is the contention of the plaintiffs in error that they did not cease to be shareholders until, under § 5 of the act, an appraisal of the value of the stock had been made and the certificates of stock duly surrendered. Upon the other hand, the defendants in error contend that, upon complying with the steps required of them, in giving notice, appointing an appraiser, and using diligence to have an appraisal, they ceased to be shareholders and were no longer liable to pay the assessment made.

The First National Bank of Chelsea was originally incorporated, under the statute, for a period of twenty years, and while that was its span of corporate life, the defendants in error became shareholders therein, received certificates of shares and were duly registered as shareholders. As twenty years was the life of the corporation, the shareholders had not bound themselves to remain such after the expiration of that definite period of time. As the statute originally stood, the venture would necessarily terminate at the end of that time.

Congress recognized that it might be proper to continue

the organization, that at least a part of the shareholders might desire to do so, and therefore the act of July 12, 1882, 22 Stat. ch. 290, provided for the extension of the corporate existence of the bank. It was also recognized that a part of the shareholders might wish to retire from the venture, and it was therefore provided that two-thirds of the shareholders must acquiesce to continue the bank's existence, and must certify such desire to the Comptroller of the Currency, who must approve of the extension of the corporate existence.

It is provided in § 5, above quoted, that each non-consenting shareholder shall give notice in writing to the directors of the association, within thirty days of the date of the certificate of approval by the Comptroller, of his desire to withdraw from the association; and further, that he thereupon shall be entitled to receive from the association the value of the shares held by him, such value to be ascertained by an appraisal by a committee of three, one to be selected by the shareholder, one by the directors of the association, and the third by the first two thus selected, the value ascertained and determined is to be deemed a debt of the bank and forthwith paid, and the surrendered shares to be sold after due notice, at public sale, after thirty days from the final appraisement provided for in the section.

The agreed facts show that the shareholders here involved strictly complied with the statute in giving the required notice, and in the selection of their appraiser. The bank also selected its appraiser, and the facts show that the shareholders urged action, employed counsel, and endeavored to bring about the appraisal. Apparently the delay was caused by the bank's representative, at least this was the possible inference suggested by the Supreme Judicial Court of Massachusetts. 199 Massachusetts, 68.

We agree with the courts below that the defendants

ceased to be shareholders after thus complying with the statute. Section 5151 of the statute makes shareholders liable to the assessment. The statute makes specific provision for the manner in which the shareholder may sever his connection with the corporation. These necessary steps were taken, as the agreed facts show. The shareholders had a right to end their connection with the association at the termination of the period of original incorporation, or, if they so desired, they might go on with the association in its renewed life.

Section five provides for the manner of manifesting such determination to terminate their relations with the corporation at the expiration of its original life. True, other things were to be done to ascertain the amounts to be paid the retiring shareholders; that they were not done in these cases is no fault of the retiring shareholders. We cannot agree with the contention of the plaintiff in error that they ceased to be shareholders only when the appraisal had been made, and the certificate of shares surrendered.

It is said that the shareholders, when the bank's representative did not act in the matter of the appraisal, might have brought suit to compel further proceedings, or to cancel their stock on the books of the company. Again we answer—that they did all that the statute required them to do.

But, it is urged, in not getting their names off the books, whatever might be their relations with the bank, these shareholders continued to be registered shareholders, and as such liable to creditors. Cases are cited which hold that where one permits his name to be registered on the books of the bank as a shareholder, or where he fails to obtain a transfer of the shares to another name, although he has in fact parted with his stock, such shareholder remains liable to the creditors. (See *National Bank* v. *Case*, 99 U. S. 628; *Matteson* v. *Dent*, 176 U. S. 521).

But those are not cases where shareholders have done all that the law required in order to end their relation to the bank and to get their names off the books.

Where the shareholder has performed every duty which the law imposes upon him in order to secure a transfer of the stock, the fact that it is not transferred on the register of the bank does not continue his liability as such shareholder. *Whitney* v. *Butler*, 118 U. S. 655; *Earle* v. *Carson*, 188 U. S. 42. The facts of the cases at bar bring them within this principle. These shareholders had done all that the law required of them. Any further action to evidence the changed relation of the shareholders to the bank, upon its books, was not a matter within the control of the shareholders.

It is argued that the construction we have given the statute may amount to a reduction of the capital stock to the detriment of creditors. The corporation in which these shares were held expired in twenty years. The creditors after that time had no right to hold these shareholders in face of the law, of which all must take notice, permitting the retirement of non-assenting shareholders. If this results in the diminution of outstanding shares of the bank assessable for creditors, it was the very thing made possible by the amended statute. New shareholders are to be brought in by the sale of the stock, as provided in § 5. It is true that these defendants retained their certificates, but they were not obliged to surrender them except upon payment for their shares.

It is said, had the corporation made a large gain, instead of failing after the action of these shareholders in giving notice and naming their appraiser, they might have withdrawn their notice, and obtained the benefit of such increase—but this depends upon the construction of the statute. As we view it, when the shareholders made their election to retire at the end of the first twenty-year period of corporate organization, and took the steps re-

quired in § 5, by giving notice and appointing an appraiser to obtain a valuation of, and payment for their shares of stock, they thereby ceased to be shareholders beyond the original twenty-year term of the life of the corporation, and they could neither share its profits, nor be compelled to bear its burdens.

The views here expressed require the affirmance of the judgments in both cases.

Affirmed.

APPLEBY *v.* CITY OF BUFFALO.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 162. Argued April 26, 27, 1911.—Decided May 29, 1911.

The right of this court to review the judgment of the highest court of a State is specifically limited by § 709, Rev. Stat., and, in cases such as this, depends on an alleged denial of a Federal right which the record shows was specially set up and claimed in, and denied by, the state court or that such was the necessary effect of the judgment.

Assignments of error made for the purpose of bringing the case to this court cannot originate the right of review here.

An exception in the state court that the judgment deprives plaintiff in error of his property without due process of law in violation of the Constitution of the United States only affords ground for an inquiry whether the proceedings themselves show a want of due process.

The Fourteenth Amendment forbids a State from taking private property for public use without compensation, *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, but where the State provides adequate machinery for ascertaining compensation on notice and hearing which were availed of and there was no ruling by the state court which prevented compensation for property actually taken, there is no lack of due process because of the amount awarded, even if only nominal.

Judgment entered on authority of 189 N. Y. 163, affirmed.

THE facts, which involve the validity of an award for property taken in condemnation proceedings, are stated in the opinion.

Mr. O. O. Cottle and *Mr. Edmund P. Cottle* for plaintiff in error.

Mr. Clark H. Hammond for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case originated in a proceeding begun by the city of Buffalo to appropriate the lands of the plaintiff in error under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line, at or near the crossing of Hamburg street, and the easterly city line of the city of Buffalo. These lands are said to lie under the waters for about seven miles in the circuitous winding of the river, and to embrace about one hundred and forty-one acres.

Application was made to the Supreme Court of the State of New York, at Buffalo, for the appointment of commissioners to ascertain the compensation to be made the owner for the lands described. The plaintiff in error appeared, and three commissioners were appointed to ascertain the just compensation to be awarded to the owner. The commissioners were duly sworn, viewed the premises, and heard a considerable amount of testimony, both for the city and the plaintiff in error, and made a report awarding compensation for the lands taken in the sum of six cents. The plaintiff in error excepted to the award, but the same was confirmed in the Supreme Court of New York. Plaintiff in error moved to set aside the order confirming the report, which was done, and thereupon a new order of confirmation was entered setting out the proceedings in greater detail.

From the order of the Supreme Court confirming the

report of the commissioners appeal was taken, by the plaintiff in error, to the Appellate Division of the Supreme Court of New York, and that court held that the only question presented by the appeal was the adequacy of the award, and reached the conclusion that the evidence showed conclusively that the property was valuable; that while the exact value was difficult to determine, the evidence established that it was more than nominal. 116 App. Div. 555.

The Appellate Division reversed the order of the Supreme Court, and adjudged that new commissioners should be appointed, at Special Term, to determine the compensation to be paid the owners of the premises in question.

The Appellate Division granted leave to the city to appeal to the Court of Appeals of the State of New York, and certified to that court four questions for review, as follows:

"1. Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than six cents damages, on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River in eminent domain proceedings, taken pursuant to its revised city charter, for the purposes of a public highway?

"2. Were the appraisal commissioners authorized and empowered, under the facts in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the city of Buffalo acquiring the fee to the lands under the waters of the Buffalo River, at six cents, and to award said sum as and for the just compensation to be made to the said Charles E. Appleby, as surviving trustee of the Ogden Land Company?

"3. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?

"4. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioner's report?"

The Court of Appeals overruled a motion to dismiss the appeal. (This ruling is reported in 189 N. Y. 537.) It answered the four questions propounded by the Appellate Division in an opinion reported in 189 N. Y. 163, the questions being answered as follows: "The first question should be answered in the negative. The second question should be answered in the affirmative. The third question is immaterial and not answered. The fourth question should be answered in the negative."

The Court of Appeals held, among other things, that the Buffalo River had been made a public highway by law; that for a large part of the distance through the city of Buffalo it is navigable to large boats from the lakes, and is a stream of much commercial importance. It held that the proceedings were under due authority of law as enacted in the charter of the city of Buffalo. In answering the questions the Court of Appeals said: "We have no great difficulty in answering these questions to the effect that the commissioners were authorized upon the evidence presented to them if they saw fit so to do to award only nominal damages for the land sought to be acquired by the City. In reaching this conclusion we have assumed as did the City in the institution of the proceedings that the respondent was vested with the fee of the river bed. Upon the other hand there does not appear to be any dispute that either by him or by the company whose rights he represents substantially all of the land abutting upon the river upon either side formerly owned by the Company has been conveyed away. This is a matter of importance as bearing upon the value of the bed of the stream, because if the bed and fee to the abutting lands were owned by the same party it very well might be that the possible connected use of the two

would be an element of much importance in passing upon the value of the bed.

"Many witnesses were sworn before the commissioners in regard to the value of this bed and the amount of the damages which should be awarded for taking it. Their evidence presented a well-defined question of fact, the testimony ranging all the way from a valuation at nominal figures to one of very substantial amount. In addition to hearing the testimony of these witnesses the commissioners were under obligations to and we must assume did view the premises to be taken. Various theories were doubtless presented to them, as they have been to us leading to the view that the land was of substantial value. These theories are more or less speculative.

"We think that the commissioners were so justified by the evidence in making the award which they did make that we cannot say, as a matter of law, that there was no evidence to sustain their conclusions."

The Court of Appeals further held that should the first and second questions be regarded as questions of fact not to be considered by it, and the third question be treated as immaterial, there would be left for consideration only the fourth question, and there being no exceptions calling for a reversal of the order confirming the commissioner's report the order of the Appellate Division would have be reversed.

The case is now brought here for a review of the judgment of the Court of Appeals, for this is the effect of the proceeding in error, although under the practice in New York the judgment of the Court of Appeals is remitted to the Supreme Court of New York, and the writ of error runs to that court.

The case has been elaborately argued, orally and in the voluminous brief of the plaintiff in error, and many alleged errors of procedure in rulings upon construction of state statutes, and questions of practice in the state courts

are pointed out. Indeed, the case has been argued, apparently, upon the theory that this court has the power, embraced in a general right to review, to correct errors in trials and procedure in the state courts.

This court has had frequent occasion to say that its right to review the judgment of the highest court of a State is specifically limited by the provisions of § 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the state court. In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. *Sayward* v. *Denney*, 158 U. S. 180, 183; *Harding* v. *Illinois*, 196 U. S. 78; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 97.

In the case at bar an elaborate assignment of error for the purpose of bringing the case to this court is found in the record, in which many rulings are referred to, which, it is alleged, resulted in deprivation of rights of Federal creation. But it is well settled that the assignments of error made for the purpose of bringing the case to this court cannot be looked to for the purpose of originating a right of review here. This must necessarily follow from the provisions of § 709, which permit a review in this court of rulings concerning claims of Federal right which were set up and denied in the state court. Neither the petition for writ of error in the state court after judgment, nor the assignments of error in this court, can supply deficiencies in the record of the state court, if such exist. *Harding* v. *Illinois*, 196 U. S. *supra*, and previous cases in this court therein cited.

The jurisdiction of the Court of Appeals of New York

was invoked because of the questions propounded by the Appellate Division. A reading of those questions shows that no right under the Federal Constitution was asserted or suggested.

We look in vain in the record to find any claim of Federal right prior to the judgment in the Court of Appeals, unless it is to be found in the third exception to the report of the commissioners.

"Third. The said report is also contrary to and in violation of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation, and the sum awarded by said report is less than just compensation."

If it be taken that the exceptions in this respect amount to a claim of violation of the due process of law clause of the Constitution, which protects against the taking of private property without compensation, and that the effect of the judgment of the Court of Appeals is to deny this claim, we proceed to inquire, do the proceedings show a want of due process in the result reached and affirmed by the Court of Appeals in its judgment answering the questions propounded by the Appellate Division?

That the Fourteenth Amendment of the Federal Constitution forbids a State to deprive any person of property without due process of law, and to take private property for public use without compensation amounts to such deprivation, is recognized and affirmed in a case wherein the subject was given much consideration. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226. After a review of the authorities this court said:

"Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he

be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

And furthermore:

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured by that instrument."

In summing up the matter, the court said:

"We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

"We say 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted."

* * * * * * * *

"In harmony with those views, we may say in the present case that the state court having jurisdiction of the subject matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in

violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See *Marchant* v. *Penna. Railroad Company*, 153 U. S. 380."

The question of what amounts to due process of law in cases of this character came again before this court in the case of *Backus* v. *Fourth Street Union Depot Co.*, 169 U. S. 557. In summing up the essentials of due process of law in condemnation cases this court said: "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."

The only assignment of error which is here open for review does not show that the court below, by any ruling of law, deprived the owner of the right of compensation for his property. The alleged denial of Federal right rests upon the assertion that the damages were nominal, while the property taken was of greater value. But, as this court has heretofore held, if the State has provided adequate machinery for the ascertainment of compensation, upon notice and hearing, and the record discloses no ruling of law which prevented compensation to the owner for the property taken, there is no lack of due process.

The proceedings in the present case were under a statute which the highest court of the State has held adequate to require condemnation, and against which no constitutional objection was urged. The same court has found that the Buffalo River was a public highway, and a navigable stream; that there was testimony before the commissioners that the land company, of which the plaintiff in error is trustee, had formerly owned land adjacent to the river, which had been sold off, and that the only remaining title was in the lands covered by the river.

The record discloses that the testimony ranged all the way from nominal valuation to one of considerable amount. The Court of Appeals held that in view of these facts, the testimony of the witnesses, and view of the premises had by the commissioners, that it could not say, as a matter of law, that there was no evidence to sustain the commissioners' conclusions.

The record thus discloses that the plaintiff in error has had a hearing as to the value of his property before a board of commissioners acting under authority of law, which order was affirmed in a reviewing court; that he was again heard in the Appellate Division where that order was reversed, and was finally heard in the Court of Appeals, where the finding of the Appellate Division was in turn reversed. And the record fails to show any ruling of law, to which an exception was properly reserved on the ground of denial of Federal rights, which prevented the plaintiff in error from obtaining just compensation for his property.

Judgment affirmed.

CARPENTER *v.* WINN.

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

No. 135. Argued April 20, 21, 1911.—Decided May 29, 1911.

Section 724, Rev. Stat., has never been construed by this court, and the decisions of the inferior courts have not had such uniformity as to exert any controlling influence.

The word "trial" as used in § 724, Rev. Stat., refers to the final examination and decision of matter of law as well as facts, for which every antecedent step is a preparation.

A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances.

Under § 724, Rev. Stat., a court of law cannot compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection of the other party.
165 Fed. Rep. 636, reversed.

In an action wherein David J. Winn was plaintiff and Joseph N. Carpenter, and others, defendants, the plaintiff Winn obtained an order from the court requiring the defendants to produce certain books and papers said to contain evidence material to make out the plaintiff's case. The order required the defendants to produce "all of their books, papers, writings, account books, day books, blotters, journals, registers, cash books, check books, contracts, contract slips and memoranda, made or received by them, their agents and employés, which contain any memoranda of any business transactions," relating to the plaintiff during the years 1905 and 1906, and particularly pertaining to a certain brokerage transaction in cotton. The order required such production before the trial, and that the plaintiff and his attorneys should be allowed, at the office of the defendants, within a time named, access to such books and papers, with leave to "examine and investigate the same and to make copies and extracts from such books, documents and writings." The order concluded thus: "In the event the defendants fail to comply with this order, judgment against them shall be entered by default."

The defendants conceiving that the court had no authority to require the production of their business books and correspondence before the trial of the cause for the investigation of the plaintiff, declined to obey the order. Thereupon judgment by default was entered and a jury empanelled to assess the plaintiff's damages, which being done, there was judgment for the plaintiff for the amount so assessed. This judgment was affirmed by the Circuit Court of Appeals and the case has come here upon a writ of certiorari.

Mr. John R. Abney for petitioners:

The decision of the court below in the case at bar is in direct conflict with the prior decisions of the Circuit Courts of Appeals for the Third and other Circuits construing said section, and is also in direct conflict with the plain language of the statute. See 1 Annals of Cong. 1846, 48, 49, 80, 74, 659, 903; Journal of Maclay, 74, 85, 117, 150; 1 Annals of Cong. 782–894; *Geyger's Lessee* v. *Geyger*, 2 Dallas, 332; Carson's Hist. of Supreme Ct. 184; *Hylton* v. *Brown*, 1 Wash. C. C. 298; *Bas* v. *Steele*, 3 Wash. C. C. 381; *Dunham* v. *Riley*, 4 Wash. C. C. 126; *Central Bank* v. *Tayloe*, 2 Cranch C. C. 427; *Triplett* v. *Bank*, 3 Cranch C. C. 646; *Walter* v. *Stewart*, 4 Cranch C. C. 532.

It appears that it became the practice to order the books produced at the trial. Judge Betts of New York, sitting in the Circuit Court, held that the plaintiff could be required to show his papers to the defendant before the trial. He so decided under the influence of the rule which permitted it in the state courts of New York. *Jacques* v. *Collins*, 2 Blatch. C. C. 23. But see *Finch* v. *Rikeman*, 2 Blatch. 301; *Iasigi* v. *Brown*, 1 Curtis, 401; *Merchants' Nat. Bk.* v. *State Bk.*, 3 Cliff. 201.

In 1879, it was held that inspection of books could be had before the trial, under the influence of the state practice. *United States* v. *Youngs*, 10 Ben. 264; *United States* v. *Hutton*, 10 Ben. 268; but in 1885, it was held, citing *Beardsley* v. *Littel*, 14 Blatch. 102, that § 724 did not permit an examination of a party's books before trial. *Colgate* v. *Compagnie Francaise*, 23 Fed. Rep. 82; and see also *Guyot* v. *Hilton*, 32 Fed. Rep. 743. Thus the question seemed settled in the Southern District of New York that an inspection of books was not authorized under § 724 before the trial.

But in 1899 an inspection of books and papers before trial was allowed by the District Judge in Delaware.

Bloede v. *Bancroft*, 98 Fed. Rep. 175, and followed by Mr. Justice Lacombe in *Gray* v. *Schneider*, 119 Fed. Rep. 474.

For other cases on this point, see *United States* v. *Nat. Lead Co.*, 75 Fed. Rep. 94, 95; *Kirkpatrick* v. *Pope*, 61 Fed. Rep. 46, 47, 49; and the Circuit Court of Appeals held that § 724 does not confer the power to require a party to produce books before trial in *Cassatt* v. *Mitchell C. & C. Co.*, 150 Fed. Rep. 32, 44; and see *Penna. R. R. Co.* v. *Int. C. M. Co.*, 156 Fed. Rep. 765.

Only in connection with the other testimony in a case can the court know what right the applicant has to see books and papers and the relevancy. There is no fairness vouchsafed in a hearing of these questions on affidavits. There is no chance to see and cross-examine the affiants, and it gives an undue advantage to those who are willing to swear anything when there is no cross-examination.

From discretionary interlocutory orders in the Federal courts there is no appeal except as to injunctions and reviews. 26 Stats. 828, §§ 6, 7. In a state court there would be.

The fact that the statute provides that the party failing to show books shall suffer "nonsuit" or "default," as the case may be, shows that it was to be at the trial.

The construction placed upon § 724 by the court below would make it possible in a case pending in New York to require a party living in California to produce his books in New York before the trial, and also at the trial.

The act should be construed under the lights then existing.

The petitioners have a right to keep their books and papers a secret under the common law and the Constitution, and § 724 should be construed strictly, like an attachment statute. *Entrich* v. *Carrington*, 19 Howell St. Tr. 1029; *Boyd* v. *United States*, 116 U. S. 616, 626, 627.

Congress having provided for discovery, there is no other authority. The statute of New York and the practice in that State cannot affect the question. *Ex parte Fisk*, 113 U. S. 713; *Amy* v. *Watertown*, 130 U. S. 301; *Pierce* v. *Un. Pac. R. Co.*, 47 Fed. Rep. 709.

Mr. John W. Boothby, with whom *Mr. Ernest E. Baldwin* was on the brief, for respondent.

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

The question is whether under § 724 of the Revised Statutes, a court of law may compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection of his adversary.

Section 724 is substantially the fifteenth section of the Judiciary Act of 1789. It reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant, as in cases of nonsuit: and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

The purpose of the provision is to provide a substitute for a bill of discovery in aid of a legal action. It may be invoked only when the document sought "contains evidence pertinent to the issue," and "in cases and under circumstances when they might be compelled to produce the same by the ordinary rules of proceeding in chancery." The penalty for failing to comply with such an order is

exceedingly stringent, that of a nonsuit or a judgment by default.

For more than a century trial courts have disagreed as to whether under this enactment the procedure is limited to a requirement that the books, documents and writings be produced at the trial, or, in the discretion of the court, before the trial, for such investigation and examination as the party obtaining the order might desire.

The contention upon the one side is that "in the trial" does not mean "at the trial," or, "during the trial," but at any time after issue joined.

The doubt about the meaning of the provision is engendered by the use of the words "in the trial." It is, of course, urged that if the Congress had intended to limit the right to such production, it would have said "at the trial," or "on the trial." But it is said with equal force that if the purpose was to compel such production before the trial and after issue joined, Congress would have substituted the words, "in an action at law," instead of using words seemingly more restrictive.

But taking the words as written, what must we infer Congress to have meant by empowering the court to compel production "in the trial"?

Some of the considerations which collectively lead us to conclude that the words "in the trial" mean "on or at the trial" are these:

a. The significance of the word "trial." Does that word embrace anything more than is commonly understood when we speak of the "trial" of an action at law? Or does it include, as contended here, every step in a cause between issue joined and that judicial examination and decision of the issues in an action at law, which we always refer to as the trial?

Blackstone defines "trial" to be the examination of the matters of fact in issue. 3 Bl. Com. 350. This definition is adopted by Bouvier. In *Miller* v. *Tobin*, 18 Fed. Rep.

609, 616, Judge Deady applied this meaning to the removal act, saying, "Trial is a common-law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided." But the word has often a broader significance, as referring to that final examination and decision of matter of law as well as fact, for which every antecedent step is a preparation, which we commonly denominate "the trial." Many cases are cited for this definition in 28 Am. & Eng. Ency., p. 636. But this does not help out those who would broaden the meaning so as to justify an order to produce before such judicial examination of both matters of fact and law which constitute that final step which is called "the trial."

b. "In the trial" implies a restricted use of the procedure as compared to a bill of discovery.

Under the ordinary rules of procedure in chancery to obtain a discovery of evidence material to the maintenance or defense of an action at law, such evidence must, in the very nature of things, result in production before the "trial" at law. Such procedure is still open if it is desired to have the evidence produced before the trial. A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances. See the very instructive discussion of the question by Judge Wallace in *Colgate* v. *Compagnie Francaise &c.*, 23 Fed. Rep. 82.

In *Guyot* v. *Hilton*, 32 Fed. Rep. 743, an application under § 724 to require the plaintiff to produce for the inspection of the defendants the business books of the plaintiff's firm for certain years "in order to enable them to prepare for trial," was denied, Judge Lacombe saying that the proper practice to obtain such relief was by a bill in equity for discovery.

The statute may therefore be well regarded as affording

a short and quick way of obtaining documentary evidence for use "in the trial" of an action at law, leaving the parties to a bill of discovery if they desire the production before the trial for the purpose of preparing for it.

c. Another consideration leading to the same conclusion is found in the fact that a bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called a "fishing bill," and will be dismissed. Story, Eq. Pl., §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated. The principle is stated by a great authority upon equity thus: "Nor has a party a right to any discovery except of fact and deeds and writings necessary to his own title under which he claims; for he is not at liberty to pry into the title of the adverse party." Story, Eq. Juris., § 1490; *Kettlewell* v. *Barstow*, 7 Ch. App. Cas. 686, 694. In *Ingilby* v. *Shafto*, 33 Beav. 31, it was said:

"The province of discovery in equity is not to compel a defendant, who is a plaintiff in a suit at law, to disclose in what manner he intends to make out his case at law. The plaintiff in equity is entitled only to the discovery of such matters in the knowledge, or possession, of the defendant in equity, as will enable him to make out his own case at law; and exceptions to an answer, omitting to respond to inquiries touching the mode in which the defendant purposed to make out his case at law, and as to documents 'relating to matters in the bill mentioned,' were overruled."

This "fundamental rule," as it is called by Judge Story in his work upon Equity Pleading, § 317, in view of the express limitation of the section, "to cases and under circumstances" when discovery might be obtained in equity,

implies that production of an adversary's documents should not be required before trial, that one party may examine and inspect in search of evidence which he may or may not use in the trial.

d. Another consideration arises from the very stringent penalty which is to result if the judge shall conclude that the documents desired have not been produced. The party against whom such an order is sought has the undoubted right to make every objection which he could make were he a defendant in equity to a bill seeking discovery of the same evidence, for the right to compel production is no broader under the statute than under a discovery proceeding in equity. This would include the right to insist that the case, the circumstances and the purpose to be advanced were not such as to justify the order. He must also be heard, if he desires, upon the pertinency of the evidence which is being sought and the right to insist that he be not required to disclose that which pertains only to his side of the case, but only that which is material to make out the case of the party seeking the order.

When, where and how are these important questions to be heard and decided? If heard by the court in advance of the trial, it will often be necessary that it shall possess itself of that kind of knowledge of the case which can be had only on the trial where the evidence is to be produced. This in many cases will practically require two trials, one before the jury is empanelled, another after. Opportunities for a miscarriage of justice, as well as inconvenience to the trial judge, may be reduced to a minimum by making an order to produce at the trial, or there show cause why he should not. *Bas* v. *Steele,* 3 Wash. C. C. 381; *Dunham* v. *Riley,* 4 Wash. C. C. 126.

In *Bas* v. *Steele* the order was to produce at the trial. Nothing is said in the opinion of Mr. Justice Washington about production before the trial, but the construction of

the act by the learned Justice furnishes practical reason for construing the statute as we have indicated. Construing the section he said:

"It is not difficult to give a construction to the section of the act of Congress. When either party wants papers, he must give notice; and he has in view one of these objects: 1st. That if the papers called for are not produced, he may be enabled to argue against the party not producing them to the jury; 2d. This object may be to obtain evidence from the contents of the papers called for; and, 3d. To move the court for a nonsuit, or for a judgment by default, as the case may be. But in either case, the party must entitle himself to the benefits of the section, by showing that the party was in possession of the papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The court will require reasonable proof of the possession, and of the pertinency of the papers. If the object of the party is to avail himself of the provision of the section, so as to move for a nonsuit, or for judgment by default, he must put the party on his guard, and let him know the consequences of a refusal; and the party receiving such notice, will come prepared to meet it. In any such case, when the party is called on to produce papers, he may make oath that he has them not; and thus extricate himself from difficulty. This is the case in chancery, where the plaintiff charges the defendant with having papers to which he has a right, and the defendant relieves himself by his oath; and this may be met by contrary proof of two witnesses. In every case, the party claiming the papers must give evidence of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default, or nonsuit, is intended to be claimed, the notice to produce papers, must give the party information that it is intended to move for a nonsuit, or a judgment by default, as the case may be;

and this must hereafter be considered as the rule of the court, under this section of the act of Congress."

In *Dunham* v. *Riley* the order was to produce on the trial. Reasons for making the rule *nisi* instead of absolute are given by Mr. Justice Washington, who said:

"But the court [in *Bas* v. *Steele*] did not decide whether such order must be absolute in the first instance. We think it need not be so; but that upon the rule to show cause, it may be made *nisi;* leaving the court at liberty to enforce the rule, unless the plaintiff can show, at the trial, good cause for not producing them. If the rule be made absolute at the time when it is argued, the court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not."

The statute has never been construed by this court, and the practice and decisions of the inferior courts have no such uniformity as to exert any controlling influence. There are perhaps as many cases upon one side as upon the other. We shall therefore refer to but a few of them.

The Third Circuit Court of Appeals construes the statute as requiring production only on the trial. *Cassett* v. *Mitchell,* 150 Fed. Rep. 32, 44; *Penna. R. R. Co.* v. *International Coal Co.,* 156 Fed. Rep. 765, 769.

The Circuit Court of Appeals for the Second Circuit reached an opposite conclusion in the case now before us.

Since *Jacques* v. *Collins,* 2 Blatch. C. C. 23, decided in 1845, the United States courts for the New York districts have generally followed the broad interpretation of Judge Betts, an interpretation which was plainly influenced by the practice in the courts of the State of New York under a state statute dealing with the matter. It is significant that in *Jacques* v. *Collins* there was no opposition to the rule to produce before trial and no consideration given to the practice under the statute in courts of the United States.

In *Bloede* v. *Bancroft*, 98 Fed. Rep. 175, though since overruled by the Circuit Court of Appeals for the Third Circuit, there is to be found a review of most of the cases bearing upon the subject.

The conclusion which we reach as to the meaning of the statute finds support in many reported cases, which, although no more numerous than those upon the other side, are entitled, as we conceive, to the greater weight as precedents. The very early practice under what was then known as the fifteenth section of the Judiciary Act of 1789, as shown by *Geyger's Lessee* v. *Geyger*, 2 Dallas, 332; *Hylton* v. *Brown*, 1 Wash. C. C. 298; *Triplett* v. *Bank*, 3 Cranch C. C. 646, and *Dunham* v. *Riley*, 4 Wash. C. C. 126, was to direct the production of books and documents at the trial. The very first reported opinion under the section, the *Geyger Case* cited above, was by Mr. Justice Patterson, one of the sub-committee of the Judiciary Committee of the Senate which framed the act. The order in that case was one requiring production on the trial of the action. *Hylton* v. *Brown*, 1 Wash. C. C. 298; *Bas* v. *Steele*, 3 Wash. C. C. 381, and *Dunham* v. *Riley*, 4 Wash. C. C. 126, were cases in which Mr. Justice Washington presided. Some of the observations of the Justice in *Bas* v. *Steele* and *Dunham* v. *Riley* have already found a place in this opinion. Two other of the early practice cases worthy of notice are *Triplett* v. *Bank*, 3 Cranch C. C. 646, and *Wallar* v. *Stewart*, 4 Cranch C. C. 532.

In 1853 the interpretation of this section of the Judiciary Act came before Mr. Justice Curtis, and his view of the question is found in *Iasigi* v. *Brown*, 1 Curtis C. C. 401. There was a motion, based upon affidavits, to compel the production and delivery to the clerk of the court of certain documents alleged to contain evidence material to the issues in a pending action. The opinion was upon this motion. The Justice said:

"By the common law, a notice to produce a paper,

merely enables a party to give parole evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case, and obtaining such an order as the act contemplates. The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery.

"The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide beforehand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case, and the posture and bearings of the evidence are seen.

"If the notice is made before the trial, the correct practice seems to me to be, after the moving party has made a *prima facie* case, to enter an order *nisi*, leaving it for the other party to show cause at the trial. He must then come prepared to produce the paper, if he fails to show cause."

In *Merchants' National Bank* v. *State Bank*, 3 Clifford, 201, Mr. Justice Clifford summarized procedure under the section. Among other things he said (p. 203):

"Those conditions are that the motion must be in a case at law, and on due notice to the opposite party, and it

must appear that the books or writings are in the possession or power of the other party, and that they contain evidence pertinent to the issue, and that the case and circumstances are such that the party might be compelled to produce the same, as therein provided. No doubt is entertained that the motion may be made, in a pending action at law, before the day of the trial; but the requirement of the order of the court must perhaps be that the books and writings be produced at the trial of the action. Such an order may be absolute or *nisi*, as the circumstances may justify or require. Production before the trial is not perhaps contemplated by the words of the provision, nor is it in general necessary, as the penalty, in case of failure to comply with the order, is not arrest and imprisonment until the party comply, as for a contempt, but a judgment of nonsuit or default, as the plaintiff or defendant is the offending party. Where the motion is accompanied by satisfactory proof that the case is one in all respects within the conditions of the provision, and it is also satisfactorily shown that there is just ground to apprehend that the books and writings may be destroyed or transferred to another, or removed out of the jurisdiction before the day of the trial, the order should be made without delay, and be absolute."

For the reasons we have stated, and upon the authorities we have cited, the judgments of both courts must be reversed.

MR. JUSTICE HUGHES dissents.

BRISCOE *v.* RUDOLPH ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

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

No. 141. Argued April 25, 1911.—Decided May 29, 1911.

Sections 997 and 1012, Rev. Stat., and Rule 35 of this court, require assignments of error and apply to appeals from courts of the District of Columbia. *Realty Co.* v. *Rudolph*, 217 U. S. 547. An assignment in the brief is not sufficient.

This court, under Rule 21, can and in this case, as the appeal was taken before the decision in *Realty Co.* v. *Rudolph*, will, notice a plain error of fact even if unassigned.

Whether a special assessment for benefits of a street opening is excessive is a question of fact. *English* v. *Arizona*, 214 U. S. 359.

Congress, under its wide legislative power over the District of Columbia, may create a special assessment district and charge a part or all of the cost of a public improvement upon the property therein according to the benefits received.

Where, as in this case, the court is possessed of statutory jurisdiction and all the essential facts appear to have existed, the judgment is no more subject to collateral impeachment than one entered in exercise of general jurisdiction.

Although the court could have, on motion of the dissatisfied owner, set the assessment in a special proceeding aside, and ordered a new trial, if the owner failed to take the proceedings provided by the statute, and the court had jurisdiction of the parties and subject-matter, the judgment cannot be attacked collaterally in a suit to enjoin sale under the judgment of assessment.

The act of February 10, 1899, 30 Stat. 834, c. 150, extending Rhode Island avenue and authorizing assessments for benefits on property within the assessment district created by the act, is not unconstitutional as depriving owners within the district of their property without due process of law either because not providing sufficient notice or as arbitrarily assessing one-half the damages upon property within the designated district.

32 App. D. C. 167, affirmed.

THE facts, which involve the validity of a street opening assessment in the District of Columbia, are stated in the opinion.

Mr. Samuel Maddox, with whom *Mr. H. Prescott Gatley* was on the brief, for appellant.

Mr. E. H. Thomas for appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill filed by a lot-owner whose property was subjected to a special assessment for benefits resulting from the extension of Rhode Island Avenue in the City of Washington. The object of the bill is to vacate the assessment and enjoin the sale about to be made by the Commissioners of the District.

The case was heard upon the bill, answer and an agreed statement of facts, and was dismissed without prejudice, to proceed in the case in which the assessment had been made for cancellation, if so advised.

The proceeding under which the special assessment in question was instituted in March, 1899, was in pursuance of authority conferred by an act of Congress of February 10, 1899, entitled "An act to extend Rhode Island Avenue." 30 Stat. 834, c. 150. That act provided that one-half of the amount awarded as damages should be assessed against the lands within an area described, as benefits, considering the benefits received by each lot within the area. Such assessments were declared a lien on the lots severally assessed and were to be collected as special improvement taxes in five equal instalments, with interest at four per cent until paid. The lot owners were not formally notified, but notice was given by publication to all property owners as required by the statute. Following the act, a jury of seven was appointed, who viewed the property and assessed damages and benefits; the lot owned

by this appellant being assessed for benefits in the sum of one thousand dollars. A rule was then made requiring all persons whose lots had been so assessed to appear and show cause why the verdict of the jury of seven should not be confirmed. The appellant appeared and filed a number of objections, which may be shortly stated as follows:

a. That the act of Congress is unconstitutional, as not providing for notice, and as an arbitrary assessment of one-half of the damage upon lots in a designated area.

b. That the assessment against the appellant was excessive, unjust, and an unequal apportionment of benefits.

c. Want of notice and opportunity to appear and be heard by the court or the said jury of seven and want of notice as to any of the proceedings until cited to show cause why the verdict of the jury should not be confirmed.

These objections were overruled and the verdict and assessment confirmed. This final judgment was on June 27, 1900. Like objections by other lot-owners assessed for benefits were filed and overruled at the same time.

From this action of the Supreme Court of the District an appeal was prayed but never prosecuted. More than two years thereafter the Commissioners advertised the lot and proceeded to sell the same to enforce payment of the whole amount of the assessment. Thereupon this bill was filed.

There is no assignment of errors as required by §§ 997 and 1011, Rev. Stat., and by Rule 35 of this court. These statutes and the rule apply to appeals from the courts of the District of Columbia, as we pointed out in the case of *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547. An assignment in the brief of appellant seems to have been regarded by many members of the District bar as sufficient. That erroneous practice has been followed here, and three errors have been assigned, though in

substance there are but two. One is that the act of February 10, 1899, for the extension of Rhode Island avenue, is unconstitutional. The other is, that the judgment confirming the assessment made by a jury of seven over the objection of the appellant is void, and conferred no authority to enforce by sale the assessment so made.

This appeal was taken prior to the warning contained in the *Columbia Heights Realty Company Case*. For this reason, we shall avail ourselves of the provision in the 21st rule of this court, by which we reserve the right to "notice a plain error," not because we assume the errors assigned in the brief to be "plain," but that questions of such gravity may not be passed without notice, in view of the practice heretofore prevailing in the courts of the District of Columbia.

The objection to the constitutionality of the act of February 10, 1899, 30 Stat. 834, c. 150, as stated in appellant's brief, is, "that it authorizes an assessment of appellant's property to meet the cost of public improvements, in substantial excess of the special benefits conferred by the improvements, and to the extent of such excess confiscates appellant's property to public use without compensation."

If by this it is meant to say that the act upon its face authorizes an assessment for benefits in excess of actual benefits conferred, the objection is not tenable. There is nothing upon the face of the act to indicate that one-half of the damage awarded to those owners whose property is taken for the extension of the street is an amount in substantial excess of the special benefits realized by owners of property in the special improvement district created by the act. If, on the other hand, it is meant that, as matter of fact, the assessment against owners assumed to be benefited is so excessive as compared to actual benefits as to amount to a taking of such excess for public purpose without compensation, then there is no evidence in the

record bearing upon the subject. The question of the excessiveness of a special assessment for benefits resulting from a public street improvement is one of fact. *English* v. *Arizona*, 214 U. S. 359.

That Congress under its wide legislative power over the District of Columbia, may create a special improvement district and charge a part or all of the cost upon the property in that improvement district, can hardly be doubted. It would be but an exercise of the power of taxation for a public purpose in an area carved out for the purpose. In *Webster* v. *Fargo*, 181 U. S. 394, it was held that a State might create such special taxing districts and charge the whole or part of the cost of a local improvement upon the property in the district, either according to valuation, superficial area or frontage. That it is within the power of Congress to create such a special improvement district and charge the cost of an improvement therein according to the benefits received by property within such district, has been more than once affirmed. *Bauman* v. *Ross*, 167 U. S. 548; *Wight* v. *Davidson*, 181 U. S. 371; *Martin* v. *District of Columbia*, 205 U. S. 135; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547.

When, as under the act for the extension of Rhode Island avenue, only one-half of the cost is to be charged upon lot-owners within the improvement district, and that upon each lot-owner in proportion to the benefit his property has received, the question of whether one such owner has been assessed beyond his proportion is one of fact, and does not touch the validity of the improvement act. This appellant was an owner within the special improvement district. That he was benefited to the extent of one thousand dollars has been determined by the confirmed verdict of the jury which was charged with the duty of proportionately distributing that part of the damages which Congress required to be paid by owners within the improvement district.

The other matter to be noticed is the contention that the sale to enforce the lien of the assessment is under an absolutely void judgment of the Supreme Court of the District of Columbia. The claim is that when the appellant appeared under a citation to show cause why the verdict of the jury of seven should not be confirmed, and filed objections to the verdict, that it was the duty of the court to have ordered a jury of twelve for a reëxamination of the matter. The section under which this contention is made prescribes the method to be pursued for the assessment of damages to land-owners when land is taken or damaged for public roads. If an owner object to the laying out or extension of the road or street and the damages are not agreed upon, a jury of seven is to be empanelled, who are to go upon the premises and assess the damages, and this assessment is to be reduced to writing and signed by the jury, attested by the marshal, returned into court and "recorded."

Section 263 of the Revised Statutes relating to the District of Columbia, provides that "if the authorities or any owner of the land are dissatisfied with the verdict," etc., the marshal shall be ordered to summon a second jury of twelve, who are to give the parties notice and meet on the premises "and proceed as before directed in regard to the first jury."

The exceptions filed by the appellant, and others included in same verdict, have elsewhere been stated. These were overruled and the assessment confirmed as made, and certified for collection. An appeal was prayed and granted, but not prosecuted, because of a stipulation that it should "abide by the decision of the Supreme Court of the United States in the pending case of *Wight* v. *Davidson*," since decided and reported in 181 U. S. 371. That decision was adverse upon every question common to the two cases. After the decision and after the time had elapsed for any error proceeding the Commissioners of the

District proceeded to advertise a sale of the lots so specially assessed for the collection of the amount. Thereupon this bill was filed and the sale has ever since stood enjoined.

Wight v. *Davidson* did not present one question which is presented here, namely, that it was the duty of the *nisi prius* court, upon the presentation of the objection which challenged the assessment upon this owner's property by the first jury as excessive, to have at once directed the calling of a second jury, under § 263, Revised Statutes relating to the District of Columbia. It is not necessary to consider the effect of the stipulation to abide by the result of the appeal in that case, as foreclosing the question stated, inasmuch as we are clearly of opinion that the failure of the Supreme Court of the District to order a second jury was at most an error which can only be available in appropriate error proceedings. It is, however, in this connection just to say that the record in the case fails to show that the court was asked for such second jury. The duty, if it existed without such motion, arose from the fact that the exceptions challenging the amount of the assessments, constituted a statement that the owner, within the meaning of § 263, "was dissatisfied with the verdict thus rendered," and therefore entitled without more to another jury. But the court was possessed of jurisdiction over the parties and over the subject-matter. If the owner assessed did not in some way take steps to set aside the first verdict, its confirmation would necessarily be final. If he was denied a second jury, when entitled to it, the court would fall into error; but the order confirming the assessment would not be void. There is no possible ground for upholding the present collateral attack if the order was voidable only.

The court was in the exercise of a special statutory jurisdiction, but all the facts necessary to the exercise of that jurisdiction appear to have existed, and such a judgment

is no more subject to collateral impeachment than if the court had been exercising its general jurisdiction. *Secombe* v. *Railroad Co.*, 23 Wall. 108; *Fauntleroy* v. *Lum*, 210 U. S. 230, 234; *United States, for use, etc.* v. *Morse*, 218 U. S. 493.

We find no error in the decree dismissing the bill for which we should reverse, and the decree is therefore

Affirmed.

LEWIS *v.* LUCKETT.

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

No. 142. Submitted April 25, 1911.—Decided May 29, 1911.

Under § 130 of the Code of the District of Columbia as amended by the act of June 30, 1902, 32 Stat. 526, c. 1329, there is no failure of jurisdiction because publication for unknown heirs has not been made, unless the record shows the actual or probable existence of persons who were heirs at law or next of kin whose names were unknown; nor will proceedings duly had be vacated at the instance of one who was cited, and whose objections to probate have been overruled, and who does not show that there are any unknown heirs or next of kin or that there is any occasion to make such publication.

32 App. D. C. 188, affirmed.

THE facts, which involve questions of practice in connection with the probate of wills in the District of Columbia, are stated in the opinion.

Mr. John C. Gittings and *Mr. J. M. Chamberlin*, with whom *Mr. Robert E. Mattingly* was on the brief, for plaintiff in error.

Mr. Lorenzo A. Bailey and *Mr. James A. Toomey*, for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

An instrument purporting to be the last will and testament of Mary Hoskins Lewis was offered for probate by L. F. Luckett, who was named as executor therein. The petition asking probate averred that the only beneficiary under the will was the defendant in error, Margaret Estelle Jones, and that the decedent left "no heir at law or next of kin so far as petitioner knew, with the exception of David W. Lewis," her husband. Lewis was made a defendant and cited. He appeared, filed a caveat and denied that the will was the will of the decedent. Miss Jones appeared and filed her petition asking that the will be admitted to probate. She averred that Mrs. Lewis had left neither heir nor next of kin, save her husband, but asked that publication be made for unknown heirs. Both petitions asked that issues be framed for trial by a jury. Issues were accordingly settled and a day named by order of the court for trial.

The jury, on February 3, 1908, found the issues in favor of the proponents of the will, the trial having been had so far as appears without objection by anyone, and without any suggestion that there were heirs or next of kin in existence who should be brought before the court. Thus the matter stood until February 24, when the court ordered publication for unknown heirs and next of kin of the said Mary Hoskins Lewis, "and for all others concerned," to appear on April 3d and show cause why the application for probate of the will should not be granted. Publication was duly made.

Pending such publication Lewis moved the court to vacate the order framing issues, and all subsequent proceedings, because there had been no publication for unknown heirs or next of kin of the decedent when the issues were framed or tried. On April 8, this motion was denied,

and on April 15 the will was ordered to be recorded as the last will and testament of Mary Hoskins Lewis.

From that judgment David W. Lewis appealed to the Court of Appeals of the District of Columbia, which affirmed the action of the court below. From this judgment of affirmance, this writ of error has been sued out.

The only question relied upon for reversal is that the Probate Court had no jurisdiction to admit the will of Mrs. Lewis to probate, because the issues under the caveat filed by the plaintiff in error and the trial of those issues by a jury was prior to the publication for unknown heirs and next of kin of the decedent.

The procedure for the probate of wills is to be found in §§ 130 to 141, inclusive, of the Code of the District of Columbia. Section 130 deals with notice when there is no caveat, upon presentation of a petition asking probate, and requires a citation to issue to all persons who would be interested in the estate if no will had been executed, and that if such persons are "returned as not to be found," then there shall be a publication for such persons. No such return was made in this case. No persons were cited or could be cited, except David W. Lewis, who was duly cited as the only known person interested in case there was no will.

Section 140 deals with the trial of issues when a caveat is filed. That section provides that "if, as to any person in interest, the notification shall be returned 'not to be found,' the court shall assign a new day for such trial and order publication." In the present case there was no return of notice, "not to be found," as to any person supposed to be interested.

But § 130 was amended by the act of June 30, 1902, 32 Stat. 526, by a provision in these words:

"In all cases where it is made to appear to the satisfaction of the court that all or any of the next of kin or heirs at law of the deceased are unknown, such unknown next

of kin or heirs at law may be proceeded against and described in the publication of notice hereinbefore provided for as 'the unknown next of kin,' or 'the unknown heirs at law,' as the case may be, of the deceased, and by such publication of such notice under such designation such unknown next of kin and heirs at law shall be as effectually bound and concluded as if known and their names were specifically set forth in said order of publication."

Assuming that publication for unknown heirs and next of kin is authorized, whether a caveat has been filed or not, it is evident that there is no failure of jurisdiction because such publication was not made, unless there was something in the record showing that there were persons actually or probably in existence who were heirs at law or next of kin whose names were unknown. The language of the opening line of the amendment is, "In all cases where it is made to appear to the satisfaction of the court that all or any of the next of kin or heirs at law of the deceased are unknown, such unknown," etc., "may be proceeded against," etc.

Now, what was the case here? The petition of the propounder of the will, the executor named therein, averred that upon his information and belief there were no heirs at law or next of kin, except David W. Lewis. Margaret Estelle Jones, the sole beneficiary under the will, made a like averment in her petition, joining in the prayer for probate and for the framing of issues to be tried by jury. David W. Lewis, the husband of the decedent, and interested only in case there was no will, made no averment that there were any persons other than himself interested in preventing probate. He asked the court to frame issues for a jury trial. He obtained such an order himself. He also obtained an order setting a day, months ahead, for the trial of such issues. The trial came on. He made no suggestion that there were any unknown heirs at law or next of kin, and asked no order of publication for them.

The trial of the issues was fatal to him. The court before ordering the will to be recorded upon the verdict, took the precaution to order publication for any unknown heirs or next of kin, and for all other persons concerned, to appear and show cause, by a day named, why this will should not be probated. Then, and only then, did the appellant wake up. But only to ask that the court vacate the order settling the issues and the verdict of the jury thereon, because this publication had not been made before any step had been taken. Neither then, nor at any other time, did he ever suggest that there were anywhere upon the surface of the earth any person who was an heir at law or next of kin. There was under such circumstances no reason for publishing for people about whose existence there was no shadow of evidence. The fact that the court out of precaution held up the final probate until publication might be made, does not raise a presumption that there were any such persons. *Hollingsworth* v. *Barbour*, 4 Pet. 466, 477.

Under the facts of this case there was no occasion to make publication for unknown heirs at law or next of kin, and no error in denying the application to vacate the verdict, or in ordering the will to probate.

Affirmed.

COYLE *v.* SMITH, SECRETARY OF STATE OF THE STATE OF OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 941. Argued April 15, 16, 1911.—Decided May 29, 1911.

The power to locate its own seat of government, to change the same, and to appropriate its public money therefor, are essentially state powers beyond the control of Congress.

The power given to Congress by Art. IV, § 3, of the Constitution is to admit new States to this Union, and relates only to such States as are equal to each other in power and dignity and competency to exert the residuum of sovereignty not delegated to the Federal Government.

The constitutional duty of Congress of guaranteeing to each State a republican form of government does not import a power to impose upon a new State, as a condition to its admission to the Union, restrictions which render it unequal to the other States, such as limitations upon its power to locate or change its seat of government.

No prior decision of this court sanctions the claim that Congress in admitting a new State can impose conditions in the enabling act, the acceptance whereof will deprive the State when admitted of any attribute of power essential to its equality with the other States.

Congress may embrace in an enabling act conditions relating to matters wholly within its sphere of powers, such as regulations of interstate commerce, intercourse with Indian tribes and disposition of public lands, but not conditions relating wholly to matters under state control such as the location and change of the seat of government of the State.

The Constitution not only looks to an indestructible union of indestructible States, *Texas* v. *White*, 7 Wall. 700, 725, but to a union of equal States as well.

The legislature of Oklahoma has power to locate its own seat of government, to change the same and to appropriate money therefor, notwithstanding any provisions to the contrary in the Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335, and the ordinance irrevocable of the convention of the people of Oklahoma accepting the same.

113 Pac. Rep. 944, affirmed.

THE facts, which involve the constitutionality of a legislative act of Oklahoma, providing for the removal of the capital of the State from Guthrie to Oklahoma City, are stated in the opinion.

Mr. Frank Dale, Mr. C. G. Hornor and *Mr. John H. Burford*, with whom *Mr. A. G. C. Bierer, Mr. Frank B. Burford* and *Mr. Benj. F. Hegler* were on the brief, for plaintiff in error:

The people of Oklahoma, under the enabling act, secured a republican form of government. *State* v. *Harris* (S. C.), 2 Bailey, 598. There is considerable diversity between the enabling acts of the States. As to Arkansas, there are provisions which are not in any respect similar to those of Oklahoma. So also as to Alabama, Louisiana, Missouri and other States.

In California, the people prepared and presented a constitution and Congress admitted the State upon such constitution, with express provisions limiting the powers of the people under their constitution; so as to Mississippi and Michigan. In the Utah enabling act there is a provision against plural marriage which does not appear in many of the enabling acts. See special provisions also in the Nebraska act. *Brittle* v. *The People*, 2 Nebraska, 198; and see collection of enabling acts in Thorpe's American Charters and Constitutions, vols. 1 to 7 inclusive.

As to what is meant by the term "equality," see *Spooner* v. *McConnell*, 1 McClain, 337, holding that if the meaning be that the people of the new State, exercising the sovereign powers which belong to the people of any other State, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned, within the restrictions of the Federal Constitution, then the States are equal in rank—equal in their powers of sovereignty. They only differ, under such conditions in those restrictions, which, in the exercise of their own

powers, they may have voluntarily imposed upon themselves. See also *Hogg* v. *Zanesville Canal Co.*, 5 Ohio, 416.

At the time Congress passed the law Oklahoma was a Territory and Congress had the unquestioned right to deal with the matter involved. *Church* v. *United States*, 136 U. S. 1; *Thompson* v. *Utah*, 170 U. S. 343.

Congress has not repealed the law. It is not claimed that a repeal was intended; so, if repealed, it must be by implication, and repeals by implication are not favored.

For other cases, involving compacts between States and the United States, and which sustain appellant's contention, see *Bennett* v. *Boggs*, Fed. Cas. No. 1,319; *Vaughan* v. *Williams*, 3 McClain, 530, Fed. Cas. No. 16,903; *Minnesota* v. *Bachelder*, 1 Wall. 109, 114; *Virginia* v. *West Virginia*, 11 Wall. 39; *White* v. *Hart*, 13 Wall. 646; *Marsh* v. *Burroughs*, 1 Woods, 463; *Romine* v. *State of Washington*, 34 Pac. Rep. 924; *Brittle* v. *The People*, 2 Nebraska, 198, *Green* v. *Biddle*, 8 Wheat. 1; *Hawkins* v. *Barney's Lessee*, 5 Pet. 456; *Albee* v. *May*, Fed. Cas. No. 134; *Hancock* v. *Walsh*, 3 Woods, 351; *Gray* v. *Davis*, 1 Woods, 430; *United States* v. *Partello*, 48 Fed. Rep. 670; *The Kansas Indians*, 5 Wall. 737; *Beecher* v. *Wetherby*, 95 U. S. 517, 522; *People* v. *Roberts*, 18 How. 173; *Boyd* v. *Thayer*, 143 U. S. 135.

The cases cited and quoted by the court in the majority opinion below do not sustain the decision.

In the formation of the Federal Union, each of the original colonies, upon entering the Union, surrendered some of its sovereign powers, and deprived itself of the power to exercise others.

Each State which has come into the Union since the formation of the Government of the United States has, either at the request or upon requirement of Congress, temporarily or permanently deprived itself of the power to exercise some of the attributes of sovereignty. And by so doing the State has not been admitted upon an unequal

footing with other States. Equality among the States, or as termed by the courts, an equal footing with the original States, means the possession of sovereignty, the power to exercise the functions of a republican form of government, not necessarily in the same manner or to the same extent. *Ableman* v. *Booth*, 21 How. 506; Vattel's Law of Nations, 3, 193, 196, 229; Baker's Int. Law, 24, 27, 43, 94.

The compact of the enabling act was entered into by the high contracting parties for good and sufficient reasons of state, which is all the consideration that is needed to support a public treaty, compact or convention. Of course in the present case there was a "consideration" in the ordinary sense. Wheaton, Int. Law, 377; Maxey's Int. Law, 26, 27; 1 Moore's Dig. Int. Law, 19; Grotius, B. 1, c. 3, §§ 16, 18; *Matheny* v. *Golden*, 5 Oh. St. 368.

Many of the Territories have yielded portions of sovereignty in order to become States (the brief refers to numerous instances).

The contemporary and departmental interpretation and *stare decisis* sustain plaintiff in error.

Mr. Charles West, Attorney General of Oklahoma, *Mr. B. F. Burwell* and *Mr. J. W. Bailey*, with whom *Mr. C. B. Stuart* and *Mr. W. A. Ledbetter* were on the brief, for defendant in error.

Mr. Justice Lurton delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma to review the judgment of that court upholding a legislative act of the State providing for the removal of its capital from Guthrie to Oklahoma City, and making an appropriation from the funds of the State for the purpose of carrying out the act by the erection of the necessary state buildings. (Act of Oklahoma, December 29, 1910) not yet published.

The opinion of the Supreme Court of Oklahoma may be found in 113 Pac. Rep. 944.

By an act passed December 7, 1910, the State gave to its Supreme Court "original jurisdiction" to entertain any proceeding brought in that court by resident taxpayers of the State to have determined "the legality of the removal or location or attempt to remove or locate the state capital" and certain other state institutions. This act was passed in advance of the removal act here involved, and for the express purpose of providing a speedy method for the determination of constitutional objections which might be urged against the proposed relocation of the seat of the state government. The Removal Act followed, and this proceeding was at once started in the Supreme Court of the State by the plaintiffs in error, who claimed not only to be citizens and taxpayers of the State, but also owners of large property interests in Guthrie, which would be adversely affected by the removal of the seat of government as proposed by the act in question. The validity of the law locating the capital at Oklahoma City was attacked for many reasons which involved only the interpretation and application of the constitution of the State. These were all decided adversely to the petitioners. We shall pass them by as matters of state law, not subject to the reviewing power of this court under a writ of error to a state court.

The question reviewable under this writ of error, if any there be, arises under the claim set up by the petitioners, and decided against them, that the Oklahoma act of December 29, 1910, providing for the immediate location of the capital of the State at Oklahoma City was void as repugnant to the Enabling Act of Congress of June 16, 1906, under which the State was admitted to the Union. 34 Stat. 267, c. 3335. The act referred to is entitled "An act to enable the people of Oklahoma and the Indian Territory to form a constitution and state

government and be admitted into the Union on an equal footing with the original States," etc. The same act provides for the admission of Arizona and New Mexico. The first twenty-two sections relate only to Oklahoma. The second section is lengthy and deals with the organization of a constitutional convention and concludes in these words: "The capital of said State shall temporarily be at the city of Guthrie, and shall not be changed therefrom previous to Anno Domini Nineteen Hundred and Thirteen, but said capital shall after said year be located by the electors of said State at an election to be provided for by the legislature; provided, however, that the legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purposes during said period."

Other sections of the act require that the constitution of the proposed new State shall include many specific provisions concerning the framework of the government, and some which impose limitations upon the State as regards the Indians therein, and their reservations, in respect of traffic in liquor among the Indians or upon their reservations. The twenty-second and last section applicable to Oklahoma reads thus: "That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this act."

The constitution as framed contains nothing as to the location of the State capital; but the convention which framed it adopted a separate ordinance in these words:

"SEC. 497. Enabling Act accepted by Ordinance Irrevocable. Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of Congress of the United States, entitled 'An Act to Enable the People

of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States; and to Enable the People of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States,' approved June the sixteenth, Anno Domini, Nineteen Hundred and Six."

This was submitted along with the constitution as a separate matter and was ratified as was the constitution proper.

The efficacy of this ordinance as a law of the State conflicting with the removal act of 1910 was, of course, a state question. The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the State after its admission, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a State of any power which it *possesses*, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union, and the constitu-

tional duty of guaranteeing to "every State in this Union a republican form of government." The position of counsel for the appellants is substantially this: That the power of Congress to admit new States and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original States."

The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States, or parts of States, without the consent of such States, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit States."

The definition of "a State" is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the State is admitted "as a new and *entire member* of the United States of America." 1 Stat.

189, 191. Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee, as the third new State, it being declared to be "one of the United States of America," "on an equal footing with the original States in all respects whatsoever," phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original States."

The power is to admit "new States into *this* Union."

"This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each State in this Union a republican form of government," power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit. It may imply the duty of such new State to provide itself with such state government, and impose upon Congress the duty of seeing that

such form is not changed to one anti-republican,—*Minor* v. *Happersett*, 21 Wall, 162, 174, 175,—but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may by the imposition of conditions in an enabling act deprive a new State of any of those attributes essential to its equality in dignity and power with other States. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new State, little need to be said. The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress.

The case of *Permoli* v. *First Municipality*, 3 How. 589, 609, is in point. By the act of February 20, 1811, the people of the Territory of Orleans were empowered to form a constitution and state government. The third

section of that act prescribed, among other things, that it should "contain the fundamental principles of civil and religious liberty." The act of 1812 admitting the State provided, "that all the conditions and terms contained in said third section should be considered, deemed and taken as fundamental conditions and terms, upon which the said State is incorporated into the Union." It was claimed that a certain municipal ordinance was in violation of religious liberty, and therefore void, as repugnant to the act under which the State had been admitted to the Union. Dealing with those terms of the enabling and admitting acts in respect to the contents of the constitution to be adopted by the people of the Territory seeking admission as a State, this court, speaking by Mr. Justice Catron, said:

"All Congress intended, was to declare in advance to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances; the instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution and admitted the state 'on an equal footing with the original States in all respects whatever,' in express terms, by the act of 1812, Congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812, could only relate to the stipulations contained in the second proviso of the act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended."

The reference by Justice Catron to the terms and conditions in act of 1812, is to a provision in the act of February 20, 1811 (2 Stat. 641, 642), quite common in enabling acts, by which the new State disclaimed title to the public lands, and stipulated that such lands should remain subject to the sole disposition of the United States, and for their exemption from taxation, and that its navigable waters should forever remain open and free, etc. Such stipulations, as we shall see, being within the sphere of congressional power, can derive no force from the consent of the State. Like stipulations, as well as others in respect to the control by the United States of large Indian reservations and Indian population of the new State, are found in the Oklahoma enabling act. Whatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the State.

So far as this court has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new States after admission, there is to be found no sanction for the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed.

The case of *Pollard's Lessee* v. *Hagan*, 3 How. 212, is a most instructing and controlling case. It involved the title to the submerged lands between the shores of navigable waters within the State of Alabama. The plaintiff claimed under a patent from the United States, and the defendant under a grant from the State. The plaintiff relied upon two propositions which are relevant to the question here. One was that in the act under which Alabama was admitted to the Union there was a stipulation that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying

within the State, and that they should remain at the sole disposal of the United States, and a second, that all of the navigable waters within the State should forever remain public highways and free to the citizens of that State and of the United States, without any tax, duty or impost imposed by the State. These provisions were relied upon as a "compact" by which the United States became possessed of all such submerged lands between the shores of navigable rivers within the State.

The points decided were:

First, following *Martin* v. *Waddell*, 16 Pet. 410, that prior to the adoption of the Constitution, the people of each of the original States "held the absolute right to all of their navigable waters and the soil under them for their common use, subject only to the rights since surrendered by the Constitution."

Second. That Alabama had succeeded to all the sovereignty and jurisdiction of all the territory within her limits, to the same extent that Georgia possessed it before she ceded that territory to the United States.

Third. That to Alabama belong the navigable waters, and soils under them.

The court held that the stipulation in the act under which Alabama was admitted to the Union, that the people of the proposed State "forever disclaim all rights and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as law. As to this the court said:

"Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

"And all constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever State or Territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new State, where it may happen to be, contains its own refutation, and requires no farther examination. The propositions submitted to the people of the Alabama Territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and state government for themselves, so far as they related to the public lands within that Territory amounted to nothing more nor less than rules and regulations respecting the sales and disposition of public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy."

Fourth. As to the stipulation in the same admission act that all navigable waters within the State should forever remain open and free, the court, after deciding that to the original States belonged the absolute right to the navigable waters within the States and the soil under them for the public use, "subject only to the rights since surrendered by the Constitution," said:

"Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has

been admitted into the union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding."

The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

This deduction finds support in *Permoli* v. *First Municipality*, 3 How. 589, from which we have heretofore used an excerpt; and in *Strader* v. *Graham*, 10 How. 82; *Withers* v. *Buckley et al.*, 20 How. 84, 93; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 160; *Huse* v. *Glover*, 119 U. S. 543; *Sands* v. *River Co.*, 123 U. S. 288, 296; *Ward* v. *Race Horse*, 163 U. S. 504; *Bolln* v. *Nebraska*, 176 U. S. 83, 87.

That the power of Congress to regulate commerce among the States involves the control of the navigable waters of the United States over which such commerce is conducted is undeniable; but it is equally well settled that the control of the State over its internal commerce involves the right to control and regulate navigable streams within the State until Congress acts on the subject. This has been the uniform holding of this court since *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683.

Many of the cases cited above presented the question as to whether state regulation of its own navigable waters, valid as an exercise of its power as a State until Congress should regulate the subject, was invalid because that "plenary power" had been cut down, not by a regulation

of the general subject by Congress, but as a result of a supposed compact, condition or restriction accepted by the State as a condition upon which it was admitted into the Union.

It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Williamette Bridge Co.* v. *Hatch*, 125 U. S. 1, 9. *Pollard's Lessee* v. *Hagan, supra.*

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. If power to impose such a restriction upon the general and undelegated power of a State be conceded as implied from the power to admit a new State, where is the line to be drawn against restrictions imposed upon new States. The insistence finds no support in the decisions of this court. In *Withers* v. *Buckley*, 20 How. 84, 92, 93, where it was contended that certain legislation of the State of Mississippi interfering with the free navigation of one of the navigable streams of the State, con-

flicted with one of the stipulations in the act under which the State had been admitted to the Union, Congress not having otherwise legislated upon the subject, it was said:

"In considering this act of Congress of March 1st, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of *Pollard's Lessee* v. *Hagan*, 3 How. p. 223."

In *Escanaba Co.* v. *Chicago*, cited above, it was contended that the control of the State of Illinois over its internal waters had been restricted by the ordinance of 1787, and by the reference to that ordinance in the act of Congress admitting the State. Concerning this insistence, this court, speaking by Mr. Justice Field, said:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States in all respects whatever.' 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new.

Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Permoli* v. *First Municipality*, id. 589; *Strader* v. *Graham*, 10 id. 82."

In *Ward* v. *Race Horse, supra*, the necessary equality of the new State with the original States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming.

In *Bolln* v. *Nebraska*, 176 U. S. 83, 89, it appeared that the act under which Nebraska had been admitted had, among other things, required the convention organized to form a constitution for the proposed State to adopt for the people of that State the Constitution of the United States. This was done. It was claimed as a result that the power of the State to authorize the prosecution of a felony by information had been restricted, because the United States could, under one of the amendments to the Constitution, prosecute only by indictment. In respect to this claim the court said:

"But conceding all that can be claimed in this connection, and that the State of Nebraska did enter the Union under the condition of the Enabling Act, and that it adopted the Constitution of the United States as its fundamental law, all that was meant by these words was that the State acknowledged, as every other State has done, the supremacy of the Federal Constitution. The first section of the act of 1867, admitting the State into the Union, declared: 'that it is hereby admitted into the Union upon an equal footing with the original States in all respects whatsoever.' It is impossible to suppose that, by such indefinite language as was used in the Enabling Act, Congress intended to differentiate Nebraska from her sister

States, even if it had the power to do so, and attempt to impose more onerous conditions upon her than upon them, or that in cases arising in Nebraska a different construction should be given to her constitution from that given to the constitutions of other States. But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the act of 1867 admitting the State of Nebraksa, it stands 'upon an equal footing with the original States in all respects whatsoever.' "

We are unable to find in any of the decisions of this court cited by counsel for the appellants anything which contravenes the view we have expressed. *Green* v. *Biddle*, 8 Wheat. 1, involved the question as to whether a compact between two States, assented to by Congress, by which private land titles in Kentucky, derived from Virginia before the separation of Kentucky from Virginia, "should remain valid and secure under the laws of the proposed State of Kentucky, and should be determined by the laws now existing in this (Virginia) State." By subsequent legislation of the State of Kentucky these titles were adversely affected. This court held that this legislation impaired the obligation of a valid contract within that clause of the Constitution forbidding such impairment. Neither does *Virginia* v. *West Virginia*, 11 Wall. 39, have any bearing here. The question there was one of compact between the two States, assented to by Congress, concerning the boundary between them. Both the cases last referred to concerned compacts between States, authorized by the Constitution when assented to by Congress. They were therefore compacts and agreements

sanctioned by the Constitution, while the one here sought to be enforced is one having no sanction in that instrument.

Beecher v. *Wetherby*, 95 U. S. 517, involved the validity of the grant of every sixteenth section in each township for school purposes. The grant was made by the act providing for the organization of a state government for the Territory of Wisconsin, and purported to be upon condition that the proposed State should never interfere with the primary disposal of the public lands of the United States, nor subject them to taxation. The grant was held to operate as a grant taking effect so soon as the necessary surveys were made. The conditions assented to by the State were obviously such as obtained no force from the assent of the State, since they might have been exacted as an exertion of the proper power of Congress to make rules and regulations as to the disposition of the public lands. *Minnesota* v. *Bachelder*, 1 Wall. 109, is another case which involved nothing more than an exertion by Congress of its power to regulate the disposition of the public lands.

The case of the *Kansas Indians*, 5 Wall. 737, involved the power of the State of Kansas to tax lands held by the individual Indians in that State under patents from the United States. The act providing for the admission of Kansas into the Union provided that nothing contained in the constitution of the State should be construed to "impair the rights of persons or property pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty with such Indians." It was held that so long as the tribal organization of such Indians was recognized as still existing, such lands were not subject to taxation by the State. The result might be well upheld either as an exertion of the power of Congress over Indian tribes, with whom the United States had treaty relations, or as a contract by which the State had agreed to forego taxation of Indian lands, a contract quite

within the power of a State to make, whether made with the United States for the benefit of its Indian wards, or with a private corporation for the supposed advantages resulting. Certainly the case has no bearing upon a compact by which the general legislative power of the State is to be impaired with reference to a matter pertaining purely to the internal policy of the State. See *Stearns* v. *Minnesota*, 179 U. S. 223.

No good can result from a consideration of the other cases cited by plaintiffs in error. None of them bear any more closely upon the question here involved than those referred to. If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new State have complied with the terms of the act that it shall be the duty of the President to issue his proclamation, and that "thereupon the proposed State of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, *on an equal footing with the original States*." The proclamation has been issued and the Senators and Representatives from the State admitted to their seats in the Congress.

Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

In *Texas* v. *White*, 7 Wall. 700, 725, Chief Justice Chase said in strong and memorable language that, "the Constitution, in all of its provisions looks to an indestructible Union, composed of indestructible States."

In *Lane County* v. *Oregon*, 7 Wall. 76, he said:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States."

To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent.

BAGLIN, SUPERIOR GENERAL OF THE ORDER OF CARTHUSIAN MONKS, *v.* CUSENIER COMPANY.

APPEAL FROM AND ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 99. Argued March 14, 15, 1911.—Decided May 29, 1911.

While names which are merely geographical cannot be exclusively appropriated as trade-marks, a geographical name which for a long period has referred exclusively to a product made at the place and not to the place itself may properly be used as a trade-mark; and so *held* that the word "Chartreuse" as used by the Carthusian Monks in connection with the liqueur manufactured by them at Grande Chartreuse, France, before their removal to Spain, was a validly registered trade-mark in this country.

The law of a foreign country has no extra-territorial effect to detach a trade-mark validly registered in this country from the product to which it is attached.

Non-user of a trade-mark, or the use of new devices, does not afford a basis for the penalty of loss of right thereto by abandonment; abandonment will not be inferred in the absence of intent, and a finding of intent must be supported by adequate facts.

While one may use the name of the place where he manufactures an article, in order to show where it is manufactured, and may state all the facts in regard to his succession, under the law of a foreign country, to property of parties formerly manufacturing an article similar in many respects, he cannot, in this country, use the name of the place to designate the article if that name has been validly registered as a trade-mark here; and so *held* that the liquidator appointed in France of the property of the Carthusian Monks could not, in this country, use the word "Chartreuse" to designate the liqueur manufactured by him at Grande Chartreuse, the Carthusian Monks having validly registered that name in the United States as a trade-mark of the liqueur manufactured by them.

A validly registered trade-mark cannot be used by anyone other than the owner, even with words explaining that the article to which it is attached is not manufactured by the owner of the trade-mark.

Where the Circuit Court has sustained the trade-mark but the Circuit Court of Appeals has suggested a form of label that the defendant might use, defendant should not be punished for contempt for using such a form.

THE facts, which involve the validity of the word "Chartreuse" as a trade-mark and other questions in regard to the ownership thereof and the sale of cordials under that name, are stated in the opinion.

Mr. Philip Mauro, with whom *Mr. C. A. L. Massie* and *Mr. Ralph L. Scott* were on the brief, for appellants and petitioners:

The office of a trade-mark is to guarantee the origin of an article with which it has become identified in the public mind. *Medicine Co.* v. *Wood,* 108 U. S. 218, 223.

Defendant's use of the "Chartreuse" trade-mark vio-

lates the fundamental law of trade-marks. Defendant's liqueur is of recent origin, its formula having been devised in 1904. Defendant's business is not a continuation of complainants' business.

The French court at Grenoble has decided that the product sold by defendant is not genuine Chartreuse. There can be no dispute between the parties hereto as to the validity of the trade-mark "Chartreuse." That word does constitute a valid trade-mark as applied to liqueurs, cordials, etc. See *Falk* v. *Trading Co.*, 180 N. Y. 445, 451; *Grezier* v. *Girard*, decided April 13, 1876; *A. Bauer & Co.* v. *Order of Carthusian Monks*, 120 Fed. Rep. 78; and see also Judgment of the English House of Lords.

The significance of the word "Chartreuse" is not geographical alone; but even if it were, geographical names may constitute lawful trade-names under some circumstances. *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Lawrence Co.* v. *Tenn. Mfg. Co.*, 138 U. S. 537, 550; *Scriven* v. *North*, 134 Fed. Rep. 366, 377; *Thompson* v. *Montgomery*, 41 Ch. D. 35, 50; *"Stone Ale" Case*, and *Reddaway* v. *Banham*, 1 Q. B. 286; *"Camel Hair Belting" Case; Shaver* v. *Heller & Merz Co.*, 108 Fed. Rep. 821; *Buzby* v. *Davis*, 150 Fed. Rep. 275; *Pillsbury* v. *Mills Co.*, 24 U. S. App. 395; *S. C.*, 12 C. C. A. 432, and 64 Fed. Rep. 841; *Kathreiner's Malzkaffee Fab.* v. *Pastor Kneipp Med. Co.*, 82 Fed. Rep. 321, 324; *Siegert* v. *Gandolfi*, 149 Fed. Rep. 100; *S. C.*, 79 C. C. A. 142; *Bauer* v. *Siegert*, 120 Fed. Rep. 81.

The property involved in this suit is the good-will of the business which has come into existence in this country, being the outgrowth of transactions, extending over many years, between complainants and the American public. It was one of the objects of the French law of 1901 to confiscate this American business, and even if such were one of the objects of that law said business is not subject to the jurisdiction of the French laws and tribunals.

For definition of "good-will" see *Washburn* v. *Wall Paper Co.*, 81 Fed. Rep. 17, 20.

The Monks owned the business in question during all the centuries they manufactured liqueurs in France, and had at any time the right to move their base of operations from one place to another. The right to transfer a business from place to place is an incident of ownership.

The attempt of the liquidator to exercise ownership over the foreign trade-marks has been disapproved by the French courts. The French law of 1901, and the decrees of the French courts give no color of authority to defendant to use the trade-marks of complainants in the United States.

The new labels employed by complainants do not in any way amount to an abandonment of the old trade-name and trade-marks.

Mr. A. L. Pincoffs, with whom *Mr. Roger Foster* was on the brief, for appellees and cross-petitioners:

The bill cannot be maintained as a bill to enjoin infringements by the complainant of a trade-mark, as the primary meaning of the word "Chartreuse" is geographical and no use of the word as its trade-mark by defendant is proved. *Elgin Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 667; *Ex parte Farmer Co.*, 18 Off. Gaz. 412; *Pillsbury Co.* v. *Eagle Co.*, 86 Fed. Rep. 608; *Waltham Watch Co.* v. *U. S. Watch Co.*, 173 Massachusetts, 85; *Wolf* v. *Goulard*, 18 How. Pr. 64, 66, 67; *Lea* v. *Wolf*, 46 How. Pr. 157, 158; Browne on Trade-marks, 2d ed., § 182, p. 193; *Durham Smoking Tobacco Case*, 3 Hughes, 111, 167.

There was no business or good-will vested in complainants in this country separate and apart from the business and good-will in France. *Knoedler* v. *Boussod*, 47 Fed. Rep. 465.

The disputed marks and the phrase "Chartreuse," as applied to a liqueur, are primarily significant of place of

manufacture; the complainants have failed to prove that they have acquired a secondary meaning and refer merely to the fact that the article is of their manufacture. *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Thompson* v. *Montgomery*, L. R. 41 Ch. Div. 35; *Bauer* v. *Carthusian Monks*, 120 Fed. Rep. 78.

Complainants cannot maintain this suit, because the marks which they seek to enjoin defendant from using cannot be used by themselves. *Atlantic Milling Co.* v. *Robinson*, 20 Fed. Rep. 218; *Dixon Crucible Co.* v. *Guggenheim*, 3 Am. L. T. 228; *Hudson* v. *Osborne*, 39 L. J. Ch. (N. S.) 79; *Shipwright* v. *Clements*, 19 W. R. 599; *Hall* v. *Barrows*, 4 DeG., J. & S. 150; *Monson* v. *Boehm*, L. R. 26 Ch. Div. 398, 405.

Those who do not in any sense succeed to the business cannot claim the trade-mark. There is no such thing as a trade-mark in gross. It must be appendant to some particular business. *Weston* v. *Ketcham*, 51 How. Pr. 455; *Kidd* v. *Johnson*, 100 U. S. 617.

The complainants have failed to prove that this defendant falsely represents that the liqueur sold by it is made in accordance with any recipe of complainants, or that it is guilty of any misrepresentation in stating that its liqueur is identical with that formerly made by the Monks. *Hostetter* v. *Hungerford*, 97 Fed. Rep. 585.

As the product formerly manufactured by the Monks owed its reputation to its quality, due to certain advantages inseparably connected with the place of manufacture, defendant's principal, who, by decree of a competent French court, has been directed and authorized to carry on such business at the identical place under similar conditions, and who, owing to the advantages so enjoyed by him, has succeeded in making the identical article, has the right to the good-will attached to such business and to use the trade-name and labels connected with it.

Trade-marks or trade-names may be assigned with the

business to which they appertain, and will go with an assignment of the good-will of that business, either voluntarily or by operation of law. *Kidd* v. *Johnson*, 100 U. S. 617; *Menendez* v. *Holt*, 128 U. S. 514; *Chemical Co.* v. *Meyer*, 139 U. S. 547; *Warren* v. *Thread Co.*, 134 Massachusetts, 247; *Nervine Co.* v. *Richmond*, 159 U. S. 302.

The good-will of a business including the right to use trade-marks, even where these consist of the names of individuals engaged in the business, and of a picture representing such name, pass with a transfer of all the property and assets of the business, although not specifically mentioned. *Fish Bros. Wagon Co.* v. *Titus G. Fish et al.*, 82 Wisconsin, 546; *Sarrazin* v. *Irby Segar & Tobacco Co.*, 93 Fed. Rep. 624; *Nervine Co.* v. *Richmond*, 159 U. S. 293; *Peck Bros. & Co.* v. *Peck Bros.*, 113 Fed. Rep. 291; *Chemical Co.* v. *Meyer, supra; LePage Co.* v. *Russia Cement Co.*, 51 Fed. Rep. 941.

The correctness of the French judgments appointing defendant's principal are not open to question here. They are of the nature of a judgment *in rem*. Black on Judgments, 2d ed., § 79; *Windsor* v. *McVeigh*, 93 U. S. 274; *Kreiss* v. *Faron*, 118 California, 142; *Whitney* v. *Walsh*, 1 Cush. 29.

When a court of competent jurisdiction and by proceedings directed specifically against things within its jurisdiction, acts on such things, its judgment, if the procedure be regular, is everywhere binding. Wharton, Conflict of Laws, 3d ed., 665, 666; *Castrique* v. *Imrie*, L. R. 4 H. L. 428; *Magoun* v. *New Eng. Co.*, 1 Story, 157; *Peters* v. *Warren Ins. Co.*, 14 Pet. 99; *Hudson* v. *Guestier*, 4 Cranch, 293; *Williams* v. *Armroyd*, 7 Cranch, 423; *Whitney* v. *Walsh*, 1 Cush. 29; Black, Judgments, § 813; *Monroe* v. *Douglas*, 4 Sandf. Ch. 126, 183; *Hilton* v. *Guyot*, 159 U. S. 167.

This court cannot enter into an inquiry as to whether the French courts proceeded correctly as to their own law.

Black on Judgments, 581–9; *Castrique* v. *Imrie*, L. R. 4 H. L. 428; *Williams* v. *Armroyd*, 7 Cranch, 423.

Even if the word "Chartreuse" and the labels ever had the secondary meaning claimed by the complainants, the evidence in this case shows that they have lost such meaning, and that both the word "Chartreuse" and the labels indicate to the American public exclusively the article manufactured by the defendant's principal. *Hildreth* v. *McDonald*, 164 Massachusetts, 16; *Singer Co.* v. *Wilson*, 2 Ch. Div. 447; *Van Camp Co.* v. *Cruikshanks Co.*, 90 Fed. Rep. 814; *Von Muenser* v. *Wittenran*, 85 Fed. Rep. 966; *S. C.*, 91 Fed. Rep. 126.

The provisions of our trade-mark treaties and our own existing registration statute support defendant's contention here.

Mr. Justice Hughes delivered the opinion of the court.

Père Baglin, Superior General of the Order of Carthusian Monks, for himself and the other members of the Order, brought this bill in equity against the Cusenier Company, a New York corporation, to restrain the infringement of trade-marks and unfair competition.

The complainant had a decree in the Circuit Court, and this was modified in certain particulars, to which we shall presently refer, by the Circuit Court of Appeals. The complainant then appealed to this court and motion was made to dismiss the appeal, it being urged that the decree below was not final. Complainant then petitioned for a writ of certiorari, and this writ and a cross-writ asked for by the respondent were granted.

The facts, so far as we deem it necessary to state them, are as follows: For several hundred years prior to 1903—save for a comparatively brief period following the French Revolution—the Order of Carthusian Monks occupied the Monastery of the Grande Chartreuse, near Voiron, in the Department of Isere, in France. This was their

Mother House. There, by a secret process, they made the liqueur or cordial which, at first sold locally, became upwards of fifty years ago the subject of an extensive trade and is known throughout the world as "Chartreuse." The Monks originally manufactured the liqueur at the Monastery itself and later at Fourvoirie, close by. It was marketed, here and abroad, in bottles of distinctive shape, to which were attached labels bearing the inscription, "Liqueur Fabriquée â la Gde. Chartreuse," with a facsimile of the signature of L. Garnier, a former Procureur of the Order, and its insignia, a globe, cross and seven stars; and these symbols with "Gde. Chartreuse" underneath were also ground into the glass. In 1876, the then Procureur registered two trade-marks in the Patent Office, and these were re-registered in 1884, under the act of 1881. In the accompanying statement the one was said to consist "of the word 'Chartreuse,' accompanied by a facsimile of the signature of L. Garnier," and the other "of the word-symbol 'Chartreuse;' " and the combinations in which these were used were described.

In the year 1903, having been refused authorization under the French law of July 1, 1901, known as the Associations Act, the congregation of the Chartreux was held to be dissolved by operation of law and possession was taken of their properties in France by a "sequestrating administrator and liquidator" appointed by the French court. Forcibly removed from their former establishment, and taking their secret with them, the Monks set up a factory at Tarragona, in Spain, and there according to their ancient process they have continued the manufacture of the liqueur, importing from France such herbs as were needed for the purpose.

The French liquidator, Henri Lecouturier, employing a skilled distiller and chemical assistants, undertook by experimentation to make at Fourvoirie a liqueur either identical with or resembling as closely as possible the

famous "Chartreuse;" and, having succeeded in this effort to his satisfaction, he placed his product upon the market under the old name. His agent in this country under date of October 25, 1904, issued a circular containing the following announcement:

"I take pleasure in informing you that I have been appointed Sole Agent for the United States and Canada for the Grande Chartreuse Liqueur. Within a few days I shall receive a shipment and therefore will be able to execute orders. As there is a very extensive demand for this cordial, I shall not be able to fill large orders in full, but I trust that, within a few weeks, I will have sufficient stock on hand to enable me to satisfy the demand through the Cusenier Company, whom I have appointed my distributing agents.

"Nothing has been changed in the putting up of the products of the Grande Chartreuse, which bear the same labels as heretofore, *the only guarantee of authenticity and of origin of the Chartreuse made at the Monastery.*"

The liquidator's cordial was shipped to this country, and sold here, in bottles of precisely the same description and with the same marks and symbols which had been used by the Monks; if there was any difference it is frankly stated to have been unintentional.

Meanwhile the Monks, debarred by the proceedings in France from the use of their old marks and symbols in that country, devised a new designation for their liqueur, in which prominence was given to the words "Pères Chartreux." The new label bore the inscription "Liqueur Fabriquée à Tarragone par les Pères Chartreux;" and this was accompanied by the statement that "this liqueur is the only one identically the same as that made at the Monastery of the Grande Chartreuse in France, previous to the expulsion of the Monks, who have kept intact the secret of its manufacture." To negative the claim of abandonment they made a small shipment to this country

under the old labels. And, both here and in other countries, the Monks have sought by legal proceedings to prevent the use of the word "Chartreuse" as a designation of the liqueur made at Fourvoirie since their expulsion, and the use or imitation by the liquidator or by those claiming under him of the marks which the Monks had associated with their product and the simulating in any way of the dress or packages in which it had been sold.

For this purpose, this suit was brought against the defendant, who was then representing the liquidator in this country. Pending it, the liquidator sold the property he had acquired and the business he had been conducting in that capacity to a company known as the "Compagnie Fermière de la Grande Chartreuse," which has continued the manufacture of liqueur at Fourvoirie and also its sale in this country through the defendant as its representative.

On final hearing the Circuit Court adjudged "that the word-symbol 'Chartreuse,' as applied to liqueur or cordial," and that "the said word-symbol 'Chartreuse' accompanied by the facsimile signature of L. Garnier," as set forth in the certificates of registry in the Patent Office, "constitute good and valid trade-marks, and in this country have been and now are the sole and exclusive property of said complainants, the Carthusian Monks or Fathers (Pères Chartreux); and that in this country the said complainants still have the right, and the exclusive right, to use the said marks, or any of them, upon liqueurs or cordials manufactured by the complainants." It was further adjudged that the defendant had been guilty of infringement of these trade-marks and of unfair competition, and the decree also contained a perpetual injunction.

The Circuit Court of Appeals affirmed the decree with modifications which affect only the paragraph containing the injunction. This paragraph as amended reads as

follows (the words inserted by the Court of Appeals being italicized):

"It is further adjudged, ordered and decreed that defendant, its associates, successors, assigns, officers, servants, clerks, agents, and workmen, and each of them be, and they hereby are perpetually enjoined from using in this country or in any possession thereof, in connection with any liqueur or cordial not manufactured by complainants, the trade-mark 'Chartreuse,' or of any colorable imitation thereof *unless so used as clearly to distinguish such liqueur or cordial from the liqueur or cordial manufactured by the complainants*—or the fac-simile signature of L. Garnier, or any colorable imitation thereof—or any of the trade-marks above referred to, or any colorable imitation thereof; and they and each of them are likewise perpetually enjoined from importing or putting out or selling or offering for sale, directly or indirectly, within this country, any liqueur or cordial not manufactured by complainants, in any dress or package like or simulating in any material respects the dress or package heretofore used by complainants—and in particular from making use of any [bottle or] label or [package] *symbol* like or substantially similar to *those appearing on* 'Complainants' Exhibit, Defendant's Liqueur,' being the bottle now on file as an exhibit in this Court—and from in anywise attempting to make use of the good-will and reputation of complainants in putting out in this country any liqueur or cordial not made by complainants."

The defendant contends that the Circuit Court was without jurisdiction. This objection must fail, as it sufficiently appears from the record that the controversy was between foreign subjects and a New York corporation. And there was also an assertion by the bill of a right under the Federal statute, by virtue of the registration of the trade-mark. *Warner* v. *Searle & Hereth Company*, 191 U. S. 195; *Standard Paint Company* v. *Trinidad Asphalt*

Company, 220 U. S. 446, decided April 10, 1911; *Jacobs* v. *Beecham*, decided May 15, 1911, *ante*, p. 263.

On the merits, the questions presented are (1) What rights, with respect to the designations and marks involved, were enjoyed by the Carthusian Monks prior to their expulsion from the French Monastery; (2) What effect upon their rights had (*a*) the liquidation proceedings in France, and (*b*) the conduct of the Monks in relation to the trade in the liqueur which they subsequently made in Spain; and, in the light of the conclusions upon these points, (3) To what remedy, if any, are the Monks entitled?

It is insisted that the judgment is erroneous in determining that "the word-symbol Chartreuse" constituted a valid trade-mark. It is argued that "Chartreuse" is a regional name; that the characteristic qualities of the liqueur were due to certain local advantages by reason of the herbs found and cultivated within the district described; that even as used in connection with the Monks' liqueur it was still a description of place; and hence, that at most, so far as this word is concerned, the question could be one only of unfair competition.

The validity of this argument cannot be admitted upon the facts which we deem to be established and controlling. It is undoubtedly true that names which are merely geographical cannot be the subject of exclusive appropriation as trade-marks. "Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies." *Canal Company* v. *Clark*, 13 Wall. p. 324. See also *Columbia Mill Company* v. *Alcorn*, 150 U. S. 460; *Elgin National Watch Company* v. *Illinois Watch Company*, 179 U. S. 665.

This familiar principle, however, is not applicable here. It is not necessary for us to determine the origin of the

name of the Order and its chief Monastery. If it be assumed that the Monks took their name from the region in France in which they settled in the Eleventh Century, it still remains true that it became peculiarly their designation. And the word "Chartreuse" as applied to the liqueur which for generations they made and sold cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian Monks at their Monastery. So far as it embraced the notion of place, the description was not of a district, but of the Monastery of the Order—the abode of the Monks—and the term in its entirety pointed to production by the Monks.

It cannot be supposed that if, during the occupation by the Monks of the Monastery of La Grande Chartreuse, another had established a factory at Fourvoirie and there manufactured a liqueur, he could have affixed to it the name "Chartreuse" or "Grande Chartreuse" or "Gde. Chartreuse" on the ground that these were place names or descriptive of advantages pertaining to the locality. It could not fail to be recognized at once that these were the distinctive designations of the liqueur made by the Monks and not geographical descriptions available to any one who might make cordial in a given section of country. The same would have been true if the Monks had voluntarily removed and continued their manufacture elsewhere. As was forcibly said by the Lord Chief Justice in the Court of Appeal in *Rey* v. *Lecouturier*, [1908] 2 Ch. 715, p. 726: "To test this question, let us suppose that the monks had moved their manufacture to another monastery or another building in France and had sold the fabric of the distillery and left the district of La Grande Chartreuse, but had continued to make the liqueur in the same way; could it be contended that any one who bought as old bricks and mortar the distillery at Fourvoirie could immediately call any liqueur made there by the name of

Chartreuse, and put it on the English market under that name? It is to me quite unarguable."

The claim of the Monks to an exclusive right in this designation as applied to the liqueur has been frequently the subject of litigation and has repeatedly been sustained. In 1872, *La Cour de Cassation* in *Le Père Louis Garnier* v. *Paul Garnier*, 17 Annales, p. 259, held that "the word Chartreuse, applied as a denomination to the liqueur made by the religious community of which Père Garnier is the representative, is but an abbreviation and the equivalent of a designation more complete; for it at once indicates *the name of the fabricants* (the Chartreux); *the name or commercial firm of manufacture*, which is no other than the community of these same Chartreux, and finally *the place of manufacture*, that is to say the monastery of La Grande Chartreuse." It was concluded that the designation was the exclusive property of the Monks. Mr. Browne, after quoting the above passage, adds: "That single word" (Chartreuse) "contains a long history of strife. It has repeatedly been held to be a perfect trade-mark, for the reasons just cited." Browne on Trade-marks, § 582; §§ 407–410. See also 17 Annales, 241, 249; *Rey* v. *Lecouturier*, *supra*, p. 726; *Grezier* v. *Girard*, and others, United States Circuit Court, Southern District of New York, 1876, not reported; *A. Bauer* v. *Order of Carthusian Monks*, 120 Fed. Rep. 78.

We find no error, therefore, in this determination of the judgment. The registered trade-marks were valid. In the statements for registration, the symbols actually used in combination were set forth. Take, for example, the mark in the glass of the bottle, consisting of "Gde. Chartreuse" under the globe, cross and seven stars. This undoubtedly is a valid mark. And the same is true of the other marks, shown on the labels attached to the bottles, which included the ecclesiastical symbols and the facsimile of the signature of L. Garnier. It follows that up to the time

of their expulsion from the Monastery, the Monks were entitled to protection against the infringement of these marks, which were their exclusive property, as well as against unfair competition.

The next inquiry is with respect to the effect of the liquidation proceedings in France. Upon the application of the Procureur of the Republic, the French court proceeded to the judicial liquidation of the properties in France held by the non-authorized congregation of the Chartreux, and it was of these properties that a liquidator was appointed. It does not appear that the court assumed jurisdiction of the trade-marks registered on behalf of the Monks in other countries. On the contrary, it appears to have been held that the question of the ownership of such trade-marks was not involved in its determination. After a successful contest of the liquidator with the Abbe Rey, in which a judgment was pronounced to the effect that the latter was an interposed person or passive trustee under a deed of transfer found to be simulated, and that the properties claimed by him personally were in fact those of the congregation and subject to the liquidation, the liquidator sought by way of interpretation of this judgment to obtain a declaration that the assets of the liquidation comprised the trade-marks registered in other countries. On refusing the application (March 27, 1906), the Court of Appeals of Grenoble used the following language,—showing that the question had not been determined in the previous decision, and also directing attention to the character of the law under which the liquidation was had as "a law of exception and police:"

"The claim of the receiver to the property of the trade-marks registered in the foreign countries, raises the question whether the law of July first, nineteen hundred and one, which is a law of exception and police, controls or not, beyond the territory of the Republic, the properties of the dissolved Congregations, and whether the trade marks

registered in foreign lands are an accessory of the commercial holding of Fourvoirie, thus coming under this title into the liquidation, or whether they constitute a distinct and independent property from this commercial holding;

"The question has not been debated between the parties, and the court would not have failed, if it had been submitted to it, to treat upon it in the counts of its decision, in order to solve it in its disposition;

"The silence in this respect, exclusive of any debate on this point, does not allow of admitting, as being implicitly contained in the decree, in an ambiguous or equivocal form, the decision of which Lecouturier claims the benefit, and as the interpretation which he solicits from the court would have as effect to extend beyond what was its sole object, the matter judged by the decree of July nineteenth last;

"Such an application must be rejected as not receivable, and it is left to Lecouturier to have recourse to such means as may be deemed proper."

Hence defendant's contention is not that the French judgments, under which its principal claims, "expressly and directly settled the status of the marks abroad, but that the said judgments were effective to vest in the defendant [liquidator] the business and good will inseparably connected both in France and in this country with the place and mode of fabrication and, therefore, gave him the right, in virtue of the principles of our law, to use the trade-mark connected therewith."

Now what was the case with respect to the business to which the trade-marks in this country related? That business consisted of the manufacture by the Monks, according to their secret process of a liqueur of which the marks and symbols were the trade designation. They took their secret with them to Spain and continued the manufacture of the liqueur. The Monks' secret was not the subject of seizure by the liquidator and did not pass to him. It is not

pretended that he or his vendee have manufactured the liqueur at Fourvoirie under a formula or receipt derived from the Monks, but it is maintained that a formula believed to be essentially similar has been arrived at by experimentation, in accordance with which the liquidator and the French Company have been making their liqueur. We are not concerned with their authority under the French law to conduct this business, but it is not the business to which the trade-marks in this country relate. That business is being conducted according to the ancient process by the Monks themselves. The French law cannot be conceived to have any extra-territorial effect to detach the trade-marks in this country from the product of the Monks, which they are still manufacturing.

The matter was put thus by Lord Macnaghten in the House of Lords, in *Lecouturier* v. *Rey*, [1910] A. C. 262, p. 265:

"To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market. But it is certainly satisfactory to learn from the evidence of experts in French law that the law of Associations is a penal law—a law of police and order—and is not considered to have any extra-territorial effect. It is also satisfactory to find that these legal experts confirm the conclusion which any lawyer would draw from a perusal of the French judgments in evidence in this case, that the sale by the liquidator of the property bought by the appellant company has not carried with it the English trade-marks, or established the claim of the appellant company to represent their manufacture as the manufacture of the monks of La Grande Chartreuse, which most certainly it is not."

And Lord Justice Buckley said in the Court of Appeal (*Rey* v. *Lecouturier*), [1908] 2 Ch. 715, p. 733:

"Of course in this country a trade-mark can only be enjoyed in connection with a business, but I think that the monks are carrying on a business in connection with which they can enjoy any trade-marks to which they may be entitled, and the labels which were put upon the register, and in respect of which the defendant Lecouturier has had his own name placed upon the register. Are those trade-marks the property of the plaintiffs? In my opinion they clearly are."

If through his experiments the liquidator had not succeeded in making a liqueur which resembled that of the Monks, he would have had no business to transact so far as the liqueur was concerned and the transfer by operation of law would not have availed to give him one. But the property in the trade-marks in this country did not depend upon the success of the endeavors of the liquidator's experts. The Monks were enabled to continue their business because they still had the process, and continuing it they enjoyed all the rights pertaining to it, save to the extent to which, by force of the local law, they were deprived of that enjoyment in France.

Failing to establish that the Monks were divested of their exclusive rights in this country by the legal proceedings in France, it is insisted that these have been lost by abandonment. This defence is based both upon non-user of the old marks and labels and upon the efforts made by the Monks, since their expulsion from France, to associate their liqueur with a new designation—as the "Liqueur des Pères Chartreux" or "Liqueur Febriquée à Tarragone par les Pères Chartreux."

But the loss of the right of property in trade-marks upon the ground of abandonment is not to be viewed as a penalty either for non-user or for the creation and use of new devices. There must be found an *intent* to abandon, or the

property is not lost; and while, of course, as in other cases, intent may be inferred when the facts are shown, yet the facts must be adequate to support the finding. "To establish the defence of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed." *Saxlehner* v. *Eisner & Mendelson Company*, 179 U. S. 19, p. 31. And this court in referring in *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, p. 186, to the loss of the right of property in a name "like the right to an arbitrary mark" by dedication or abandonment, quoted with approval the definition of De Maragy, in his International Dictionary of Industrial Property as follows:

"Abandonment in industrial property is an act by which the public domain originally enters or reënters into the possession of the thing, (commercial name, mark or sign,) by the will of the legitimate owner. The essential condition to constitute abandonment is, that the one having a right should consent to the dispossession. Outside of this there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word."

What basis is there in this case for a finding of intent to abandon the old marks? It is to be remembered that they were of a personal character, involving the adaptation of the name and the use of the ecclesiastical symbols of the Order. It is pointed out that, to show that there was no intention to abandon, a shipment was made to this country from Tarragona, of the Monks' liqueur, under the old marks. But it is not necessary to rest on that. The attitude of the Monks in their efforts here and in other countries to prevent the use of the old marks shows clearly that there has been no intention to abandon.

It was natural enough that the Monks, unable to use their former marks in France, should desire to bring into use a designation which could be available there as well as in other countries. But this is far from indicating the slightest disposition to surrender to the world the right to denominate liqueurs by the ancient name and symbols taken from their own Order. As soon as the liquidator, as the result of his experiments, announced that he was prepared to put upon the market "the Grande Chartreuse Liqueur" under the same labels as theretofore,—"the only guarantee of authenticity and of origin of the Chartreuse made at the monastery,"—the Monks promptly asserted their rights.

The liquidator was not moved to the use of the marks in question by any consideration of abandonment on the part of the Monks, but by virtue of their exclusion from their former abode and of the rights of succession which he claimed under the French law. The main issue between the parties has been one of title, "each claiming a right to the disputed marks to the exclusion of the other." The respective parties, and those representing them, have been in constant litigation in France and elsewhere since the liquidator was appointed, and reviewing the facts in this case we find no possible ground upon which it can be said that the Monks have abandoned the rights they possessed.

We come then to the question of remedy.

In view of the acts of the defendant, with respect to the marks, labels, and bottles shown to have been used in connection with the liqueur made at Fourvoirie after the removal of the Monks, the decree adjudging it guilty of infringement and unfair competition was plainly right. We are also of the opinion that the provisions of the injunction against infringement and simulation, set forth in the decree of the Circuit Court, were proper.

In dealing, however, with the question of unfair trade, it is to be remembered that the liquidator, and the French

Company to whom he sold, lawfully conducted the manufacturing business at Fourvoirie, and, of course, were entitled respectively to sell their product here. They were entitled to state that they made it and the the place and circumstances of its manufacture. In short, they were not debarred from making a statement of the facts, including the appointment of the liquidator and the French Company's succession by virtue of his sale, provided it was made fairly and was not couched in language, or arranged in a manner, which would be misleading and would show an endeavor to trade upon the repute of the Monks' cordial. It is also to be noted that the words "Grande Chartreuse" form a part of the name of the French Company which it, and the defendant as its representative, had a right to use in lawful trade. But neither it, nor the defendant, was entitled to use the word "Chartreuse" as the name or designation of the liqueur it manufactured, and in any other use of that word, or in any reference to the Monks, in its statement of the facts it was bound by suitable and definite specification to make clear the distinction between its product and the liqueur made by the Monks.

These considerations, undoubtedly, led the court below to modify the decree by inserting the words—"unless so used as clearly to distinguish such liqueur or cordial from the liqueur or cordial manufactured by the complainants." But this insertion was made in connection with that portion of the injunction which related to the trade-mark, and this, we think, was error. It amounted, by reason of the juxtaposition with what preceded, to a permission to the defendant to use the trade-mark "Chartreuse" or that word as the name or description of its liqueur, provided it were distinguished from the liqueur of the Monks. This was inconsistent with the decree as to the ownership of the trade-mark.

The modification, in this form, should therefore be

struck out, but more completely to adapt the remedy to conditions disclosed, there should be inserted in the fourth paragraph of the decree—in that portion which contains the injunction against unfair trade—a provision restraining the use of the word "Chartreuse" in connection with the sales of liqueur not made by the Monks, as the name of or as descriptive of the liqueur, or without clearly distinguishing it from the Monks' product.

The decree will be amended accordingly, as shown in the margin.[1]

After the decision by the court below, application was made by the complainants for an injunction against the use by the defendant, in connection with its liqueur, of the words "Pères Chartreux." The injunction was not granted, but, the parties having been heard, the court ad-

[1] 4. It is further ADJUDGED, ORDERED AND DECREED that defendant, its associates, successors, assigns, officers, servants, clerks, agents and workmen and each of them be and they hereby are perpetually enjoined from using in this country or in any possession thereof, in connection with any liqueur or cordial not manufactured by complainants, the trade mark "Chartreuse" or any colorable imitation thereof—or the fac-simile signature of L. Garnier or any colorable imitation thereof—or any of the trade marks above referred to or any colorable imitation thereof; and they and each of them are likewise perpetually enjoined from importing or putting out or selling or offering for sale, directly or indirectly within this country *or in any possession thereof*, any liqueur or cordial not manufactured by complainants in any dress or package like or simulating in any material respects the dress or package heretofore used by complainants—and in particular from making use of any label or symbol like or substantially similar to those appearing on "Complainants' Exhibit Defendant's Liqueur," being the bottle now on file as an exhibit in this Court—*and from using the word "Chartreuse" in connection with the importing, putting out, or sale of such liqueur or cordial, as the name of or as descriptive of such liqueur or cordial, or without clearly distinguishing such liqueur or cordial from the liqueur or cordial manufactured by the complainant*—and from in any wise attempting to make use of the good will and reputation of complainants in putting out in this country any liqueur or cordial not made by complainants.

judged the defendant in contempt and imposed a fine. The order was reversed by the Circuit Court of Appeals, and the complainants have applied for a writ of certiorari, which is granted.

In the opinion of the Circuit Court of Appeals upon the appeal from the decree on the main issue, there were set forth two forms of labels which, it was suggested, might properly be used by the defendant, printed in any language. In the contempt proceeding it was shown that the defendant followed closely one of these forms, but used in place of the words "Carthusian Monks," as these there appeared, the description "Pères Chartreux."

In view of the language of its opinion, and the permission it implied, it is clear that the court rightly held that the defendant should not be fined for contempt. But, in saying this, we do not wish to be understood as approving the suggested forms of labels, for they seem to us objectionable in view of the arrangement of the inscription and the special prominence given to the words "Grande Chartreuse." Nor does the making of a fair and adequate statement as to the liqueur of the defendant, its origin and manufacture, require the use of the words "Pères Chartreux," and we are unable to escape the conclusion that such use, in the manner shown, was to serve the purpose of simulation, and to draw to the defendant's liqueur the reputation of that of the Monks, contrary to the provisions of the decree.

For the reasons we have stated, the order of the court below in the contempt proceeding is affirmed, but without prejudice to any future application.

The decree is reversed and the cause is remanded with directions to enter a decree in favor of the complainants, amending the decree entered in the Circuit Court in accordance with this opinion; and the order in the contempt proceeding is affirmed without prejudice to any future application.

AMERICAN LITHOGRAPHIC COMPANY *v.* WERCKMEISTER.

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

No. 115. Argued April 10, 1911.—Decided May 29, 1911.

The forfeiture for infringement of copyright prescribed by § 4965, Rev. Stat., is not only for every copy found in possession of the infringer, but in the alternative for every copy by him sold.

Where a distinction is plainly made in an act of Congress prescribing penalties as to different classes of the offense, the court need not search for the reason for making the distinction but must give it effect.

Under § 4965, Rev. Stat., no penalty for infringement can be recovered with respect to prints, photographs, etc., except for sheets found in defendant's possession, and there cannot be two actions as to the same copies, one for replevin and the other for penalty; but with respect to paintings, statues and statuary an action can be brought for penalties on copies sold by the infringer and not included in those replevied in another action. *Werckmeister* v. *American Tobacco Co.*, 207 U. S. 375; *Hills* v. *Hoover*, 220 U. S. 334, distinguished.

The authority to issue writs conferred on courts of the United States by § 14 of the Judiciary Act of 1789, and § 716, Rev. Stat., includes the authority to issue subpœnas *duces tecum;* and it was not the purpose of § 724, Rev. Stat., to interpose an obstacle with respect to the issuance of such subpœnas.

The act of July 2, 1864, c. 210, § 3, 13 Stat. 351, now Rev. Stat., § 858, removing disabilities of witnesses on account of being parties to the action removed whatever obstacle existed as to issuing subpœnas *duces tecum* to parties.

Section 860, Rev. Stat., providing that no pleading or discovery obtained from a party or witness by means of judicial proceeding shall be used against him in any criminal proceeding, relates to using the evidence in a subsequent proceeding.

A corporation defendant in a suit to enforce penalties under § 4965, Rev. Stat., for infringment of copyright is not entitled under the Fourth or Fifth Amendment to object to the admission of evidence of entries in its books produced under a subpœna *duces tecum*. *Wilson* v. *United States*, *ante*, p. 361.

THE facts, which involve the construction of § 4965, Rev. Stat., are stated in the opinion.

Mr. Wm. A. Jenner for plaintiff in error:

Section 4965 is a penal statute, and prosecutions under it, although civil in form, are essentially criminal prosecutions. See *Backus* v. *Gould*, 7 How. 798, 811, construing the sixth section of the act of February 3, 1831, corresponding to § 4965. *Bolles* v. *Outing Co.*, 175 U. S. 262, 264; *Werckmeister* v. *Am. Tobacco Co.*, 207 U. S. 375, 381.

Discovery, i. e., production of books and papers, will not be ordered in chancery in aid of an action to enforce penalties. See 2 Story's Eq. Jur., §§ 1319, 1494; 2 Daniel's Ch. Pl. & Pr. 1557; 2 Beach, Mod. Eq. Jur., § 871; 2 Story, Eq. Jur., § 1494; *Horsburg* v. *Baker*, 1 Pet. 232; *Boyd* v. *United States*, 116 U. S. 616, 631; *United States* v. *Saline Bank*, 1 Pet. 100; *Counselman* v. *Hitchcock*, 142 U. S. 563.

The exemption has always been allowed in actions for penalties under the copyright and patent laws. *Atwill* v. *Ferrett*, 2 Blatchf. 39; *Johnson* v. *Donaldson*, 18 Blatchf. 287; 1 Daniel's Chancery Pr., 4th Am. ed., 563; Story's Eq. Pl., § 575; *Snow* v. *Mast*, 63 Fed. Rep. 623; *Daly* v. *Brady*, 69 Fed. Rep. 285. Section 724 has been applied to exempt from production in penalty cases against corporations. *United States* v. *National Lead Co.*, 75 Fed. Rep. 94.

The compulsory production of defendant's books and the obtaining of evidence therefrom in support of plaintiff's case was error, and the rights of plaintiff in error under Rev. Stat., §§ 724 and 860 were violated by the compulsory production of its books and the compulsory reading in evidence by Mr. Eddy, its treasurer, of entries therefrom. The subpœna *duces tecum* was not rightfully available to the plaintiff to obtain production of books in a penalty action. Section 724 governs the production of books in an action at law. Under § 724 defendant could not rightfully be compelled to produce its books. As to

the authority to issue the subpœna *duces tecum*, Section 724 controls the production of book evidence from the adversary party at the trial and excludes all other modes of compelling production. *Ex parte Fisk*, 113 U. S. 713; *Union Pacific R. R. Co.* v. *Botsford*, 141 U. S. 250; *Hanks Dental Assn.* v. *Tooth Crown Co.*, 194 U. S. 303.

The history of § 724 shows that its object was to provide in actions at law a method of obtaining inspection of books and papers analogous to discovery in equity. *Owyhee Land Co.* v. *Tautphaus*, 109 Fed. Rep. 547; *Hylton's Lessee* v. *Brown*, 1 Wash. C. C. 298; *Finch* v. *Rikeman*, 2 Blatch. 302.

In Blackstone's time the subpœna *duces tecum* was not available in actions at law for bringing into court the books of a party, and hence was not a writ "agreeable to the usages and principles of law," under § 14 of the Judiciary Act of 1789 (Rev. Stat., § 716). In *Merchants' Nat. Bank* v. *State Nat. Bank*, 3 Cliff. 201, the court held that at common law parties could not be compelled to attend or by subpœna *duces tecum* to produce books. *United States* v. *Reyburn*, 6 Pet. 363; *President &c.* v. *Hillard*, 5 Cowen, 419.

In suits in equity resort has sometimes been had to subpœnas *duces tecum* to obtain from the adverse party production of books, as in *Bischoffsheim* v. *Brown*, 29 Fed. Rep. 341; *Johnson Steel Co.* v. *North Branch Co.*, 48 Fed. Rep. 191, 195; *Edison Elec. Co.* v. *U. S. Elec. Co.*, 44 Fed. Rep. 294; *Same* v. *Same*, 45 Fed. Rep. 55.. But see *Gregory* v. *Chicago, M. & St. P. R. Co.*, 10 Fed. Rep. 529; *Kirkpatrick* v. *Pope Mfg. Co.*, 61 Fed. Rep. 46.

Section 724 has not been modified expressly or by implication.

Section 860 is expressly applicable to actions for the enforcement of a penalty and prescribes that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceed-

ing . . . shall be given in evidence, or in any manner used against him" in such an action.

Mr. Antonio Knauth for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the Circuit Court of Appeals affirming a judgment upon a verdict in favor of Emil Werckmeister, plaintiff below. The action was brought under § 4965, p. 959, ch. 3, of the United States Revised Statutes, to recover penalties for the infringement of a copyright. The subject of the copyright was the painting "Chorus," and the penalties demanded were for copies printed and sold by the Lithographic Company.

It is contended that the recovery was unauthorized by the statute, for the reason that the copies were not found in the defendant's possession. Section 4965, Rev. Stat.; 3 U. S. Comp. Stat., p. 3414, so far as material, provides:

"SEC. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, . . . shall . . . engrave, etch, work, copy, print, publish . . . or import, either in whole or in part, . . . or, knowing the same to be so printed, published, . . . or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale."

The contention is "that the penalty attaches in the case of a *painting* only under the same conditions as in the case of a *print;* that the intent of the statute is to differentiate a *painting* from a *print* only in respect to the amount of the penalty, $1 in case of a print, and $10 in case of a painting; and that, in both cases, a *finding in possession of the defendant* is a condition precedent to the recovery of the penalty." It is further urged that only one action can be maintained for forfeiture of the copies and for the penalties, and that the action lies only against the person in whose possession the copies are found, and that the penalties are to be computed upon the number so found.

The argument fails to give effect to the express provision of the statute. Its words are "he shall forfeit ten dollars for every copy of the same in his possession, *or by him sold* or exposed for sale." No process of construction can override this explicit language. The prescribed forfeiture is not only for every copy found "in his possession," but, in the alternative, for every copy "by him sold." We need not search for the reason for the distinction between maps, charts, photographs, prints, etc., on the one hand, and paintings, statues and statuary on the other. The character of the latter suggests the basis; but the distinction is plainly made, and it must be given effect.

With respect to prints, photographs, etc., the money penalty for the acts defined is "one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale." The words "found in his possession" limit the entire clause. And no penalty can be recovered in such case except for sheets found in the possession of the defendant. *Bolles* v. *Outing Company*, 175 U. S. 262.

The cases of *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, and *Werckmeister* v. *American To-*

bacco Company, 207 U. S. 375, related to the same copyrighted painting that is involved here. In the first case there was a recovery in an action in the nature of replevin of 1196 sheets containing copies. The second action was brought to recover the money penalties for the sheets seized in the former action. The question was whether there could be two actions against the same party; one for the seizure of the sheets forfeited and another for the penalties, and it was held "that the statute contemplated but a single action in which the defendant 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." See *Hills & Company* v. *Hoover*, 220 U. S. 334, 335. These decisions did not involve the determination that an action could not be brought to enforce the forfeiture prescribed by the statute in a case of the sale of copies of a copyrighted painting where there was no finding in possession, and hence no proceeding to forfeit copies so found. Here, there is no attempt to recover in a second action penalties which should have been embraced in a former action; and the recovery is based simply upon the forfeiture incurred by sales of the prohibited copies.

Assuming that the action for the penalties would lie, it is further contended by the defendant company that its rights under § 724, p. 137, c. 12, and § 860, p. 163, c. 17, of the Revised Statutes were violated by the compulsory production of its books and the reception in evidence of entries showing sales of infringing copies.

Without attempting to state in detail the proceedings which culminated in the introduction of the book entries in evidence, it is sufficient to say that after a review of the course of the trial, and of the directions and rulings of the court during its progress, we are satisfied that the enforced production of the books cannot properly be said to rest upon an order made under § 724, but that in fact they

were produced under a subpœna *duces tecum* served upon the company's officer.

But, it is urged, that the books were those of a party to the action, and hence that the limitations of § 724 must be deemed controlling; that in actions at law this section excludes all other modes of compelling production of books or writings by the adversary party.

Under § 14 of the Judiciary Act of 1789 (§ 716, Rev. Stat.), power was conferred upon the Federal courts to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the practice and usages of law. This comprehended the authority to issue subpœnas *duces tecum*, for "the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law." *Amey* v. *Long*, 9 East, 484. Section 724, which was originally § 15 of the Judiciary Act of 1789, was to meet the difficulty arising out of the rules relating to parties at common law and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action. *Carpenter* v. *Winn*, decided this day, *ante*, p. 533.

But by the act of July 2, 1864, c. 210, § 3, 13 Stat. 351, it was provided that there should be "no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried." This provision was continued in § 858 of the Revised Statutes. "The purpose of the act in making the parties competent was, except as to those named in the proviso, to put them upon a footing of equality with other witnesses, all to be admissible to testify for themselves and compellable to testify for the others." *Texas* v. *Chiles*, 21 Wall. 488, p. 492. Section 858 was amended by the act of June 29, 1906, ch. 3608 (34 Stat. 618), which refers the competency of witnesses in the courts of the

United States to the laws of the State or Territory in which the court is held.

It was not the purpose of § 724 to interpose an obstacle to the exercise of the general power of the court with respect to the issuance of subpœnas *duces tecum*, and that was not its effect. The barrier, in the case of parties, existed independently of the provisions of the section and by these it was sought to mitigate the resulting inconvenience. When, however, the rule as to parties was changed it followed that the obstacle was removed and by virtue of the general authority of the court subpœnas *duces tecum* may run to parties as well as to others,—leaving those who are subpœnæd to attack the process if of improper scope or lacking in definiteness, or to assert against its compulsion whatever privileges they may enjoy. See *Merchants' National Bank* v. *State National Bank*, 3 Cliff. 203, 204; *Nelson* v. *United States*, 201 U. S. 92.

We conclude, therefore, that no question arises under § 724, which cannot be regarded as providing an exclusive procedure. The subpœna was valid; and the books called for were produced. The inquiry, then, is as to the admissibility of the entries.

It is insisted that the evidence was inadmissible under § 860 of the Revised Statutes. This ground, although it had been relied upon earlier in the trial, was not included in the objection—as it was formally stated at length—when the books were finally produced and the entries offered. But, apart from this, the statute did not afford a sufficient basis for objection.

Section 860—since repealed by the act of May 7, 1910, ch. 216 (36 Stat. 352),—was a reënactment of § 1 of the act of February 25, 1868, ch. 13 (15 Stat. 37), and provided:

"SEC. 860. No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall

be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

This language is inapposite here, for it manifestly refers to a case where, in some prior judicial proceeding, discovery had been made or testimony had been given and the evidence so obtained was sought to be used. The object of the statute is sufficiently plain. It was intended to give immunity as to subsequent proceedings to the one making discovery or testifying. But it was held to be inadequate, because it was not co-extensive with the constitutional privilege. *Counselman* v. *Hitchcock*, 142 U. S. 547, 564; *Brown* v. *Walker*, 161 U. S. 594.

In the present case, the question, therefore, must be whether under the Fourth and Fifth Amendments of the Constitution of the United States the defendant Company, as it contends, was entitled to object to the admission in evidence of the entries from its books. As to this, we need only refer to the recent decisions of this court. *Hale* v. *Henkel*, 201 U. S. 43; *Nelson* v. *United States, supra; Hammond Packing Company* v. *Arkansas*, 212 U. S. 348, 349; *Wilson* v. *United States*, decided May 15, 1911, *ante*, p. 361.

We have examined the errors assigned with respect to other rulings on questions of evidence and the refusal of the court to direct a verdict for the defendant, and we find no ground for a reversal of the judgment.

Affirmed.

BALTIMORE AND OHIO RAILROAD COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

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

No. 222. Argued April 17, 18, 1911.—Decided May 29, 1911.

The act of March 4, 1907, 34 Stat. 145, c. 2939, regulating the hours of labor of railway employés engaged in interstate commerce and requiring carriers to make reports in regard thereto, is not unconstitutional as beyond the power of Congress because it applies to railroads and employés engaged in intrastate business. *Employers' Liability Cases*, 207 U. S. 463, distinguished.

By virtue of its power to regulate interstate and foreign commerce Congress may enact laws for the safeguarding of persons and property in interstate transportation and may restrict the hours of labor of employés connected with such transportation.

The length of time employed has a direct relation to efficiency of employés, and the imposition of reasonable restrictions in regard thereto is not an unconstitutional interference with the liberty of contract. *C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549.

The power of Congress to make regulations in regard to agencies for interstate commerce is not defeated by the fact that the agencies regulated are also connected with intrastate commerce.

An exception in a statute of cases of emergency does not render a statute void for uncertainty where Congress has appropriately described the exceptional cases intended to be covered.

Under § 4 of the Act to Regulate Commerce the Interstate Commerce Commission has power to require carriers to make reports regarding the hours of labor of such employés as are subject to the act of March 4, 1907, and the requirement of such reports does not constitute an unreasonable search or seizure within the meaning of the Fourth Amendment.

A corporation cannot plead a privilege against self-incrimination under the Fifth Amendment; nor can an officer of a corporation plead that the immunity guaranteed by that amendment relieves him personally from making records from the books and papers of the corporation. *Wilson* v. *United States*, *ante*, p. 361.

THE facts, which involve the validity of an order made by the Interstate Commerce Commission, and the construction of the Employé's Act (hours of service) of March 4, 1907, 34 Stat. 1415, c. 2939, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John G. Johnson* and *Mr. Hugh L. Bond, Jr.*, were on the brief, for appellant.

The Solicitor General for the appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a bill in equity to annul an order made by the Interstate Commerce Commission on March 3, 1908, and for injunction. The order required the carriers within the provisions of the act of Congress of March 4, 1907, chapter 2939, 34 Stat. 1415, to make monthly reports, under oath, showing the instances where employés subject to that act had been on duty for a longer period than that allowed. The statute, entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," is set forth in the margin.[1]

[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employés, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether

By stipulation there were introduced into the record additional instructions issued by the Commission under date of August 15, 1908. These prescribed new forms, and also a separate form of oath for use in case there had been no excessive service; and it was further directed that reports of hours of service of the employés described should be made by the secretary or similar officer of the carrier.

It was agreed that a number of like suits brought by other carriers should abide the final disposition of this cause and that meanwhile the reports should not be required.

The bill alleged that the purpose of the Commission in

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owned or operated under a contract, agreement, or lease; and the term "employés" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employé subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain 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 daytime, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within

making the order was to secure from carriers evidence of infractions of the law in order that suits might be brought to recover penalties; that, even if this were not the purpose, the result of the requirement would be the same, because of the provision that the Commission should lodge with the proper district attorneys information of the violations coming to its knowledge; and that this compulsory disclosure, both as to the corporation itself and as to the officers concerned in such violations, was repugnant to the Fourth and Fifth Amendments of the Constitution of the United States. It was also alleged

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which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every 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; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

SEC. 5. That this Act shall take effect and be in force one year after its passage.

that the Commission was without authority to make the order, either under the provisions of the act or otherwise.

A demurrer for want of equity was sustained, and the complainant appeals.

First. Although the question was not specifically raised by the bill, it is now contended that the statute is unconstitutional in its entirety and therefore no action of the Commission can be based upon it. It is said that it goes beyond the power which Congress may exercise in the regulation of interstate commerce; that while addressed to common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and penalties are not limited to interstate commerce, but apply to intrastate railroads and to employés engaged in local business.

The prohibitions of the act are found in § 2. This provides that it shall be "unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employé subject to this Act to be or remain on duty" for a longer period than that prescribed. The carriers and employés subject to the act are defined in § 1 as follows:

"That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employés, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a rail-

road, whether owned or operated under a contract, agreement, or lease; and the term 'employés' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train."

No difficulty arises in the construction of this language. The first sentence states the application to carriers and employés who are "engaged in the transportation of passengers or property by railroad" in the District of Columbia or the Territories, or in interstate or foreign commerce. The definition in the second sentence, of what the terms "railroad" and "employés" shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employés must be engaged in order to come within the provisions of the statute. If the definition, in the last part of the sentence, of the words used in the first part be read in connection with the latter the meaning of the whole becomes obvious. The section, in effect, thus provides: "This act shall apply to any common carrier or carriers, their officers, agents, and employés (meaning by 'employés' persons actually engaged in or connected with the movement of any train), engaged in the transportation of passengers or property by railroad (meaning by 'railroad' to include all bridges and ferries used or operated in connection with any railroad) in the District of Columbia or any Territory . . . or from one State . . . to any other State," etc. In short, the employés to which the act refers, embracing the persons described in the last sentence of the section, are those engaged in the transportation of passengers or property by railroad in the district, territorial, interstate or foreign commerce defined; and the railroad, including bridges and ferries, is the railroad by means of which the defined commerce is conducted.

The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 34

Stat. 232, which was before this court in the *Employers' Liability Cases*, 207 U. S. 463. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employé, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employés as well as the carriers.

But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employés in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employés who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastrate transportation.

This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. *Johnson* v. *Southern Pacific Company*, 196 U. S. 1; *Adair* v. *United States*, 208 U. S. 177, 178; *St. Louis, I. M. & S. Railway Company* v. *Taylor*, 210 U. S. 281; *Chicago, Burlington & Quincy Railway Company* v. *United States*, decided May 15, 1911, 220 U. S. 559. The fundamental question here is whether a restriction upon the hours of labor of employés who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one

answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employés and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, Burlington & Quincy Railroad Company* v. *McGuire*, 219 U. S. 549.

If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employés engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations.

Second. It is also urged that the statute is void for uncertainty. This objection is based on the wording of the first proviso in § 2 of the act, which is as follows:

"*Provided*, That no operator, train dispatcher, . . . shall be required or permitted to be or remain 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, except in case of emergency, when the employés named in this

proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

It is said that the words "except in case of emergency," make the application of the act so uncertain as to destroy its validity. But this argument in substance denies to the legislature the power to use a generic description, and if pressed to its logical conclusion would practically nullify the legislative authority by making it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged.

Nor does the contention gather strength from the broad scope of the proviso in § 3, for if the latter, in limiting the effect of the entire act, could be said to include everything that may be embraced within the term "emergency" as used in § 2, this would be merely a duplication which would not invalidate the act.

Third. Finding that the objections to the validity of the statute are not well taken, we are brought to the question whether the Interstate Commerce Commission has authority to require the reports called for by its order.

Section 4 of the act provides:

"SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act."

The Commission then may call to its aid in the enforcement of the act "all powers granted" to it. And, although there might have been doubt as to the adequacy of the authority of the Commission, under the law as it formerly

stood, to require these reports, there can be none now in view of the amendment of § 20 of the act to regulate commerce by the act of June 18, 1910, c. 309, 36 Stat. 556. As so amended, this section contains the following provision:

"The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires."

This clearly embraces the power which the Commission here asserts, and it is certainly now entitled to promulgate an order requiring reports to be made. It follows that as, under the stipulation of record here, the requirement of the Commission is to operate wholly in the future and it has been suspended awaiting the final determination of this cause, the question of the authority of the Commission at the time the order was made has become a moot one. Were there no other question before us the appeal would accordingly be dismissed, and to justify a reversal of the judgment and the sustaining of the complainant's bill other grounds must appear.

Nor can it be said, so far as the scope of the requirement of the order is concerned, that it goes beyond the authority which has been conferred upon the Commission. The order relates to the employés who are "subject to said act." The bill alleges that, in the original forms prescribed, the carrier was required to show the employés who were "either on duty for a period of time in excess of that contemplated by the act or who had not been off duty after any period of service for the length of time prescribed by the act, and in the case of every such employé

the carrier was required to state the cause of and the facts, if any, explanatory of the excess service thus rendered by the employé." By the amended instructions set forth in the stipulation, it appears that "in case no employé has been employed in excess of the time named in said act, and in case no employé has gone on duty with less than the statutory period off duty," a separate form of oath to that effect will be accepted in lieu of the forms which are to be used in detailing excess service. And, as already noted, the reports are to be made by the secretary or similar officer.

To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to the hours of service exacted of the employés who are subject to the provisions of the statute, and the requirements to which we have referred are appropriate for that purpose and are comprehended within the power of the Commission.

Fourth. There is the final objection that to compel the disclosure by these reports of violations of the law is contrary to the Fourth and Fifth Amendments of the Constitution of the United States.

The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

Nor can the corporation plead a privilege against self-crimination under the Fifth Amendment. *Hale* v. *Henkel*, 201 U. S. 74, 75; *Hammond Packing Company* v. *Arkansas*, 212 U. S. 348, 349; *Wilson* v. *United States*, decided May 15, 1911, *ante*, p. 361. With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which cannot be asserted on their behalf by the corporation. But the transactions to which the required reports relate are corporate transactions subject to the regulating power

of Congress. And, with regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the Commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation and cannot claim a personal privilege in hostility to the requirement. *Wilson* v. *United States, supra.*

The decree of the Circuit Court is

Affirmed.

JOVER Y COSTAS *v.* INSULAR GOVERNMENT OF THE PHILIPPINE ISLANDS.

INSULAR GOVERNMENT OF THE PHILIPPINE ISLANDS *v.* JOVER Y COSTAS.

APPEALS FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Nos. 112, 113. Argued April 7, 1911.—Decided May 29, 1911.

Article 46 of the constitution of Spain as existing in 1859, providing that in order to alienate, cede or exchange any part of Spanish territory, the King required the authority of a special law, related to transference of national sovereignty and not to disposal of public land as property.

The laws of the Partida which affirm that the sea and its shore are among the things that are common to all men are not to be so literally construed, as held by the Spanish courts prior to the cession of the Philippine Islands, as prohibiting a grant of tide lands to one desiring to reclaim and improve them.

The Governor General of the Philippine Islands under Spanish rule possessed all the powers of the King except where otherwise provided, and a grant of lands made by him was valid unless in violation of law specially prohibiting him from making it.

Where the local authorities in the Philippine Islands, with full knowl-

edge of the circumstances under which a grant was made, imposed taxes on the property for many, in this case thirty-nine, years, it is persuasive proof that the grant was valid and that the Governor General did not exceed his authority in making it.

A grant of tide lands, although made upon condition of reclamation, is not defeated by failure to reclaim if the granting words import a present and immediate transfer of ownership; and so *held* as to a grant of such lands in the Philippine Islands where the grantee was "granted possession and ownership," and there was no express condition either precedent or subsequent that the land be reclaimed within any definite period.

Where a practical interpretation has been given to a grant of land by the public officials authorized to interpret it, full effect should be given thereto.

The appropriate method to review judgments of the Supreme Court of the Philippine Islands in cases from the Court of Land Registration is by writ of error and not by appeal.

10 Phil. Rep. 522, reversed.

THE facts, which involve the validity of a grant of lands in the Philippine Islands, made prior to the cession to the United States, are stated in the opinion.

Mr. Aldis B. Browne, with whom *Mr. W. A. Kincaid*, *Mr. Alexander Britton*, *Mr. J. H. Blount* and *Mr. Evans Browne* were on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Fowler for the Philippine Islands (Insular Government).

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a petition to the Court of Land Registration of the Philippine Islands for the registration of the title to a tract of land in the City of Manila, claimed to have been granted to Don Jose Camps, February 12, 1859, by a decree of the Governor General of those Islands, reading as follows:

"Acting upon the petition in which Don Jose Camps on November 17, 1858, solicited a grant for the land which he fills at his expense on the lowlands situated along the northern wharf (Murallón del Norte) and on the north side thereof, on the right side of the mouth of the Pasig River, with an extension of 200 brazas in length and 100 brazas in width, beginning at a distance of 25 varas (Spanish yards) west of the bridge built on said wharf for the connection of the waters of the river and of the bay from the Beach of Binondo, as appears on the plan hereto attached, to which land, after it has been filled in he intends to move his artistic establishment called 'Camps é Hijos,' and a manufactory of hemp rope; in view of the report made on the 26th of the said month of November by the Alcalde Mayor 1.° of Manila, who, after consultation with the director of public works of the province, is of the opinion that the waste land asked for should be granted to Camps, said land being at present covered by the sea, and being far from the houses situated on the Binondo beach, it is very suitable for purposes of maritime commerce and it is convenient for the purpose of public adornment, that the foundry, iron-working and scientific instrument establishment of Camps é Hijos be located on that place provided that the said Camps shall agree not to erect such buildings with brick and stone or strong materials, for the reason that the same is outside of the military lines; in view of the report made on December 17, 1858, by the Commanding General of Marine, in agreement with the captain of the port regarding the convenience of such concession for the merchant marine and public adornment, but with the precise condition that Camps shall leave a distance of 16½ varas between the outside edge of the wharf and the intended building, which width is the one fixed for wharves; in view also of the report of the sub-inspector of engineers, with the approval of the commander of the

post, proposing that the concession asked for shall not be granted for a building of strong materials, on account of the forts of the place, and that the building to be erected shall consist of only one story, and shall be removed at the expense of its owner, at the discretion of the superior authority of the Islands, when the public interests so require, taking into consideration the circumstances and official and industrial merits of the said Don Jose Camps, and the offer of protection stated in the decree dated November 4, 1858, when refusing the sale, asked for by him, of an irregular piece of land adjoining the new *Cuartel del Carenero*, and in conformity with the above-mentioned reports of the commanding general of marine, the sub-inspector of engineers and the civil chief of the Province of Manila, I hereby decree: Don Jose Camps, *comisario de guerra honorario, oficial mayor jubilado* of the office of the secretary of his superior government, and director of the iron-working and nautical instrument establishment of Camps é Hijos, is granted the possession and ownership of a parcel of land 200 brazas in length and 100 brazas in width, covered at present by the waters of the sea, near the Binondo beach, which land is situated alongside the Murallón del Norte, and requested authority to fill in the same at his expense, is also hereby granted, subject to the following conditions and restrictions:

"First. The land to be filled in shall form a quadrangle 200 brazas long and 100 brazas wide; beginning on the longer side, nearest to the Pasig River, at a point 25 varas from the bridge connecting the waters of the river and of the bay, and running parallel with the wharf toward the lighthouse.

"Second. The buildings to be erected by Camps on this new land so granted shall be located along the said longer side parallel to the breakwater, separated from the edge of the exterior wharf for its whole length, a distance of 16½ varas, which is the width required for wharves.

"Third. The said buildings shall consist of only one story, no materials of the kind prohibited in the military zone shall be employed therein, and shall be roofed with zinc, tarred paper, nipa or other similar materials.

"Fourth. The said buildings shall be removed at the expense of Don Jose Camps or his successors whenever, at the discretion of the superior authority of the Islands, the military service so requires.

"Let the interested party be notified and a certified copy be issued to him.

(Signed) NORZAGARAY."

Opposition to the registration was made by the Insular Government and the City of Manila upon the ground that the grant was unauthorized because the land was a part of the shore of the sea. The Court of Land Registration pronounced the grant valid, sustained the petitioner's asserted ownership of all existing title under it, construed it as made upon condition that the land be reclaimed from the sea, found that the condition had been fulfilled as to part of the land only, and entered a judgment allowing registration of that part and refusing registration of the remainder. Appeals to the Supreme Court of the Philippines resulted in an affirmance of the judgment by an opinion saying:

"Although we are unable to agree upon the grounds upon which our conclusion is based, we are of the opinion that the judgment of the Court of Land Registration should be affirmed, without costs to either party." 10 Phil. Rep. 522.

One member of the court (Johnson, J.) dissented because he was of opinion that the grant was not made upon condition that the land be reclaimed, and another member (Tracy, J.) dissented because he was of opinion that the grant, being of land covered by tidal waters, was one which only the King of Spain could make. Each of the parties

has appealed to this court and has also sued out a writ of error.

In addition to the authenticity of the grant and the petitioner's ownership of all existing title under it, neither of which was questioned, the facts disclosed by the record are these: At the date of the grant the land was marshy waste land, which was covered by the sea at high tide and was uncovered at low tide. Soon after the grant was made the grantee marked its boundaries and began filling in the land. In the course of twenty years, about one-third of the tract was reclaimed and was then improved by erecting warehouses and other buildings thereon. At irregular intervals further work was done toward filling in the remainder, but the area fully reclaimed was not materially enlarged. The grantee and those claiming under him were in the exclusive occupancy and use of the land reclaimed from the time the work was done and at all times asserted title to the entire tract, and intended to complete its reclamation. What was done by them in filling in and improving the land was done openly and at large expense, and neither their work nor their occupancy was at any time disturbed, although both were at all times well known to those in authority at Manila. Nor was the validity or extent of the grant in any wise called in question while the Philippines remained under the dominion of Spain, or until four years thereafter, which was forty-four years after the date of the grant. On the contrary, taxes were imposed upon the land as private property, and at the commencement of the proceeding for registration the land and the improvements were assessed to the petitioner at a valuation of $255,578.00.

It is the contention of the Insular Government and the City of Manila that the grant was unauthorized and void, first, because the King of Spain was without power to make it, and so could not devolve that power upon the Governor General, and second, because, even if the King possessed

that power, he had not devolved it upon the Governor General.

The first branch of the contention is rested, primarily, upon Article 46 of the then constitution of Spain, which declared that "to alienate, cede or exchange any part of Spanish territory" the King required "the authority of a special law," and, secondarily, upon laws 3 and 4, title 28, Partida 3, which affirm that the sea and its shore are among the things which belong in common to all men. Of the article in the Spanish constitution it is enough to say that it obviously did not relate to the disposal of public land as property, but only to the transference of national sovereignty; and of the laws cited from Partida 3 it is enough to say that the same meaning and influence must be attributed to them now that were attributed to them by the Supreme Judicial Tribunal of Spain in its decision of May 1, 1863 (Book 8, p. 288), wherein, in sustaining a royal order of January 15, 1853, making a grant of tide land to one who desired to reclaim and improve it, it was said:

"While it is true that Partida 3, title 28, laws 3 and 4, in determining what things are the common right of men and how they may use them, enumerates as such, among other things, the sea and its shore, this is not to be taken in an absolutely literal manner, since a number of limitations to the general proposition have been recognized for the common benefit of the community as being conducive to the general welfare of the State, which latter may grant shore land for improvement where the same has not already lawfully come under private ownership."

As then the King possessed the power to make the grant, we come to the second branch of the contention, namely, that he had not devolved that power upon the Governor General. Many royal orders bearing upon the subject have been called to our attention. The one of first importance is embodied in law 11, title 15, book 2, Laws of the Indies, and reads as follows:

"In the city of Manila, Island of Luzon, capital of the Philippines, another audiencia and royal chancellory is established, with a president, *who shall be the Governor and Captain General;* four associate judges (oidores), who shall also be criminal judges (alcaldes el crimen); one fiscal; one high constable; one vice grand chancellor (teniente de gran chanciller), and the other necessary ministers and officials; and the said audiencia shall have as its district the lands of the said island of Luzon, already discovered and which may be discovered. And *we order that the governor and captain general* of the said Islands and provinces, and president of the royal audiencia of the same, *hold exclusively the superior government of the whole district of said audiencia in peace and in war, and make in our royal name these sentences and grant those favors, which, in conformity with the laws of this 'Recopilacion' and of these Kingdoms of Castile, and with the instructions and powers received from us, he may and ought to make, and in all* those administrative cases and *matters of importance,* the said president-governor shall try the same together with the oidores of said audiencia in order that they may give him their opinion in consultation, and after hearing the same, *he shall provide for what is best for the service of God and our own interests and the peace and tranquility of the said province and community.*"

Without doubt it was intended by this order to invest the Governor General with large powers and a wide range of discretion, fully commensurate with the situation in which they were to be exercised. The language used was general and comprehensive. Possibly, according to Spanish standards, its meaning was much the same as if it had been said directly that the Governor General of the Philippines was empowered thereby to do in that distant province whatever the King could do, if he were present, save where it was otherwise specially provided. The other orders bearing upon the subject are not inconsistent with

that view of it. But whatever the original meaning of the order may have been, the one suggested was adopted and adhered to by the successive governors general, and their action in that regard was acquiesced in, and therefore ratified, by the King. Thus, in the course of approved usage, the order came to be, in effect, the same as the one relating to the viceroys of Peru and New Spain, which is embodied in law 2, title 3, book 3, Laws of the Indies, and declares, "they shall do what they may think and consider to be suitable, and provide for everything we might do, and provide for, of whatever quality and condition it may be, in the provinces under their charge, as if the same were governed by ourselves, in all cases where no special prohibition exists."

Recognition of this is found in Coronado's Legislacion Ultramarina, vol. 2, pp. 175, 176, where, after stating that the powers of the governors general of the Philippines and other provinces beyond the seas include the powers named "under the titles of viceroys and presidents in the Laws of the Indies," the author proceeds:

"This consolidation of such vastly important powers, although it has some inconveniences, has been deemed necessary in order to surround with prestige and sustain a superior authority, at so great a distance from the sovereign, in the capitals of those large provinces, sufficiently to provide speedily and easily all requirements for their preservation and tranquility, for which the captains-general are responsible, and to provide also a good policy and administration, the security of the persons and property of the inhabitants, the publication and due execution of the laws and orders emanating from the high government, and, generally, every wise and prudent measure demanded by the public order, the tranquility and greater prosperity of the countries intrusted to them."

See also San Pedro's Legislacion Ultramarina, vol. 1, p. 65.

And so it is that historical reviews of the Philippines, while under Spanish dominion, uniformly speak of the governors general as possessing almost absolute authority, as is illustrated by the following:

In the history by Juan Jose Delgado, chapter 17, pp. 212 et seq., which was written in 1754, it is said:

"In no kingdom or province of the Spanish crown do the viceroys or governors enjoy greater privileges, superiority and grandeur than in Filipinas. That is advisable because of the long distance from the court, and their proximity to so many kingdoms and nations, some of them civilized but others barbaric. . . . The governors of these islands are almost absolute. . . . They exercise supreme authority by reason of their charge, for receiving and sending embassies to the neighboring kings and tyrants, for sending them gifts and presents in the name of their king, and for accepting those which those kings and tyrants send them. They can make and preserve peace, declare and make war, and take vengeance on all who insult us, without awaiting any resolution from court for it. . . . Besides the above, the governors of these islands have absolute authority privately to provide and attend to all that pertains to the royal estate."

In Montero y Vidal's work, p. 162, published in 1866, this appears:

"A governor and captain-general exercises the supreme authority in Filipinas. In his charge is the direction of all civil and military matters, and even the direction of ecclesiastical matters, in so far as they touch the royal patronage. . . . The authority, then, of the governor-general, is complete."

And in the Philippine census of 1903, vol. 1, p. 364, Trinidad H. Pardo de Tavera of the Philippine Commission states that "the powers given to a governor of the Philippine Islands was practically unlimited."

Considering then that the Governor General, within the

territory committed to his charge, possessed all the powers of his master, the King, save where it was otherwise specially provided, the question whether the grant was within or in excess of the authority of the Governor General is to be determined, not by inquiring whether there was a law or order specially confiding to him the disposal of tide land, but by inquiring whether there was a law or order specially prohibiting such a disposal; that is to say, the existence of power, being usual, will be presumed, and the absence of it, being exceptional, must be shown. *United States* v. *Arredondo*, 6 Pet. 691, 728; *United States* v. *Clarke*, 8 Pet. 436, 451.

The laws and orders brought to our attention do not contain anything which, rightly considered, amounted to a prohibition of this grant. Laws 3 and 4, title 28, Partida 3, which affirm that the sea and its shore are among the things which are common to all men, are the nearest in point, but they, as interpreted by the Supreme Judicial Tribunal of Spain, were not to be taken literally and did not forbid the granting of tide land for purposes of reclamation and improvement.

What has been said sufficiently shows that the grant was made upon adequate authority, but there are other considerations which enforce this conclusion. The Spanish authorities at Manila, although familiar with what was done and claimed under the grant, and although in a position to know and enforce the law applicable to it, did not call it in question at any time during the thirty-nine years of Spanish dominion after it was made, but, on the contrary, treated it as valid by imposing taxes upon the land as private property. This is persuasive proof that in making the grant the Governor General did not exceed his authority. Besides, it must be presumed, there being no showing to the contrary, that he reported the grant to his superiors at Madrid, as was required by the royal order of January 4, 1856 (San Pedro's Legislacion Ultramarina,

vol. 1, p. 75), and therefore the fact that the grant went unchallenged, as it did, dispels all doubt of his authority.

Next to be considered is the contention, advanced by the Insular Government and the city of Manila, that the grant was made upon condition that the land be reclaimed from the sea and that "all title thereunder is defeated," because part of the land has not as yet been reclaimed. The granting words, "is granted the possession and ownership," are plain and import a present and immediate transfer of the ownership of all the land. There are no words of exception, nor any which purport to postpone the transfer until a later time. And while it clearly is contemplated that the land is to be reclaimed, there is no language which fixes a time for beginning or completing that work. Nor is the contemplated reclamation treated as the sole inducement to the grant, for it recites that it is made in consideration, *inter alia*, of "the official and industrial merits of the said Don Jose Camps and the offer of protection stated" in a prior decree. Thus, upon a survey of the grant, it is manifest that there was no express condition, either precedent or subsequent, that the land be reclaimed within any period of time. Of course, it was for the Governor General to judge of the restrictions to be imposed. He could have designated a time within which the reclamation should be effected, and could have made compliance with that requirement a condition, either precedent or subsequent. Or, if to him it seemed wise, he could have left the grantee free to effect the reclamation at such time as to the latter might seem practicable and advantageous, considering the cost of the undertaking, the means at hand for completing it, and the benefits to be derived from it. But the Governor General did not expressly adopt either of these alternatives. On the contrary, his will and purpose in that regard were expressed with such uncertainty that they could be determined only by resorting to interpretation. But that uncertainty was

effectually eliminated before the termination of Spanish dominion in the Philippines. During the many intervening years the parties concerned, that is to say, the representatives of Spain and those claiming under the grant, pursued a course of action, heretofore described, which admits of no other conclusion than they concurred in treating the grant as embodying the latter of the two alternatives suggested. In that way a practical interpretation was given to the grant by those who were authorized to interpret it, and full effect must be given to that interpretation now.

It follows that the contention last stated must be rejected and that the petitioner's contention that registration should have been allowed of the entire tract, including the part not as yet reclaimed, must be sustained.

The parties, being in doubt whether they should invoke our appellate jurisdiction in cases such as this by writ of error or by appeal, resorted to both methods. Since then it has been settled that the appropriate method is by writ of error. *Cariño* v. *Insular Government*, 212 U. S. 449, 456; *Tiglao* v. *Insular Government*, 215 U. S. 410, 414.

The appeals are dismissed and the judgment of the Supreme Court of the Philippines is reversed and the cause is remanded to that court with a direction to reverse the judgment of the Court of Land Registration and remand that cause to the court with a direction to allow registration of the entire tract as prayed in the petition.

HOPKINS *v.* CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA.

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

No. 70. Submitted December 7, 1910; ordered for reargument January 30, 1911; resubmitted March 15, 1911.—Decided May 29, 1911.

With the exception named in the constitution every State has absolute immunity from suit; and the Eleventh Amendment applies not only where the State is actually named as a party but where the suit is really against it although nominally against one of its officers.

Immunity from suit is a high attribute of soveriegnty and a prerogative of the State itself which cannot be availed of by public agents when sued for their own torts.

Neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator; in such a case the law of agency has no application and the individual is liable to suit and injunction.

While the State as a sovereign is not subject to suit, cannot be enjoined, and the State's officers cannot be restrained from enforcing the State's laws or held liable for consequences of obedience thereto, a void law is neither a law or command but a nullity conferring no authority and affording no protection or immunity from suit.

Neither public corporations nor political subdivisions are clothed with the immunity from suit which belongs to the State alone; and while they may be relieved from responsibility to a wider degree than individuals would be they must make the defense and cannot rely on immunity.

In this case *held* that an agricultural college corporation was not such an agent of the State as to be immune under the Eleventh Amendment from suit for damages caused by erection of a dyke and consequent overflow of plaintiff's property; but also held that as the dyke was on property belonging to the State, the State would be a necessary party to the suit in order to decree removal, and in the absence of consent to be sued the court had no jurisdiction to decree removal.

Although parties erecting a dyke on property belonging to the State

may not, under the Eleventh Amendment, be immune from suit, the State is a necessary party to a suit to remove the dyke and it is beyond the jurisdiction of the court to make a decree to that effect.

Where a suit is for damages caused by erection of a dyke and for removal of the dyke the prayer for removal can be stricken out without depriving the court of jurisdiction to hear and determine the prayer for damages.

77 So. Car. 12, reversed.

In his complaint the plaintiff alleged that he owned a valuable body of fertile bottom lands, on the west side of the Seneca River, on which he had raised large crops from the time of purchasing the farm in 1880 until 1895, when the defendant, by its trustees, erected and maintained a high embankment on the eastern side of the river. This dyke was to protect the lands of the college from overflow, but its construction so narrowed the channel of the river that it caused the rapid current of the stream in time of high water to flow across the lands of plaintiff, whereby the natural bank had been destroyed, the rich soil had been washed away, and his property practically ruined for agricultural purposes, and "during the period aforesaid said injury has been and still is continuous from day to day and year to year." He prayed for judgment for $8,000; that the defendant be required to abate and remove the dyke and restore the condition prevailing prior to its construction and for general relief.

The defendant denied all the allegations of the complaint and alleged that the College had no title to the land, or any other property in connection with the establishment and maintenance of the institution; that the construction of the dyke was authorized by the State and had been built by the College, as a public agent, on land the title and possession of which was in the State. It therefore prayed that the complaint be dismissed.

By stipulation the case was heard solely on the question of jurisdiction. Evidence was introduced showing that

by his will, probated April 20, 1888, Thomas G. Clemson left personal property and the "Fort Hill" place, consisting of 814 acres, providing that whenever the State of South Carolina should accept the property for the purpose of founding an agricultural college, his executor should convey it to the State, to be held so long as it in good faith devoted the property to the purposes of the donation —such College to be governed by a board of trustees, which should never be increased to more than thirteen. Seven trustees named by the testator, and their successors, were to have the right to fill vacancies in their number, but the legislature might elect six other trustees.

On November 27, 1889, the State accepted the Clemson bequest, subject to the terms set forth in the will and enacted that upon the transfer of the property to the State by the executor a college should be established in connection with the devise, to be styled the Clemson Agricultural College of South Carolina, to be situated at Fort Hill, on the plantation so devised, in which should be taught all branches of study relating to agriculture, the College to be under the management of a board of thirteen trustees, composed of the seven nominated by the will and their successors and six members elected by the legislature.

Sec. 4 of the charter provided:

"That the said Board of Trustees is hereby declared to be a body politic and corporate, under the name and style of the Clemson Agricultural College of South Carolina. They shall have a corporate seal, which they may change at their discretion; and in their corporate name they may contract for, purchase and hold property, for the purpose of this act, and may take any property or money conveyed by deed, devise or bequest to said college, and may hold the same for its use and benefit; Provided that the conditions of such gift or conveyance shall in no case be inconsistent with the purposes of this act,

and shall incur no obligation on the part of the State. They shall securely invest all funds and keep all property which may come into their possession, and may sell any of the personal property not subject to trust, and reinvest the same in such way as they may deem best for the interest of said college. They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this act, and may make by-laws for this purpose if they deem it necessary."

By the act of January 4, 1894, it was declared that fifty convicts might *be employed by the Trustees of Clemson College in dyking Seneca River, adjoining the college farm, and such other work as the Trustees deem useful, for twelve months.*

In April, 1894, a resolution was passed by the Board of Trustees concerning the work of "building the dykes necessary to protect the bottom lands of Clemson College." It does not appear when this work began or was finished, but various extracts from the minutes of the trustees, from April, 1894, to July, 1905, were introduced in evidence from which it appeared that the dyke was constructed according to plans and specifications approved by the board, under the direction of engineers selected by the board, and that payments were made by it on account of work thereon. The embankment was either wholly or partially washed away, and, in 1903, a resolution was adopted by the board "to have a survey made of the dyke for the purpose of submitting estimates of the work necessary to be done to afford protection to the bottom lands on the college property—the cost of the estimate to be based on the recent flood."

Evidence was introduced as to the property owned by the College and the sources of its income, from which it appeared that a tract of land, partially paid for by the State, had been conveyed to the College in fee simple, and

other land had been conveyed for college purposes. The State appropriated more than $100,000 per annum, which, with the interest on the securities passing under the residuary clause of Dr. Clemson's will, constituted the main source of income, though the College did receive about $6,500 per annum from tuition, rent, sale of dairy products and the proceeds derived from the electric plant and textile department.

There is copied in the record the act of 1894 to incorporate Clemson College for the purpose of police regulation over the territory within five miles of the college building.

The trial court found that the current expenses were paid out of interest on the donation and from the annual appropriations by the State; that the College had no property which could be sold under execution; that the title to the land on which the dyke was erected was in the State. Referring also to the Act of 1894, conferring municipal powers on Clemson College, the court held that the defendant was a public agent, which could not be sued without the consent of the State; that such consent was not given by the provision of the charter that the trustees "might sue and be sued, plead and be impleaded in their corporate capacity," inasmuch as that related to contracts made for College purposes and did not warrant suits against a public agent for a tort. Holding that the State was an indispensable party, and had not given its consent to be sued, the court dismissed the complaint.

On the appeal the plaintiff in his assignments of error contended that the title to the land was in the State only as trustee; that the college was not a public corporation, but a private educational institution, without governmental powers; that it had not been established or endowed by the State and was not governed by the State or solely by trustees appointed by the State (4 Wheat. 634); that in addition to the equitable ownership of the Fort

Hill place, it owned certain lands in fee simple, which were subject to levy and sale and that the corporation was liable for its own torts.

The twenty-third assignment of error was as follows:

"Because the Fourteenth Amendment to the Constitution of the United States provides: 'Nor shall any State deprive any person of life, liberty or property without due process of law.' The allegations of the complaint show that plaintiff has been deprived of his property for all practical purposes as agricultural lands as effectually as if there had been a physical taking thereof; that plaintiff has thus been deprived of his property by the defendant corporation, acting by and through its board of trustees, and this constitutional guarantee has been violated by such action, whether taken pursuant to an act of the legislature or otherwise, and his honor erred in not so holding."

The Supreme Court of the State adopted the opinion of the trial judge, and on the ground that the State was a necessary party and had not consented to be sued, dismissed the bill of complaint. 77 S. Car. 12; 57 S. E. Rep. 551. Thereupon the plaintiff sued out a writ of error to this court:

Mr. Joseph A. McCullough and *Mr. R. T. Jaynes* for plaintiff in error.

Mr. J. P. Carey for defendant in error.

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

The plaintiff sued the Clemson Agricultural College of South Carolina, for damages to his farm, resulting from the College having built a dyke which forced the waters of the Seneca River across his land, whereby the soil had

been washed away and the land ruined for agricultural purposes. There was no demurrer, but the defendant filed what was treated as a plea to the jurisdiction in which it averred that it owned no property, and had constructed the dyke as a public agent only, by authority of the State, on land belonging to the State. By stipulation the hearing was confined solely to the question of jurisdiction, and after considering the evidence the complaint was dismissed.

That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the State's immunity from suit, in a proceeding against it for so managing the land of the State as to damage or take private property without due process of law.

With the exception named in the Constitution, every State has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the Eleventh Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights. *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446; *North Carolina* v. *Temple*, 134 U. S. 22; *Louisiana* v. *Steele*, 134 U. S. 230; *Louisiana* v. *Jumel*, 107 U. S. 711; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *In re Ayers*, 123 U. S. 443; *Hans* v. *Louisiana*, 134 U. S. 1; *Harkrader* v. *Wadley*, 172 U. S. 148; *Hagood* v. *Southern*, 117 U. S. 52, 70.

But immunity from suit is a high attribute of sover-

eignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how "can the principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual defendants . . . whenever they interpose the shield of the State. . . . The whole frame and scheme of the political institutions of this country, state and Federal, protest" against extending to any agent the sovereign's exemption from legal process. *Poindexter* v. *Greenhow*, 114 U. S. 270, 291.

The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446, 452. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute. Besides, neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury.

Consequently there have been recoveries in ejectment

where the public agent in possession defended under a void title of the Government. *United States* v. *Lee*, 106 U. S. 196; *Tindal* v. *Wesley*, 167 U. S. 204. A suit against a bank was sustained even though the State held part of the stock, *Bank of U. S.* v. *Planters' Bank of Georgia*, 9 Wheat. 904. A tax collector was enjoined, where, under an unconstitutional law, he was about to sell the property of the taxpayer, *Poindexter* v. *Greenhow*, 114 U. S. 270. An attorney general was restrained from suing to recover penalties imposed by an unconstitutional statute, *Ex parte Young*, 209 U. S. 123. Commissions have been enjoined from enforcing confiscatory rates, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Proutt* v. *Starr*, 188 U. S. 537. A state land commissioner was enjoined from proceeding, under an unconstitutional act, to cause irreparable damage to defendant's property rights, *Pennoyer* v. *McConnaughy*, 140 U. S. 1. Commissions have been restrained from enforcing a statute which illegally burdened interstate commerce, *McNeill* v. *Southern Ry.*, 202 U. S. 543; *Railway Commission* v. *Illinois Central R. R.*, 203 U. S. 335.

Other cases might be cited which deny public boards, agents and officers immunity from suit. But the principle underlying the decisions is the same. All recognize that the State, as a sovereign, is not subject to suit; that the State cannot be enjoined; and that the State's officers, when sued, cannot be restrained from enforcing the State's laws or be held liable for the consequences flowing from obedience to the State's command.

But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit.

It is said, however, that, in the cases referred to, the of-

ficers were held liable to suit because in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the State. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the State itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty. In *County of Lincoln* v. *Luning*, 133 U. S. 529, 530, the court said that: "While a county is territorially a part of the State, yet politically it is also a corporation, created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part." The court there held that the Eleventh Amendment was limited to those cases in which the State is the real party, or party on the record, but that counties were corporations which might be sued. *Dunn* v. *University of Oregon*, 9 Oregon, 357, 362; *Herr* v. *Kentucky Lunatic Asylum*, 97 Kentucky, 458, 463; *S. C.*, 28 L. R. A. 394.

Corporate agents or individual officers of the State stand in no better position than officers of the General Government, and as to them it has often been held that: "The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose rights of property they have wrongfully invaded or injured, even by authority of the United States." *Belknap* v. *Schild*, 161 U. S. 10, 18.

Undoubtedly counties, cities, townships and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable. But they must at least make that defense. They

cannot rely on freedom from accountability as could a State.

In this case there is no question of corporate existence and no claim that building the dyke was *ultra vires*. Plaintiff was denied a hearing, not on the ground that his complaint did not set out a cause of action, but solely for the reason that even if the College did destroy his farm, the court had no jurisdiction over a public agent.

If the State had in so many words granted the College authority to take or damage the plaintiff's property for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption. But the State of South Carolina passed no such act and attempted to grant no such immunity from suit as is claimed by the College. On the contrary, the statute created an entity, a corporation, a juristic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name.

Reference is made, however, to *Kansas ex rel. Little* v. *University of Kansas*, and the note to 29 L. R. A. 378, where state colleges, prison boards, lunatic asylums and other public institutions have been held to be agents of the State not liable to suit unless expressly made so by statute.

But an examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit. Most of them were actions for torts committed, not by the public corporation itself, but by officers of the law. These public corporations were held free from liability in the suit, on the same ground that municipalities are held not to be responsible for the negligence of policemen, jailers, prison guards, firemen, and other agents performing governmental duties. *Workman* v. *Mayor of N. Y.*, 179 U. S. 556. That general rule is of force in South Carolina, as

appears from *Gibbs* v. *Beaufort*, 20 S. Car. 213, 218, cited in the opinion of the court below, where it was said that "a municipal corporation, instituted for the purpose of assisting a State in the conduct of local self government, is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties, unless expressly made so by statute." But the plaintiff is not seeking here to hold the College liable for the nonfeasance or misfeasance either of its own officers or officers of the public. This is a suit against the College itself for its own corporate act in building a dyke, whereby the channel had been narrowed, the swift current had been diverted from the usual course across the plaintiff's farm, and, as it is alleged, destroying the banks, washing away the soil and for all practical purposes as effectually depriving him of his property as if there had been a physical taking. Compare Lewis on Eminent Domain, 2d ed., § 67; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *Chicago &c.* v. *Chicago*, 166 U. S. 226; Farnham on Waters, § 191; *Conniff* v. *San Francisco*, 67 California, 45, 50.

Again, and still treating the question as though involved in the plea to the jurisdiction, this is not an action against the College for a tort committed in the prosecution of any governmental function. The fee was in the State, but the corporation, as equitable owner, was in possession, use and enjoyment of the property. For protecting the bottom land the College, for its own corporate purposes and advantage, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the College, he could have been sued

and held liable. In the same way, and on similar principles of justice and legal liability, the College is responsible to him if, for its own benefit and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff's farm. 2 Dillon M. Corp. (4th ed.), § 966, p. 1180.

As a part of its plea to the jurisdiction, the College also claimed that "it never had any interest or title in the land described in the complaint, or in any other property connected with the establishment and maintenance of Clemson Agricultural College of South Carolina, all of it being the property of the State of South Carolina." And it is argued that the court could take no jurisdiction of a case against a public corporation which, at most, could only result in a judgment unenforceable by levy and sale under execution.

As a matter of fact, the record indicates that besides the State's annual appropriation and the interest on securities held under the residuary clause of Dr. Clemson's will, the College has other sources of income. It appears to own some land in fee simple. The charter authorizes it to receive bequests. So that if the Fort Hill place is not subject to levy and sale, it does not follow that the institution may not now or hereafter own property out of which a judgment in plaintiff's favor could be satisfied. Besides, we have no right to proceed on the theory that if, at the end of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in a plea to the jurisdiction, afford no reason why the College should be granted immunity from suit, when it is claimed that, in violation of the Constitution, it has taken private property for its corporate purposes without compensation.

The plaintiff prayed not only for damages but that the embankment should be removed. The title to the land and everything annexed to the soil is in the State, subject

to the conditions named in the will. The State, therefore, may be a necessary party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court cannot decree the removal of the embankment which forms a part of the State's property. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446. But the prayer for that part of the relief can be stricken out without depriving the court of jurisdiction to hear and determine the question whether Clemson Agricultural College of South Carolina is liable to the plaintiff for its own corporate act in building for its own proprietary and corporate purposes a dyke which it is alleged damaged or took the plaintiff's farm. *Columbia Waterpower Company* v. *Electric Co.*, 43 S. Car. 154, (1), 167, 169. And, if the facts hereafter warrant it, the College may be enjoined against further acts looking to the maintenance or reconstruction of the dyke. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HARLAN dissents.

FABER *v.* UNITED STATES.

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

No. 134. Submitted April 20, 1911.—Decided May 29, 1911.

Quœre and purposely not decided whether the reduction in tariff rates provided by § 2 of the treaty with Cuba of 1903 is limited to rates of duty in general tariff acts and does not apply to special rates under special agreements with other countries. *Whitney* v. *Robertson*, 124 U. S. 190.

The treaty with Cuba of 1903 was signed and proclaimed after the

decisions of this court in the *Insular Cases* to the effect that Porto Rico and the Philippine Islands were not foreign countries; and within the meaning of that treaty the Philippines are not a foreign country or another country, and the reduction of tariff on articles imported from Cuba are not to be based on tariff rates on the same articles brought from the Philippine Islands.

In the absence of some qualifying phrase the word "country" in the revenue laws of the United States embrace all provinces of a state no matter how widely separated and the Philippines are a part of the United States within the meaning of the treaty with Cuba of 1903.

The duties imposed and collected on articles coming into the United States from the Philippine Islands are not covered into the treasury of the United States but are used and expended solely for the use and government of those Islands and are not to be regarded as duties on imports from foreign countries within the meaning of the treaty with Cuba of 1903.

The word "imports" is the correlative of the word "exports" and preferential rates granted to Cuba under the treaty of 1903 relate only to duties on imports from countries foreign to the United States.

The provisions of Art. VIII of the treaty with Cuba of 1903 will not be construed so as to give that country advantages over shipments coming into the United States from a part of its own territory.

157 Fed. Rep. 140, affirmed on the above points.

THIS case raises the question as to whether Cuban imports are entitled to a reduction of twenty per cent upon the rates charged on goods coming from the Philippine Islands, or only twenty per cent upon the regular tariff rates on goods imported from foreign countries.

The Tariff Act of July 24, 1897, lays a duty on cigars of $4.50 per pound and twenty-five per cent ad valorem.

The act of March 8, 1902, § 2, c. 140, 32 Stat., 54, to raise revenue for the Philippine Islands, provides that there shall be "levied, collected and paid upon all articles coming into the United States from the Philippine Archipelago the rates of duty which are required to be collected and paid upon like articles imported from foreign countries: Provided "that upon all articles the growth and

product of the Philippine Archipelago *coming into the United States from the Philippine Archipelago there shall be levied, collected and paid only seventy-five per centum of the rates of duty aforesaid.* . . . All duties and taxes collected in the United States upon articles coming from the Philippine Archipelago . . . shall not be covered into the general fund of the Treasury of the United States, but shall be held as a separate fund and paid into the Treasury of the Philippine Islands to be used and expended for the government and benefit of said islands." (32 Stat. 54; 5 Fed. Stat. Ann. 716.)

The Commercial Convention with Cuba, proclaimed December 17, 1903 (33 Stat. 2136), declares, in Article 2, "that during the term of this convention all merchandise . . . being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States, approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted."

Article 8, p. 2140, 33 Stat. provides that "*the rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of this convention preferential in respect to all like imports from other countries*, and, in return for said preferential rates of duty granted to the Republic of Cuba by the United States, it is agreed that the concession herein granted on the part of the said Republic of Cuba to the products of the United States shall likewise be, and shall continue, during the term of this convention, preferential in respect to all like imports from other countries."

In April, 1906, the convention and statutes above referred to being of force, the plaintiffs imported cigars and alcohol into the United States from Cuba. He contended that under the convention he could only be required to

pay a duty twenty per cent less than that collected on tobacco coming into the United States from Philippine Islands which paid seventy-five per cent of the regular rate under the Tariff Act of July, 1897. He also claimed that he should not be required to pay twenty per cent less than the regular tariff on alcohol, but twenty per cent less than special rates allowed on importations of alcohol from France, Germany, Italy and Portugal.

His claim being disallowed he paid, under protest, a duty of twenty per cent less than the tariff rate on cigars and alcohol. On a hearing by the Board of Appraisers his protest was overruled. That judgment was affirmed by the Circuit Court (157 Fed. Rep. 140) and the case was brought here.

Mr. Edward S. Hatch and *Mr. Walter F. Welch* for appellants:

A treaty is governed by the same rules of law as other contracts. *Foster* v. *Neilson*, 2 Pet. 253, 314; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 182; *Head Money Cases*, 112 U. S. 580.

In construing the language of treaties the courts will adopt the same general rules which are applicable in the construction of statutes, contracts and written instruments generally, in order to carry out the purpose and intention of the makers. *Tucker* v. *Alexandroff*, 183 U. S. 424; *The Amiable Isabella*, 6 Wheat. 1, 71; *United States* v. *Percheman*, 7 Pet. 51.

The court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. *The Amiable Isabella*, 6 Wheat. 1, 71.

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and one liberal, the latter construction is to be preferred and the interpretation which is favorable to the inferior

party should be adopted. *Worcester* v. *Georgia*, 6 Pet. 582; *Tucker* v. *Alexandroff*, 183 U. S. 424; *Shanks* v. *Dupont*, 3 Pet. 242; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Geofroy* v. *Riggs*, 133 U. S. 258, 272; Vattel's Law of Nations, bk. 2, c. 17.

The American favored nation doctrine is not applicable to this case. *Bartram* v. *Robertson*, 122 U. S. 116; *Whitney* v. *Robertson*, 124 U. S. 190.

The promise of the United States for a good and valuable consideration, enacted by the Congress, becomes a rule of law enforceable by the courts. Art. VI, Par. 2, Const. U. S.; Art. III, § 2, Const.

Courts are bound to give effect to treaties in precisely the same manner that they do to the provisions of the Constitution or the laws of Congress. There is no distinction. They are equally the supreme law of the land. *United States* v. *The Peggy*, 1 Cranch, 103; *Strother* v. *Lucas*, 12 Pet. 410, 439; *Foster* v. *Neilson*, 2 Pet. 253, 314; *Nicholas* v. *United States*, 122 Fed. Rep. 892; *Boudinot* v. *United States*, 11 Wall. 616; *Whitney* v. *Robertson*, 124 U. S. 190; *Taylor* v. *Morton*, 2 Curtis, 454, 459.

Alcohol from Cuba is entitled to a twenty per centum preference over like merchandise from France, Germany and other foreign countries. Section 1, Par. 289, Tariff Act of July 24, 1897.

The Philippines are within the phrase "other countries" as used in Art. VIII of the Cuban Treaty. In the treaty and the act of Congress a careful distinction is made between "other countries" and "foreign countries." *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176; *Downs* v. *Bidwell*, 182 U. S. 244.

Algeria was an African country different from and other than France. *United States* v. *Tartar Chemical Co.*, 127 Fed. Rep. 944; T. D. 29149.

For tariff purposes the United States regarded Great Britain as one country and India as another. T. D.

27507, G. A. 6405, see also Sen. Doc. 185, 60th Cong., 1st Sess.; T. D. 27840; T. D. 27583; *Queen* v. *Commissioners of Stamps*, 18 L. J. Q. B. 201; *Campbell* v. *Hall*, 1 Cowper, 204, 211; *Otway* v. *Ramsay*, King's Bench, 1736; Sir H. Jenkins, "British Rule and Jurisdiction Beyond the Seas," 41. As to Channel Islands see Cooley's Blackstone, Vol. 1, 4th ed.; *United States* v. *The Nancy and the Caroline*, 3 Wash. C. C. 281; Daily Consular and Trade Reports, Nov. 27, 1906, No. 2729; same for Dec. 28, 1907.

By international usage, which must govern in the construction of a treaty between two nations, the Philippines must be regarded as falling within the phrase "other countries" in a commercial convention having to do with tariff rates between Cuba and the United States. T. D. 24051; T. D. 28401; Int. Rev. Circ. No. 581; *Rassmussen* v. *United States*, 197 U. S. 516; *Dorr* v. *United States*, 195 U. S. 138. Canada, India, Australia, or New Zealand, each having its own customs and revenue system, would be regarded for the purposes of a commercial convention as "other countries," as to Great Britain, although they were possessions of that country.

If the present movement for the consummation of a reciprocity treaty with Canada succeeds it ought to be made known by this court whether Cuba can be discriminated against and deprived of the benefit of her agreement with the United States, and whether numerous articles can be admitted free of duty from Canada by agreement without according to Cuba the same rights under the treaty now in existence. If Cuba can be discriminated against in any of these ways the promise of the United States in the Cuban treaty cannot mean anything to the effect that Cuban products shall have a preference over all like imports from other countries. If the United States for any reason is not willing to carry out its agreement with Cuba then there is

ample provision therein for denouncing the same, and until that time it should be carried out according to its terms.

Mr. D. Frank Lloyd, Assistant Attorney General, and *Mr. Charles E. McNabb*, for the United States:

The Philippine Islands are neither a "foreign country" nor an "other country," within the meaning of the Cuban convention.

For definitions of "foreign country" see *The Ship Adventure*, 1 Brock. 235, 241; Fed. Cas. 202, 204; *The Boat Eliza*, 2 Gall. 4; 8 Fed. Cas. 455, 456; *Taber* v. *United States*, 1 Story, 1; 23 Fed. Cas. 611, 613, 614.

Upon ratification of the treaty of peace with Spain the Philippines and other islands therein ceded to the United States ceased to be foreign and became territory of the United States subject to such tariff legislation as Congress might deem proper. *Insular Cases* in Vol. 182 U. S. Reports; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 178, 179, 181, 182; *United States* v. *Heinszen*, 206 U. S. 370, 379, 380.

The words "foreign country" appear only in § 28 of the Customs Administrative Act of June 10, 1890. The word "country" without the adjective "foreign" appears in §§ 2, 3, 4, 5, 7, 10 and 19. There can be no doubt whatever that foreign country is invariably meant by the word "country," because the Customs Administrative Act relates only to merchandise imported from foreign countries. See *United States* v. *The Recorder*, 1 Blatchf. 218; 27 Fed. Cas. 718, 720, 721; *Stairs* v. *Peaslee*, 18 How. 521, 526.

The term "country" as used in the law is to be regarded as embracing all the possessions of a nation, however widely separated, which are subject to the same supreme executive and legislative authority and control. (Cust. Reg. 1857, art. 300; Cust. Reg. 1874, art. 432;

Cust. Reg. 1884, art. 499; Cust. Reg. 1892, art. 835; Cust. Reg. 1899, art. 1254; Cust. Reg. 1908, art. 873.)

The legal effect of contemporaneous and long-continued construction and practice of the executive department charged with the administration of the law has been repeatedly declared by the courts. *United States* v. *The Recorder*, and *Stairs* v. *Peaslee*, *supra*, are in point. For recent decisions of this court, sustaining such construction and practice, see: *United States* v. *Falk*, 204 U. S. 143, 152; *United States* v. *Cerecedo*, 209 U. S. 337, 339; *Komada* v. *United States*, 215 U. S. 392, 396.

The words "other countries" appearing in Art. VIII of the Cuban convention, *supra*, are inapplicable to the Philippine Islands, as is shown by the context and the purpose.

Article VIII declares that the concession made in said convention shall be "preferential in respect to all like imports from other countries." The words "imports from other countries" do not refer to goods coming into the United States from the Philippine Islands. "Import," "imports," "imported," and "importation" are used in the customs laws to refer only to merchandise brought into the United States from a foreign country the same as the correlative terms "export," "exports," "exported," and "exportation" are applied to merchandise carried out of the United States to a foreign country. *Woodruff* v. *Parham*, 8 Wall. 123, 131 *et seq.*; *Brown* v. *Houston*, 114 U. S. 622, 628 *et seq.*; *Fairbank* v. *United States*, 181 U. S. 283, 294; *De Lima* v. *Bidwell*, 182 U. S. 1, 176; *Dooley* v. *United States*, 183 U. S. 151, 154, 155.

A thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *Jones* v. *Guaranty &c. Co.*, 101 U. S. 622, 626; *Smythe* v. *Fiske*, 23 Wall. 374, 380; *United States* v. *Babbit*, 1 Black, 55, 61; *Raymond* v.

Thomas, 91 U. S. 712, 715; *Indianapolis &c. R. Co.* v. *Horst*, 93 U. S. 291, 300; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

The law governing tariff relations with the Philippine Islands is for the benefit of the inhabitants thereof and not to provide revenue for the Government of the United States.

The far-reaching effect of the construction contended for by appellants would accomplish results entirely inconsistent with the purpose of Congress, to wit, cigars and other articles would be imported from Cuba in effective competition with, and perhaps to the exclusion of, similar products of the Philippine Islands, and articles on the free list which do not come into the United States from those islands would be imported from Cuba to the detriment of American industries.

Article VIII of the Cuban convention provides that the rates of duty granted to Cuba shall be "preferential in respect to all like imports from other countries," and then provides that in return therefor the concession to products of the United States shall likewise be "preferential in respect to all like imports from other countries."

The words "other countries" must mean the same thing in both clauses, and it is obvious that the latter clause cannot include the Philippine Islands because the word "preferential" is predicated upon and pre-supposes a treaty or convention with another country prejudicial to the United States. Cuba could not enter into such a treaty or convention with the Philippine Islands as a country.

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

Article 2 of the Convention with Cuba provides that the products of that island shall be admitted into the

United States at a reduction of twenty per cent of the rates of duty in the Tariff of 1897, or tariff laws subsequently enacted. There is much force in the suggestion that the reduction is limited to the rates of duty in general tariff acts, and does not apply to special rates under special agreements with other countries. *Whitney* v. *Robertson*, 124 U. S. 190. This point, however, we purposely leave open and limit our consideration to the principal question discussed in the brief, whether the Philippine Islands are "another country" within the meaning of the eighth article of the Cuban Treaty, providing that the rates therein granted shall continue "preferential in respect to all like imports from other countries."

This treaty was signed and proclaimed several years after it had been decided, in the *Insular Cases*, that Porto Rico and the Philippine Islands were not foreign countries, but territory of the United States, subject to such laws as Congress might enact for their political and fiscal management. In 1901 this court, in *Fourteen Diamond Rings* v. *The United States*, 183 U. S. 176, 178, said that "the theory that a country remains foreign with respect to the tariff laws, until Congress has acted by embracing it within the Customs Union, presupposes that the country may be domestic for one purpose and foreign for another." That case and *DeLima* v. *Bidwell*, 182 U. S. 1; *United States* v. *Heinszen*, 206 U. S. 370; *Dooley* v. *United States*, 183 U. S. 151, show that, notwithstanding their geographical remoteness, the Philippines are not a foreign country, and, if so, not "another country" within the meaning of the Cuban Treaty.

There have been statutes in which the language indicated an intent to make a distinction between a country and its colonies. But in the absence of some qualifying phrase "the word country in the revenue laws of the United States has always been construed to embrace all

the possessions of a foreign State, however widely separated, which are subject to the same supreme executive and legislative control." *Stairs* v. *Peaslee*, 18 How. 521, 526. If, therefore, in our revenue laws, a colony is treated as a part of the country to which it belongs, the Philippine Islands must be treated as a part of this Nation and not as another country. It must be presumed that the words "other country" in the Cuban Treaty were used according to their known and established interpretation, *Ibid*, and did not refer to charges on shipments from territory belonging to the United States. That they were not so regarded appears from the language of the act of March 8, 1902, 32 Stat., c. 140, which studiously avoids using the words "imports," and enacts that upon articles "*coming into* the United States from the Philippine Archipelago," there shall be levied only seventy-five per cent of the rates of duty imposed on like articles imported from foreign countries. These duties, when collected, are not covered into the Treasury of the United States, but are to be used and expended solely for the use and government of the Philippine Islands.

But it is argued that even if the United States understood the Philippine Islands to be a part of this country, Cuba could not be expected to understand that the words "other countries" did not include the Philippines if a duty was in fact charged on goods coming from those islands.

But the eighth article refers to "imports"—the correlative of "exports." This necessarily related to shipments from a country which was foreign to the United States. *Pittsburgh Coal Co.* v. *Louisiana*, 156 U. S. 590, 600; *Patapsco Co.* v. *North Carolina*, 171 U. S. 345, 353. The provision that the rates granted to Cuba shall continue "preferential in respect to all like imports from other countries," does not relate to charges on shipments between places under the same flag, but to duties laid on ship-

ments—on imports—from countries which are foreign to the United States. Both in the light of our own legislation and in view of the generally accepted interpretation of the word "imports," the eighth article of the treaty cannot be construed to have been intended to give to Cuba an advantage over shipments of merchandise coming into the United States from a part of its own territory, where the collections were in part made as a means for raising revenue for the support of the government of the Philippine Islands. Cuba was given a preferential of twenty per cent over tariff rates on imports from countries which are foreign to the United States.

We make no ruling as to the duty to be charged on alcohol, because in the brief of the Government it is said that without conceding plaintiff's contention to be sound, and for reasons unnecessary to state, it consents to a reversal of so much of the judgment as relates to alcohol. It will be so ordered. The judgment of the Circuit Court as to the rate of duty on the cigars is

Affirmed.

PROVIDENT INSTITUTION FOR SAVINGS *v.* MALONE, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

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

No. 151. Argued April 26, 1911.—Decided May 29, 1911.

The State has power to legislate in regard to the preservation and disposition of abandoned property and to establish presumptions of abandonment after lapse of reasonable period. *Cunnius* v. *Reading*, 198 U. S. 454.

A statute directing that savings banks turn over to the proper state officers money in accounts inactive for thirty years and where the

depositor cannot be found, with provisions for the payment over to the depositor or his heirs on establishment of right, does not deprive savings banks of their property without due process of law and is not a denial of equal protection of the law because it applies only to savings banks, the classification not being unreasonable; and so held as to the statute of Massachusetts to that effect.

The question of whether a statute allows a depositor or his heirs a lower rate of interest on a deposit turned over to the State as abandoned than allowed by the bank amounts to a deprivation of property without due process of law within the Fourteenth Amendment cannot be raised by the bank as against the State.

There is a special reason for protecting depositors of savings banks and there is a difference between them and deposits in other banks that affords a reasonable basis for classification in legislation.

Whether the State can require payment of accounts in savings banks without production of the pass-book and the rights and relations of parties arising out of the charter and contract of deposit are to be determined by local law and do not present Federal questions giving this court jurisdiction under § 709, Rev. Stat.

In 1907 the General Court of the Commonwealth of Massachusetts passed an act providing that deposits in savings banks which had remained inactive and unclaimed for thirty years, and where the claimant was unknown or the depositor could not be found, should be paid to the treasurer and receiver general.

Under this statute, which is copied in the margin,[1] the

[1] Sec. 56. The probate court shall, upon the application of the attorney-general, and after public notice, order and decree that all amounts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, or on whose passbooks the interest has not been added, which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the passbook, and for which no claimant is known or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the treasurer and receiver general, to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto, with interest at the rate

attorney general on May 5, 1908, filed in the Probate Court of Suffolk County a petition, setting out the names and last known addresses of 226 persons who had deposit accounts ranging from $1 to $4,284 in the "Provident Institution for Savings in the Town of Boston." He alleged that for more than thirty years no part of the principal or interest had been withdrawn, no interest had been added upon any of the passbooks and no additional deposits had been made on any of the accounts; that no claimant for any of said deposits was known, and that the depositors could not be found. He thereupon prayed that the court would order the said sums of money, with the increases thereof, to be paid over to the treasurer and receiver general of the Commonwealth. A copy of the petition was served on the bank, and a citation, addressed to the depositors, was published once in each week for three successive weeks in two newspapers in Boston, requiring them each to show cause on July 16, 1908, why the prayer of the petition should not be granted.

The Savings Bank alone answered. It admitted the allegations of the petition. It averred, however, that when each deposit was made, an agreement was signed by which the by-laws of the bank made in pursuance of the charter granted December 11, 1816, was assented to by the depositor. These by-laws provided that regular semi-annual dividends of four per cent should be declared on all deposits of $5 and over, and should be added to the principal; that no dividends should be paid on sums above $1,600; that no money could be withdrawn without the production of the passbook, and that by a vote of the

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of three per cent per annum from the time when it was paid to said treasurer to the time when it is paid over by him to such person.

SEC. 57. Any person claiming a right to money deposited with the treasurer and receiver general under the provisions of either of the two preceding sections . . . may establish the same by a petition to the superior court. . . .

trustees they might dissolve the institution at any time and divide the whole property among the dispositors in proportion to their respective interests therein.

The bank contended that the act requiring deposits to be paid over to the receiver general deprived persons of their property without due process of law and also impaired the obligation of contracts. After hearing, the Probate Court directed the bank to pay over and transfer to the treasurer and receiver general of the Commonwealth the amounts deposited by the persons named in the petition. On appeal that order was affirmed by the Supreme Judicial Court of Massachusetts. 201 Massachusetts, 23; *S. C.*, 86 N. E. Rep. 912.

Mr. John C. Gray, with whom *Mr. William Ropes Trask* and *Mr. Roland Gray* were on the brief, for plaintiff in error.

Mr. Dana Malone, with whom *Mr. Fred. T. Field* was on the brief, for defendant in error.

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

The Massachusetts statute as to abandoned funds in savings banks only applies where the owner cannot be found. In the nature of the case, therefore, no depositor could except to the judgment of the Probate Court which directed the money to be turned over to the treasurer; and, it is claimed that as the Bank does not represent the depositors, it cannot be heard to raise the objection that their property has been taken without due process of law. *Hatch* v. *Reardon*, 204 U. S. 152, 160. This may be true, except in so far as its rights are involved in those of the depositor. Savings banks are maintained in the expectation that the deposits may, for years, remain uncalled

for, to the mutual advantage of bank and customer. So that if the statute had provided that the money should be paid over to the receiver-general if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented from that arising under an act which deals with absence and non-action so long continued as to suggest that the law of escheats or of lost property might be enforced. This, however, is not a statute of escheats, since it does not proceed on the theory that the depositor is dead, leaving no heirs. It does not purport to dispose of lost property, but deals with a deposit the owner of which, though known, cannot be found. The act is like those which provide for the appointment of custodians for the real and personal property of an absentee.

In this case though the money is on deposit with a bank, which has faithfully kept its contract, yet the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that, after long lapses of time, changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act of ownership as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appear to claim it; or failing that, until it should be escheated to the State. The right and power so to legislate is undoubted. *Cunnius* v. *Reading*, 198 U. S. 458.

The statute here is reasonable in its terms and is so framed as to work injustice to no one. It only applies to cases where no deposit has been made, no interest added on passbook, no check drawn against the account, for thirty years, and where no claimant is known and the depositor cannot be found. Before the money can be turned over to the receiver general proceedings must be

instituted in the Probate Court, and, under the decision of the Supreme Court of the State, personal notice must be given to the bank and citation and notice, usual in the Probate Court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right.

It is true that the rate of interest paid by the State is not the same as that paid by the bank—as to sums under $1,600 it is less, and as to those over $1,600 it is more. But this is a matter with which the plaintiff in error is not concerned and can arise only between the State and the claimant when he asserts a right to property long neglected and apparently abandoned.

But the bank insists that there has been no abandonment; that the money is in safe hands where it was originally left, under by-laws which contemplated that the deposit might remain in the bank without interest on sums over $1,600 until the corporation was dissolved. It contends that to deprive it of the benefit of such deposits is to take property without due process of law.

But while there was a possibility that the money might so remain the bank had no right to require that it should be so left. Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown. On dissolution the shares of a depositor, who could not be found, would be paid over to his legal representative, who might be an administrator in case his death was established, or a guardian, in case of mental incapacity, or a trustee in bankruptcy in case of insolvency, or a representative appointed under statutes applicable to abandoned property. But it is not necessary to wait for the dissolu-

tion of the bank. If the facts warrant it a legal representative can be appointed at any time, with all the rights incident to such appointment, including that of withdrawing the funds and holding them for the true owner when he shall establish his claim.

There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage-earners, moving from place to place, there is special reason for intervening to protect their interest in this class of property in banks as to which the State's supervisory power is constantly exercised.

The other questions as to payment without the production of the passbook, the rights and relations of the parties arising out of the charter and contract of deposit present no Federal question. The statute does not violate the Constitution of the United States. The judgment is

Affirmed.

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AMENDMENTS TO CONSTITUTION.

Fourth. See CONSTITUTIONAL LAW, 24, 25, 38.
Fifth. See CONSTITUTIONAL LAW, 19–28.
Sixth. See CORPORATIONS, 3; PHILIPPINE ISLANDS, 5.
Eleventh. See CONSTITUTIONAL LAW, 32–37.
Fourteenth. See CONSTITUTIONAL LAW.

ANTI-TRUST ACT.

See JURISDICTION, B;
RESTRAINT OF TRADE.

APPEAL AND ERROR.

1. *Assignments of error; necessity for and sufficiency of.*

Sections 997 and 1012, Rev. Stat., and Rule 35 of this court, require assignments of error and apply to appeals from courts of the District of Columbia. *Realty Co.* v. *Rudolph*, 217 U. S. 547. An assignment in the brief is not sufficient. *Briscoe* v. *District of Columbia*, 547.

2. *Method of review of judgments of Supreme Court of Philippine Islands.*

The appropriate method to review judgments of the Supreme Court of the Philippine Islands in cases from the Court of Land Registration is by writ of error and not by appeal. *Jover* v. *Insular Government*, 623.

See CRIMINAL LAW, 3; JURISDICTION;
FEDERAL QUESTION, 1; PHILIPPINE ISLANDS, 3, 4;
STATUTES, A 6.

APPROPRIATION OF WATERS.

See RIPARIAN RIGHTS, 2, 3.

ASSESSMENT AND TAXATION.

See CONSTITUTIONAL LAW, 11; JUDGMENTS AND DECREES, 2; FACTS; NATIONAL BANKS; TAXES AND TAXATION.

ASSIGNMENTS.

1. *Of chose in action; reservation of excess over debt secured, by separate instrument, as evidence of fraud.*

The assignment of a mere chose in action, not subject to legal process and of uncertain value, given to secure an honest debt, will not be set aside by this court as fraudulent in law because the surplus, if any (there actually being a deficit), was reserved to the assignors by a separate instrument, for the recording of which there was no provision, after two courts have held that the assignment was not made with intent to hinder and defraud creditors and as matter of law had no such result. *Merillat* v. *Hensey*, 333.

2. *Of chose in action; reservation by assignor of amount in excess of debt as evidence of fraud.*

Reservation to the assignor of surplus of a chose in action given in payment of a debt does not of itself constitute fraud in law. To be fraud in law the reservation must be of some pecuniary benefit to the assignor at the expense of creditors and a prime purpose of the conveyance. Section 1120, Code of the District of Columbia. *Ib.*

3. *Of chose in action in payment of debt; excessive amount as evidence of fraud.*

The fact that the amount alleged to be due on an unliquidated chose in action is greater than the amount of the debt in payment of which it is assigned is not necessarily evidence of fraud against other creditors; and where the amount actually recovered is less than the amount of the debt this court will not disturb the finding of both courts below that there was no fraud. *Ib.*

4. *Of chose in action; when effective.*

Where, as in the District of Columbia, the assignment of a chose in action does not have to be recorded and there is no way in which constructive notice can be given, the assignment, if valid upon its face, is ineffective only in case of actual bad faith established by the facts. *Ib.*

See PUBLIC LANDS, 1, 2.

ASSIGNMENTS OF ERROR.

See APPEAL AND ERROR, 1;
JURISDICTION, A 3;
PRACTICE AND PROCEDURE, 1.

BANKRUPTCY.

Receiver; right to possession of books of bankrupt.

Under § 2 of the act of 1898, where the bankruptcy court can enforce title against the bankrupt in favor of the trustee, it can enforce possession *ad interim* in favor of the receiver; and so *held* as to books of the bankrupt. *Matter of Harris*, 274.

See CONSTITUTIONAL LAW, 30.

BANKS.

See CONSTITUTIONAL LAW, 13, 16;
NATIONAL BANKS;
PRACTICE AND PROCEDURE, 4.

BLACKLISTING

See RESTRAINT OF TRADE, 22.

BOOKS AND PAPERS, PRODUCTION OF.

See BANKRUPTCY;
CONSTITUTIONAL LAW, 20–26, 28;
CORPORATIONS, 2, 4, 5, 7, 8, 9;
WRIT AND PROCESS.

BOYCOTTS.

See CONSTITUTIONAL LAW, 17;
INJUNCTION, 1, 2, 3;
RESTRAINT OF TRADE, 22.

BRIBERY.

See CRIMINAL LAW, 5.

BRIDGES.

See NAVIGABLE WATERS.

BRIEFS OF COUNSEL.

See APPEAL AND ERROR, 1.

BURDEN OF PROOF.

See UNFAIR TRADE, 2, 3.

CARRIERS.

See CONSTITUTIONAL LAW, 1, 2, 4, 15, 38; COURTS.

CASES DISTINGUISHED.

Counselman v. *Hitchcock*, 142 U. S. 547, distinguished in *Matter of Harris*, 274.

Employers' Liability Cases, 207 U. S. 463, distinguished in *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

Hills v. *Hoover*, 220 U. S. 334, distinguished in *American Lithographic Co.* v. *Werckmeister*, 603.

Hudson County Water Co. v. *McCarter*, 209 U. S. 349, distinguished in *Oklahoma* v. *Kansas Natural Gas Co.*, 229.

Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, distinguished in *Oklahoma* v. *Kansas Natural Gas Co.*, 229.

Petit v. *Walshe*, 194 U. S. 205, distinguished in *Glucksman* v. *Henkel*, 508.

United States v. *E. C. Knight Co.*, 156 U. S. 1, distinguished in *Standard Oil Co.* v. *United States*, 1.

Werckmeister v. *American Tobacco Co.*, 207 U. S. 375, distinguished in *American Lithographic Co.* v. *Werckmeister*, 603.

Wright v. *Henkel*, 190 U. S. 40, distinguished in *Glucksman* v. *Henkel*, 508.

CASES EXPLAINED.

Nelson v. *Northern Pacific Ry. Co.*, 188 U. S. 108, explained in *Northern Pacific Railway* v. *Trodick*, 208.

United States v. *Chicago, M. & St. P. Ry.*, 218 U. S. 233, explained in *Northern Pacific Railway* v. *Trodick*, 208.

United States v. *Joint Traffic Assn.*, 171 U. S. 505, explained in *United States* v. *American Tobacco Co.*, 106.

United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, explained in *United States* v. *American Tobacco Co.*, 106.

CASES FOLLOWED.

Blackstone v. *Miller*, 188 U. S. 205, followed in *Liverpool & London & Globe Ins. Co.* v. *Orleans Assessors*, 346.

Chicago, B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226, followed in *Appleby* v. *Buffalo*, 524.

Chicago, B. & Q. R. R. Co. v. *McGuire*, 219 U. S. 549, followed in *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

Cunnius v. *Reading*, 198 U. S. 454, followed in *Provident Savings Institution* v. *Malone*, 660.

Dorr v. *United States*, 195 U. S. 138, followed in *Dowdell* v. *United States*, 325.
Eastern Building & Loan Assn. v. *Ebaugh*, 185 U. S. 114, followed in *Texas & New Orleans R. R. Co.* v. *Miller*, 408.
English v. *Arizona*, 214 U. S. 359, followed in *Briscoe* v. *Rudolph*, 547.
Hale v. *Henkel*, 201 U. S. 43, followed in *Wilson* v. *United States*, 361.
Huntley v. *Kingman*, 152 U. S. 527, followed in *Merillat* v. *Hensey*, 333.
Hurtado v. *California*, 110 U. S. 516, followed in *Dowdell* v. *United States*, 325.
Hyatt v. *Corkran*, 188 U. S. 691, followed in *Strassheim* v. *Daily*, 280.
Kentucky Union Co. v. *Kentucky*, 219 U. S. 156, followed in *Orient Ins. Co.* v. *Assessors of Orleans*, 358.
Liverpool & London & Globe Ins. Co. v. *Assessors*, 221 U. S. 346, followed in *Orient Ins. Co.* v. *Assessors of Orleans*, 358.
Louisville & Nashville R. R. Co. v. *Melton*, 218 U. S. 36, followed in *Texas & New Orleans R. R. Co.* v. *Miller*, 408.
Mogul Steamship Co. v. *McGregor*, 1892, A. C. 25, followed in *Standard Oil Co.* v. *United States*, 1.
Nelson v. *Northern Pacific Railway*, 188 U. S. 108, followed in *Northern Pacific Railway* v. *Trodick*, 208.
Pierce v. *Creecy*, 210 U. S. 387, followed in *Strassheim* v. *Daily*, 280.
Realty Co. v. *Rudolph*, 217 U. S. 547, followed in *Briscoe* v. *Rudolph*, 547.
Rice v. *Ames*, 180 U. S. 371, followed in *Glucksman* v. *Henkel*, 508.
Standard Oil Co. v. *United States*, 221 U. S. 1, followed in *United States* v. *American Tobacco Co.*, 106.
Texas v. *White*, 7 Wall. 700, followed in *Coyle* v. *Oklahoma*, 559.
Texas & New Orleans R. R. Co. v. *Miller*, 221 U. S. 408, followed in *Texas & New Orleans R. R. Co.* v. *Gross*, 417.
Tiger v. *Western Investment Co.*, 221 U. S. 286, followed in *Hallowell* v. *United States*, 317.
Union Bridge Co. v. *United States*, 204 U. S. 364, followed in *Hannibal Bridge Co.* v. *United States*, 194.
United States v. *Morris*, 10 Wheat. 246, followed in *Texas & New Orleans R. R. Co.* v. *Miller*, 408.
Whitney v. *Robertson*, 124 U. S. 190, followed in *Faber* v. *United States*, 649.
Wilson v. *United States*, 221 U. S. 361, followed in *Dreier* v. *United States*, 394; *American Lithographic Co.* v. *Werckmeister*, 603; *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

CASES LIMITED AND QUALIFIED.

United States v. *Joint Traffic Assn.*, 171 U. S. 505, limited and qualified in *Standard Oil Co.* v. *United States*, 1.

United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, limited and qualified in *Standard Oil Co.* v. *United States*, 1.

CHOSES IN ACTION.

See ASSIGNMENTS.

CIRCUIT COURTS.

See JURISDICTION, B.

CITIZENSHIP.

Governmental restraint to which citizen subject.

The privileges and immunities of Federal citizenship do not prevent such proper governmental restraint upon the conduct or property of citizens as may be necessary for the general good. *Tiger* v. *Western Investment Co.*, 286.

See INDIANS, 4, 7, 9, 11.

CLASSIFICATION FOR REGULATION.

See CONSTITUTIONAL LAW, 13, 15, 16.

COLLATERAL ATTACK.

See JUDGMENTS AND DECREES.

COMBINATIONS IN RESTRAINT OF TRADE.

See RESTRAINT OF TRADE.

COMMERCE.

See CONGRESS, POWERS OF, 1, 2; INTERSTATE COMMERCE; CONSTITUTIONAL LAW, 1; NAVIGABLE WATERS, 1; RESTRAINT OF TRADE.

COMMON LAW.

See RESTRAINT OF TRADE, 1, 2, 3, 4, 26.

COMPETITION.

See RESTRAINT OF TRADE.

CONDEMNATION OF LAND.

See CONSTITUTIONAL LAW, 12.

CONGRESS, ACTS OF.

See ACTS OF CONGRESS.

CONGRESS, POWERS OF.

1. *To restrict hours of labor of employés engaged in interstate and foreign commerce.*

By virtue of its power to regulate interstate and foreign commerce Congress may enact laws for the safeguarding of persons and property in interstate transportation and may restrict the hours of labor of employés connected with such transportation. *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

2. *To regulate interstate commerce; effect of involution of intrastate commerce.*

The power of Congress to make regulations in regard to agencies for interstate commerce is not defeated by the fact that the agencies regulated are also connected with intrastate commerce. *Ib.*

See CONSTITUTIONAL LAW, 30, 31; NAVIGABLE WATERS, 1, 4; CORPORATIONS, 4; RESTRAINT OF TRADE, 19; INDIANS, 2, 4, 7, 8, 10, 11; STATES, 2, 3, 6; TAXES AND TAXATION, 11.

CONSTITUTIONAL LAW.

1. *Commerce; validity of act of March 4, 1907, relative to hours of labor of railroad employés.*

The act of March 4, 1907, 34 Stat. 145, c. 2939, regulating the hours of labor of railway employés engaged in interstate commerce and requiring carriers to make reports in regard thereto, is not unconstitutional as beyond the power of Congress because it applies to railroads and employés engaged in intrastate business. *Employers' Liability Cases*, 207 U. S. 463, distinguished. *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

See INTERSTATE COMMERCE, 1, 7; NAVIGABLE WATERS, 1.

2. *Contracts; existence of contract in charter of corporation within meaning of Constitution.*

The charter of this transportation company *held* not to contain any provisions giving it such contract right to use its vehicles for advertising purposes as rendered a subsequent ordinance prohibiting such use unconstitutional under the contract clause of the Constitution. *Fifth Avenue Coach Co.* v. *New York*, 467.

3. *Contracts; provisions in corporate charter not within protection of contract clause.*

Provisions in a corporate charter which are beyond the power of the

legislature to grant are not within the protection of the contract clause of the Federal Constitution. *Texas & New Orleans R. R. Co.* v. *Miller*, 408; *Texas & New Orleans R. R. Co.* v. *Gross*, 417.

4. *Contracts; provision in charter of railroad exempting from liability not contract within protection of Constitution.*

A provision in its charter exempting a railroad company from liability for death of employés, even if caused by its own negligence, does not amount to an irrevocable contract within the protection of the Federal Constitution, but is as much subject to future legislative action as though embodied in a separate statute. *Ib.*

5. *Contracts; protection of charter rights; to what subject.*

The protection of charter rights by the contract clause of the Federal Constitution is subject to the rule that a legislature cannot bargain away the police power, or withdraw from its successors the power to guard the public safety, health and morals. *Ib.*

6. *Contracts; act of instrumentality as law of State within meaning of clause.*

A legislative act by an instrumentality of the State exercising delegated authority is of the same force as if made by the legislature and is a law of the State within the meaning of the contract clause of the Constitution. *Grand Trunk Western Ry. Co.* v. *Indiana R. R. Comm.*, 400.

7. *Contract impairment; limitation of charter rights of corporation.*

A contract with a corporation is subject to the limitations of the charter rights of the corporation and is not impaired within the meaning of the contract clause of the Constitution by subsequent legislation that does not extend such limitations. *Fifth Avenue Coach Co.* v. *New York*, 467.

8. *Contract impairment; effect of law relating to matters beyond scope of contract.*

A contract cannot be impaired, within the meaning of the contract clause of the Constitution, by a law which relates to matters beyond the scope of the contract as construed according to the usual meaning of the words used. *Grand Trunk Western Ry. Co.* v. *Indiana R. R. Comm.*, 400.

9. *Contract impairment. Same.*

A contract between two railroads for maintaining the physical cost of a crossing and guarding it by good and substantial semaphores

or other signals is not impaired by a subsequent act requiring an interlocking system and apportioning the expense in a different manner than provided in the contract. The contract did not embrace such a system. *Ib.*

10. *Contracts; liberty of; effect of restriction as to hours of labor.*

The length of time employed has a direct relation to efficiency of employés, and the imposition of reasonable restrictions in regard thereto is not an unconstitutional interference with the liberty of contract. (*C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549.) *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

See PRACTICE AND PROCEDURE, 3.

11. *Due process of law; deprivation of property without; validity of act of Feb. 10, 1899, relative to assessment of property in District of Columbia.*

The act of February 10, 1899, 30 Stat. 834, c. 150, extending Rhode Island avenue and authorizing assessments for benefits on property within the assessment district created by the act, is not unconstitutional as depriving owners within the district of their property without due process of law either because not providing sufficient notice or as arbitrarily assessing one-half the damages upon property within the designated district. *Briscoe* v. *District of Columbia*, 547.

12. *Due process of law; property rights; compensation; validity of condemnation proceeding.*

The Fourteenth Amendment forbids a State from taking private property for public use without compensation, *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, but where the State provides adequate machinery for ascertaining compensation on notice and hearing which were availed of and there was no ruling by the state court which prevented compensation for property actually taken, there is no lack of due process because of the amount awarded, even if only nominal. *Appleby* v. *Buffalo*, 524.

13. *Due process of law; equal protection of the law; validity of Massachusetts Savings Bank Act of 1907.*

A statute directing that savings banks turn over to the proper state officers money in accounts inactive for thirty years and where the depositor cannot be found, with provisions for the payment over to the depositor or his heirs on establishment of right, does not deprive savings banks of their property without due process of law and is not a denial of equal protection of the law because it

applies only to savings banks, the classification not being unreasonable; and so held as to the statute of Massachusetts to that effect. *Provident Savings Institution* v. *Malone*, 660.

See CRIMINAL LAW, 3; INTERSTATE COMMERCE, 7; INDIANS, 9; TAXES AND TAXATION, 2, 3, 4, 7, 9.

14. *Equal protection of the law; individual and aggregate rights.*

Where rights exist to one they exist to all of the class to which that one belongs. *Fifth Avenue Coach Co.* v. *New York*, 467.

15. *Equal protection of the law; classification for regulation; validity of New York ordinance prohibiting advertising vehicles in certain streets.*

Classification based on reasonable distinctions is not an unconstitutional denial of equal protection of the laws; and so *held* that an ordinance of the city of New York prohibiting advertising vehicles in a certain street is not unconstitutional as denying equal protection to a transportation company operating stages on such street either because signs of the owners may be displayed on business wagons, or because another transportation company may display advertising signs on its structure. There is a purpose to be achieved, as well as a distinction, which justifies the classification. *Ib.*

16. *Equal protection of the law; validity of classification for regulation of savings from other banks.*

There is a special reason for protecting depositors of savings banks and there is a difference between them and deposits in other banks that affords a reasonable basis for classification in legislation. *Provident Savings Institution* v. *Malone*, 660.

See Supra, 13.

Extradition. See EXTRADITION, 3.

17. *Freedom of speech; effect of order of court restraining publication in pursuance of boycott, as abridgment of.*

An order of a court of equity, restraining defendants from boycotting complainant by publishing statements that complainant was guilty of unfair trade, does not amount to an unconstitutional abridgment of free speech; the question of the validity of the order involves only the power of the court to enjoin the boycott. *Gompers* v. *Bucks Stove & Range Co.*, 418.

18. *Full faith and credit; effect of decision of court of State construing foreign statute, to violate.*

Where an action is commenced in the courts of one State, based on a

right given by the statute of another State provided it be commenced within a specified period, which has not expired, the omission of the plaintiff to plead the statute may be cured by the defendant pleading the statute, although the answer may not be filed until after the period of limitation has expired; and the decision of the state court to that effect does not violate the full faith and credit clause of the Federal Constitution, and involves no Federal question. *Texas & New Orleans R. R. Co.* v. *Miller*, 408; *Texas & New Orleans R. R. Co.* v. *Gross*, 417.

Legislative powers. *See Supra*, 1;
CONGRESS, POWERS OF;
RESTRAINT OF TRADE, 19.

Property rights. *See Supra*, 11;
NAVIGABLE WATERS, 6.

19. *Self-incrimination; right does not extend to appropriation of property.*

The right under the Fifth Amendment not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story. *Matter of Harris*, 274.

20. *Self-incrimination; effect of order requiring bankrupt to surrender books to receiver.*

A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized receiver. *Counselman* v. *Hitchcock*, 142 U. S. 547, distinguished. *Ib.*

21. *Self-incrimination; protection to which officer of corporation entitled.*

An officer of a corporation is protected by the self-incrimination provisions of the Fifth Amendment against the compulsory production of his private books and papers, but this privilege does not extend to books of the corporation in his possession. *Wilson* v. *United States*, 361.

22. *Self-incrimination; protection to which officer of corporation entitled.*

An officer of a corporation cannot refuse to produce documents of a corporation on the ground that they would incriminate him simply because he himself wrote or signed them, and this even if indictments are pending against him. *Ib.*

23. *Self-incrimination; right of corporation and of officer thereof to plead privilege.*

A corporation cannot plead a privilege against self-incrimination

under the Fifth Amendment; nor can an officer of a corporation plead that the immunity guaranteed by that amendment relieves him personally from making records from the books and papers of the corporation. (*Wilson* v. *United States*, *ante*, p. 361.) *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

24. *Self-incrimination; right of corporation defendant in suit under § 4965, Rev. Stat.*

A corporation defendant in a suit to enforce penalties under § 4965, Rev. Stat., for infringement of copyright is not entitled under the Fourth or Fifth Amendment to object to the admission of evidence of entries in its books produced under a subpœna *duces tecum*. (*Wilson* v. *United States*, *ante*, p. 361.) *American Lithographic Co.* v. *Werckmeister*, 603.

25. *Self-incrimination; right of officer of corporation having possession of and being called upon to produce its books.*

A subpœna *duces tecum*, which is suitably specific and properly limited in its scope, and calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced, does not violate the unreasonable search and seizure provisions of the Fourth Amendment, and the constitutional privilege against testifying against himself cannot be raised for his personal benefit by an officer of the corporation having the documents in his possession. *Wilson* v. *United States*, 361.

26. *Self-incrimination; protection to which physical custodian of incriminating documents entitled.*

Physical custody of incriminating documents does not protect the custodian against their compulsory production. The privilege which exists as to private papers cannot be maintained. *Ib.*

27. *Self-incrimination; party in proceeding in criminal contempt entitled to protection.*

In criminal proceedings for contempt the party against whom the proceedings are instituted is entitled to the protection of the constitutional provisions against self-incrimination. *Gompers* v. *Bucks Stove & Range Co.*, 418.

28. *Self-incrimination; waiver of immunity by conduct on part of officer of corporation; quære as to.*

Quære whether if a privilege to refuse to produce documents of a corporation in response to a subpœna *duces tecum* does exist the per-

son entitled to claim it may not waive it by his conduct. *Dreier* v. *United States*, 394.

See CORPORATIONS, 4, 5, 8, 9.

29. *States; equality of.*

The Constitution not only looks to an indestructible union of indestructible States, *Texas* v. *White*, 7 Wall. 700, 725, but to a union of equal States as well. *Coyle* v. *Oklahoma*, 559.

30. *States; admission into Union; power of Congress; equality of States.*

The power given to Congress by Art. IV, § 3, of the Constitution is to admit new States to this Union, and relates only to such States as are equal to each other in power and dignity and competency to exert the residuum of sovereignty not delegated to the Federal Government. *Ib.*

31. *States; duty of Congress to guarantee republican form of government; power of Congress in respect of.*

The constitutional duty of Congress of guaranteeing to each State a republican form of government does not import a power to impose upon a new State, as a condition to its admission to the Union, restrictions which render it unequal to the other States, such as limitations upon its power to locate or change its seat of government. *Ib.*

32. *States; immunity from suit; application of Eleventh Amendment.*

With the exception named in the Constitution every State has absolute immunity from suit; and the Eleventh Amendment applies not only where the State is actually named as a party but where the suit is really against it although nominally against one of its officers. *Hopkins* v. *Clemson College*, 636.

33. *States; immunity from suit; public agents amenable for own torts.*

Immunity from suit is a high attribute of sovereignty and a prerogative of the State itself which cannot be availed of by public agents when sued for their own torts. *Ib.*

34. *States; immunity from suit; suit to enjoin enforcement of void law not within.*

While the State as a sovereign is not subject to suit, cannot be enjoined, and the State's officers cannot be restrained from enforcing the State's laws or held liable for consequences of obedience thereto, a void law is neither a law or command but a nullity conferring no authority and affording no protection or immunity from suit. *Ib.*

35. *States; immunity from suit; public corporations and political subdivisions not entitled.*

Neither public corporations nor political subdivisions are clothed with the immunity from suit which belongs to the State alone; and while they may be relieved from responsibility to a wider degree than individuals would be they must make the defense and cannot rely on immunity. *Ib.*

36. *States; immunity from suit; who entitled to claim; application where State necessary party.*

In this case *held* that an agricultural college corporation was not such an agent of the State as to be immune under the Eleventh Amendment from suit for damages caused by erection of a dyke and consequent overflow of plaintiff's property; but also held that as the dyke was on property belonging to the State, the State would be a necessary party to the suit in order to decree removal, and in the absence of consent to be sued the court had no jurisdiction to decree removal. *Ib.*

37. *States; immunity from suit; application where State a necessary party.*

Although parties erecting a dyke on property belonging to the State may not, under the Eleventh Amendment, be immune from suit, the State is a necessary party to a suit to remove the dyke and it is beyond the jurisdiction of the court to make a decree to that effect. *Ib.*

38. *Unreasonable searches and seizures; effect of report required by § 4 of Act to Regulate Commerce as.*

Under § 4 of the Act to Regulate Commerce the Interstate Commerce Commission has power to require carriers to make reports regarding the hours of labor of such employés as are subject to the act of March 4, 1907, and the requirement of such reports does not constitute an unreasonable search or seizure within the meaning of the Fourth Amendment. *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

See Supra, 25.

CONSTRUCTION OF STATUTES.

See STATUTES, A.

CONTEMPT OF COURT.

1. *Civil and criminal contempts differentiated.*

Civil and criminal contempts are essentially different and are gov-

erned by different rules of procedure. *Gompers* v. *Bucks Stove & Range Co.*, 418.

2. *Civil contempt; what amounts to; punishment for.*

A proceeding, instituted by an aggrieved party to punish the other party for contempt for affirmatively violating an injunction in the same action in which the injunction order was issued, and praying for damages and costs, is a civil proceeding in contempt, and is part of the main action, and the court cannot punish the contempt by imprisonment for a definite term; the only punishment is by fine measured by the pecuniary injury sustained. *Ib.*

3. *Procedure and punishment for civil and criminal contempt at variance.*

There is a substantial variance between the procedure adopted and punishment imposed, when a punitive sentence appropriate only to a proceeding for criminal contempt is imposed in a proceeding in an equity action for the remedial relief of an injured party. *Ib.*

4. *Effect of settlement of suit between parties on right of court to pursue violator of injunction issued therein.*

The fact that the party aggrieved by the violation of an injunction deprives himself, by settling the main case, of the right to pursue the violator for contempt does not prevent the court, whose order was violated, from instituting proceedings to vindicate its authority; and in this case the dismissal of the civil contempt proceeding is without prejudice to the power and right of the court whose injunction was violated to punish for contempt by proper proceedings. *Ib.*

5. *Acting on suggestion of Circuit Court of Appeals not contempt of lower court.*

Where the Circuit Court has sustained the trade-mark but the Circuit Court of Appeals has suggested a form of label that the defendant might use, defendant should not be punished for contempt for using such a form. *Baglin* v. *Cusenier Co.*, 580.

See CONSTITUTIONAL LAW, 27;
CORPORATIONS, 6.

CONTRACTS.

Freedom to contract defined.

Freedom to contract is the essence of freedom from undue restraint on the right to contract. *Standard Oil Co.* v. *United States*, 1.

See CONSTITUTIONAL LAW, 2–10;
PRACTICE AND PROCEDURE, 3;
RESTRAINT OF TRADE.

CONVEYANCES.

See ASSIGNMENTS;
INDIANS, 5, 6, 7.

COPYRIGHTS.

1. *Forfeiture for infringement prescribed by § 4965, Rev. Stat.*

The forfeiture for infringement of copyright prescribed by § 4965, Rev. Stat., is not only for every copy found in possession of the infringer, but in the alternative for every copy by him sold. *American Lithographic Co.* v. *Werckmeister*, 603.

2. *Actions for infringement; to what owner entitled under § 4965, Rev. Stat.*

Under § 4965, Rev. Stat., no penalty for infringement can be recovered with respect to prints, photographs, etc., except for sheets found in defendant's possession, and there cannot be two actions as to the same copies, one for replevin and the other for penalty; but with respect to paintings, statues and statuary an action can be brought for penalties on copies sold by the infringer and not included in those replevied in another action. *Werckmeister* v. *American Tobacco Co.*, 207 U. S. 375; *Hills* v. *Hoover*, 220 U. S. 334, distinguished. *Ib.*

See CONSTITUTIONAL LAW, 24.

CORPORATIONS.

1. *Power of State to limit use of property of.*

Whatever the general rights as to corporate property may be, a State, in granting a charter, may define and limit the use of property necessary to the exercise of the granted powers. *Fifth Avenue Coach Co.* v. *New York*, 467.

2. *Duty to produce books and papers when required.*

A corporation is under a duty to produce records, books and papers in its possession when they may be properly required in the administration of justice. *Wilson* v. *United States*, 361.

3. *Duty to respond to subpœna duces tecum; effect of §§ 877, 879, Rev. Stat., and Sixth Amendment.*

A corporation is not relieved from responding to a subpœna *duces tecum* or from producing the documents required by reason of the provisions of §§ 877 and 829, Rev. Stat., or those of the Sixth Amendment to the Constitution. *Ib.*

4. *Duty to submit books and papers on judicial process; right to resist on ground of self-incrimination.*

Under the visitatorial power of the State, and the authority of Con-

gress over corporate activities within the domain subject to Congress, a corporation must submit its books and papers whenever properly required so to do and cannot resist on the ground of self-incrimination, even if the inquiry may be to detect and prevent violations of law. (*Hale* v. *Henkel*, 201 U. S. 43, 74.) *Ib.*

5. *Production of books and papers; law governing.*
Notwithstanding English views as to the extent of protection against self-incrimination the duties of corporations and officers thereof are to be determined by our laws. *Ib.*

6. *Officers; command to corporation as command to officers thereof.*
A lawful command to a corporation is in effect a command to its officers, who may be punished for contempt for disobedience of its terms. *Ib.*

7. *Officers; right to withhold corporate documents from grand jury.*
An officer cannot withhold from a grand jury corporate documents in his possession because the inquiry was directed against the corporation itself. *Ib.*

8. *Officer's duty to produce books, even though they may tend to incriminate it or him.*
An officer of a corporation cannot withhold its books to save it, or if he is implicated in its violation of law, to protect himself, from disclosures, although he may decline to utter on the witness stand any self-incriminating word. *Ib.*

9. *Officers; right to refuse to produce books and papers on ground of personal self-incrimination.*
Wilson v. *United States*, *ante*, p. 361, followed to effect that an officer of a corporation cannot refuse to produce books and papers of the corporation in response to a subpœna *duces tecum* on the ground that the contents thereof would tend to incriminate him personally. *Dreier* v. *United States*, 394.

See CONSTITUTIONAL LAW, 2, 3, 4, 5, 7, 21–25, 28, 35, 36; COURTS; INTERSTATE COMMERCE, 3, 5, 7; RESTRAINT OF TRADE, 21; WRIT AND PROCESS, 2.

COURTS.

Competency of courts of State to construe its laws.
The courts of a State are competent to construe the laws of the State and to determine what powers a corporation derives thereunder, and the use to which such corporation may employ its necessary

property; and so *held* as to uses to which stages may be put by a transportation company. *Fifth Avenue Coach Co.* v. *New York*, 467.

See BANKRUPTCY;
CONTEMPT OF COURT;
INDIANS, 2;
PENALTIES AND FORFEITURES, 1, 2;
PUBLIC LANDS, 13;
RESTRAINT OF TRADE, 11, 12;
STATUTES, A 5, 6;
WRIT AND PROCESS, 5.

CREDITS.

See TAXES AND TAXATION, 1–6, 9.

CRIMINAL LAW.

1. *Overt act retrospectively guilty, when.*

An overt act becomes retrospectively guilty when the contemplated result ensues. *Strassheim* v. *Daily*, 280.

2. *Pleading; objections to form and verification.*

Objections as to form and verification of pleading must be taken by accused before pleading general issue. *Dowdell* v. *United States*, 325.

3. *Presence of accused; presumption of, in appellate court, when represented by counsel.*

Although due process of law requires the accused to be present at every stage of the trial, it does not require accused to be present in an appellate court where he is represented by counsel and where the only function of the court is to determine whether there was prejudicial error below. *Ib.*

4. *Punishment; power of State to punish one committing crime done outside its jurisdiction.*

A State may punish one committing crimes done outside its jurisdiction for the purpose of producing detrimental effects within it when it gets the criminal within its power. *Strassheim* v. *Daily*, 280.

5. *Punishment by State of one committing fraud while outside its borders.*

Commission of the crimes alleged in this indictment—bribery of a public officer and obtaining public money under false pretenses—warrants punishment by the State aggrieved even if the offender did not come into the State until after the fraud was complete. *Ib.*

See DEBTOR AND CREDITOR;
EXTRADITION;
PHILIPPINE ISLANDS, 1, 2, 3, 5;
WITNESSES, 1, 2.

CUBA.

See CUSTOMS LAW, 1–6.

CUSTOMS LAW.

1. *Rates under § 2 of treaty with Cuba of 1903; quære as to.*

Quære and purposely not decided whether the reduction in tariff rates provided by § 2 of the treaty with Cuba of 1903 is limited to rates of duty in general tariff acts and does not apply to special rates under special agreements with other countries. (*Whitney* v. *Robertson*, 124 U. S. 190.) *Faber* v. *United States*, 649.

2. *Rates on imports from Cuba; construction of treaty of 1903.*

The treaty with Cuba of 1903 was signed and proclaimed after the decisions of this court in the *Insular Cases* to the effect that Porto Rico and the Philippine Islands were not foreign countries; and within the meaning of that treaty the Philippines are not a foreign country or another country, and the reduction of tariff on articles imported from Cuba is not to be based on tariff rates on the same articles brought from the Philippine Islands. *Ib.*

3. *"Country" as used in revenue laws; status of Philippines within meaning of treaty with Cuba.*

In the absence of some qualifying phrase the word "country" in the revenue laws of the United States embraces all provinces of a state no matter how widely separated and the Philippines are a part of the United States within the meaning of the treaty with Cuba of 1903. *Ib.*

4. *Duties on imports from Philippine Islands; disposition of; character as duties on imports from foreign countries.*

The duties imposed and collected on articles coming into the United States from the Philippine Islands are not covered into the treasury of the United States but are used and expended solely for the use and government of those Islands and are not to be regarded as duties on imports from foreign countries within the meaning of the treaty with Cuba of 1903. *Ib.*

5. *Preferential rates granted to Cuba by treaty of 1903 relate to what.*

The word "imports" is the correlative of the word "exports" and preferential rates granted to Cuba under the treaty of 1903 relate only to duties on imports from countries foreign to the United States. *Ib.*

6. *Preferential rates granted to Cuba; construction of Art. VIII of treaty of 1903.*

The provisions of Art. VIII of the treaty with Cuba of 1903 will not

be construed so as to give that country advantages over shipments coming into the United States from a part of its own territory. *Ib.*

DEBATES.

See STATUTES, A 2.

DEBTOR AND CREDITOR.

Preferences with knowledge of insolvency; when not illegal.

Knowledge of one's own insolvency, except in cases provided by statute, does not render it illegal or criminal to prefer one creditor above another. (*Huntley* v. *Kingman*, 152 U. S. 527.) *Merillat* v. *Hensey*, 333.

See TAXES AND TAXATION, 1–5.

DEFENSES.

See WRIT AND PROCESS, 3.

DELEGATION OF POWER.

See NAVIGABLE WATERS, 2.

DEPARTMENTAL CONSTRUCTION.

See STATUTES, A 2.

DESERT LANDS.

See PUBLIC LANDS, 1, 2.

DISCOVERY.

See EQUITY;
EVIDENCE, 1, 2.

DISTRICT OF COLUMBIA.

See APPEAL AND ERROR, 1; TAXES AND TAXATION, 11;
ASSIGNMENTS, 4; TESTAMENTARY LAW.

DOCUMENTS.

See BANKRUPTCY;
CONSTITUTIONAL LAW, 20–26, 28;
CORPORATIONS, 2–5, 7–9.

DUE FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 18.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 11, 12, 13;
CRIMINAL LAW, 3;
INDIANS, 9;
INTERSTATE COMMERCE, 7;
PHILIPPINE ISLANDS, 1;
TAXES AND TAXATION, 2, 3, 4, 7, 9.

DUTIES ON IMPORTS.

See CUSTOMS LAW.

ELEVENTH AMENDMENT.

See CONSTITUTIONAL LAW, 32–37.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 12.

EMPLOYÉS' HOURS OF LABOR.

See CONGRESS, POWERS OF, 1.
CONSTITUTIONAL LAW, 1, 10, 38.

ENABLING ACTS.

See STATES, 2, 3.

ENGLAND.

See EVIDENCE, 3;
RESTRAINT OF TRADE, 1–6.

EQUALITY OF STATES.

See STATES, 3.

EQUAL PROTECTION OF THE LAW.

See CONSTITUTIONAL LAW, 13–16.

EQUITY.

Jurisdiction of bill for discovery; effect of enlargement of powers of courts of law.

A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances. *Carpenter* v. *Winn*, 533.

See INJUNCTION.

ESTOPPEL.

See TAXES AND TAXATION, 8.

EVIDENCE.

1. *Production of, in court of law; construction of § 724, Rev. Stat.*

Section 724, Rev. Stat., has never been construed by this court, and the decisions of the inferior courts have not had such uniformity as to exert any controlling influence. *Carpenter* v. *Winn*, 533.

2. *Production of, in court of law; meaning of word "trial" as used in § 724, Rev. Stat.*

The word "trial" as used in § 724, Rev. Stat., refers to the final examination and decision of matter of law as well as facts, for which every antecedent step is a preparation. *Ib.*

3. *Decision of House of Lords of England as.*

A decision of the House of Lords, although announced after an event, may serve reflexly to show the state of the law in England at the time of such event. *Standard Oil Co.* v. *United States*, 1.

See ASSIGNMENTS, 3;
CONSTITUTIONAL LAW, 19–28;
EQUITY;
PHILIPPINE ISLANDS, 7;
RESTRAINT OF TRADE, 29;
WITNESSES;
WRIT AND PROCESS.

EXCEPTIONS.

See FEDERAL QUESTION, 2.
STATUTES, A 4.

EXECUTIVE DEPARTMENTS.

See EXECUTIVE OFFICERS.

EXECUTIVE OFFICERS.

Act of subordinate as act of head of department.

The head of an executive department of this Government cannot himself sign every official communication emanating from his department, and a proper notice signed by the Assistant Secretary has the same force as though signed by the Secretary. *Hannibal Bridge Co.* v. *United States*, 194.

See NAVIGABLE WATERS, 2.

EXTRADITION.

1. *Sufficiency of indictment.*

In a *habeas corpus* proceeding in extradition it is sufficient if the count

in the indictment plainly shows that the defendant is charged with a crime. (*Pierce* v. *Creecy*, 210 U. S. 387.) *Strassheim* v. *Daily*, 280.

2. *Fugitive from justice; what constitutes.*

One who is never within the State before the commission of a crime producing its results within its jurisdiction is not a fugitive from justice within the rendition provisions of the Constitution, *Hyatt* v. *Corkran*, 188 U. S. 691, but, if he commits some overt and material act within the State and then absents himself, he becomes a fugitive from justice when the crime is complete if not before. *Ib.*

3. *Fugitive from justice; when one absent from State when crime committed became such.*

Although absent from the State when the crime was completed in this case, the party charged became a fugitive from justice by reason of his having committed certain material steps towards the crime within the State, and the demanding State is entitled to his surrender under Art. IV, § 2 of the Constitution of the United States and the statutes providing for the surrender of fugitives from justice. *Ib.*

4. *International; effect of untechnical request for.*

While a person is not to be sent from this country on mere demand or surmise, this Government should respond to a request for extradition if there is reasonable ground to suppose the accused to be guilty of an extraditable crime, even if presented in untechnical form; good faith demands this much in carrying out an extradition treaty. *Glucksman* v. *Henkel*, 508.

5. *International; assumption as to fair trial in demanding country.*

Courts are bound by the existence of an extradition treaty to assume that the trial in the demanding State will be fair. *Ib.*

6. *International; presumption as to certificate of magistrate of demanding country.*

Where a magistrate of a demanding State certifies of his own knowledge to the identity of photographs, the courts of this country will presume in extradition proceedings that he had reason for so doing. *Ib.*

7. *International; sufficiency of presentation.*

In this case *held* that although the presentation was untechnical it was sufficient to justify surrender. *Ib.*

8. *International; effect of variance between complaint and evidence where crime plainly charged.*

Where the complaint calls the instruments alleged to have been forged bills of exchange and the evidence showed they were promissory notes the variance will not defeat surrender where the instruments are identified and there is a plain charge of forgery. *Ib.*

9. *International; variance between complaint and proof; law governing materiality.*

If an extraditable crime under the law of the state where the accused is found is sufficiently charged, the effect of variance between complaint and proof is a matter to be decided on general principles irrespective of the law of that state. *Wright* v. *Henkel*, 190 U. S. 40; *Petit* v. *Walshe*, 194 U. S. 205, distinguished. *Ib.*

10. *International; sufficiency of complaint.*

Even though the complaint be sworn to on information and belief, if it is supported by testimony of witnesses stated to have deposed, the court will presume that they were sworn and the complaint is sufficient. (*Rice* v. *Ames*, 180 U. S. 371.) *Ib.*

FACTS.

Question of fact; excessiveness of assessment as.

Whether a special assessment for benefits of a street opening is excessive is a question of fact. (*English* v. *Arizona*, 214 U. S. 359.) *Briscoe* v. *District of Columbia*, 547.

FEDERAL QUESTION.

1. *When action of Supreme Court of Philippine Islands to supply omissions in record, not reviewable.*

Under § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691, unless action taken by the Supreme Court of the Philippine Islands to supply omissions in the record violates the Constitution or a statute of the United States, this court cannot disturb the judgment. *Dowdell* v. *United States*, 325.

2. *Effect of exception in state court that judgment deprives of property without due process of law.*

An exception in the state court that the judgment deprives plaintiff in error of his property without due process of law in violation of the Constitution of the United States only affords ground for an inquiry whether the proceedings themselves show a want of due process. *Appleby* v. *Buffalo*, 524.

See CONSTITUTIONAL LAW, 18;
JURISDICTION, A 2;
TAXES AND TAXATION, 9.

FIFTH AMENDMENT.
See CONSTITUTIONAL LAW, 19.

FOREIGN CORPORATIONS.
See INTERSTATE COMMERCE, 7;
RESTRAINT OF TRADE, 16.

FOREIGN COUNTRY.
See CUSTOMS LAW, 2–5.

FOREIGN LAW.
See TRADE-MARKS, 2.

FOREIGN STATUTES.
See STATUTES, A 5, 6.

FOURTEENTH AMENDMENT
See CONSTITUTIONAL LAW.

FOURTH AMENDMENT.
See CONSTITUTIONAL LAW, 24, 25, 38.

FRAUD.
What constitutes; furnishing old articles under guaranty of fitness.
Where a guaranty goes not to newness but to fitness of articles furnished, it is a material fraud to furnish old articles even if they can meet the test of the guaranty; and the fact that the purchaser may rely on the guaranty does not exclude the possibility that the purchase price was obtained by false representations as to the newness of the articles. *Strassheim* v. *Daily*, 280.
See ASSIGNMENTS; PRACTICE AND PROCEDURE, 2;
CRIMINAL LAW, 5; UNFAIR TRADE, 4.

FRAUDULENT CONVEYANCES.
See ASSIGNMENTS.

FREEDOM OF SPEECH.
See CONSTITUTIONAL LAW, 17.

FUGITIVE FROM JUSTICE.
See EXTRADITION, 2, 3.

FULL FAITH AND CREDIT.
See CONSTITUTIONAL LAW, 18.

GEOGRAPHICAL NAMES.
See TRADE-MARKS, 1, 4.

GRAND JURY.
See CORPORATIONS, 7;
WITNESSES, 2.

GUARANTY.
See FRAUD.

GUARDIANSHIP.
See INDIANS, 2.

HABEAS CORPUS.
See EXTRADITION, 1.

HOMESTEADS.
See PUBLIC LANDS, 5–9.

HOURS OF LABOR.
See CONGRESS, POWERS OF, 1;
CONSTITUTIONAL LAW, 1, 10, 38.

IMMUNITY FROM SUIT.
See CONSTITUTIONAL LAW, 32–37.

IMMUNITY OF WITNESSES.
See WITNESSES, 1.

IMPAIRMENT OF CONTRACT OBLIGATION.
See CONSTITUTIONAL LAW, 2–10.

IMPORTS.
See CUSTOMS LAW.

INDIANS.

1. *Policy of Congress in legislation respecting.*

From the earliest period Congress has dealt with Indians as dependent people and legislated concerning their property with a view to their protection as such. *Tiger* v. *Western Investment Co.*, 286.

2. *Guardianship; cessation of; determination by Congress and not by courts.*

It is for Congress, in pursuance of long established policy of this Government, and not for the courts, to determine for itself when, in the interest of the Indian, government guardianship over him shall cease. *Ib.*

3. *Intoxicating liquors; effect of allotment in severalty of tribal lands on power of Congress to prohibit.*

When, under the act of August 7, 1882, c. 434, 22 Stat. 341, an allotment in severalty has been made to a tribal Indian out of lands in a tribal reservation in the State of Nebraska, and a trust patent therefor has been issued to the allottee, and when the provisions of § 7 of that act and of § 7 of the act of February 8, 1887, c. 119, 24 Stat. 388, have been effective as to such allottee, the fact that the United States holds the lands so allotted in trust for the allottee, or, in case of his decease for his heirs as provided in § 6 of the said act of 1882, enables, authorizes and permits the United States to regulate and prohibit the introduction of intoxicating liquors upon such allotment during the limited period for which the land so allotted is so held in trust by the United States. *Hallowell* v. *United States*, 317.

4. *Intoxicating liquors; effect of citizenship of Indians on duty of United States to prohibit.*

The mere fact that citizenship has been conferred on allottee Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people; and so held that the prohibitions of the act of January 30, 1897, c. 109, 29 Stat. 506, against introduction of liquor into Indian country, are within the power of Congress. *Ib.*

5. *Lands; essentials to validity of conveyances of, under act of April 26, 1906.*

The act of April 26, 1906, c. 1876, 34 Stat. 137, providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, while it permitted lands to be conveyed by full-blood Indians, was nevertheless intended to prevent imprudent sales by this class of Indians and made such conveyances valid only when affirmed by the Secretary of the Interior. *Tiger* v. *Western Investment Co.*, 286.

6. *Land; testamentary disposition of; conveyances; purpose of § 8 of act of May 27, 1908.*

The obvious purpose of § 8 of the act of May 27, 1908, c. 199, 35 Stat.

312, was to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court. *Ib.*

7. *Property of; alienation; power of Congress to restrict; effect of citizenship of Indians. Act of April 26, 1906, and supplemental Creek agreement of June 30, 1902.*

When the act of April 26, 1906, was passed, Congress had not by the supplemental Creek agreement of June 30, 1902, c. 1323, 32 Stat. 500, or by any other act, released its control over the alienation of lands of full-blood Creek Indians, and it was within its power to continue to restrict such alienation, notwithstanding the bestowal of citizenship upon the Indians, by requiring the approval of the Secretary of the Interior to conveyances made by them. *Ib.*

8. *Property; effect of Oklahoma Enabling Act to preserve authority of Federal Government.*

In passing the enabling act for the admission of Oklahoma of June 16, 1906, c. 3335, 34 Stat. 267, Congress preserved the authority of the Government of the United States over the Indians, their lands and property, which it had prior to the passage of that act. *Ib.*

9. *Property rights; constitutionality of act of April 26, 1906, restricting right of alienation.*

As above construed, the act of April 26, 1906, c. 1876, 34 Stat. 137, is not unconstitutional as depriving full-blood Indians upon whom citizenship has been bestowed of their property without due process of law because it places further restrictions upon their right of alienation of lands. *Ib.*

10. *Tribal lands; power of United States to regulate.*

The power of the United States to make rules and regulations respecting tribal lands, the title to which it has not parted with, although allotted, is ample. (*Tiger* v. *Western Investment Co.*, *ante*, p. 286.) *Hallowell* v. *United States*, 317.

11. *Tribal property; power of Congress over; effect of citizenship of individual Indian.*

Congress has full power to legislate concerning tribal property of Indians, and the conferring of citizenship on individual Indians does not prevent Congress from continuing to deal with tribal lands. *Tiger* v. *Western Investment Co.*, 286.

See PRACTICE AND PROCEDURE, 5.
STATES, 2.

INDICTMENT AND INFORMATION.

See EXTRADITION, 1;
PHILIPPINE ISLANDS, 1.

INFRINGEMENT OF COPYRIGHT.

See COPYRIGHTS.

INJUNCTION.

1. *Violation of injunction against boycott; what may constitute.*

Where conditions exist that justify the enjoining of a boycott, the publication and use of letters, circulars and printed matter, may constitute the means of unlawfully continuing the boycott and amount to a violation of the order of injunction. *Gompers* v. *Bucks Stove & Range Co.*, 418.

2. *Boycott that may be enjoined.*

Quære as to what constitutes a boycott that may be enjoined by a court of equity; but, in order that it may be enjoined, it must appear that there is a conspiracy causing irreparable damage to complainant's business or property. *Ib.*

3. *Against publication of words used as signal.*

An agreement to act in concert on publication of a signal makes the words used as the signal amount to verbal acts, and, when the facts justify it, the court having jurisdiction can enjoin the use of the words in such connection; and so *held* as to words "unfair" and "we don't patronize" as used in this case for the purpose of continuing a boycott. *Ib.*

4. *Violation; effect on proceeding for, of settlement of main suit in which writ granted.*

Where the main suit in which an injunction order has been granted is settled and discontinued, every proceeding which is a part thereof, or dependent thereon, is also necessarily settled as between the parties; and so held as to a proceeding instituted by the party aggrieved against the other party for violation of an injunction. *Ib.*

See ACTIONS;
CONSTITUTIONAL LAW, 17, 34;
CONTEMPT OF COURT, 2, 4;
EQUITY;
JUDGMENTS AND DECREES, 2;
RESTRAINT OF TRADE, 37, 38.

INSOLVENCY.

See DEBTOR AND CREDITOR.

INSURANCE PREMIUMS.
See TAXES AND TAXATION, 4, 5.

INTERNATIONAL EXTRADITION.
See EXTRADITION, 4–10.

INTERSTATE COMMERCE.

1. *Commerce clause; purpose and effect to promote welfare of United States and States.*

The welfare of the United States is constituted of the welfare of all the States, and that of the States is made greater by mutual division of their resources. This is the purpose and result of the commerce clause of the Constitution. *Oklahoma* v. *Kansas Natural Gas Co.*, 229.

2. *State lines obliterated; power transcending that of State.*

In matters of foreign and interstate commerce there are no state lines; in such commerce instead of the States a new power and a new welfare appears that transcend the power and welfare of any State. *Ib.*

3. *Right to engage in; power of State over.*

The right to engage in interstate commerce is not the gift of a State; nor can a State regulate or restrain such commerce, or exclude from its limits a corporation engaged therein. *Ib.*

4. *Subjects of; natural gas and oil as.*

Natural gas and oil when reduced to possession by the owner of the land are commodities belonging to him subject to his right of sale thereof and are subjects of both intrastate and interstate commerce. *Ib.*

5. *State may not prohibit interstate commerce in article produced within its borders.*

When a State recognizes an article to be a subject of interstate commerce it cannot prohibit that article from being the subject of interstate commerce; and so held that corporations engaged in interstate commerce cannot be excluded from transporting from a State oil and gas produced therein and actually reduced to possession. *Ib.*

6. *State interference; effect of inaction by Congress.*

Inaction by Congress in regard to a subject of interstate commerce is a declaration of freedom from state interference. *Ib.*

7. *State interference; validity of Oklahoma statute prohibiting transportation of natural gas to points without State.*

Where a State grants the use of its highways to domestic corporations engaged in intrastate commerce in a commodity it cannot deny the same use, under the same restrictions, to foreign corporations engaged in interstate commerce in the same commodity; and so *held* that the statute of Oklahoma prohibiting foreign corporations from building pipe lines across highways and transporting natural gas therein to points outside the State is unconstitutional as an interference with, and restraint upon, interstate commerce, and as a deprivation of property without due process of law. *Ib.*

See CONGRESS, POWERS OF, 1, 2;
CONSTITUTIONAL LAW, 1;
STATES, 2, 4.

INTERSTATE COMMERCE COMMISSION.

See CONSTITUTIONAL LAW, 38.

INTERSTATE RENDITION.

See EXTRADITION, 1, 2, 3.

INTOXICATING LIQUORS.

See INDIANS, 3, 4.

JUDGMENTS AND DECREES.

1. *Collateral impeachment of judgment rendered by court exercising statutory jurisdiction.*

Where, as in this case, the court is possessed of statutory jurisdiction and all the essential facts appear to have existed, the judgment is no more subject to collateral impeachment than one entered in exercise of general jurisdiction. *Briscoe* v. *District of Columbia*, 547.

2. *Collateral attack of judgment of assessment precluded.*

Although the court could have, on motion of the dissatisfied owner, set the assessment in a special proceeding aside, and ordered a new trial, if the owner failed to take the proceedings provided by the statute, and the court had jurisdiction of the parties and subject-matter, the judgment cannot be attacked collaterally in a suit to enjoin sale under the judgment of assessment. *Ib.*

JUDICIAL NOTICE.

Of traffic conditions.

This court may take judicial notice of the density of traffic on a well known thoroughfare. *Fifth Avenue Coach Co.* v. *New York*, 467.

JURISDICTION.

A. Of This Court.

1. *To review judgment of highest court of State; limitations of § 709, Rev. Stat.*

The right of this court to review the judgment of the highest court of a State is specifically limited by § 709, Rev. Stat., and, in cases such as this, depends on an alleged denial of a Federal right which the record shows was specially set up and claimed in, and denied by, the state court or that such was the necessary effect of the judgment. *Appleby* v. *Buffalo*, 524.

2. *Under § 709, Rev. Stat.; sufficiency of Federal question for.*

Whether the State can require payment of accounts in savings banks without production of the pass-book and the rights and relations of parties arising out of the charter and contract of deposit are to be determined by local law and do not present Federal questions giving this court jurisdiction under § 709, Rev. Stat. *Provident Savings Institution* v. *Malone*, 660.

3. *Assignments of error cannot originate right of review.*

Assignments of error made for the purpose of bringing the case to this court cannot originate the right of review here. *Appleby* v. *Buffalo*, 524.

B. Of Circuit Courts.

Under § 4 of Anti-trust Act of 1890.

Where one of the defendants in a suit, brought by the Government in a Circuit Court of the United States under the authority of § 4 of the Anti-trust Act of July 2, 1890, is within the district, the court, under the authority of § 5 of that act, can take jurisdiction and order notice to be served upon the non-resident defendants. *Standard Oil Co.* v. *United States*, 1.

C. Equity.

See Equity.

D. Generally.

See Constitutional Law, 36, 37; Criminal Law, 4, 5; Judgments and Decrees, 1, 2; Pleading, 1; Taxes and Taxation, 2, 3; Testamentary Law.

JURY TRIAL.

See Philippine Islands, 2.

LABOR.

See CONGRESS, POWERS OF, 1;
CONSTITUTIONAL LAW, 1, 10.

LACHES.

See PUBLIC LANDS, 8.

LAND DEPARTMENT.

See PUBLIC LANDS, 2.

LAND ENTRIES.

See PUBLIC LANDS, 1, 2.

LAND GRANTS.

Interpretation by public officials; effect to be given.
Where a practical interpretation has been given to a grant of land by the public officials authorized to interpret it, full effect should be given thereto. *Jover* v. *Insular Government*, 623.

See PHILIPPINE ISLANDS, 6, 7, 8;
PUBLIC LANDS;
SPAIN, 2.

LAND WARRANTS.

See PUBLIC LANDS, 11, 12.

LAW GOVERNING.

See CORPORATIONS, 5;
JURISDICTION, A 2.

LIBERTY OF CONTRACT.

See CONSTITUTIONAL LAW, 10;
CONTRACTS;
RESTRAINT OF TRADE, 25.

LIQUORS.

See INDIANS, 3, 4.

LOCAL LAW.

District of Columbia. Code, § 130, as amended by act of June 30, 1902 (see Testamentary Law). *Lewis* v. *Luckett*, 554.
Code, § 1120 (see Assignments, 2). *Merillat* v. *Hensey*, 333.
Act of Feb. 10, 1899, 30 Stat. 834, extending Rhode Island Avenue (see Constitutional Law, 11). *Briscoe* v. *District of Columbia*, 547.

Louisiana. Act of 1884, giving right of action for wrongful death (see Practice and Procedure, 3). *Texas & New Orleans R. R. Co.* v. *Miller*, 408.

Massachusetts. Savings Bank Act of 1907 (see Constitutional Law. 13). *Provident Savings Institution* v. *Malone*, 660.

New York. Advertising vehicles law (see Constitutional Law, 15), *Fifth Avenue Coach Co.* v. *New York*, 467.

Philippine Islands. Bill of Rights (see Philippine Islands, 1, 3). *Dowdell* v. *United States*, 325. Spanish law (see Philippine Islands, 6). *Jover* v. *Insular Government*, 623.

Spain. Constitution as existing in 1859, Art. 46 (see Spain, 1). *Jover* v. *Insular Government*, 623. Laws of Partida relative to common right to sea and its shores (see Spain, 2). *Ib.*

Generally. See States.

MAXIMS.

Corruptio optimi pessima. Sound general principles should not be turned to support a conclusion manifestly improper. *Jacobs* v. *Beecham*, 263.

Mobilia sequuntur personam. *See* TAXES AND TAXATION, 2.

MISBRANDING.

See PURE FOOD AND DRUG ACT.

MONOPOLIZATION.

See RESTRAINT OF TRADE.

NATIONAL BANKS.

Shareholders; liability under § 5151, Rev. Stat.; withdrawals.

Shareholders who have complied, so far as steps required to be done on their part is concerned, with the provisions of the act of July 12, 1882, 22 Stat. 162, c. 290, in regard to withdrawing from a national banking association, two-thirds of the shareholders whereof have asked for a renewal of the charter, cease to be members of the association, even if, through no fault of their own, the final action is not taken; and such shareholders are not liable

for assessments subsequently made by the Comptroller of the Currency under § 5151, Rev. Stat. *Apsey* v. *Kimball*, 514.

NATURAL GAS AND OIL.

See INTERSTATE COMMERCE, 4, 5, 7.
STATES, 4, 5.

NAVIGABLE WATERS.

1. *Bridges over; removal of; validity of act of Congress of March 3, 1899, § 18.*

Section 18 of the act of March 3, 1899, c. 425, 30 Stat. 1153, authorizing the Secretary of War to require the removal of bridges which are obstructions to navigation over navigable waterways of the United States, is within the constitutional powers of Congress, and was enacted to carry out the declared policy of the Government as to the free and unobstructed navigation of waters of the United States over which Congress has paramount control in virtue of its power to regulate commerce. *Hannibal Bridge Co.* v. *United States*, 194.

2. *Bridges over; removal of; effect of act of 1899 as unconstitutional delegation of power to executive officer.*

As the statute only imposes on the Secretary of War the duty of attending to details necessary to carry out such declared policy it is not an unconstitutional delegation of legislative or judicial power to an executive officer. *Ib.*

3. *Bridges; removal of; right of owners to complain of action of Secretary of War.*

Notice was duly served on all parties in interest and the hearings given on the report of the Chief of Engineers by the Secretary of War were in accord with the statute and the owners of the bridge, the removal whereof was ordered, cannot complain. *Ib.*

4. *Bridges; removal of; effect of act authorizing erection on right of Congress to exercise reserved powers.*

The fact that a bridge was erected over a navigable water of the United States under authority of the act of July 25, 1866, c. 246, 14 Stat. 244, does not prevent Congress from ordering its removal when it becomes an obstruction, as the act expressly reserves the right to alter or amend it so as to prevent obstructions to navigation. (*Union Bridge Co.* v. *United States*, 204 U. S. 364.) *Ib.*

5. *Bridges; alteration; sufficiency of notice therefor.*

The notice of alterations required was sufficient in this case as it left no reasonable doubt as to what was to be done. *Ib.*

6. *Bridges; requiring alteration not a taking of property.*
Requiring the alteration of a bridge which is an obstruction to navigation is not a taking of property of the owners of such bridge within the meaning of the Constitution. *Ib.*

NON-RESIDENT DEFENDANTS.
See JURISDICTION, B.

NON-USER.
See TRADE-MARKS, 3.

NORTHERN PACIFIC LAND GRANT.
See PUBLIC LANDS, 5–9.

NOTICE.
See DEBTOR AND CREDITOR; JUDICIAL NOTICE;
EXECUTIVE OFFICERS; JURISDICTION, B;
NAVIGABLE WATERS, 3, 5.

OBJECTIONS.
See CRIMINAL LAW, 2.

OBSTRUCTIONS TO NAVIGATION.
See NAVIGABLE WATERS.

OKLAHOMA.
See INDIANS, 8;
INTERSTATE COMMERCE, 7;
STATES, 7.

ONUS PROBANDI.
See UNFAIR TRADE, 2, 3.

OPEN ACCOUNT.
See TAXES AND TAXATION, 1.

PARTIES.
See CONSTITUTIONAL LAW, 36, 37;
PRACTICE AND PROCEDURE, 4, 5.

PATENTS.
See UNFAIR TRADE, 4.

PENALTIES AND FORFEITURES.

1. *Judiciary limited to infliction of what.*

Penalties which are not authorized by the law cannot be inflicted by judicial authority. *Standard Oil Co.* v. *United States*, 1.

2. *Reason for distinction in penalties prescribed; duty of court as to.*

Where a distinction is plainly made in an act of Congress prescribing penalties as to different classes of the offense, the court need not search for the reason for making the distinction but must give it effect. *American Lithographic Co.* v. *Werckmeister*, 603.

See CONTEMPT OF COURT, 2, 3; COPYRIGHTS; CRIMINAL LAW, 4, 5; NATIONAL BANKS; TRADE-MARKS, 3.

PHILIPPINE ISLANDS.

1. *Criminal law; necessity for indictment.*

The Bill of Rights of the Philippine Islands does not require convictions to be based on indictment; nor does due process of law require presentment of an indictment. (*Hurtado* v. *California*, 110 U. S. 516.) *Dowdell* v. *United States*, 325.

2. *Trial by jury; right to.*

In the absence of legislation by Congress, there is no right in the Philippine Islands to require trial by jury in criminal cases. (*Dorr* v. *United States*, 195 U. S. 138.) *Ib.*

3. *Record on appeal; additional; effect of "face to face" provision of Bill of Rights.*

The "face to face" provision of the Philippine Bill of Rights does not prevent the judge and clerk of the trial court from certifying as additional record to the appellate court what transpired on the trial of one convicted of a crime without the accused being present when the order was made. *Ib.*

4. *Practice as to form of record on appeal not objectionable under Constitution.*

There is no valid objection based on the Constitution of the United States to the practice of the Supreme Court of the Philippine Islands adopted in this case for determining in what form it will accept the record of the court below. *Ib.*

5. *Witnesses in criminal prosecution; provision in § 5 of act of July 1, 1902, construed.*

The provision in § 5 of the Philippine act of July 1, 1902, c. 1369, 32 Stat. 691, that in all criminal prosecutions the accused shall meet

the witnesses face to face is substantially the provision of the Sixth Amendment; is intended thereby that the charge shall be proved only by such witnesses as meet the accused at the trial face to face and give him an opportunity for cross-examination. It prevents conviction by *ex parte* affidavits. *Ib.*

6. *Land grants; status of Governor General under Spanish rule.*

The Governor General of the Philippine Islands under Spanish rule possessed all the powers of the King except where otherwise provided, and a grant of lands made by him was valid unless in violation of law specially prohibiting him from making it. *Jover* v. *Insular Government*, 623.

7. *Land grants; exaction of taxes as evidence of validity.*

Where the local authorities in the Philippine Islands, with full knowledge of the circumstances under which a grant was made, imposed taxes on the property for many, in this case thirty-nine, years, it is persuasive proof that the grant was valid and that the Governor General did not exceed his authority in making it. *Ib.*

8. *Land grants; tide lands; effect to defeat, of failure to reclaim.*

A grant of tide lands, although made upon condition of reclamation, is not defeated by failure to reclaim if the granting words import a present and immediate transfer of ownership; and so *held* as to a grant of such lands in the Philippine Islands where the grantee was "granted possession and ownership," and there was no express condition either precedent or subsequent that the land be reclaimed within any definite period. *Ib.*

See APPEAL AND ERROR, 2; FEDERAL QUESTION, 1;
CUSTOMS LAW, 2, 3, 4; SPAIN, 2.

PLEADING.

1. *Amendment by striking out untenable prayer.*

Where a suit is for damages caused by erection of a dyke and for removal of the dyke the prayer for removal can be stricken out without depriving the court of jurisdiction to hear and determine the prayer for damages. *Hopkins* v. *Clemson College*, 636.

2. *Cure of omission in complaint.*

An omission in the complaint can be cured by an allegation in the answer. (*United States* v. *Morris*, 10 Wheat. 246.) *Texas & New Orleans R. R. Co.* v. *Miller*, 408; *Texas & New Orleans R. R. Co.* v. *Gross*, 417.

See CONSTITUTIONAL LAW, 18;
CRIMINAL LAW, 2;
EXTRADITION, 10.

PLEADING AND PROOF.
See EXTRADITION, 8, 9.

POLICE POWER.
See CONSTITUTIONAL LAW, 5;
STATES, 4.

PRACTICE AND PROCEDURE.

1. *Noticing plain error not assigned.*
This court, under Rule 21, can and in this case, as the appeal was taken before the decision in *Realty Co.* v. *Rudolph*, will, notice a plain error of fact even if unassigned. *Briscoe* v. *District of Columbia*, 547.

2. *Question of actual fraud precluded by findings of lower courts.*
Both courts below having found that no actual fraud was intended in this case, this court considered only the question of constructive fraud. *Merillat* v. *Hensey*, 333.

3. *Review of decision of state court construing foreign statute.*
This court will not disturb the decision of the courts of Texas that the act of Louisiana of 1884, giving a right of action to relatives of persons killed by negligence of another, repealed the provisions in the charter of a railroad company granted in 1878 exempting it from liability for a person killed by its negligence; and the act of 1884 is not unconstitutional as impairing any contract obligation in such charter. *Texas & New Orleans R. R. Co.* v. *Miller*, 408; *Texas & New Orleans R. R. Co.* v. *Gross*, 417.

4. *Who may raise question as to constitutionality of state statute.*
The question of whether a statute allows a depositor or his heirs a lower rate of interest on a deposit turned over to the State as abandoned than allowed by the bank amounts to a deprivation of property without due process of law within the Fourteenth Amendment cannot be raised by the bank as against the State. *Provident Savings Institution* v. *Malone*, 660.

5. *Who may attack constitutionality of act of Congress; quære as to.*
Quære whether the constitutionality of an act of Congress limiting a right of conveyance by a class of Indians can be questioned by the grantee of an Indian of that class on the ground that it deprives the Indian of his property without due process of law. *Tiger* v. *Western Investment Co.*, 286.

6. *Mandate on modification of decree below; when reversal proper course.* Where a case is remanded, as this one is, to the lower court with directions to grant the relief in a different manner from that decreed by it, the proper course is not to modify and affirm, but to reverse and remand with directions to enter a decree in conformity with the opinion and to carry out the directions of this court with costs to defendants. *United States* v. *American Tobacco Co.*, 106.

See CONTEMPT OF COURT, 1, 3;
PHILIPPINE ISLANDS, 4;
TESTAMENTARY LAW.

PRAYERS.

See PLEADING, 1.

PREFERENCES.

See CUSTOMS LAW;
DEBTOR AND CREDITOR.

PRESUMPTIONS.

See EXTRADITION, 5, 6, 10;
RESTRAINT OF TRADE, 24;
RIPARIAN RIGHTS, 1, 2;
STATES, 1;
UNFAIR TRADE, 3.

PRINCIPAL AND AGENT.

See ACTIONS.

PROBATE LAW.

See TESTAMENTARY LAW.

PRODUCTION OF BOOKS AND PAPERS.

See BANKRUPTCY;
CONSTITUTIONAL LAW, 20–26, 28;
CORPORATIONS, 2, 4, 5, 7, 8, 9;
WRIT AND PROCESS.

PROPERTY.

See TAXES AND TAXATION, 1.

PROPERTY RIGHTS.

Individual rights not enlarged by others refraining from exercise to harm of public.

The rights of one to do that which if done by all would work public

harm and injury are not greater because others refrain from exercising such rights. *Fifth Avenue Coach Co.* v. *New York*, 467.

See CORPORATIONS, 1; INDIANS;
COURTS; INTERSTATE COMMERCE, 7;
NAVIGABLE WATERS, 6.

PROPRIETARY MEDICINES.

See UNFAIR TRADE, 4;

PUBLICATION.

See TESTAMENTARY LAW.

PUBLIC CORPORATIONS.

See CONSTITUTIONAL LAW, 35, 36.

PUBLIC IMPROVEMENTS.

See FACTS;
TAXES AND TAXATION, 11.

PUBLIC LANDS.

1. *Desert lands; assignability of entries.*

Under the Desert Land Act of March 3, 1877, c. 107, 19 Stat. 377, as added to by the act of March 3, 1891, c. 561, 26 Stat. 1096, a desert land entry is assignable. *United States* v. *Hammers*, 220.

2. *Desert land entries; assignability; practice of Land Department considered in determining.*

There is confusion between the original desert land act of 1877 and the act as amended in 1891 as to whether entries can be assigned, and the court turns for help to the practice of the Land Department in construing the act, and that has uniformly been since 1891 that entries were assignable. *Ib.*

3. *Grants to States; grant to Utah construed as to saline lands included.*

The words "110,000 acres of land . . . and including all the saline lands in the State" as used in § 8 of the Utah Enabling Act are not to be construed as a grant of such salines in addition to the 110,000 acres, but simply as conferring on the State the right, which it would not otherwise have, of including saline lands within its selections for the 110,000 acres. *Montello Salt Co.* v. *Utah*, 452.

4. *Grants of saline lands to States.*

This construction is in harmony with the uniform policy of Congress in connection with grants to the States of saline lands. *Ib.*

5. *Northern Pacific Land Grant Act of 1864; lands passing by; priority of right of homesteader.*

Land within place limits of the Northern Pacific Land Grant Act of July 2, 1864, c. 217, 13 Stat. 365, actually occupied by a homesteader intending to acquire title, did not pass by the grant but were excepted from its operation, and no right of the railroad attached to such lands when its line was definitely located. (*Nelson* v. *Northern Pacific Railway*, 188 U. S. 108.) *Northern Pacific Ry. Co.* v. *Trodick*, 208.

6. *Northern Pacific Land Grant; lands exempted from; right of vendee of prior homestead settler.*

Where a *bona fide* settler was in actual occupation of unsurveyed lands at the time of definite location of the line, the land occupied was excepted from the grant; and if, before survey, he sold his improvements to one who also settled on the land intending to apply for title under the homestead laws of the United States, the claim of the latter is superior to that of the railroad company notwithstanding the original settler had no claim of record. *Ib.*

7. *Northern Pacific Land Grant; right of settler in actual occupation before location of definite line of railroad.*

A settler in actual occupation before the location of the definite line of the railroad can stand upon his occupancy until the lands are surveyed, and his claim cannot be defeated by the railroad assuming without right at a date prior to his application to assert a claim to the lands. *Ib.*

8. *Northern Pacific Land Grant; effect, under act of May 14, 1880, of delay on part of homesteader in making application after survey.*

Under the act of May 14, 1880, c. 89, 21 Stat. 140, delay on the part of a homesteader in making application after survey cannot be taken advantage of by one who had acquired no rights prior to the filing; and so *held*, that where the Northern Pacific land grant had not attached on account of actual occupation, delay on the part of the settler in filing after survey did not inure to the benefit of the company. *Ib.*

9. *Northern Pacific Land Grant; rights of homesteader; effect of prior decisions.*

Nelson v. *Northern Pacific Railway Co.*, 188 U. S. 108, was not modified by *United States* v. *Chicago, Milwaukee & St. Paul Railway*, 218 U. S. 233, as to the rights of *bona fide* settlers which attached prior to definite location. *Ib.*

10. *Taxation by State.*

A State is without power to tax public lands which have been located under warrant until the equitable title has passed from the United States. *Sargent* v. *Herrick*, 404.

11. *Warrants; location; effect to pass title.*

The mere location of a land warrant does not operate as a payment of the purchase price and does not operate to pass the equitable title from the United States. *Ib.*

12. *Warrants; location; effect to pass title. Right of State to tax.*

Although if the locator had been the lawful owner of the warrant location would have entitled him to patent, if the Land Office found him not to be the lawful owner, location does not operate to pass the title until he substitutes and pays the Government price, and meanwhile the United States has such an interest in the land as renders its taxation by the State invalid. *Ib.*

13. *When held in trust by patentee; power of courts to declare trust.*

Where, by error of law, the Land Office incorrectly holds a party is entitled to patent and issues it, the courts can declare that the patent is held by the patentee in trust for the party actually entitled to have his ownership in the lands recognized. *Northern Pacific Ry. Co.* v. *Trodick*, 208.

See SPAIN, 1;
STATES, 2.

PUBLIC OFFICERS.

See EXECUTIVE OFFICERS;
LAND GRANTS;
PHILIPPINE ISLANDS, 6.

PUBLIC POLICY.

See RESTRAINT OF TRADE, 5, 7.

PURE FOOD AND DRUG ACT.

Misbranding; provisions of § 8 of act of June 30, 1906, not applicable to statements as to curative effect of article.

The term "misbranded" and the phrase defining what amounts to misbranding in § 8 of the Food and Drugs Act of June 30, 1906, 34 Stat. 768, c. 3915, are aimed at false statements as to indentity of the article, possibly including strength, quality and purity, dealt with in § 7 of the act, and not at statements as to curative

effect; and so *held* that a statement on the labels of bottles of medicine that the contents are effective as a cure for cancer, even if misleading, are not covered by the statute. *United States* v. *Johnson*, 488.

RAILROADS.

See CONSTITUTIONAL LAW, 1, 4, 9;
PUBLIC LANDS, 5–8.

RATES.

See CUSTOMS LAW, 1, 2, 5, 6.

REAL PROPERTY.

See INDIANS, 5–11.

RECEIVERS.

See BANKRUPTCY;
CONSTITUTIONAL LAW, 20;
RESTRAINT OF TRADE, 38.

RECORD ON APPEAL.

See FEDERAL QUESTION, 1;
PHILIPPINE ISLANDS, 3, 4.

REMEDIES.

See RESTRAINT OF TRADE, 32–38
TAXES AND TAXATION, 7, 8.

RESTRAINT OF TRADE.

1. *Origin and meaning of terms used in Anti-trust Act of 1890.*

The terms "restraint of trade," and "attempts to monopolize," as used in the Anti-trust Act, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the act, and their meaning should be sought from the conceptions of both English and American law prior to the passage of the act. *Standard Oil Co.* v. *United States*, 1.

2. *Monopolies at common law; contracts within prohibitions.*

At common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public and at common law; and contracts creating the same evils were brought within the prohibition as impeding the due course of, or being in restraint of, trade. *Ib.*

3. *Common law of United States against; doubt as to existence shown by debates on Anti-trust Act.*

The debates in Congress on the Anti-trust Act of 1890 show that one of the influences leading to the enactment of the statute was doubt as to whether there is a common law of the United States governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absence of legislation. *Ib.*

4. *English rule as to freedom of contract.*

At the time of the passage of the Anti-trust Act the English rule was that the individual was free to contract and to abstain from contracting and to exercise every reasonable right in regard thereto, except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his right to carry on his trade. (*Mogul Steamship Co.* v. *McGregor*, 1892, A. C. 25.) *Ib.*

5. *Effect in this country of development of law of England as to.*

This country has followed the line of development of the law of England, and the public policy has been to prohibit, or treat as illegal, contracts, or acts entered into with intent to wrong the public and which unreasonably restrict competitive conditions, limit the right of individuals, restrain the free flow of commerce, or bring about public evils such as the enhancement of prices. *Ib.*

6. *Monopolies incompatible with English constitution.*

The early struggle in England against the power to create monopolies resulted in establishing that those institutions were incompatible with the English Constitution. *Ib.*

7. *Public policy manifested by Anti-trust Act.*

The public policy manifested by the Anti-trust Act is expressed in such general language that it embraces every conceivable act which can possibly come within the spirit of its prohibitions, and that policy cannot be frustrated by resort to disguise or subterfuge of any kind. *United States* v. *American Tobacco Co.*, 106.

8. *Intent of Congress in enacting Anti-trust Act of 1890; contracts contemplated.*

The Anti-trust Act of 1890 was enacted in the light of the then existing practical conception of the law against restraint of trade, and the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which do not unduly restrain interstate or foreign commerce, but to protect that commerce from contracts or combina-

tions by methods, whether old or new, which would constitute an interference with, or an undue restraint upon, it. *Standard Oil Co.* v. *United States*, 1.

9. *Intent of Congress in enacting Anti-trust Act of 1890; contracts and combinations contemplated.*

The words "restraint of trade" at common law, and in the law of this country at the time of the adoption of the Anti-trust Act, only embraced acts, contracts, agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade, and Congress intended that those words as used in that act should have a like significance; and the ruling in *Standard Oil Co.* v. *United States*, *ante*, p. 1, to this effect is reëxpressed and reaffirmed. *United States* v. *American Tobacco Co.*, 106.

10. *Duty of government to protect against unlawful organizations.*

On appeal against unlawfully exercising power of organizations it is the duty of government to protect the one against the many as well as the many against the one. *Gompers* v. *Bucks Stove & Range Co.*, 418.

11. *Acts prohibited; sufficiency of enumeration by Anti-trust Act.*

The Anti-trust Act generically enumerates the character of the acts prohibited and the wrongs which it intends to prevent and is susceptible of being enforced without any judicial exertion of legislative power. *Standard Oil Co.* v. *United States*, 1.

12. *Devices to which court's protective powers extend.*

The court's protective powers extend to every device whereby property is irreparably damaged or interstate commerce restrained; otherwise the Anti-trust Act would be rendered impotent. *Gompers* v. *Bucks Stove & Range Co.*, 418.

13. *Contracts and combinations within prohibition of Anti-trust Act of 1890.*

The Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209, should be construed in the light of reason; and, as so construed, it prohibits all contracts and combinations which amount to an unreasonable or undue restraint of trade in interstate commerce. *Standard Oil Co.* v. *United States*, 1.

14. *Contracts and combinations within prohibition of Anti-trust Act of 1890.*

The Anti-trust Act must have a reasonable construction as there can

scarcely be any agreement or contract among business men that does not directly or indirectly affect and possibly restrain commerce. (*United States* v. *Joint Traffic Association*, 171 U. S. 505, 568.) *United States* v. *American Tobacco Co.*, 106.

15. *Combination held within prohibition of act of 1890.*
The combination of the defendants in this case is an unreasonable and undue restraint of trade in petroleum and its products moving in interstate commerce, and falls within the prohibitions of the act as so construed. *Standard Oil Co.* v. *United States*, 1.

16. *Combination held within prohibition of Anti-trust Act.*
In this case the combination in all its aspects both as to stock ownership, and as to the corporations independently, including foreign corporations to the extent that they became coöperators in the combination, come within the prohibition of the first and second sections of the Anti-trust Act. *United States* v. *American Tobacco Co.*, 106.

17. *Combination held within prohibition of act of 1890.*
Standard Oil Co. v. *United States*, *ante*, p. 1, followed and reaffirmed as to the construction to be given to the Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209; and *held* that the combination in this case is one in restraint of trade and an attempt to monopolize the business of tobacco in interstate commerce within the prohibitions of the act. *Ib.*

18. *Combination held within prohibition of Anti-trust Act.*
The record in this case discloses a combination on the part of the defendants with the purpose of acquiring dominion and control of interstate commerce in tobacco by methods and manners clearly within the prohibition of the Anti-trust Act; and the subject-matters of the combination and the combination itself are not excluded from the scope of the act as being matters of intrastate commerce and subject to state control. *Ib.*

19. *Combinations involving production of commodities within State; effect of application of Anti-trust Act as to.*
The application of the Anti-trust Act to combinations involving the production of commodities within the States does not so extend the power of Congress to subjects dehors its authority as to render the statute unconstitutional. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, distinguished. *Standard Oil Co.* v. *United States*, 1.

20. *Combination over product of commodity; effect on application of Anti-trust Act of exclusion of crude article from combination.*

The fact that a combination over the products of a commodity such as petroleum does not include the crude article itself does not take the combination outside of the Anti-trust Act when it appears that the monopolization of the manufactured products necessarily controls the crude article. *Ib.*

21. *Corporation a "person" within meaning of Anti-trust Act.*

The word "person" in § 2 of the Anti-trust Act, as construed by reference to § 8 thereof, implies a corporation as well as an individual. *Ib.*

22. *Boycotts and blacklisting as unlawful combinations within meaning of Anti-trust Act of 1890.*

The Anti-trust Act of 1890 applies to any unlawful combination resulting in restraint of interstate commerce including boycotts, and blacklisting whether made effective by acts, words or printed matter. *Gompers* v. *Bucks Stove & Range Co.*, 418.

23. *Combinations which are unobjectionable.*

Society itself is an organization and does not object to organizations for social, religious, business, and all other legal purposes. *Ib.*

24. *Presumption of illegal combination; what sufficient to raise.*

The unification of power and control over a commodity such as petroleum, and its products, by combining in one corporation the stocks of many other corporations aggregating a vast capital gives rise, of itself, to the *prima facie* presumption of an intent and purpose to dominate the industry connected with, and gain perpetual control of the movement of, that commodity and its products in the channels of interstate commerce in violation of the Anti-trust Act of 1890, and that presumption is made conclusive by proof of specific acts such as those in the record of this case. *Standard Oil Co.* v. *United States*, 1.

25. *Universality of prohibition of contracts modified to exclude reasonable ones.*

The original doctrine that all contracts in restraint of trade were illegal was long since so modified in the interest of freedom of individuals to contract that the contract was valid if the resulting restraint was only partial in its operation and was otherwise reasonable. *Ib.*

26. *Standard of reason in interpretation of Anti-trust Act of 1890.*

The Anti-trust Act contemplated and required a standard of inter-

pretation, and it was intended that the standard of reason which had been applied at the common law should be applied in determining whether particular acts were within its prohibitions. *Ib.*

27. *Rule of reason in construction of Anti-trust Act; effect of prior decisions on application of rule.*

In prior cases where general language has been used, to the effect that reason could not be resorted to in determining whether a particular case was within the prohibitions of the Anti-trust Act, the unreasonableness of the acts under consideration was pointed out and those cases are only authoritative by the certitude that the rule of reason was applied; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505, limited and qualified so far as they conflict with the construction now given to the Anti-trust Act of 1890. *Ib.*

28. *Rule of reason in construction of Anti-trust Act; effect of prior decisions on application of rule.*

In *Standard Oil Co.* v. *United States*, *ante*, p. 1, the words "restraint of trade" as used in § 1 of the Anti-trust Act were properly construed by the resort to reason; the doctrine stated in that case was in accord with all previous decisions of this court, despite the contrary view at times erroneously attributed to the expressions in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505. *United States* v. *American Tobacco Co.*, 106.

29. *Determination of what constitutes; scope of consideration.*

Allegations as to facts occurring prior to the passage of the Anti-trust Act may be considered solely to throw light on acts done after the passage of the act. *Standard Oil Co.* v. *United States*, 1.

30. *Scope of words used in § 2 of Anti-trust Act.*

The words "to monopolize" and "monopolize" as used in § 2 of the Anti-trust Act reach every act bringing about the prohibited result. *Ib.*

31. *Commerce contemplated by § 2 of Anti-trust Act.*

The commerce referred to by the words "any part" in § 2 of the Anti-trust Act, as construed in the light of the manifest purpose of that act, includes geographically any part of the United States and also any of the classes of things forming a part of interstate or foreign commerce. *Ib.*

32. *Remedy in case of unlawful combination.*

The remedy to be administered in case of a combination violating the

Anti-trust Act is two-fold: first, to forbid the continuance of the prohibited act, and second, to so dissolve the combination as to neutralize the force of the unlawful power. *Ib.*

33. *Remedy in case of unlawful combination; considerations in determining.*

In determining the remedy against an unlawful combination, the court must consider the result and not inflict serious injury on the public by causing a cessation of interstate commerce in a necessary commodity. *Ib.*

34. *Remedy in case of unlawful combination; considerations in determining.*

In giving relief against an unlawful combination under the Anti-trust Act the court should give complete and efficacious effect to the prohibitions of the statute; accomplish this result with as little injury as possible to the interest of the general public; and have a proper regard for the vested property interests innocently acquired. *United States* v. *American Tobacco Co.*, 106.

35. *Remedy in case of unlawful combination; rights of constituents.*

The constituents of an unlawful combination under the Anti-trust Act should not be deprived of power to make normal and lawful contracts, but should be restrained from continuing or recreating the unlawful combination by any means whatever; and a dissolution of the offending combination should not deprive the constituents of the right to live under the law but should compel them to obey it. *Standard Oil Co.* v. *United States*, 1.

36. *Remedy in case of unlawful combination; application to be given Anti-trust Act of 1890.*

In order to meet such a situation as is presented by the record in this case and to afford the relief for the evils to be overcome, the Anti-trust Act of 1890 must be given a more comprehensive application than affixed to it in any previous decision. *United States* v. *American Tobacco Co.*, 106.

37. *Remedy; injunction pending dissolution.*

Pending the achievement of the result decreed all parties to the combination in this case should be restrained and enjoined from enlarging the power of the continuation by any means or device whatever. *Ib.*

38. *Remedy in case of unlawful combination; scope of decree in this court.*

In this case the combination in and of itself, and also all of its con-

stituent elements, are decreed to be illegal, and the court below is directed to hear the parties and ascertain and determine a plan or method of dissolution and of recreating a condition in harmony with law, to be carried out within a reasonable period (in this case not to exceed eight months), and, if necessary, to effectuate this result either by injunction or receivership. *Ib.*

REVENUE LAWS.

See CUSTOMS LAW.

RIPARIAN RIGHTS.

1. *Rights presumed in waters flowing through more than one State.*

Where streams flow through more than one State, it will be presumed, in the absence of legislation on the subject, that each allows the same rights to be acquired from outside the State as could be acquired from within. *Bean* v. *Morris,* 485.

2. *Appropriation of waters; where doctrine prevails.*

The doctrine of appropriation has always prevailed in that region of the United States which includes Wyoming and Montana; it was recognized by the United States before, and by those States since, they were admitted into the Union and the presumption is that the system has continued. *Ib.*

3. *Appropriation of waters sustained.*

In this case an appropriation validly made under the laws of Wyoming is sustained as against riparian owners in Montana. *Ib.*

See STATES, 5.

RIVERS.

See NAVIGABLE WATERS;
RIPARIAN RIGHTS;
STATES, 5;

SALES.

See INDIANS, 5, 7.

SALINE LANDS.

See PUBLIC LANDS, 3, 4.

SAVINGS BANKS.

See CONSTITUTIONAL LAW, 13, 16;
PRACTICE AND PROCEDURE, 4.

SEA AND SHORE.
See SPAIN, 2.

SEARCHES AND SEIZURES.
See CONSTITUTIONAL LAW, 38.

SEAT OF GOVERNMENT.
See STATES, 6, 7.

SECRETARY OF THE INTERIOR.
See INDIANS, 5, 7.

SECRETARY OF WAR.
See NAVIGABLE WATERS, 1, 2.

SELF-INCRIMINATION.
See CONSTITUTIONAL LAW, 19–28;
CORPORATIONS, 4, 5, 8, 9.

SIXTH AMENDMENT.
See CORPORATIONS, 3;
PHILIPPINE ISLANDS, 5.

SPAIN.

1. *Alienation of territory; Art. 46 of constitution as existing in 1859 applied.*

Article 46 of the constitution of Spain as existing in 1859, providing that in order to alienate, cede or exchange any part of Spanish territory, the King required the authority of a special law, related to transference of national sovereignty and not to disposal of public land as property. *Jover* v. *Insular Government*, 623.

2. *Common right to sea and its shore; laws of the Partida concerning, construed.*

The laws of the Partida which affirm that the sea and its shore are among the things that are common to all men are not to be so literally construed, as held by the Spanish courts prior to the cession of the Philippine Islands, as prohibiting a grant of tide lands to one desiring to reclaim and improve them. *Ib.*

SPECIAL ASSESSMENTS.
See CONSTITUTIONAL LAW, 11;
FACTS;
JUDGMENTS AND DECREES, 2;
TAXES AND TAXATION, 11.

STATES.

1. *Abandoned property; power to legislate concerning.*

The State has power to legislate in regard to the preservation and disposition of abandoned property and to establish presumptions of abandonment after lapse of reasonable period. (*Cunnius* v. *Reading*, 198 U. S. 454.) *Provident Savings Institution* v. *Malone*, 660.

2. *Admission into Union; conditions which Congress may impose in enabling act.*

Congress may embrace in an enabling act conditions relating to matters wholly within its sphere of powers, such as regulations of interstate commerce, intercourse with Indian tribes and disposition of public lands, but not conditions relating wholly to matters under state control such as the location and change of the seat of government of the State. *Coyle* v. *Oklahoma*, 559.

3. *Admission into Union; power of Congress to impose conditions.*

No prior decision of this court sanctions the claim that Congress in admitting a new State can impose conditions in the enabling act, the acceptance whereof will deprive the State when admitted of any attribute of power essential to its equality with the other States. *Ib.*

4. *Power to regulate taking of natural product and to prohibit its transportation in interstate commerce.*

There is a distinction between the police power of the State to regulate the taking of a natural product, such as natural gas, and prohibiting that product from transportation in interstate commerce. The former is within, and the latter is beyond, the power of the State. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, distinguished. *Oklahoma* v. *Kansas Natural Gas Co.*, 229.

5. *Right to natural gas and oil not analogous to that to flowing waters.*

A State does not have the same ownership in natural gas and oil after the same have been reduced to possession as it does over the flowing waters of its rivers. Riparian owners have no title to the water itself as a commodity. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, distinguished. *Ib.*

6. *Seat of government; power to locate beyond control of Congress.*

The power to locate its own seat of government, to change the same, and to appropriate its public money therefor, are essentially state powers beyond the control of Congress. *Coyle* v. *Oklahoma*, 559.

7. *Seat of government; powers in respect of; validity of provision in Oklahoma Enabling Act in respect of.*

The legislature of Oklahoma has power to locate its own seat of government, to change the same and to appropriate money therefor, notwithstanding any provisions to the contrary in the Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335, and the ordinance irrevocable of the convention of the people of Oklahoma accepting the same. *Ib.*

See ACTIONS; CONSTITUTIONAL LAW, 6, 12, 29–37; CORPORATIONS, 1, 4; CRIMINAL LAW, 4, 5; INTERSTATE COMMERCE, 2, 3, 5, 6, 7; PUBLIC LANDS, 3, 4, 10, 12; RESTRAINT OF TRADE, 18, 19; RIPARIAN RIGHTS, 1; TAXES AND TAXATION, 1–8, 10.

STATUTES.

A. CONSTRUCTION OF.

1. *Subsequent legislation considered, when.*

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in interpretation of the prior legislation. *Tiger* v. *Western Investment Co.*, 286.

2. *Debates of enacting body resorted to, when.*

While debates of the body enacting it may not be used as means for interpreting a statute, they may be resorted to as a means of ascertaining the conditions under which it was enacted. *Standard Oil Co.* v. *United States*, 1.

3. *Departmental construction; persuasive effect of.*

Where a statute is so ambiguous as to render its construction doubtful the uniform practice of the officers of the Department whose duty has been to construe and administer the statute since its enactment and under whose constructions rights have been acquired is determinatively persuasive on the courts. *United States* v. *Hammers*, 220.

4. *Uncertainty; exceptions affecting validity on ground of.*

An exception in a statute of cases of emergency does not render a statute void for uncertainty where Congress has appropriately described the exceptional cases intended to be covered. *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 612.

5. *Foreign statutes; duty of court to construe statute of another State in absence of allegation or proof that highest court of such State has done so.*

Where there is no allegation or proof that the highest court of a State

has construed a statute of that State, it becomes the duty of the courts of another State, which do not take judicial knowledge of decisions of other States, to construe the statute and its effect upon prior statutes according to their independent judgment. (*Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36.) *Texas & New Orleans R. R. Co.* v. *Miller*, 408; *Texas & New Orleans R. R. Co.* v. *Gross*, 417.

6. *Review by this court of decision of state court construing foreign statute.* The decision of a state court construing a statute of another State under such circumstances is not subject to review by this court if no Federal right is involved. (*Eastern Building & Loan Assn.* v. *Ebaugh*, 185 U. S. 114.) *Ib.*

See COURTS; EVIDENCE, 1; INDIANS; LAND GRANTS; PRACTICE AND PROCEDURE, 3; PUBLIC LANDS, 2, 3, 4; PURE FOOD AND DRUG ACT; RESTRAINT OF TRADE; SPAIN, 2.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STOCKHOLDERS.

See NATIONAL BANKS.

STREET OPENING.

See FACTS; TAXES AND TAXATION, 11.

SUBPŒNA *DUCES TECUM*.

See CONSTITUTIONAL LAW, 25, 28; CORPORATIONS, 3, 4, 9; WRIT AND PROCESS.

TARIFF RATES.

See CUSTOMS LAW.

TAXES AND TAXATION.

1. *Credits on open account as property subject to.* Credits on open account are incorporeal and have no actual situs, but

they constitute property and as such are taxable by the power having jurisdiction. *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 346.

2. *Credits, intangible; power of sovereignty of debtor's domicile to tax.*
The maxim of *mobilia sequuntur personam* yields to the fact of actual control; and jurisdiction to tax intangible credits exists in the sovereignty of the debtor's domicile, such credits being of value to the creditor because of the power given by such sovereignty to enforce the debt. *Blackstone* v. *Miller*, 188 U. S. 205. Such taxation does not deny due process of law. *Ib.*

3. *Credits taxable in place other than that of creditor's domicile and where he does business and such credits accrue.*
The jurisdiction of the State of the domicile over the creditor's person does not exclude the power of another State in which he transacts his business to tax credits there accruing to him from resident debtors, and thus, without denying due process of law, to enforce contribution to support the government under whose protection his affairs are conducted. *Ib.*

4. *Credits subject to taxation at place of debtor's domicile; overdue insurance premiums as.*
Premiums due by residents to a non-resident insurance company and which have been extended, but for which no written obligations have been given, are credits subject to taxation by the State where the debtor is domiciled; and so *held* that the statute of Louisiana to that effect is not unconstitutional as denying due process of law. *Ib.*

5. *Credits subject to taxation at place of debtor's domicile; overdue insurance premiums as.*
Liverpool & London & Globe Insurance Co. v. *Assessors*, *ante*, p. 346, followed as to right of State to tax insurance premiums due and extended by residents to non-resident companies although such premiums were due from local agents and not from policy-holders. *Orient Ins. Co.* v. *Assessors of Orleans*, 358.

6. *Credits, how evidenced, for purposes of.*
Credits need not be evidenced in any particular manner in order to render them subject to taxation. *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 346.

7. *Remedies against excessive valuation must be availed of as prescribed.*
Where a state statute prescribes a method for review and reduction of

excessive valuation for taxes the remedy must be availed of within the prescribed period; and one not availing thereof in time cannot attack the assessment as depriving him of property without due process of law. *Orient Ins. Co.* v. *Assessors of Orleans*, 358.

8. *Remedies against; estoppel to ask for reduction in amount in suit for cancellation of entire assessment.*

In a suit for cancellation of an entire assessment as unconstitutional the plaintiff cannot ask for a reduction of amount if there is a proceeding under the state statute for that purpose and which he has not availed of. *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 346.

9. *Credits subject to; excessive valuation of; quære as to raising of Federal question.*

Quære whether any Federal question was raised on this record as to excessive valuation of taxable credits; but the assessments not being nullities, plaintiffs in error have not been deprived of their property without due process of law. *Orient Ins. Co.* v. *Assessors of Orleans*, 358.

10. *Assessments; actions for reduction; power of State to fix time for.*

A State has power to fix a reasonable time within which actions for reduction of assessments must be taken. (*Kentucky Union Co.* v. *Kentucky*, 219 U. S. 156.) *Ib.*

11. *Special assessments in District of Columbia; power of Congress as to.*

Congress, under its wide legislative power over the District of Columbia, may create a special assessment district and charge a part or all of the cost of a public improvement upon the property therein according to the benefits received. *Briscoe* v. *District of Columbia*, 547.

See CONSTITUTIONAL LAW, 11;
PHILIPPINE ISLANDS, 7;
PUBLIC LANDS, 10, 12.

TESTAMENTARY LAW.

Publication for unknown heirs in probate proceeding; § 130 of Code of District of Columbia, as amended, construed.

Under § 130 of the Code of the District of Columbia as amended by the act of June 30, 1902, 32 Stat. 526, c. 1329, there is no failure of jurisdiction because publication for unknown heirs has not been made, unless the record shows the actual or probable existence of persons who were heirs at law or next of kin whose names were

unknown; nor will proceedings duly had be vacated at the instance of one who was cited, and whose objections to probate have been overruled, and who does not show that there are any unknown heirs or next of kin or that there is any occasion to make such publication. *Lewis* v. *Luckett*, 554.

See INDIANS, 6.

TITLE.

See BANKRUPTCY;
PUBLIC LANDS, 11, 12.

TORTS.

See ACTIONS;
CONSTITUTIONAL LAW, 33.

TRADE.

See RESTRAINT OF TRADE.

TRADE-MARKS.

1. *Geographical name appropriable as; "Chartreuse" held to be.*

While names which are merely geographical cannot be exclusively appropriated as trade-marks, a geographical name which for a long period has referred exclusively to a product made at the place and not to the place itself may properly be used as a trade-mark; and so *held* that the word "Chartreuse" as used by the Carthusian Monks in connection with the liqueur manufactured by them at Grande Chartreuse, France, before their removal to Spain, was a validly registered trade-mark in this country. *Baglin* v. *Cusenier Co.*, 580.

2. *Foreign law; extra-territorial effect of.*

The law of a foreign country has no extra-territorial effect to detach a trade-mark validly registered in this country from the product to which it is attached. *Ib.*

3. *Abandonment; non-user, effect of.*

Non-user of a trade-mark, or the use of new devices, does not afford a basis for the penalty of loss of right thereto by abandonment; abandonment will not be inferred in the absence of intent, and a finding of intent must be supported by adequate facts. *Ib.*

4. *Use of geographical name validly registered as.*

While one may use the name of the place where he manufactures an article, in order to show where it is manufactured, and may state all the facts in regard to his succession, under the law of a foreign

country, to property of parties formerly manufacturing an article similar in many respects, he cannot, in this country, use the name of the place to designate the article if that name has been validly registered as a trade-mark here; and so *held* that the liquidator appointed in France of the property of the Carthusian Monks could not, in this country, use the word "Chartreuse" to designate the liqueur manufactured by him at Grande Chartreuse, the Carthusian Monks having validly registered that name in the United States as a trade-mark of the liqueur manufactured by them. *Ib.*

5. *Use of; right of other than owner.*

A validly registered trade-mark cannot be used by anyone other than the owner, even with words explaining that the article to which it is attached is not manufactured by the owner of the trade-mark. *Ib.*

See CONTEMPT OF COURT, 5.

TRADE-NAME.

Right to use of name of originator of article.

Where the name of the originator has not left him to travel with the goods the name remains with the manufacturer, as an expression of source and not of character. *Jacobs* v. *Beecham*, 263.

See UNFAIR TRADE, 1, 2, 3.

TRAFFIC CONDITIONS.

See JUDICIAL NOTICE.

TREATIES.

See CUSTOMS LAW, 1–6;
EXTRADITION, 4.

TRIAL.

See EVIDENCE, 2;
EXTRADITION, 5;
PHILIPPINE ISLANDS, 5.

TRIAL BY JURY.

See PHILIPPINE ISLANDS, 2.

TRUSTS AND TRUSTEES.

See INDIANS, 3;
PUBLIC LANDS, 13.

UNFAIR TRADE.

1. *Use of trade-name constituting.*

The word "Beecham's" as used in connection with pills manufactured by the party of that name is not generic as to the article manufactured but individual as to the producer; and one calling his product by the same name is guilty of unfair trade even if he states that he, and not Beecham, makes them. *Jacobs* v. *Beecham*, 263.

2. *Use of trade-name; burden to justify use.*

The burden is on a defendant who uses plaintiff's trade-name to justify the using thereof. *Ib.*

3. *Use of trade-name; evidence as to identity of article manufactured under secret formula.*

Even if the burden of proof is on one manufacturing a named article under a secret formula to prove that one selling an article by the same name is not manufacturing under that formula, there is a *prima facie* presumption of difference, which protects the owner without requiring him to give up the secret. *Ib.*

4. *Use of word "patent"; effect to infer that article is patented.*

The word "patent" as used in connection with medicines does not mean that the article is patented but that it is proprietary; and there is no fraud on the public in using the word in that sense although the article has not been patented. *Ib.*

5. *Protection against; effect, to deprive of, of misstatements harmless to public.*

The proprietor of a valuable article will not be deprived of protection against unfair trade because of certain trivial misstatements as to place of manufacture and Christian name of manufacturer when both statements were true at one time and it does not appear that the public have been improperly misled. *Ib.*

UNITED STATES.

See INDIANS, 3, 4, 8, 10;
INTERSTATE COMMERCE, 1;
PUBLIC LANDS, 11, 12.

UNREASONABLE SEARCHES AND SEIZURES.

See CONSTITUTIONAL LAW, 25, 38.

UTAH.

See PUBLIC LANDS, 3.

VARIANCE.

See EXTRADITION, 8, 9.

WAIVER.

See CONSTITUTIONAL LAW, 28.

WATERS.

See NAVIGABLE WATERS;
RIPARIAN RIGHTS;
STATES, 5.

WILLS.

See INDIANS, 6;
TESTAMENTARY LAW.

WITNESSES.

1. *Immunity; meaning of provision of § 860, Rev. Stat.*

Section 860, Rev. Stat., providing that no pleading or discovery obtained from a party or witness by means of judicial proceeding shall be used against him in any criminal proceeding, relates to using the evidence in a subsequent proceeding. *American Lithographic Co.* v. *Werckmeister*, 603.

2. *Refusal to answer before grand jury.*

Hale v. *Henkel*, 201 U. S. 43, followed to effect that a witness properly subpœnaed cannot refuse to answer questions propounded by the grand jury on the ground that there is no cause or specific charge pending. *Wilson* v. *United States*, 361.

See CONSTITUTIONAL LAW, 19–28; PHILIPPINE ISLANDS, 5;
CORPORATIONS, 8, 9; WRIT AND PROCESS, 6.

WORDS AND PHRASES.

"*And including.*"

The words "and including" following a description do not necessarily mean "in addition to," but may refer to a part of the thing described. *Montello Salt Co.* v. *Utah*, 452.

"*Any Part*" in reference to commerce, as used in § 2 of Anti-trust Act (see Restraint of Trade, 3). *Standard Oil Co.* v. *United States*, 1.

"*Country*" as used in revenue laws (see Customs Law, 3). *Faber* v. *United States*, 649.

"*Imports*" and "*exports*" (see Customs Law, 5). *Faber* v. *United States*, 649.

"*Misbranded*" as used in Pure Food and Drug Act (see Pure Food and Drug Act). *United States* v. *Johnson*, 488.

"*Patent*" as used in connection with medicines (see Unfair Trade, 4). *Jacobs* v. *Beecham*, 263.

"*Person*" as used in Anti-trust Act (see Restraint of Trade, 21). *Standard Oil Co.* v. *United States*, 1.

"*Restraint of trade*" and "*Attempts to monopolize*" as used in Anti-trust Act (see Restraint of Trade, 1, 9). *Standard Oil Co.* v. *United States*, 1.

"*To monopolize*" and "*monopolize*" as used in Anti-trust Act (see Restraint of Trade, 30). *Standard Oil Co.* v. *United States*, 1.

"*Trial*" as used in § 724, Rev. Stat. (see Evidence, 2). *Carpenter* v. *Winn*, 533.

WRIT OF ERROR.

See APPEAL AND ERROR, 2.

WRIT AND PROCESS.

1. *Subpœna duces tecum; ad testificandum clause not essential.*

The *ad testificandum* clause is not essential to the validity of a subpœna *duces tecum*, and the production of papers by one having them under his control may be enforced independently of his testimony. *Wilson* v. *United States*, 361.

2. *Subpœna duces tecum; amenability of corporations to.*

Corporate existence implies amenability to legal powers, and a subpœna *duces tecum* may be directed to a corporation. *Ib.*

3. *Subpœna duces tecum; defense of one responding to.*

The right of one responding to a subpœna *duces tecum* to show why he need not produce does not depend on the *ad testificandum* clause, but is incidental to the requirement to produce. *Ib.*

4. *Subpœna duces tecum; proof of papers.*

Where the subpœna *duces tecum* contains the usual *ad testificandum* clause it is not necessary to have the person producing the papers sworn as a witness. The papers may be proved by others. *Ib.*

5. *Subpœna duces tecum; power of Federal courts to issue.*

The authority to issue writs conferred on courts of the United States

by § 14 of the Judiciary Act of 1789, and § 716, Rev. Stat., includes the authority to issue subpœnas *duces tecum;* and it was not the purpose of § 724, Rev. Stat., to interpose an obstacle with respect to the issuance of such subpœnas. *American Lithographic Co.* v. *Werckmeister*, 603.

6. *Subpœna duces tecum; issuance to parties to action; Rev. Stat., § 858, applied.*

The act of July 2, 1864, c. 210, § 3, 13 Stat. 351, now Rev. Stat., § 858, removing disabilities of witnesses on account of being parties to the action removed whatever obstacle existed as to issuing subpœnas *duces tecum* to parties. *Ib.*

See CONSTITUTIONAL LAW, 25, 28;
CORPORATIONS, 3, 9;
INJUNCTION.