

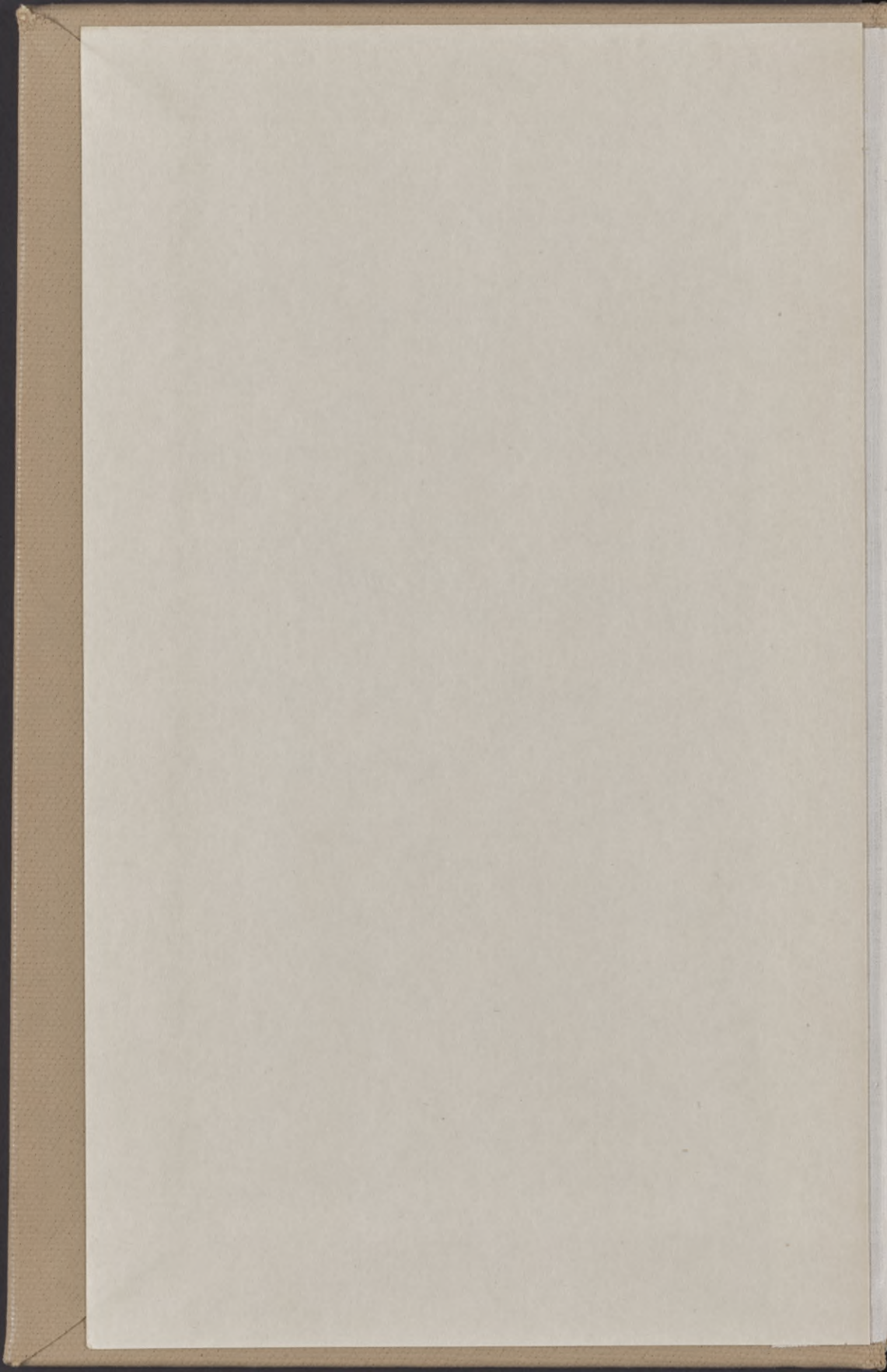
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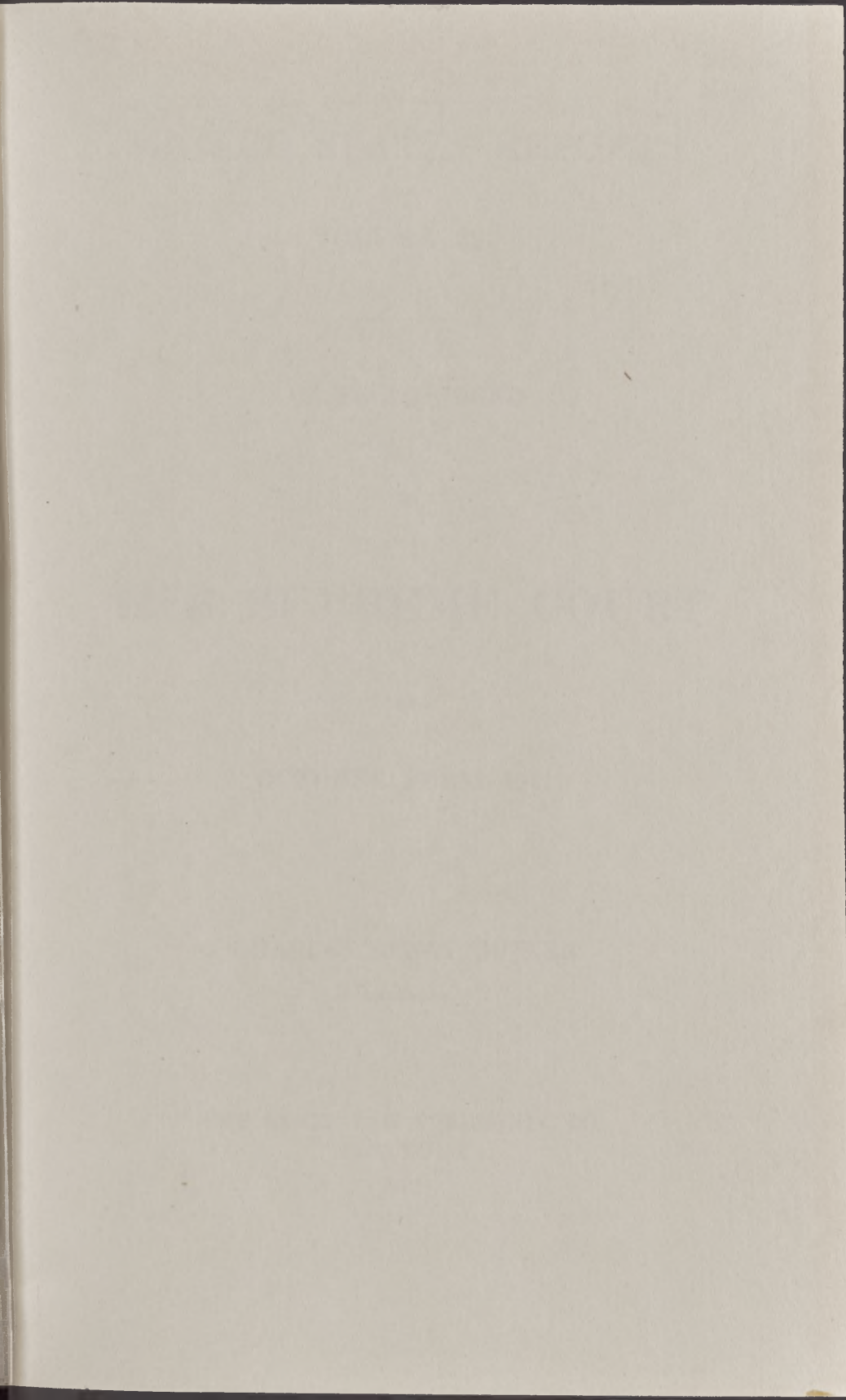


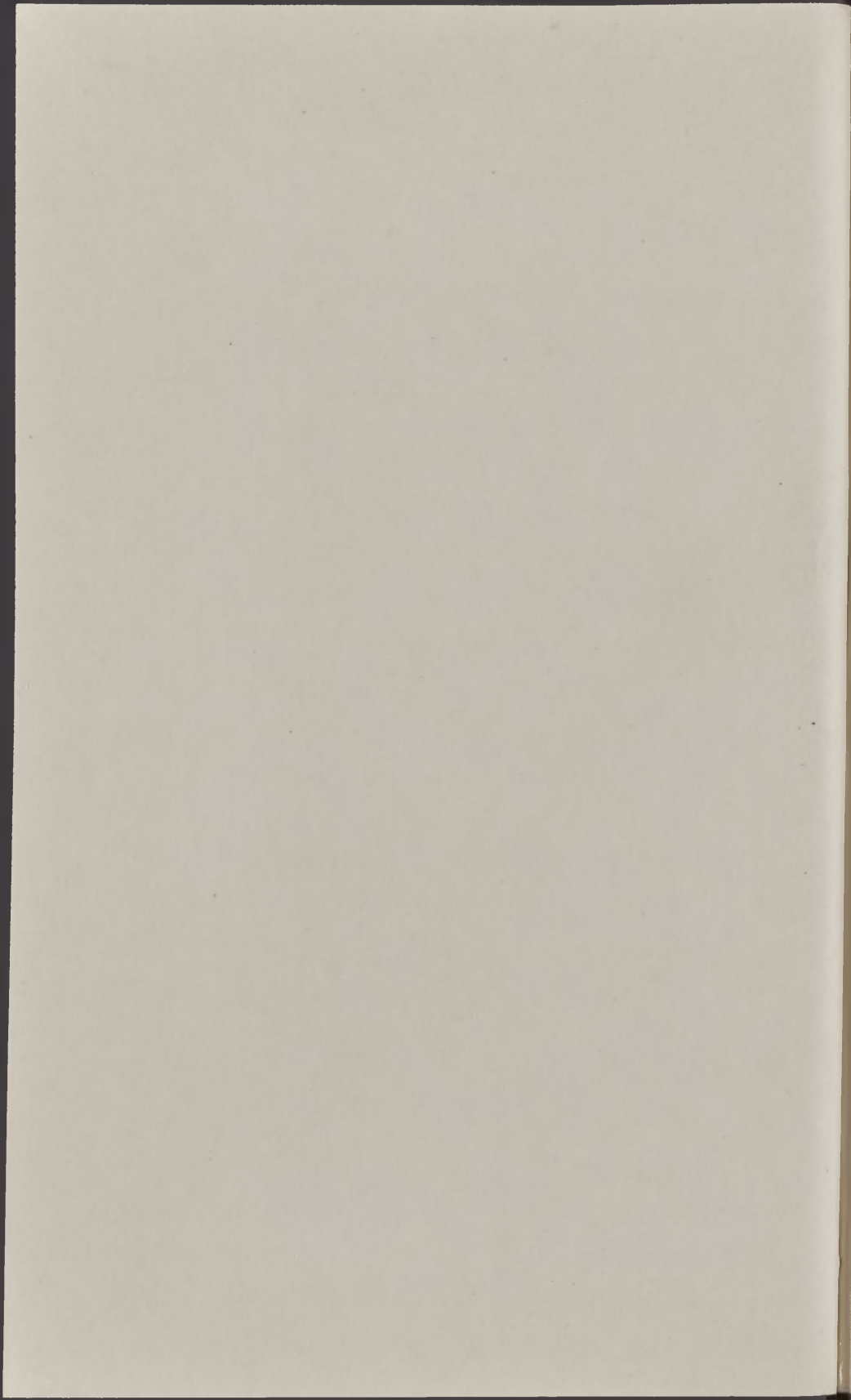
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UNITED STATES REPORTS

VOLUME 225

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1911

CHARLES HENRY BUTLER

REPORTER

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1912

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.¹

EDWARD DOUGLASS WHITE, CHIEF JUSTICE.
JOHN MARSHALL HARLAN, ASSOCIATE JUSTICE.²
JOSEPH McKENNA, ASSOCIATE JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIAM R. DAY, ASSOCIATE JUSTICE.³
HORACE HARMON LURTON, ASSOCIATE JUSTICE.
CHARLES EVANS HUGHES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JOSEPH RUCKER LAMAR, ASSOCIATE JUSTICE.
MAHLON PITNEY, ASSOCIATE JUSTICE.⁴

GEORGE WOODWARD WICKERSHAM, ATTORNEY GENERAL.
FREDERICK W. LEHMANN, SOLICITOR GENERAL.
JAMES HALL McKENNEY, CLERK.
JOHN MONTGOMERY WRIGHT, MARSHAL.

¹ For allotment of THE CHIEF JUSTICE and Associate Justices among the several circuits see next page.

² MR. JUSTICE HARLAN died on October 14, 1911 (see 222 U. S., p. v). He took no part in the decisions of any cases submitted during October Term, 1911, and reported in this volume.

³ MR. JUSTICE DAY was necessarily absent during October Term, 1911, until January 18, 1912 (see 222 U. S., p. xxix), and took no part in any of the decisions reported in this volume in cases which were argued or submitted during his absence.

⁴ On February 19, 1912, President Taft nominated MAHLON PITNEY, Chancellor of the State of New Jersey, as Associate Justice to succeed MR. JUSTICE HARLAN. He was confirmed by the Senate on March 13, 1912, commissioned on the same day, and on March 18, 1912, qualified, and immediately took his seat upon the bench. He took no part in any of the decisions reported in this volume in cases which were argued or submitted before that date.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, MARCH 18, 1911.¹

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

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

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

For the Third Circuit, Mahlon Pitney, Associate Justice.

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

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

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

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

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

For the Ninth Circuit, Joseph McKenna, Associate Justice.

¹ For previous allotment see 222 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1911.

THE STATE OF MARYLAND *v.* STATE OF
WEST VIRGINIA.

IN EQUITY.

No. 1, Original. Motion to confirm majority report of Commissioners.
Submitted April 29, 1912.—Decided May 27 1912.

Report of Commissioners appointed by decree of May 31, 1910, to run, locate and permanently mark with suitable monuments the Deakins line between Maryland and West Virginia from the North Branch of the Potomac River and Pennsylvania, in pursuance of decision, 217 U. S. 1 and 577, confirmed and exceptions thereto overruled.

THE State of West Virginia having moved the court to take up for consideration the exceptions heretofore filed in this cause by the State of Maryland to the report of Commissioners Julius K. Monroe and Samuel S. Gannett, two of the commissioners who were appointed by the decree entered in this cause on the thirty-first day of May, 1910 (see 217 U. S. 1, 577), to run, locate and permanently mark, with suitable monuments, the Deakins or Old State Line, as the boundary line between the States of Maryland and West Virginia, from low water mark on

the southern bank of the North Branch of the Potomac River to the Pennsylvania line, and to overrule said exceptions and confirm said report, which report is in the words and figures following, to wit:

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We, Julius K. Monroe and Samuel S. Gannett, two of the Commissioners appointed under the decree of the Court rendered May 31, 1910, "to run, locate, and establish and permanently mark with suitable monuments the said Deakins or 'Old State Line' as the boundary line between the States of Maryland and West Virginia from said point (low water mark) on the southern bank of the North Branch of the Potomac River to the said Pennsylvania line, etc.," have the honor to submit the following report, and map entitled, "Map Showing The Boundary Line Between Maryland and West Virginia, from the Potomac River to the Pennsylvania State Line, as surveyed and marked under the decree of the Supreme Court of the United States, rendered May 31, 1910," etc.:

The party was organized and went into camp on July 12, 1910, on Arnold's Ridge, about one mile north of the North Branch of the Potomac River, and immediately began the survey of the line.

Beginning at the Fairfax Stone, a line was first run North $0^{\circ} 56'$ E. along a well marked line to a planted stone marked "B", at the southwest corner of Military Lot, No. 1101, originally a "bounded maple standing one mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Potowmack River." The intersection of this line with the south bank of the North Branch of the Potomac (at low water mark) was, under the decree of the Court, fixed as the corner of Maryland and West Virginia, and monument No. 1 was therefore erected at this place and became the initial point of the boundary line run in 1910 and 1911.

From the corner of lot 1101 B, where monument No. 2 was erected, the line deflects slightly to the west and follows the old marked line on the course N. $0^{\circ} 47' 53''$ E. as

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identified by the surveyors in the case in 1897 and shown on the maps filed by the defendants. This line crosses Arnold's Ridge, Laurel Run, Backbone Mountain, Youghiogheny River, and where it intersects the 3rd line of a Maryland tract called "Covent Garden" monument No. 4 was erected and an offset was made to the west. The 3rd line of Covent Garden was followed for a distance of 402.15 feet on the course N. $71^{\circ} 48'$ W. (true) to a planted stone, acknowledged by residents and owners of adjoining property and pointed out by them as being the limit of their respective claims, at this point. Monument No. 5 was built over this stone and the line was run N. $0^{\circ} 27' 04''$ E. in a manner to follow the property lines, as acknowledged by the citizens of the two states; passing over the center of a planted stone property corner, which marked the beginning of the Maryland tract called Mount Pleasant, surveyed in 1774. Monument No. 6 was built over and around this stone, which was pointed out by witnesses as marking the place of the original corner, a white oak tree. Continuing on the same course, a large anciently marked white oak tree was reached and identified as the beginning of a Virginia tract of land surveyed for John Pettyjohn in 1781, and also a corner of John T. Goff 1000 acres, survey made in 1782, both of which call for the boundary line. This tree was cut and blocks taken out by your Commissioners which showed surveyors' axe marks in the wood; one 130 years old, one 117 years, and the last 78 years, thus indisputably establishing this course as following the oldest marked line extant. The stump of this tree was removed and monument No. 8 was built in the exact spot occupied by it. Upon trial it was found that from this white oak, northward, the line between property holdings of citizens in the two states, verged to the eastward, and a slight angle was therefore made to the east and the boundary line run N. $0^{\circ} 42' 57''$ E. to the stump of a bounded sugar tree, the northwest corner of a Maryland tract called Eelshine; this tree, while standing, was identified by the surveyors in this case in 1897, and also by the owners of the tract. The land, since that time has been cleared, and the timber destroyed by fire. The stump of this sugar tree was again pointed out to the Commissioners, in 1910, by Peter F. Nine, the

present owner of the tract Eelshine. This stump was removed and monument No. 10 erected exactly where it stood.

From this point the boundary line runs S. $89^{\circ} 17' 03''$ E. 482.3 feet along the line common to the tract Eelshine and the Virginia Grant to Wm. Ashby for 50 acres, to the southwest corner of the Maryland tract called Buckdale. As the southwest corner of Buckdale and the southeast corner of the Ashby 50 acre tract, which are common, could not be definitely located upon the ground, as all original objects marking them have been destroyed, this point was determined by the intersection of a line produced southward passing through known and accepted points in the "Old Line," namely: "the stake and stone pile," on Lauer Hill, which is the common corner of the Maryland tract called "Maryland," and the Virginia grant to John Hoyer for 500 acres, and which was identified and located by the surveyors in this case in 1897, and shown at Red "C-6" upon Map No. 1, filed by defendants, and again identified by your Commissioners in 1910; and a point north of the B. & O. Railroad near Hutton, Maryland, in the property line between lands of the Connell Heirs and George Morris. Monument No. 11 was placed at the intersection of the line above described with the line eastward from Monument No. 10. The course of the boundary from monument No. 11, as above determined, is N. $0^{\circ} 41' 02''$ E. following closely the lines of the original Virginia grants, and passing through, or very near the several points indicated upon map No. 1 filed in this case by defendant, and testified to as standing in the "Deakins, or Old State Line," to a point on Glover's Hill, $1\frac{1}{2}$ miles north of the Baltimore & Ohio Railroad, where Monument No. 15 was erected. From this point northward it was found that the general course of the property lines verged slightly to the west, and the course of the boundary was here changed to N. $0^{\circ} 22' 27''$ E to conform thereto, following the well marked divisional lines between the F. & W. Deakins 6000 acre Virginia grant, and the Maryland Military Lots (Nos. 1237 to 1245) and the eastern line of the Hoyer and Martin 3600 acre Virginia grant, passing over the summits of Snaggy Mountain and through the southern end of the Pine Swamp to a point where this

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line intersects the southern line of the John Crane 776 acre Virginia grant, a short distance north of the Cranesville and Oakland road, as indicated upon the maps filed by the defendant in this case. This point was determined by reproducing upon the ground the southern line of said 776 acre Crane Survey. Monument No. 19 was erected at this point.

From Monument No. 19 an offset of 971.09 feet was made along the south line of the John Crane 776 acre tract N. $89^{\circ} 27' 27''$ E to its intersection with the west boundary of Maryland Military Lot No. 1292, where Monument No. 20 was built. The boundary here turns northward, following the west limit of Military Lots 1292, 1294, 1296, 1298, 1400, & 1402 as laid out by Francis Deakins, on a true course of N. $0^{\circ} 17' 00''$ E. to the northwest corner of Military Lot 1402. Monument No. 21 was placed at this point and an offset made 53.69 feet S. $89^{\circ} 43' 00''$ E, along the north side of Lot 1402, (which is also the division line between lands of E. F. Jenkins and M. H. Frankhouser), where Monument No. 22 was erected.

From Monument No. 22 the course of the boundary is N. $0^{\circ} 24' 42''$ E., passing through, or near the point where a large marked Red Oak formerly stood, testified to in this case by Ethbell Falkenstine, as standing in the Deakins or Old State Line, and shown at the letters "W-K" upon the maps heretofore filed; a planted stone, a short distance north of the Red Oak in the east line of the Henry Banks Survey of 8000 acres, and following a well marked line along and with the eastern boundary of the Banks Survey and the western boundary of the Maryland tract called "Canrobert" to a point where it intersects the south line of the 328 acre tract granted by Virginia to Henry Deal, and passing through the same, to a point where the east line of the Banks Survey intersects the south line of a tract of 367 acres granted by Virginia to Henry Deal, where Monument No. 27 was erected.

From Monument No. 27 an offset was made 347.3 feet N. $89^{\circ} 25' 12''$ E. along the line between the two Henry Deal tracts above mentioned, where Monument No. 28 was placed.

From Monument No. 28 to Monument No. 32 the course of the boundary is N. $0^{\circ} 20' 07''$ W. and closely follows

the mutually accepted property lines of citizens of the two States; corners, trees, and fences having been pointed out by various land owners on both sides of the "Old Line." Monument No. 32 replaces a large marked Spanish Oak, which was a common corner of lands owned by John and George W. Vansickle, in West Virginia, and in the west line of land owned by W. M. Fike in Maryland. This tree was cut down and the stump removed by your Commissioners in 1911. From this point northward it was found that the old accepted boundary line veered slightly to the east, and the course of the boundary line was therefore changed to N. $0^{\circ} 4' 55''$ E to conform to it.

Monument No. 34 was set at the intersection of this line with the southern boundary line of the State of Pennsylvania.

In addition to the monuments just mentioned as standing at the angular points in the boundary, others were set between, exactly in line (see description of Monuments).

The total number of large monuments erected along the Maryland-West Virginia boundary line is 34, in addition to the one restoring the "Fairfax Stone." Of small monuments, 26 were erected making a total of 60 permanent marks. The line is also marked at suitable places by 5 copper bolts securely fastened into natural and planted rocks.

A description of instruments and methods used in the survey, the method of constructing the monuments; location, latitude, longitude, approximate elevation, distance, true and magnetic bearings, will be found in the following pages.

Instruments.

The following instruments were used in making the survey: Theodolite, $7\frac{1}{2}$ inch No 11, United States & Canada Boundary Survey, temporarily loaned during 1910 to this Survey. In 1911, $7\frac{1}{2}$ inch theodolite No. 219 of United States Coast & Geodetic Survey, loaned by the Superintendent of that Bureau in place of No. 11. No. 219 is lighter, works more freely, and is altogether much more satisfactory than No. 11. The circles on both theodolites are graduated to 10' spaces and read by verniers to 10''. With these instruments the line was ranged out from hill-top to hilltop and flagpoles set at intervals of 1 to 4 miles.

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2 Gurley transits, circles $5\frac{1}{2}$ inches diameter reading by vernier A to minutes and by vernier B to hundredths of a degree, loaned by Julius K. Monroe. With these transits the line was run from flagpole to flagpole, previously located with the theodolite, in the usual manner with double backsights and foresights. The length of foresight was limited by the length of tape, 500 feet; the length of backsight was limited only by the visibility of the rear tripod. Instead of the ordinary rods for lining in, brass plumb bobs weighing 2 pounds each, supported by tripods 7 feet high, with movable heads were used. As sights were taken on the string supporting the plumb bobs, the line was produced with great accuracy. A brass tack was set in a solid hub at each transit station.

Distances.

Distances were measured to the nearest $\frac{1}{100}$ of a foot with a 500 foot standardized steel tape, supported at several points along its length so as to have a uniform slope, approximately parallel to the slope of the ground.

The inclination or slope of the tape was measured by the vertical circle on the transit and the horizontal distance and difference in elevation carefully computed.

Besides the 500 ft. steel tape, which was graduated to single feet, except at each end, where 1 foot was graduated to tenths, a 100 foot steel tape graduated throughout to feet, tenths and hundredths was used for shorter measurements.

Astronomical Observations.

Astronomical observations for azimuth were obtained with the theodolite by observing Polaris near eastern elongation. Ten measurements of the angle between star and mark were made with telescope direct and reversed in 5 positions of the circle. The mark was a bulls-eye lantern placed at one of the transit stations a mile or more distant, northward. Time was obtained from the railroad; a mean time Waltham watch being compared with 75th meridian time as sent by telegraph from the United States Naval Observatory at Washington each noon, and proper reduction was made for difference in longitude. Azimuth observations were made at 8 stations along the boundary

line, 36.7 miles in length; usually at or near a point of deflection in the final line.

Geodetic Positions.

At a point near Cranesville, West Virginia, 24 miles north of the Fairfax stone and 12 miles south of the Pennsylvania line, connection was made with Piney Swamp triangulation station located by the United States Geological Survey by a belt of triangulation extending westward from Maryland Heights and Sugarloaf, 2 primary triangulation stations of the Coast and Geodetic Survey. The geodetic position of Piney Swamp station is on United States Standard datum, and is thus free from station error. A portion of the boundary line, 1.9 miles east of this station, measured during the progress of the survey, was used as a base line, and by measuring all the angles in 2 triangles accurate connection was made with this triangulation station. From these data the geodetic positions of all large monuments were computed.

Elevations.

The approximate elevations of all stations were determined by carrying a line of vertical angle measurements along the boundary. The elevation of Fairfax Stone was accepted as 3162 feet above mean sea level, as derived from railroad levels, and checks on the heights as computed from this, were obtained at 5 points from the topographic work of the United States Geological Survey, as follows: Near Gnegy Church; at the crossing of the Northwestern Pike; at Hutton; near Cranesville; and at the intersection of the Maryland-West Virginia line with the Pennsylvania state line. The apparent errors at these check points were distributed at the various stations in proportion to the distance.

MONUMENTS.

List of Monuments from the Fairfax Stone to the Pennsylvania Line, Giving the Size, Method of Construction, and Location,—Together with the Latitude and Longitude of Each of the Principal Monuments.

The PRINCIPAL MONUMENTS are uniform in size and shape, and consist of a moulded concrete column,

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twenty-two inches square at the base, tapering to ten inches square at four feet in height, (top of mould) and finished, in a few instances, with rounded top, but generally flat, pyramidal shape, extending four to five inches above the top of mould, or form, making the entire column four feet four inches in height above base; the corners are beveled one and one half inches in width to prevent defacement.

INSCRIPTIONS: Each Monument, beginning with the initial one at the North Branch of the Potomac River, is numbered consecutively from 1 to 34 Northward to the Pennsylvania State Line; the numbers and the names of the Commissioners being placed upon the south face of the monument, except where set diagonally; the date, 1910, on the North face; the letters MD. on the East, and W. VA. on the West. The letters MD., and W. VA., are $3\frac{1}{4}$ inches in height and $\frac{3}{8}$ inch deep; the numbers $2\frac{3}{4}$ inches high, and $\frac{5}{16}$ inch deep, and the names of Commissioners, one inch in height and of proportional depth. The inscriptions were moulded in the monuments, when built, (except the monument at Fairfax Stone, and Nos. 1 and 2), by means of reversed bevel faced brass and lead pattern letters, which were attached separately to the inside of the "forms"; subsequently the letters MD., W. VA., the names of Commissioners, and the date, 1910, were soldered on plates of tin reinforced with heavy sheet iron, which were securely fastened to the forms with screws. These plates were depressed slightly below the surface, which, on the finished monuments, formed corresponding elevations.

Material.

Three bags (300 pounds) best Portland cement, and seven bags (700 pounds) washed, white sand, were used in each of the large monuments. The cement and sand were thoroughly mixed before and after adding water. This material was firmly tamped in the "form," the top being finished with an ordinary mason's trowel. No stone was used in the monument.

Base.

The base of each of the principal monuments was made of concrete, the usual size being $3\frac{1}{2}$ feet square, and $2\frac{1}{2}$

feet deep, depending upon the character and formation of the ground; in all cases sufficient depth and breadth being obtained to insure stability.

The average amount of material used in each base, was $\frac{3}{4}$ barrel of best Portland cement, 1200 pounds of sand, and 1500 to 2000 pounds of broken stone. The cement and sand were thoroughly mixed before and after adding water; cement and stone were placed in the excavations in alternate layers and the whole thoroughly tamped and bonded. The base was finished and cross-lines indicating its exact center marked upon it, and when firm enough to sustain the weight of the monument, the "form" was set up and carefully centered by means of the cross-lines, and the monument built before the final "set," thus forming the base and column into one solid mass. In the few instances where the bases were built a day or more before the monument, a large stone was set in the center of the base and allowed to project a foot or more above the surface, and the monument built around it, thus securing a firm bond.

Small Monuments.

Small monuments are also of concrete, uniform in size, 1 foot square and 2 feet high, moulded in a wooden form, without taper, and contain 1 bag (100 pounds) cement, 2 bags (200 pounds) washed, white sand. The top was finished in a similar manner to the large monuments. The letters MD cut on the east face, W. VA. on the west, and the date, 1910, on the north. The base, 2 feet square and 2 feet deep, also of concrete, and built as in the larger monuments. One bag of cement and four bags of sand, in addition to the broken stone, were used.

The "Fairfax Stone."

The "Fairfax Stone" stands at the head of the North Branch of the Potomac River. It derived its name from Thomas, Lord Fairfax, who became the proprietor of what was known as the "Northern Neck of Virginia." The original grant was made in 1663, by Charles II of England, and subsequently successively confirmed by James II and George II. The title having rested by

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transfers in Lord Fairfax, on the 7th of September, 1736, Commissioners were appointed, with the approval of George II, to define the boundaries of the grant, which was to be "all the land lying and situate between and within the heads of the Rivers Rappahannock and Potomac, the courses of the said rivers together with the rivers themselves." The survey of the upper part of the Potomac River was made in 1736, and at the head spring as then determined a number of trees were marked by the surveyors. A dispute arose between Lord Fairfax and the representatives of the Colony of Virginia as to the source of the Potomac, and no further work or agreement reached until 1746, when representatives for each side having been named, the survey was resumed and a line was run from the head of the Rappahannock to the head of the Potomac River. The trees and springs located in the former survey of 1736, as the head of the Potomac having been found, the course of the trial line was corrected and the final line run in the reverse direction from the Potomac to the Rappahannock.

Before leaving the head of the Potomac, additional trees were marked and a stone set up, described as follows, in the note book (still in existence) of Thomas Lewis, one of the surveyors: "October 23, 1746, Returned to the spring where we made the following marks: '—' on another Beach WB WR 1746 Y3—a stone by the corner pine marked \overline{D} FX, on a Beach marked AC." This done we bid adieu to the head spring about $\frac{1}{2}$ hour after nine o'clock, our course directing to the head of Rappahannock bearing S. 46° E. 30 poles the top of the mountain in the spring heads on."

When Lieut. N. Michler made his survey of the meridian line north from the Fairfax Stone in 1859, he thus describes the stone in his report. "The initial point of the work,—the Fairfax Stone,—stands on the spot encircled by several small streams flowing from springs about it. It consists of a rough piece of sandstone, indifferent and friable, planted to the depth of a few feet in the ground and rising a foot or more above the surface, shapeless in form, it would scarce attract the attention of the passer by. The finding of it was without difficulty, and its

recognition and identification by the inscription Fx, now almost obliterated by the corroding action of water and air. In order not to disturb this stone the first observatory was built immediately in the rear (South) of it." Here, later, Michler built his monument, which was about 4 feet in height and made of several hewn stones, the upper ones being conical. The original Fairfax Stone was in existence until about the year 1883, when it was destroyed by vandals and subsequently carried away, leaving the Michler monument as the only marker.

The stream surveyed in the year 1736 was what has since been designated the North Branch of the Potomac River. The source, designated as the Fairfax Stone, is upon the divide between the eastern and western water sheds. It is $\frac{1}{4}$ mile northerly from the summit of the Western Maryland Railroad, which is here the highest point on that line between Cumberland, Maryland, and Elkins, West Virginia.

The stone is easily reached by a trail from Fairfax Station, which is $\frac{1}{2}$ mile to the south east. The large timber all around has been cut by mill men and fire has destroyed the balance so that the immediate spot is now largely covered by brush and briers. The land near the Fairfax Stone is principally owned by the Davis Coal & Coke Company (in 1910).

On August 12, 1910, during the present work, a new concrete monument was built, replacing both the previous marks. The new monument stands 2 feet North of the center of the base of the Michler Monument, which point was marked by a brass bolt bedded level with surface of the ground. This rock and mark are still left in place but are not visible, and the mark is 1 foot north of the point where the original stone stood. The portion of the Michler Monument above ground was removed.

"Fairfax Stone," Restored 1910.

The base is of concrete $3\frac{1}{2}$ ft. square and 2 ft. deep set flush with surface of ground. On this base the monument was built, utilizing the form which had been designed for, and was afterwards used in the construction of the monuments along the boundary from the Potomac River to the Pennsylvania line. The monument is 22 inches square at

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the base and 10 inches square at the top, the latter being built up a few inches and rounded off. The total height being 4 ft. and 4 inches above the base. The monument contains $3\frac{1}{2}$ bags of best Portland Cement and $6\frac{1}{2}$ bags of white sand. It is marked as follows: On South face Fx On North face 1910.

1746

The corners are beveled $1\frac{1}{2}$ inches in width.

Latitude $39^{\circ} 11' 41.92''$ Longitude $79^{\circ} 29' 15.50''$

Monument No. 1.

This monument marks the initial point of the present Boundary Survey. It is on the South bank of the North Branch of the Potomac River, 3983 feet N $0^{\circ} 56'$ E (true) from the Fairfax Stone. The base is $3\frac{1}{2}$ ft. square and 4 ft. deep and tapers to $2\frac{1}{2}$ ft. square at its top. The monument is placed diagonally on this base and is marked as follows:

On the Northeast side 1910	On the Southeast side
MD	W. Va.
On the Southwest side No 1	On the Northwest side
W. Va.	W. Va.

It can be reached from the Fairfax Station of Western Maryland Railroad by following an old lumber tram road which goes within 100 yards of the river. From the north on Maryland side there is a bridle path leading from the County Road on Arnold's Ridge, to a point almost in sight of this monument, $\frac{1}{2}$ mile distant.

Latitude $39^{\circ} 12' 21.34''$ Longitude $79^{\circ} 29' 14.67''$

Monument No. 2.

Is in place of a maple tree marked "1101" which was the beginning of the Maryland Military Lot 1101. It can be reached from the county road on Arnold's Ridge by the same trail that leads to the river. It is less than $\frac{1}{4}$ mile from top of the ridge and about 1 mile west of Eli Mosser's house. The boundary line makes a slight angle to west at this point.

Latitude $39^{\circ} 12' 33.28''$ Longitude $79^{\circ} 29' 14.42''$

Arnold's Ridge.

A small monument on the highest point of Arnold's

Ridge. It is one mile west of house of Eli Mosser and can be reached by the county road along the ridge.

Monument No. 3.

On summit of Backbone or Great Savage Mountain. The base of monument rests on the solid ledge which forms the crest of the mountain. It is reached with difficulty by an old road crossing the mountain from Eli Mossers to Sommers Mossers upon the west and is more than $\frac{1}{4}$ mile west of this trail over rough, rocky ground. It can most readily be reached from the west. There is an extended view from this summit as far north as Snaggy Mountain.

Latitude $39^{\circ} 14' 12.43''$ Longitude $79^{\circ} 29' 12.65''$

Stahlnaker Ridge.

A small monument about 1 mile west of Sommers Mossers, and $\frac{1}{2}$ mile southwest of county road from Gnegy Church to Breedlove.

Monument No. 4.

Just north of the Youghiogheny River and south of a county road from Gnegy Church to Breedlove. It is in the line of a Maryland land grant called Covent Garden and in property line of Wm. Bittner and Oscar Roth. It is $\frac{3}{4}$ mile south of Gnegy Church and is easily reached. The monument stands diagonally as the line here changes its course to the westward.

Latitude $39^{\circ} 15' 53.73''$ Longitude $79^{\circ} 29' 10.84''$

Monument No. 5.

About 100 yards north of county road from Gnegy Church to Breedlove and in sight of road. It is in a line of the Covent Garden Survey, and is in or near property lines of Wm. Bittner, Chas. Winters, Oscar Roth and J. Stahlnaker. The monument was built over and around a rough stone marking property corners and stands diagonally as the course of the boundary line here turns northward.

Latitude $39^{\circ} 15' 54.97''$ Longitude $79^{\circ} 29' 15.69''$

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Monument No. 6.

On the south side of the county road from Oakland to Horse Shoe Run, 100 yards southwest of the cross roads at Gnegy Church. On or near the property line of Daniel Gnegy and Elijah Bechtel. The monument was built over and around a stone property corner which marked the beginning of the Maryland land grant called "Mount Pleasant" surveyed in 1774. The original beginning called for was a white oak tree, now gone. The stone was pointed out as said beginning by Daniel Gnegy.

Latitude $39^{\circ} 16' 31.10''$ Longitude $79^{\circ} 29' 15.32''$

Hamstead Hill.

A small monument on the Obed Hamstead Hill, $\frac{2}{3}$ of a mile east of the southwest prong of the Youghiogheny River and $\frac{3}{4}$ mile north of Gnegy Church. The monument is 45 feet north of an east-west wire fence and 5 feet west of a north-south line fence.

Monument No. 7.

Situated 15 feet south of center of county road from Cash Valley to the Horseshoe Run road and $1\frac{1}{2}$ miles east of Eglon, West Virginia. The land on the east of monument is owned by George H. Gauer and that on the west by William Weimer.

Latitude $39^{\circ} 17' 46.83''$ Longitude $79^{\circ} 29' 14.56''$

Monument No. 8.

About $1\frac{1}{2}$ miles northeast of Eglon, West Virginia, and 150 yards east of house of Silas Fike. This monument marks the spot where stood a large white oak tree called for in the Virginia Patent to John Pettyjohn, surveyed May 30, 1781, for 400 acres. The call being at "a white oak in the Maryland line and running—and finally to pointers in the Maryland line and with said line N. 226 poles to the beginning." This tree was blocked during the survey of 1910 and the oldest mark counted 130 years growth, the second 117 years, and the third 78 years. The block was saved. The tree was cut down and stump blown up with dynamite and replaced by the monument which now marks property holdings of Silas Fike, Amelius

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Fike, and Seymour Hamstead. There is an angle to the east in the boundary line at this point.

Latitude $39^{\circ} 17' 52.63''$ Longitude $79^{\circ} 29' 14.50''$

Silas Fike's Ridge.

A copper bolt set in a rock flush with the ground on summit of a flat timbered ridge $\frac{1}{4}$ mile north of house of Silas Fike, who lives $1\frac{1}{2}$ miles northeast of Eglon, West Virginia.

Dawson's Hill.

A small monument on wooded hill of Lloyd Dawson, about $\frac{3}{4}$ mile south of the Northwestern Pike. It is 26 feet west of north-south fence and 195 feet north of an east-west fence.

Monument No. 9.

Situated 8 miles southwest of Oakland, Maryland, in the angle formed by the Northwestern Turnpike and the county road from Eglon, West Virginia, to Oakland. The monument is 100 yards east of the Youghiogheny River and is on a slight ridge between above described roads and can be seen from them.

Latitude $39^{\circ} 19' 07.64''$ Longitude $79^{\circ} 29' 13.29''$

Offut's Hill.

A small monument on summit of wooded hill belonging to D. E. Offutt, $\frac{1}{4}$ mile north of the Northwestern Turnpike and 10 feet east of a north-south fence.

Stahl's Hill.

A small monument on summit of Stahl's Hill, 20 feet west of an old split rail fence running north and south and is on land owned by Peter F. Nine.

Monument No. 10.

In an open field about 300 yards south of a county road running east and west across the Youghiogheny River. The monument stands in place of a sugar tree which formerly stood here and marked a corner of the Maryland

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grant called "Eelshine." The place was pointed out by Peter F. Nine, who owns the property east of it. John Bittner owns the land to the west and his house is 100 yards west of the monument. The boundary line turns to the east and the monument stands diagonally.

Latitude $39^{\circ} 20' 39.47''$ Longitude $79^{\circ} 29' 11.82''$

Monument No. 11.

Situated 482 feet east from Monument No. 10, as there is here an offset in the line. It is in the line of Eelshine and Ashby 50 acre survey, and stands diagonally as boundary line here turns to north.

Latitude $39^{\circ} 20' 39.41''$ Longitude $79^{\circ} 29' 05.68''$

Monument No. 12.

Is upon the south side of the county road from Brookside, West Virginia, to Oakland, Maryland. It is about 100 feet north of the Youghiogheny River on land of Dorsey Ashby and about 100 yards southwest of his house.

Latitude $39^{\circ} 21' 04.15''$ Longitude $79^{\circ} 29' 05.30''$

Ashby's Hill.

A small monument on summit of a flat ridge owned by Dorsey Ashby, $\frac{1}{4}$ mile northwest of road from Brookside to Oakland, and $\frac{1}{4}$ mile northwest of Mr. Ashby's house.

Lauer Hill (South Brow).

A copper bolt set in a rock 6 by 6 by 20 inches set flush with surface of ground, on south brow of Lauer Hill $\frac{3}{4}$ mile south of house of Charles Fulks. It can be reached from the north by road and trail through the woods.

Monument No. 13.

On the summit of Lauer Hill about 6 miles southwest of Oakland, Maryland. The monument can be reached by a trail running south from a road to a coal mine near Chas. Fulk's house, which is on the north side of Lauer Hill about $\frac{1}{2}$ mile from summit. The land is covered with timber and is owned by Daniel E. Offutt.

Latitude $39^{\circ} 22' 02.42''$ Longitude $79^{\circ} 29' 04.40''$

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Miller.

A small monument on summit of flat ridge $\frac{1}{3}$ mile north of Laurel Run, on land owned by J. S. Miller. It can be reached by road from Crellin, Maryland, which is $1\frac{1}{2}$ miles to the east.

Poling.

A small monument on a timbered ridge $1\frac{1}{2}$ miles northwest of Crellin, Maryland, and on land owned by Zach Poling. It is 120 feet south of a 2nd class road crossing the ridge.

White.

A small monument $\frac{3}{4}$ mile south of Hutton, Maryland, on northwest side of a 2nd class road and is on land owned by Charles White.

Monument No. 14.

Is about 200 yards west of Hutton, Maryland, Station, B. & O. R. R., and close to south limit of right of way of main line of that railroad. It is north of wagon road from Hutton, Maryland, to Corinth, W. Va., is conspicuously placed, and can be seen from trains as they pass. It is near lands of John A. Connell, Chas. White, and Grant Felton.

Latitude $39^{\circ} 25' 08.88''$ Longitude $79^{\circ} 29' 01.54''$

Morris-Connell.

A small monument on summit of flat ridge cleared on west and timbered on east. It is $\frac{1}{2}$ mile north of Hutton, Maryland, and is on land owned by George Morris on the west and J. A. Connell on the east.

Monument No. 15.

About $1\frac{1}{2}$ miles north of Hutton, Maryland, or Corinth, West Virginia, and can be reached by road from Corinth. The monument is on cleared land owned by Dennis Glover. There is a slight deflection of the boundary line to the westward at this point.

Latitude $39^{\circ} 26' 07.60''$ Longitude $79^{\circ} 29' 00.63''$

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Severe.

A small monument on north side of county road 2 miles north of Corinth, West Virginia. On land owned by John M. Browning.

Browning.

A small monument on summit of a flat wooded ridge owned by John M. Browning, $2\frac{1}{2}$ miles north of Corinth, West Virginia.

Camp Rocks.

A copper bolt set in a hole drilled in top of and near the northeast corner of a rocky bluff on south slope of Snaggy Mountain. 700 feet south of old Burchinal road. Stones are piled around and over the bolt. From this point, Glover's Hill, Backbone Mountain, and other distant points southward can be seen.

Burchinal.

1st. A small monument on top of a large flat rock 20 feet south of old Burchinal road which crosses Snaggy Mountain near this place.

2nd. A copper bolt set in solid rock 350 feet north of the small monument described above.

3rd. A copper bolt set in solid rock 1400 feet north of small monument described above.

Monument No. 16.

On one of the main summits of Snaggy Mountain about 1281 feet east of the "Fairfax Meridian," and 75 yards from a rough road to fields on top of mountain. It can be reached from the Burchinal Road, which comes out at White Oak Spring on the road to Terra Alta.

Latitude $39^{\circ} 29' 07.98''$ Longitude $79^{\circ} 28' 59.11''$

Monument No. 17.

Is on the very high north summit or brow of Snaggy Mountain and is one of the highest points along the boundary line, being about 3070 feet above mean sea level. It can be reached either from a trail which crosses through

the gap between Monuments 16 and 17, or from the Cranesville-Oakland road above Brownings Lake, or by climbing the steep side of the mountain just south of Pine Swamp.

Latitude $39^{\circ} 29' 50.50''$ Longitude $79^{\circ} 28' 58.75''$

Teets.

A small monument on north side of county road which crosses Pine Swamp about 3 miles south of Cranesville, West Virginia. The monument is about 1000 feet south of house of Eugene Teets.

Monument No. 18.

On the north side of the county road from Cranesville, West Virginia, to Oakland, Maryland, and is about 3 miles south of Cranesville, 100 yards east of house of Eugene Teets, and west of Muddy Creek, and on the edge of Pine Swamp, which has here been drained.

Latitude $39^{\circ} 31' 38.50''$ Longitude $79^{\circ} 28' 57.84''$

Monument No. 19.

Is about $2\frac{1}{2}$ miles southeast of Cranesville, West Virginia, and is on the western edge of the Pine Swamp about 100 yards from solid ground. The foundation of the monument rests on hard sand 4 feet below the surface. The timber and brush near the monument are mostly dead or burnt. The land is owned by Hiram Ringer. The monument is set diagonally as the line turns abruptly east.

Latitude $39^{\circ} 31' 53.96''$ Longitude $79^{\circ} 28' 57.71''$

Monument No. 20.

Near the middle of Pine Swamp about 3 miles southeast of Cranesville, West Virginia, $\frac{1}{3}$ mile west of house of John H. Sommers and 50 feet west of Muddy Creek. The base of the monument is 4 feet square and 6 feet deep, resting on a sticky clay. The surface of the swamp near this monument is very soft and all material had to be drawn by men on a sled for a distance of 200 yards. The land is owned by Hiram Ringer, and the adjoining land to the east by John H. Sommers. The Monument is set diagonally.

Latitude $39^{\circ} 31' 54.05''$ Longitude $79^{\circ} 28' 45.32''$

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Monument No. 21.

One mile east of Cranesville, West Virginia, in a small ravine, and is on property line between M. H. Frankhouser and E. F. Jenkins at the Northwest corner of Maryland Military Lot 1402, at the end of 2nd line. It is 200 yards northwest of M. H. Frankhouser's house, 50 yards west of county road and on northeast side of Pine Swamp. The Monument stands diagonally as the line turns to the east.

Latitude $39^{\circ} 33' 08.69''$ Longitude $79^{\circ} 28' 44.85''$

Monument No. 22.

Is 53.69 feet eastward from Monument No. 21 in the same ravine, and about 100 feet west of the county road. It stands in the 2nd line of lot 1402 and is also on the property line between Frankhouser & Jenkins. The Monument stands diagonally as the boundary line turns northward again.

Latitude $39^{\circ} 33' 08.68''$ Longitude $79^{\circ} 28' 44.16''$

Monument No. 23.

Is about 1 mile east of Cranesville, West Virginia, 80 feet north of county road from that place to Sang Run, Maryland. It is on a bank above a large spring and is on cleared land owned by J. G. Elsey, and is 50 yards north of house of E. F. Jenkins.

Latitude $39^{\circ} 33' 22.93''$ Longitude $79^{\circ} 28' 44.03''$

Elsey's Hill.

A small monument on summit of flat cultivated ridge, 1 mile east of Cranesville, on land owned by J. G. Elsey, and $\frac{1}{4}$ mile north of house of E. F. Jenkins.

Latitude $39^{\circ} 33' 34.93''$ Longitude $79^{\circ} 28' 43.92''$

Strawser Road.

A small monument on north side of road from Cranesville, West Virginia, to Sang Run, Maryland, about $1\frac{1}{2}$ miles northeast of Cranesville and on land owned by Samuel A. Strawser.

Fike's Mountain (South Brow).

A small monument on South Brow of Fike's Mountain, 2 miles northeast of Cranesville. It can be reached by a rough road through the woods.

Monument No. 24.

On summit of Fike's Mountain $2\frac{1}{4}$ miles northeast of Cranesville, West Virginia. It can be reached by a rough trail through the woods from a wagon road which crosses the mountain $\frac{1}{2}$ mile west of Monument. The summit of the mountain is comparatively flat and no distant large monuments can be seen. The small monument on the south brow is visible as well as small monument on north brow.

Latitude $39^{\circ} 34' 49.21''$ Longitude $79^{\circ} 28' 43.23''$

Fike's Mountain (North Brow).

A small monument on the north brow of Fike's Mountain, 1041.56 feet northward from Monument No. 24. It is $2\frac{1}{2}$ miles northeast of Cranesville *nad* $\frac{1}{2}$ mile northeast of county road, which crosses Fike's Mountain $\frac{3}{4}$ mile west of this point.

Monument No. 25.

On a timbered flat ridge north of White Rock Run near southeast corner of John A. Reckard's land and $\frac{1}{2}$ mile south of his house. It is in the woods 100 yards from private road from the Cranesville road to Reckard's house.

Latitude $39^{\circ} 36' 06.30''$ Longitude $79^{\circ} 28' 42.51''$

Reckard Road.

A small monument 30 feet south of a second class road through the woods near house of John A. Reckard about 6 miles west of Friendsville, Maryland.

Herbert Friend's Ridge.

A small monument on summit of flat ridge partly covered with timber and brush, owned by Herbert Friend, and is $\frac{1}{2}$ mile southeast of his house. It is 6 miles southwest of Friendsville.

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Monument No. 26.

On north side of county road from Keeler Glade to Friendsville and is 5 miles southwest of latter place. It is on land of Sherman Friend, about 100 yards northeast of his house.

Latitude $39^{\circ} 37' 47.35''$. Longitude $79^{\circ} 28' 41.57''$.

Sherman Friend's Hill.

A small monument on summit of a flat cleared hill, owned by Sherman Friend, who lives 300 yards to southwest. It is 5 miles southwest of Friendsville, Maryland.

Melville Friend's Hill.

A small monument on summit of flat cleared hill owned by Melville G. Friend, who lives $5\frac{1}{2}$ miles west of Friendsville, Maryland, and 300 yards west of monument. A road crosses the hill 200 yards west of monument, and another is at foot of hill 300 yards to north of it.

Monument No. 27.

On north side of county road near Mrs. Marshall Friend's house, about 5 miles west of Friendsville, Maryland. It is on south edge of a cleared field bordering the county road and is on south property line of Mrs. Marshall Friend. It is in the Henry Deal surveys. The monument stands diagonally as boundary line has offset to east.

Latitude $39^{\circ} 38' 32.37''$. Longitude $79^{\circ} 28' 41.16''$.

Monument No. 28.

This monument is 347.3 feet eastward from Monument No. 27, and the same description applies to it. It also stands diagonally as boundary line here turns northward.

Latitude $39^{\circ} 38' 32.40''$. Longitude $79^{\circ} 28' 36.72''$.

Monument No. 29.

Is north of a wagon road through land of Jere Teets, and is about $\frac{1}{2}$ mile southeast of his house, and 5 miles west of Friendsville, Maryland.

Latitude $39^{\circ} 38' 58.92''$. Longitude $79^{\circ} 28' 36.92''$.

Jere Teets' Ridge.

A small monument on a flat cultivated ridge sloping to the east, owned by Jere Teets, and is 150 yards east of his house, which is 5 miles west of Friendsville, Maryland. It is a few feet north of an east-west private road.

L. Dedrick's Ridge.

A small monument on a flat, cleared ridge, owned by L. Dedrick. It can be reached from county road on the west by leaving that road near Chestnut Avenue Church and going eastward past house of Joshua Fike.

Monument No. 30.

On summit of Evans Hill, 1 mile west of Fearer Post-office, Maryland, and 150 yards south of the county road from Fearer to Chestnut Avenue Church. The monument is on cultivated land owned by Hosea Thomas, who lives 200 yards to the west.

Latitude $39^{\circ} 40' 15.92''$. Longitude $79^{\circ} 28' 37.50''$.

Monument No. 31.

On north side of county road from Friendsville, Md., to Hazelton, West Va., and is 1 mile west of Fearer, Md. It is 100 yards west of house of A. J. Thomas and on line dividing his property from that of Hosea Thomas.

Latitude $39^{\circ} 40' 26.10''$. Longitude $79^{\circ} 28' 37.58''$.

Monument No. 32.

Is $\frac{1}{2}$ mile southeast of house of Geo. W. Vansickle, and is nearly the same distance southwest of W. M. Fike's house, and about 5 miles west of Selbysport, Maryland. The monument stands in place of a large Spanish Oak tree, which was removed during the survey in 1911. This tree was corner of property of John Van Vansickle, George W. Vansickle, on the west, and in a line of W. Marshall Fike on the east. The land is cleared and the boundary line makes a slight deflection angle to the east. The monument is marked "Span Oak" in addition to other inscriptions.

Latitude $39^{\circ} 41' 14.28''$. Longitude $79^{\circ} 28' 37.94''$.

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F. T. Fike's Ridge.

A small monument in a field owned by F. T. Fike 200 yards east of a road leading from George Vansickle's place to Selbysport, Maryland.

Monument No. 33.

On north side of county road leading towards Selbysport, Maryland, and is about 5 miles west of that place. It is on line between cleared land owned by James McDermott and Isaiah Umble.

Latitude $39^{\circ} 42' 06.58''$. Longitude $79^{\circ} 28' 37.84''$.

Thomas' Ridge.

A small monument on cleared flat ridge owned by M. M. Thomas on the west and by Joseph Thomas on the east. It is 300 yards northwest of house of Joseph Thomas and $\frac{1}{2}$ mile south of Pennsylvania State Line.

Monument No. 34.

At the intersection of the Md.-W. Va. boundary line from the south with the Pennsylvania state line. It is 2 miles southwest of Markleysburg, Pennsylvania, $\frac{1}{4}$ mile east of point where the pike to that place crosses the Penna. line, and $\frac{1}{4}$ mile northeast of house of M. M. Thomas. It is 1051 feet westward from the Mason & Dixon mound in which a stone monument marked, "55.2 M 1885," was set by survey made in 1885 by the states of Pennsylvania and West Virginia.

Monument 34 is 40 feet south of oil pipe line, which runs through Pennsylvania near its southern boundary, and is $\frac{1}{4}$ mile west of a metal gate house of this pipe line. It is in the straight line between Monuments of 1885 numbered 55.2 M and 54.2 M; the latter being 4276 feet to the westward and in center of a Mason & Dixon mound. The land south of Monument No. 34 is owned by M. M. Thomas. The monument sets square and is marked the same as others, excepting that on the north face are the letters PA above the date 1910.

Latitude $39^{\circ} 43' 15.88''$. Longitude $79^{\circ} 28' 37.72''$

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TABLE No. 1.

Horizontal Distances from Monument No. 1,—Distances Between Monuments,—True Bearings,—Magnetic Bearings and Approximate Elevations Above Mean Sea Level.

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monu- ments.	True bearings.	Magnetic bearings October 1, 1910.	Approxi- mate ele- vation above mean sea level.
	(Feet.)	(Feet.)	° ' "	° ' "	
Fairfax.....	3989.13	3989.13	S. 0 56 00 W.		3162 ft.
1.....	0000.00	1208.55	N. 0 56 00 E.		2721 "
2.....	1208.55	767.94	N. 0 47 53 E.	N. 4 40 E.	2894 "
Arnolds Ridge ..	1976.49	9265.63	"	"	3103 "
3.....	11242.12	6664.26	"	"	3343 "
Stahlnaker Ridge	17906.38	3587.76	"	"	2778 "
4.....	21494.14	402.15	N. 71 48 00 W.		2480 "
5.....	21896.29	3655.65	N. 0 27 04 E.	N. 4 19 E.	2536 "
6.....	25551.94	4052.94	"	"	2523 "
Hamsteads Hill .	29604.88	3610.43	"	"	2575 "
7.....	33215.31	587.40	"	"	2512 "
8.....	33802.71	1371.44	N. 0 42 57 E.	N. 4 38 E.	2535 "
Silas Fike Bolt in rock	35174.15	2650.09	"	"	2568 "
Dawson's Hill...	37824.24	3568.81	"	"	2548 "
9.....	41393.05	1391.72	"	"	2441 "
Offuts Hill.....	42784.77	5280.81	N. 0 42 57 E.	N. 4 38 E.	2558 ft.
Stahl's Hill.	48065.58	2621.23	"	"	2707 "
10.....	50686.31	482.30	S. 89 17 03 E.		2464 "

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TABLE NO. 1—*Continued.*

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monu- ments.	True bearings.	Magnetic bearings October 1, 1910.	Approx- imate ele- vation above mean sea level.
11.	51169.11				2444 "
		2503.67	N. 0 41 02 E.	N. 4 42 E.	
12.	53672.78				2420 "
		1188.10	"	"	
Ashby's Hill. . .	54860.88				2617 "
		3321.20	"	"	
Lauer Hill Bolt in rock.	58182.08				2807 "
		1386.99	N. 0 41 02 E.	N. 4 42 E.	
13.	59569.07				2857 "
		7505.82	"	"	
Miller.	67074.89				2619 "
		3042.91	"	"	
Poling.	70117.80				2634 "
		5274.19	"	"	
White.	75391.99				2433 "
		3047.23	"	"	
14.	78439.22				2470 "
		2405.81	"	"	
Morris-Connell. .	80845.03				2548 "
		3536.24	"	"	
15.	84381.27				2587 "
		4873.83	N. 0 22 27 E.	N. 4 34 E.	
Severe.	89255.10				2530 "
		1713.46	"	"	
Browning.	90968.56				2622 "
		7280.65	"	"	
Burchinal road. .	98249.21				2799 "
		4386.10	"	"	
16.	102635.31				3020 "
		4302.13	"	"	
17.	106937.44				3072 "
		9976.18	"	"	
Teet's Road. . . .	116913.62				2572 "
		953.38	"	"	
18.	117867.00				2572 "
		1563.97	"	"	
19.	119430.97				2572 "
		971.09	N. 89 27 27 E.	
20.	120402.06				2572 "
		7553.36	N. 0 17 00 E.	N. 4 29 E.	

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TABLE No. 1—*Continued.*

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monu- ments.	True bearings.	Magnetic bearings October 1, 1910.	Approximate ele- vation above mean sea level.
21.	127955.42				2575 "
		53.69	S. 89 43 00 E.	
22.	128009.11				2575 "
		1441.82	N. 0 24 42 E.	N. 4 48 E.	
23.	129450.93				2630 "
		1213.70	"	"	
Elsey's Hill.	130664.63				2788 "
		2696.96	"	"	
Strawser Road. .	133361.59				2494 "
		3868.96	"	"	
Fike's Hill — South brow. . .	137230.55				2862 "
		951.02	N. 0 24 42 E.	N. 4 48 E.	
24.	138181.57				2867 "
		1041.56	"	"	
Fike's Hill — North brow. . .	139223.13				2843 "
		6760.07	"	"	
25.	145983.20				2582 "
		4621.04	"	"	
Near Reckart road.	150604.24				2344 "
		2534.50	N. 0 24 42 E.	N. 4 48 E.	
H. Friend.	153138.74				2379 "
		3070.16	"	"	
26.	156208.90				2260 "
		568.91	"	"	
Friends Hill.	156777.81				2331 "
		2995.97	"	"	
M. O. Friend. . .	159773.78				2299 "
		991.13	"	"	
27.	160764.91				2229 "
		347.31	N. 89 25 12 E.	
28.	161112.22				2221 "
		2682.81	N. 0 20 07 W	N. 4 10 E.	
29.	163795.03				2193 "
		1493.04	"	"	
Jer. Teets.	165288.07				2282 "
		2411.66	"	"	
L. Dedrick.	167699.73				2331 "
		3887.49	"	"	

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TABLE NO. 1—*Continued.*

Monument name or number.	Horizontal distances from mon. No. 1.	Distances between monu- ments.	True bearings.	Magnetic bearings October 1, 1910.	Approximate elevation above mean sea level.
30.	171587.22	1031.22	"	"	2399 "
31.	172618.44				2344 "
32.	177493.39	3070.97	N. 0 04 55 E.	N. 4 38 E.	2337 "
F. T. Fike.	180564.36				2337 "
33.	182785.95	4549.13	"	"	2289 "
Thomas.	187335.08				2301 "
34.	189798.97	2463.89	"	"	2321 "

TABLE NO. 2.

Magnetic Bearings Between Monuments on the Maryland-West Virginia Boundary Line from the Potomac River to the Pennsylvania line, for October, 1910.

NOTE: The original observations were reduced at the office of the Coast and Geodetic Survey, Washington, D. C., by courtesy of the Superintendent of that Bureau.

Monu- ments Nos.	True bearing.	Magnetic bearing.	Magnetic declination.	Num- ber of ob- serva- tions.
2-4	N. 0° 47' 53" E.	N. 4° 40' E.	3° 52' W.	20
5-7	N. 0° 27' 04" E.	N. 4° 19' E.	3° 52' W.	7
8-10	N. 0° 42' 57" E.	N. 4° 38' E.	3° 55' W.	8
11-15	N. 0° 41' 02" E.	N. 4° 42' E.	4° 01' W.	6
15-18	N. 0° 22' 27" E.	N. 4° 34' E.	4° 12' W.	13
20-21	N. 0° 17' 00" E.	N. 4° 29' E.	4° 12' W.	2
23-27	N. 0° 24' 42" E.	N. 4° 48' E.	4° 23' W.	5
28-32	N. 0° 20' 07" W.	N. 4° 10' E.	4° 30' W.	5
32-34	N. 0° 04' 55" E.	N. 4° 38' E.	4° 33' W.	3

If values for shorter intervals are desired, it will probably be best to obtain them by interpolating the declina-

tion. The value for the line between Nos. 20 and 21 is probably less reliable than the others, as it depends upon only two results which differ by 10'.

We return herewith a financial statement showing in detail the money actually expended by the Commissioners for surveying and marking the boundary line under the decree in this case, including the per diem compensation of all the Commissioners. We also return herewith the several exceptions made and filed before the Commissioners by Mr. W. McCulloh Brown, one of the Commissioners, during the progress of the work, together with such explanations, observations and notes as we have thought proper to make concerning said exceptions for the information of the court.

We also return herewith a number of photographs taken upon the ground illustrating the monuments erected by us to mark the line as run by us, showing the character of the work, method of construction and location of such monuments.

Respectfully submitted,

JULIUS K. MONROE,
SAMUEL S. GANNETT,
Commissioners.

And this cause coming on this day to be heard upon said motion and upon the said report of Julius K. Monroe and Samuel S. Gannett, and upon the separate report of W. McCulloh Brown, one of the said Commissioners, including his protest and exceptions in respect to said report of Commissioners Monroe and Gannett, and also upon the supplemental report filed by said Commissioners Monroe and Gannett; and the court being now fully advised in the premises:

Mr. Isaac Lobe Straus and Mr. Edgar Allen Poe for complainant.

Mr. Wm. G. Conley and Mr. G. E. Price for defendant.

It is thereupon adjudged, ordered and decreed that the

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said exceptions filed on behalf of the State of Maryland, as aforesaid, to said report of Commissioners Julius K. Monroe and Samuel S. Gannett, be, and they are, hereby overruled, and that said report be, and the same is, hereby in all respects confirmed.

It is further adjudged, ordered and decreed that the line as delineated and set forth in said report of Commissioners Monroe and Gannett, and upon the map accompanying the same and referred to therein, which line has been marked with permanent monuments, as stated in said report, be, and the same is hereby, established, declared and decreed to be the true boundary line between the said States of Maryland and West Virginia, and said map is hereby directed to be filed as part of this decree.

And it appearing that the total expenses and compensation of said Commissioners and the expenditures attending upon the discharge of their duties amount to the sum of \$17,154.60, it is further adjudged, ordered and decreed that the same be, and they are, hereby approved and allowed as part of the costs of this suit, to be borne equally between the parties to this cause. And it appearing from said report that the State of Maryland has already paid \$5,038.40 of said amount, and that the State of West Virginia has already paid \$12,116.11 of said amount, it is ordered that said amounts be credited to said States respectively in the settlement of the costs of this suit between them in accordance with the provisions of this decree and the former decrees entered herein.

It is further adjudged, ordered and decreed that the clerk of this court do transmit to the chief magistrates of the States of Maryland and West Virginia copies of this decree, duly authenticated under the seal of this court, omitting from said copy, however, the map filed with the report of said Commissioners Monroe and Gannett above mentioned.

May 27, 1912.

THE JASON.¹

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

No. 220. Argued April 18, 1912.—Decided May 13, 1912.

A general average agreement inserted in bills of lading, providing that if the owner of the ship shall have exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, the cargo shall contribute in general average with the shipowner even if the loss resulted from negligence in the navigation of the ship, is valid under the Harter Act, and entitles the shipowner to collect a general average contribution from the cargo-owners in respect to sacrifices made and extraordinary expenditures incurred by him for the common benefit and safety of ship, cargo and freight subsequent to a negligent stranding.

Under § 3 of the Harter Act, the cargo-owners under the same circumstances have a right of contribution from the shipowner for sacrifices of cargo made subsequent to the stranding for the common benefit and safety of ship, cargo and freight.

Under the same circumstances the cargo-owners cannot recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowners made for the same purpose.

The essence of general average contribution is that extraordinary sacrifices made and expenses incurred for the common benefit are to be borne proportionately by all who are interested.

The Irrawaddy, 171 U. S. 187, distinguished.

Questions certified in case reported in 162 Fed. Rep. 56, and 178 Fed. Rep. 414, answered.

Cross libels were filed in the United States District Court for the Southern District of New York between the owner of the steamship *Jason* and the firm of Arbuckle Brothers, owners, and the Insurance Company of North

¹ The docket title of the case is *Actieselskabet "Jason" v. John Arbuckle et al.*

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America, insurers, of part of that vessel's cargo, to recover general average contributions. The District Court dismissed both libels. 162 Fed. Rep. 56. Upon appeal the Circuit Court of Appeals at first filed an opinion for affirmance (178 Fed. Rep. 414), but afterwards granted a rehearing, as a result of which the questions of law at issue were certified to this court as follows:

"Statement of Facts.

"The facts upon which the questions arise are these:

"On July 30, 1904, the Norwegian Steamship *Jason* while bound on a voyage from Cienfuegos, Cuba, to New York, with general cargo, including 12,000 bags of sugar, consigned to Arbuckle Brothers, and insured with the Insurance Company of North America, stranded off the south coast of Cuba, through the negligence of her navigators. The steamship was seaworthy and was properly manned, equipped and supplied.

"The vessel was relieved from the strand on August 9 as the result of sacrifices by jettison of 2,042 bags of sugar (1,657 bags being the property of Arbuckle Brothers), of sacrifices and extraordinary expenditures voluntarily made or incurred by the shipowner through the master, and of the services of salvors specially employed. Said sacrifices and expenditures were necessary to relieve ship, cargo and freight from common peril. She then completed her voyage, and made delivery of the remainder of her cargo to the several consignees at New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters 'in accordance with established usages and laws in similar cases.'

"The bills of lading for all of the *Jason's* cargo contained the following provision:

" 'General average payable according to York-Antwerp

Rules, and as to matters not therein provided for according to usages of port of New York.

“ ‘If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness.’

“Both parties pleaded the bills of lading as constituting the contract of carriage.

“A general average adjustment was afterwards made in New York by Johnson & Higgins, adjusters appointed in the average bond. Both parties presented their claims to the adjusters for sacrifices made by them respectively for the common benefit and safety of the adventure. The adjusters allowed in the General Average account the compensation of the salvors, the sacrifices of cargo, and the sacrifices and extraordinary expenditures of the shipowner, and each of the interests was credited with such amounts as had been paid by it for the common benefit.

“The adjustment was prepared in accordance with York-Antwerp Rules, as provided for in the bill of lading, and otherwise in accordance with established usages and laws.

“The adjustment and apportionment of General Average, so made, showed a balance due from Arbuckle

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Brothers of \$5,060.24, which the latter refused to pay. The grounds of such refusal were that the stranding resulted from the ship's negligence, and that the general average clause, above quoted, contained in the bills of lading is invalid.

"The original libel was filed by the owner of the *Jason* against Arbuckle Brothers and its guarantor, the Insurance Company of North America, to recover this amount.

"Arbuckle Brothers and the Insurance Company of North America filed a cross libel to recover the sum of \$3,506.50, which they alleged would be due them on an adjustment of the general average losses, if the shipowner's losses and sacrifices were excluded from the General Average account by reason of the fact that the stranding was caused by negligence of the ship's navigators. They claimed that the shipowner's sacrifices and extraordinary expenditures, made for the common benefit and safety of the adventure after the stranding, should not be allowed in the adjustment. If said sacrifices and expenditures should be excluded from the adjustment and the value of the ship should be taken account of as a contributory interest, the adjustment would show a balance in favor of Arbuckle Brothers.

"The District Court made a decree dismissing both libels, from which decree both parties duly appealed to this Court.

"Questions Certified.

"Upon the facts above set forth the questions of law concerning which this Court desires the instruction of the Supreme Court are:

"1. Whether the general average agreement above quoted from the bills of lading is valid, and entitles the shipowner to collect a general average contribution from the cargo owners, under the circumstances above stated, in respect of sacrifices made and extraordinary expendi-

tures incurred by it subsequent to the stranding for the common benefit and safety of ship, cargo and freight.

"2. Whether, in view of the provisions of the third section of the Harter Act the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight?

"3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

"In accordance with the provisions of Section 6 of the Act of March 31, 1891, establishing courts of appeals, the foregoing questions of law are by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court."

Mr. J. Parker Kirlin, with whom *Mr. Charles C. Burlingham* was on the brief, for The Jason:

The facts present a case of general average within the meaning of the clause in the bill of lading.

All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested. *Birkley v. Presgrave*, 1 East, 220; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *McAndrews v. Thatcher*, 3 Wall. 348; *The Star of Hope*, 9 Wall. 203; Lowndes, 5th ed., p. 25.

The case was one of general average, whether the shipowner's sacrifices should receive contribution or not. It would have been a case of general average even if there had been but one interest to contribute. *Montgomery v. Indemnity Marine Ins. Co.* (1901), 1 Q. B. 147; (1902), 1 K. B. 734; *Potter v. Ocean Ins. Co.*, 3 Sumn. 27; *Risley v.*

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Ins. Co. of N. A., 189 Fed. Rep. 529. The owners of the cargo, in any event, would have been entitled to contribution from one another. *Strang v. Scott*, 14 App. Cas. 601, 609, 610; *The City of Para*, 69 Fed. Rep. 414; 74 Fed. Rep. 565, 567. The owners of cargo would also be entitled, notwithstanding the fault of the shipowner, to demand a contribution from him, subject to the reciprocal right of the shipowner to receive contribution in respect of his losses and sacrifices from them. *The Strathdon*, 94 Fed. Rep. 206; 101 Fed. Rep. 600.

The case being one of general average, the general average clause in the bills of lading makes the shipowner's sacrifices and extraordinary expenses proper subjects of contribution in an affirmative suit against the owners of cargo. *Ralli v. Troop*, 157 U. S. 386, 393; *The Bona* (1905), Probate, 125; *McAndrews v. Thatcher*, 3 Wall. 348, 366; *The Star of Hope*, 9 Wall. 203; Lowndes, Law of General Average, 5th ed. (1912), § 37, p. 172.

The only substantial question in dispute is whether the shipowner, by force of the general average clause in the contract, can have his sacrifices and extraordinary expenses brought into the adjustment for contribution.

The answer to the first question is not controlled by the decision of this court in the case of *The Irrawaddy*, 171 U. S. 187. In this case the bill of lading contained a clause closely following the language of § 3 of the Harter Act of Feb. 13, 1893, c. 105, 27 Stat. 445. There was no such clause in "*The Irrawaddy*."

The question of the right of the parties to contract for a contribution in general average, in a case of negligent stranding, was not in issue, does not appear from the briefs to have been argued, and, therefore, cannot properly be considered to have been decided by anything that the court may have said in the course of its opinion.

The court expressly decided that the Harter Act does modify the public policy as previously declared by the

courts, which theretofore had refused to permit a carrier to exempt himself from the consequences of the negligence of his servants, in the performance of the essential duties of his employment.

To that extent, therefore, the public policy of the country and the rights and duties of shipper and carrier were held to be modified and changed by the Harter Act.

Whether this modification of public policy and of the shipowners' duty and liability by statute does not pave the way for a lawful contract that losses arising from sacrifices made by the master, in his quality of agent, in emergency, for all concerned, shall be apportioned in general average over all the interests benefited by the sacrifices, was not decided and that question is now, for the first time, presented for decision.

The first question certified should be answered in the affirmative.

The general average provisions contained in the bills of lading constitute a lawful contract mutually binding on the owners of the cargo and of the ship.

The general average clause does not purport to relieve the carrier from the performance of any duty that he owed to the cargo. It deals only with sacrifices voluntarily made, and with extraordinary expenses voluntarily incurred for the common safety.

As to the history of the York-Antwerp Rules of General Average, see App. Y 5th ed., Lowndes on General Average, pp. 788-798.

Where these rules are adopted in a contract of carriage, as in this case, they are held to relate "to the subjects of contribution in general average." *Ralli v. Troop*, 157 U. S. 386, 412; *Magdala S. S. Co. v. Baars*, 101 Fed. Rep. 303; *The Santa Ana*, 154 Fed. Rep. 800; *Greenshields v. Stephens* (1908), 1 K. B. 51; (1908), A. C. 431.

Such contribution shall be payable in accordance with the rules, as a legal right, unless the person asked to con-

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tribute can show that the claimant is debarred from such right by an actionable wrong on his own part which occasioned the sacrifice. *Stewart v. West India S. S. Co.*, L. R., 8 Q. B., 88, 95; affirmed, *Id.*, 362, 363; *Harris v. Scaramanga*, L. R., 7 C. P., 481, 488, 489; *Greenshields v. Stephens*, *supra*; *De Hart v. Campania &c.*, 8 Com. Cas. 42, 314; *The Santa Ana*, 154 Fed. Rep. 800; *Anglo-Argentine Agency v. Temperley* (1899), 2 Q. B. 403, 408, 412-413; *The Rossija*, 21 R. I. D. M. 215.

It is implied in every contract for the carriage of goods from or to a port in the United States that the shipment is to be carried and delivered subject to the terms and provisions of the Harter Act. *The Silvia*, 171 U. S. 462. It is also implied that the parties will mutually contribute to any general average loss that may arise or happen during the voyage. *Burton v. English*, 12 Q. B. D. 218, 223; *Ralli v. Troop*, 157 U. S. 396-397; *Anderson v. Ocean S. S. Co.*, 10 App. Cas. 107, 112, 115.

The rights, duties and liabilities are not any different where the stranding is due to nautical faults, from those which arise when the stranding is due to a sea peril. *Ralli v. Troop*, 157 U. S. 386, 397; *The Gratitudine*, 3 C. Rob. 240; *Anglo-Argentine Agency v. Temperley* (1899), 2 Q. B. 403; *Carver's Carriage by Sea*, 5th ed., 1909 (§§ 294-295).

The master in an emergency such as was involved in this case has authority to jettison. *McAndrews v. Thatcher*, 3 Wall. 347, 366; *Star of Hope*, 9 Wall. 203, 228.

Damage voluntarily done to the framework or appurtenances of the ship or by extraordinary use of the machinery is also the subject of contribution as a sacrifice. *Birkley v. Presgrave*, 1 East, 220; *The Bona* (1895), P. D. 125, 129, 131, 138-141; *Robinson v. Price*, 2 Q. B. D. 91; *Int. Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, 312; *Watson v. Ins. Co.*, 7 Johns. 57, 62; *Providence & Stonington S. S. Co. v. Phœnix Ins. Co.*, 89 N. Y. 559;

The Star of Hope, 9 Wall. 203, 228. *The Yucutan*, 139 Fed. Rep. 894 appears to be unsound in principle.

In *The Ettrick*, 6 P. D. 127, and *Strang v. Scott*, 14 App. Cas. 601, there was no contractual exemption, and no statute in those cases, that exonerated the shipowners from the faults of their servants; and see *Greenshields v. Stephens* (1908), 1 K. B. 51; *The Enrique*, 7 Fed. Rep. 490; *The Bodo*, 56 Fed. Rep. 980; *The Santa Ana*, 154 Fed. Rep. 800; *DeHart v. Campania Anonima Seguros Aurora*, 8 Commercial Cases, 42 and 314; *Harris v. Scaramanga*, L. R., 7 C. P., 481.

The general average clause is not contrary to public policy as defined by this court. *Railroad Co. v. Lockwood*, 17 Wall. 357; *The Montana*, 129 U. S. 397, distinguished; and see *The Delaware*, 161 U. S. 459; *The Irrawaddy*, 171 U. S. 187, 193.

Since the Harter Act the general average clause does not contravene public policy. It does not undertake to exempt the shipowner from the performance of any of the essential duties of his employment. He has been absolved from responsibility for the stranding and its consequences by the Harter Act. *Pacific v. Honduras*, 69 Fed. Rep. 414; 74 Fed. Rep. 504.

A clause of which the main intent and purpose is not to relieve the carrier from negligence in the performance of his essential duties, may be supported as reasonable and valid, even though its incidental or contingent effect may be to relieve him, in some measure, from the consequences of acts of servants for which, in its absence, he would be responsible. *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Hohl v. North German Lloyd*, 175 Fed. Rep. 544; *The Queen of the Pacific* (*Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*), 94 Fed. Rep. 180; 180 U. S. 49; *The Persiana*, 185 Fed. Rep. 396; *Phœnix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312; *Express Co. v. Caldwell*, 21 Wall. 264, 268.

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Regulation of general average by agreement is permitted by the laws of a great majority of the leading maritime countries. *England*—*Simonds v. White*, 2 B. & C. 805; *DeHart v. Campania &c.*, 8 Com. Cas. 314; Lowndes on Gen. Average, 5th ed. 34; *France*—§§ 398, 405, Code of Commerce; *Crowley v. Saint Freres*, 10 Revue Internationale du Droit Maritime, 147, cited *The Irrawaddy*, 171 U. S. 199; *Le Normand v. La Compagnie &c.*, 1 Dalloz, 471; Valroger, Vol. 5, p. 11; 4 Desjardins, Droit Maritime, pp. 121, 122; 2 Lyon-Caen & Renault, Droit Maritime, pp. 92, 93. *Germany*—Commercial Code of 1900, § 702; Lowndes, 5th ed., p. 521; *Judgment of the Reichs-Gerichte*, 1905, S. S. Rossya; Lowndes, 5th ed., p. 547; 21 Revue Internationale du Droit Maritime, 215. *Belgium*—Arts. 145–148, Code of Commerce of 1908; Lowndes, 5th ed., p. 463; *Navire Llansannor*, 22 Revue Internationale du Droit Maritime, 534; *The Irrawaddy*, 171 U. S. at pp. 200, 201. *Italy*—Arts. 642, 643, Code of Commerce of 1883; Lowndes, 5th ed., p. 597; Lowndes, 5th ed., p. 610, note T; the Court of Appeal of Italy, *Compagnie &c. v. De Giovanni*, 21 Revue Internationale du Droit Maritime, 689. *Chili*—Arts. 1086, 1090, Code of 1865; Lowndes, 5th ed., p. 485. *Portugal*—Art. 634, § 2, Code of 1889; Lowndes, 5th ed., p. 639. *Norway*—Lowndes, 5th ed., p. 636. As to other countries, see Lowndes, 5th ed., p. 567.

These conditions are found in the Codes of Greece, 1910, §§ 193, 194, Lowndes, 5th ed., p. 562; *The Argentine Republic*, Code, Articles 1313, 1318, Lowndes, 5th ed., pp. 422, 427; *Brazil*, Code, Articles 762, 765, Lowndes, 5th ed., pp. 478, 479.

The decisions of the highest courts of France, Germany, Belgium and Italy, are identical in principle with those of the English courts that where nautical faults are excepted, contribution is allowed to the shipowners' sacrifices as though he were a stranger to the fault. In this case the clause carries the agreement much further It

makes the claim for contribution to the shipowners' sacrifices, in such a case, the subject of express agreement instead of leaving it to inference or construction.

See Proceedings of the International Law Association, 21st Rep. Antwerp, 1903, p. 231; Carver's Carriage by Sea, 5th ed., p. 980.

As to the impolicy of adopting any general rule which will tend to exempt one class of sacrifices from contribution rather than another, the decisions of this court are in accord with those of Massachusetts and of England. *The Star of Hope*, 9 Wall. 203, 230, citing *Emerigon*, p. 467; *Marwick v. Rogers*, 163 Massachusetts, 50; *Johnson v. Chapman*, 19 C. B. N. S. 563, 582; *The Strathdon*, 94 Fed. Rep. 206; 101 Fed. Rep. 600.

The second question, which asks whether, in view of the provisions of § 3 of the Harter Act, and of the general average clause, the cargo-owners have a right to contribution from the shipowner for sacrifices of cargo made subsequent to a negligent stranding in order to save the joint interests from common peril, should be answered in the affirmative. Section 482, Rev. Stat. There is a similar statute in England. *The Roanoke*, 46 Fed. Rep. 297; 53 Fed. Rep. 270; affirmed, 59 Fed. Rep. 161; *The Rapid Transit*, 52 Fed. Rep. 320; *The Santa Ana*, 154 Fed. Rep. 800; *Schmidt v. Royal Mail S. S. Co.*, 45 L. J. Q. B. 646; *White Cross Co. v. Savill*, 8 Q. B. D. 653; *Green-shields v. Stephens* (1908), 1 K. B. 51; affirmed (1908), App. Cas. 431; *Phœnix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312.

It seems impossible to make up an adjustment according to the accepted principles of general average, under the rule stated in the Court of Appeals' opinion.

The third question, which asks whether in view of the general average clause, the cargo-owners, in a case of stranding arising from faulty navigation, can recover contribution from the shipowner in respect of general

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average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the ship-owner made for the same purpose, should be answered in the negative. *The Strathdon*, 94 U. S. 206.

Reciprocity of contribution is a fundamental idea in the law of general average. *Birkley v. Presgrave*, 1 East, 220, 228; *Svendsen v. Wallace*, 13 Q. B. D. 69, at p. 73.

Definitions of general average identical in substance, if not in form, are found in other English decisions. *Robinson v. Price*, 2 Q. B. D. 91; *The Bona* (1895), Probate, 125, 129, 131, 138-141; and in the Federal and state courts of this country, *Ins. Co. v. Ashby*, 13 Pet. 331, 338; *McAndrews v. Thatcher*, 3 Wall. 347, 366; *The Star of Hope*, 9 Wall. 203, 228; *Sturges v. Cary*, 2 Curtis, 59 and 382; *Potter v. Ocean Ins. Co.*, 3 Sumn. 27; *The Strathdon*, 94 Fed. Rep. 206; *International Navigation Co. v. Atlantic Mutual Ins. Co.*, 100 Fed. Rep. 304, 312; *Watson v. Ins. Co.*, 7 Johns. (N. Y.) 57, 62; *Providence & Stonington S. S. Co. v. Phoenix Ins. Co.*, 89 N. Y. 559; Lowndes on General Average, 5th ed., p. 42.

The doctrine of reciprocity is found in nearly all the continental codes of Europe, substantially in the form in which it is found in the "Ordonnance" of Louis XIV, Tit. 7, Arts. 2 and 3; 4 Pardessus, 380.

The only important exceptions to the doctrine of reciprocity of contribution that have been admitted in practice, in England, or in this country, relate to passengers' baggage and to deck loads; and these exceptions are not based on equitable principles.

Contribution to passengers' baggage has been allowed in this country. Though ordinarily it does not contribute, yet if sacrificed it does contribute. *Heye v. North German Lloyd*, 33 Fed. Rep. 60; 36 *id.* 705. There are no decisions on the point in England. See Lowndes, 5th ed., p. 375; Arnould on Insurance, 8th ed., p. 936.

The second important exception relates to deck load.

This, also, is not based on equitable grounds. The exception, indeed, is by no means universal. Contribution to a deck load loss is exacted where it is customary, in particular trades, to carry a deck load. Lowndes, 5th ed., pp. 59, 71, 745; *Brown v. Cornwell*, 1 Root (Conn.), 60, decided in 1773; *Johnson v. Chapman*, 19 C. B. (N. S.) 563; *Strang v. Scott*, 14 App. Cas. at p. 609; *Wright v. Marwood*, 7 Q. B. D., 62, 67, 68.

The case of deck-load is, therefore, no authority for the claim that reciprocity of contribution is not an essential condition of general average, and that the shipowner's sacrifices could be denied the right of contribution without violating the fundamental rule of general average. *The Strathdon*, 94 Fed. Rep. 210, 211.

Mr. Lawrence Kneeland for the cargo-owners:

The bill of lading clause, to which the first question relates, in so far as it imposes upon the cargo-owner the obligation to contribute in general average to the ship's sacrifices made to save the vessel, freight and cargo from a situation of peril resulting from the negligence of her master and crew, is contrary to public policy and invalid. *N. Y. & Cuba Mail S. S. Co. v. Ansonia Clock Co.*, 139 Fed. Rep. 894.

Whether this bill of lading clause is valid or invalid depends upon whether it is one such as the law can recognize as reasonable and not inconsistent with sound public policy. *Express Company v. Caldwell*, 21 Wall. 264. See *The Irrawaddy*, 171 U. S. 187.

The limitation of the right to contribution is well settled and established by the English and American authorities. Lowndes on General Average; Goullie on General Average, p. 15; *The Ontario*, 37 Fed. Rep. 220; *Snow v. Perkins*, 39 Fed. Rep. 334; *Schloss v. Heriot*, 14 C. B. (N. S.) 59; *The Nicanor*, 44 Fed. Rep. 504, 509; *Strang v. Scott*, 14 A. C. 601.

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Argument for the cargo-owners.

This court has, therefore, declared that, prior to the enactment of the Harter Act, sound public policy forbade the participation by a shipowner in a general average contribution when the danger which necessitated the general average sacrifices was occasioned by the negligence of the shipowner's servants, and that that act has not changed the law in that respect.

The Harter Act confers no right to contract for such right, and indeed confers no right to contract for any exemption. The act itself gives and measures the exemption and no right to contract for any further exemption or privilege exists.

The master of a vessel in a situation of peril occasioned by faulty navigation is bound to exert himself and to exercise his best judgment in rescuing the property which has been imperilled by his neglect.

No obligation whatever rests upon the cargo-owner. *The Nicanor*, 44 Fed. Rep. 504.

The acceptance of a bill of lading containing a contract of waiver is not the voluntary act of the shipper, for he has no real choice. *Liverpool Steam Co. v. Phœnix Ins. Co.*, 129 U. S. 441; *The Portsmouth*, 9 Wall. 682, 687.

If the property can be saved only by a sacrifice of some part thereof, it is the master's duty to make such sacrifice, irrespective of any question of contribution thereto.

The decisions of the English courts and of the courts of certain continental countries cited on the brief of counsel for the Jason are based upon a different view from that taken by this court. *The Carron Park*, 15 P. D. 203; *Mary Thomas* (1894), Prob. 104; *Millburn v. Jamaica Co.* (1900), 2 Q. B. 540.

Question nevertheless exists as to what decision will be reached by the highest English court upon this question. See *Greenshields v. Stephens* (1908), 1 K. B. 51.

The principal controversy in England, at the present time, appears to be whether a mere exception in a bill

of lading has any effect whatever upon contribution in general average. See Mr. Carver's position in *Journal of the Society of Comparative Legislation*, 1903, Vol. 5, p. 227.

The same difference in view as to public policy is involved in the continental decisions.

The French law, like the English, permits the utmost freedom of contract. *La Normand v. Compagnie Gen. Trans.*, 1 Dalloz, 479; *Rassija*, cited on the brief for the *Jason*; German Maritime Code, § 702.

As to the decisions of the Belgian and Italian courts, the codes of both countries declare that sacrifices or expenditures occasioned by unseaworthiness of the ship or negligence of the captain or crew or by *vice propre* of the cargo are particular average. Italian Code, §§ 643-646; Belgian Code, § 103.

As to the second question certified, whether the Harter Act is a defense to the cargo-owners' claim for contribution to their general average sacrifices and losses, neither exemptions in a bill of lading nor statutory exemptions from liability relieve a shipowner from contribution to general average sacrifices of cargo. *Schmidt v. Royal Mail S. S. Co.*, 45 L. J. Q. B. 646; *Crooks v. Allan*, L. R., 5 Q. B. D., 218; *Burton v. English*, L. R., 12 Q. B. D., 218; *The Roanoke*, 59 Fed. Rep. 161.

Neither § 4282 of Rev. Stat. nor clauses in the bill of lading providing that the carrier should not be liable for loss or damage arising from fire or wetting, or that the carrier should have the benefit of any insurance on the property, release the carrier from liability to contribute towards general average. *The Santa Ana*, 154 Fed. Rep. 800; *The Wm. J. Quillan*, 175 Fed. Rep. 207.

While in none of the cases did the danger result from negligence, negligence of the carrier's servants cannot affect his liability to contribute. *The Strathdon*, 94 Fed. Rep. 208.

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Argument for the cargo-owners.

If an innocent shipowner must contribute notwithstanding the statute, *a fortiori* a negligent shipowner must do so. *Strang v. Scott*, 14 A. C. 609.

The contention that because the shipowner is not entitled to claim contribution he is not liable to contribute appears to be based upon the fact that ordinarily the right to contribution and the liability to contribute are reciprocal. But see *Heye v. North German Lloyds*, 33 Fed. Rep. 64.

The third question certified is: Assuming that the cargo-owner is entitled to recover contribution from the shipowner, is his enforcement of such right conditional upon his contributing to any extent to the losses of the shipowner?

The master of a vessel, stranded as a result of his negligence, may save the common adventure by sacrificing some part of the ship's appliances or making extraordinary use of her engines, or he may jettison cargo, or he may, as in the present case, do both.

If the general average sacrifice is a sacrifice of the vessel alone the shipowner cannot recover contribution thereto from the cargo.

If the property is saved by a jettison of the cargo alone the vessel is bound to contribute to such jettison. *The Strathdon*, 94 Fed. Rep. 210, distinguished, as violating the fundamental principle of the law of general average, that all losses shall be borne equally. Lowndes, Gen. Av., 4th ed., p. 38; Arnould, Mar. Ins., 8th ed., § 974.

The *Strathdon* decision is in error, as it treats the statute as blotting out the fault of the shipowner and placing him in the position of an innocent party. See *The Ettrick*, 6 P. D. 127; *The Hector*, 8 P. D. 218.

The *Strathdon* decision also fails to distinguish between damages caused directly by the negligent navigation and the general average sacrifices of the cargo to avert further loss.

For the distinction between claims for damages by the original disaster and claims for contribution to sacrifices voluntarily made to avoid further loss therefrom, see *The Roanoke*, 59 Fed. Rep. 161, 164; *Pacific Mail S. S. Co. v. N. Y. & H. & R. Min. Co.*, 74 Fed. Rep. 568.

Confusion has arisen on this question owing to the failure to recognize that it is the law not only that no one can recover general average contribution if the danger to avert which a sacrifice was made has arisen from the fault of the claimant or his servants, but that those who are innocent can recover contribution from the guilty; that this latter right exists notwithstanding and irrespective of the liability in damages of the negligent shipowner, and that it is only the shipowner's liability in damages which has been affected by the Harter Act. See Lowndes on General Average, 34; *Strang v. Scott*, 14 App. Cases, 601; Carver on Carriage by Sea, 5th ed., § 373a; *The Irrawaddy (Crystal v. Flint)*, 82 Fed. Rep. 472, 475.

There is no element of unfairness to the shipowner in the contention of the cargo-owners in this case, for the principle we contend for is applicable to every party or interest, whether shipowner or cargo-owner, whose negligence or fault has occasioned the danger which the sacrifice has averted. 2 Parsons' Mar. Ins. 217.

In the absence of an established usage in the particular trade to carry on deck, contribution to the jettison of deck cargo is not allowed, yet if the deck cargo be saved it contributes to the sacrifices of other interests. 3 Kent's Com., 3d ed., p. 240; Phillips on Insurance, § 1396; Mac-lachlan, Law of Merchant Shipping, 5th ed., p. 766.

MR. JUSTICE PITNEY, after stating the case as above, delivered the opinion of the court.

That the facts present a case of general average within the meaning of the clause embodied in the bills of lading is entirely clear. There was a common, imminent peril

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involving ship and cargo, followed by a voluntary and extraordinary sacrifice of property (including extraordinary expenses), necessarily made to avert the peril, and a resulting common benefit to the adventure. *McAndrews v. Thatcher*, 3 Wall. 347, 365; *Star of Hope*, 9 Wall. 203, 228; *Ralli v. Troop*, 157 U. S. 386, 394.

The principal controversy is upon the question of the validity of the agreement that if the shipowner "shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped and supplied," then, in case of danger, damage, or disaster resulting from (*inter alia*) negligent navigation, the cargo-owners shall not be exempted from liability for contribution in general average, but with the shipowner shall contribute as if such danger, damage, or disaster had not resulted from negligent navigation. The facts show that the shipowner had fulfilled the condition imposed upon him by this clause; that is, he had "exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied." The question presented for solution turns upon the effect of the third section of the act of Congress approved February 13, 1893, c. 105, 27 Stat. 445 (U. S. Comp. Stat., 1901, p. 2946), known as the Harter Act, and of the decision of this court in the case of *The Irrawaddy*, 171 U. S. 187.

Prior to the Harter Act it was established that a common carrier by sea could not by any agreement in the bill of lading exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 438; following *New York C. Railroad Co. v. Lockwood*, 17 Wall. 357.

But of course the responsibilities of the carrier were subject to modification by law, and with respect to vessels transporting merchandise from or between ports of the United States and foreign ports they were substantially

modified by the Harter Act. The first three sections of this enactment are pertinent to the present discussion and are set forth in full in the margin.¹

Section 1 deals with the shipowner's responsibility for the proper loading, stowage, custody, care and delivery of the cargo, prohibits the insertion in any bill of lading of an agreement relieving him from responsibility for negligence in respect to these duties, and declares such agreements null and void. Section 2 prohibits the insertion in any bill of lading of an agreement lessening or avoiding the obligation of the shipowner to "exercise due diligence (to) properly equip, man, provision and outfit said vessel and to make said vessel seaworthy," etc. Section 3 proceeds to limit the responsibility of a shipowner who shall have exercised due diligence to make his vessel seaworthy and properly manned, equipped and supplied. Instead of merely sanctioning covenants and agreements limiting his liability, Congress went further

¹ The title and first three sections of the Harter Act are as follows:

"An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

"Be it enacted, etc., That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit

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and rendered such agreements unnecessary by repealing the liability itself, declaring that if the shipowner should exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped and supplied, neither the vessel, her owner or owners, etc., should be responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel, etc., etc. The antithesis is worth noting. Congress says to the shipowner—"In certain respects you shall not be relieved from the responsibilities incident to your public occupation as a common carrier, although the cargo owners agree that you shall be relieved; in certain other respects (provided you fulfill conditions specified) you shall be relieved from responsibility, even without a stipulation from the owners of cargo."

In the case now before us it is argued in behalf of the shipowner that since by the third section of the Harter Act he is absolved from responsibility for the negligence

said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

"SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port of the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

of his master and crew under the circumstances existing, there is nothing in the policy of the law to debar him from bargaining with the owners of cargo for a participation in the general average contribution. In behalf of the cargo-owners it is insisted that the construction placed upon the legislation in question by this court in *The Irrawaddy*, 171 U. S. 187, leaves the shipowner still disabled from making an agreement with the cargo-owners for a participation with them in general average contributions resulting from negligent navigation or management of the ship by its master and crew.

The latter view was adopted by the District Court in *New York & Cuba Mail S. S. Co. v. Ansonia Clock Co.*, 139 Fed. Rep. 894, where a clause identical with the one now under consideration was held invalid. This decision was apparently followed, although not cited, by the same court (162 Fed. Rep. 56), and by the Circuit Court of Appeals (178 Fed. Rep. 414, 416), in the case now under review. In reaching this result the courts below have, as we think, misconceived the effect of the language used by Mr. Justice Shiras, speaking for this court, in *The Irrawaddy*, and have given to that decision an import quite beyond its legitimate scope. In that case there was no agreement between shipowner and cargo-owner respecting general average, nor respecting the consequences of a stranding or other peril that might result from the negligence of the master or crew of the vessel. On familiar grounds, all of the expressions employed in the opinion are to be construed in the light of the facts of the case and the question actually presented for decision. This was, whether § 3 of the Harter Act, *proprio vigore*, gave to the shipowner, under the circumstances, a right to general average contribution for sacrifices made by him subsequent to the stranding of the vessel in successful efforts to save her and her freight and cargo. It was pointed out in the opinion that previous to that enactment, in the

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case of a loss arising from the ship's fault, the shipowner was excluded from contribution by way of general average, and was also legally responsible to the owner of the cargo for loss and damage so occasioned; and that it was against the policy of the law to allow stipulations that would relieve a carrier from such liability. It was, however, recognized that it was "competent for Congress to make a change in the standard of duty." It was remarked that by the first and second sections of the Harter Act shipowners were prohibited from inserting in their bills of lading agreements limiting their liability in certain respects, and that the third section by its own terms limited their liability in other respects. The opinion, after stating that as the law stood before the passage of the act the shipowner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in officers and crew, and that in this particular the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who might so contract, proceeded to say (p. 193) that "Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty."

This language is laid hold of as indicating that the decision proceeded upon the ground that Congress thought it improper to permit owners of vessels to contract for exemption from liability. What it really means, as will be observed, is, that Congress went further, and by its own enactment exempted them from liability, under given conditions, for the consequences of faulty navigation.

The point of the decision in *The Irrawaddy* (and as an authority the case goes no further), is, that while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence.

It is, however, further insisted in behalf of the cargo-owners that the agreement in question is contrary to public policy in another respect, namely, in that it attempts to relieve the shipowner from one of the essential duties arising out of the relation of carrier and shipper, and from which the Harter Act has not relieved him. The argument is that although that act exempts him from the consequences of the negligent stranding, it leaves him still under the duty and obligation of caring for and preserving the cargo, after the stranding; that whenever the safety of the property entrusted to the shipowner is menaced, whether the peril be occasioned by *vis major* or by fault, and whether such fault be or be not of such character as to fall within the third section of the Harter Act, "the master is nevertheless bound to exert every effort to save the property, and if he fail in this duty his owners are liable to the cargo for the resulting loss." If by "every effort" is meant every *reasonable* effort, we see no occasion to question the soundness of the reasoning. But it is further insisted that the duty of the master to save the imperiled property extends so far as to call for a sacrifice of a part of the owner's property if necessary to save the cargo. In our opinion the master's duty as agent of the owner is not so extensive. If it were, there would be an end at once of all contribution in general average for ship's sacrifices, for such sacrifices could not be deemed voluntary and extraordinary, if made in performance of the owner's general duty to his cargo.

The cases cited do not support the contention of coun-

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sel for the cargo-owners in this behalf. *Propeller Niagara v. Cordes*, 21 How. 7, 28, holds that although the vessel be stranded "the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is *no more than a prudent man would do* under like circumstances." *The Maggie Hammond*, 9 Wall. 435, 458, holds that when the vessel is wrecked or otherwise disabled in the course of the voyage and cannot be repaired without too great delay and expense, it is the duty of the master to transship the goods and send them forward, if another vessel can be had in the same or a contiguous port or within a reasonable distance, and that upon so doing he is entitled to *charge the goods with the increased freight* arising from the hire of the vessel so procured. In *Star of Hope*, 9 Wall. 203, 230, it is pointed out that the duty imposed upon the master, in case of a peril arising to the common adventure, is "to judge and determine at the time whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder." The duty to make a sacrifice of such portion of the associated interests as in the judgment of the master will save the common adventure is obviously inconsistent with the suggested duty to first sacrifice the owner's property for the safety of the cargo. The other cases cited upon this point require no mention.

In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the

provision in question is valid, and entitles him to contribution under the circumstances stated.

The second question is whether, under the like circumstances, the cargo-owners can recover contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight.

This question was dealt with in *The Strathdon*, 94 Fed. Rep. 206; 101 Fed. Rep. 600; 41 C. C. A. 515; where, however, there seems to have been no general average clause such as we have in the case before us; and by the same courts in this case, 162 Fed. Rep. 56; 178 Fed. Rep. 414; where the general average clause was dealt with as invalid, and therefore, of course, was given no influence in the determination of the present point. The Circuit Court of Appeals expressed the view that if the cargo-owner were allowed to obtain indirectly through a general average adjustment, compensation for losses attributable to the faulty navigation of the ship, and which therefore he could not recover directly because of § 3 of the Harter Act, the result would be a judicial repeal of that section, and that therefore the cargo-owner could not bring the shipowner as a contributing interest into a general average adjustment that might result in a claim which the Harter Act disallows. With this view we have no present concern, because it seems to us that the response we are to make to the second question certified must depend upon the construction of the agreement between the parties. Having already held that the general average clause contained in the bill of lading is valid as against the cargo-owner, it follows *ex necessitate* that it is valid in his favor; indeed, no ground is suggested for disabling the shipowner from voluntarily subjecting himself or his ship to liability to respond to the cargo in an action or in a general average adjustment, for the consequences of the negligence of his master or crew, even

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though by the Harter Act he is relieved from responsibility for such negligence. Therefore we have only to determine whether by the language of the general average clause the cargo-owners are entitled to contribution from the ship for sacrifices of cargo made subsequent to the stranding for the common benefit and safety. The language is that in the circumstances presented "the consignees or owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred, but with the shipowner shall contribute in general average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such default, negligence," etc. This language clearly imports an agreement that the shipowner shall contribute in general average. The opposite view would render the clause inconsistent with the principles of equity and reciprocity upon which the entire law of general average is founded.

The foregoing considerations compel a negative answer to the third question. In view of the valid stipulations contained in the bill of lading, it would be a contradiction of terms to permit the cargo-owners to recover contribution from the ship in respect of general average sacrifices of cargo, without on their part contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose. This would not be general average contribution, the essence of which is that extraordinary sacrifices made and expenses incurred for the common benefit and safety are to be borne proportionately by all who are interested.

Our conclusion, accordingly, is that of the questions certified to us by the Circuit Court of Appeals, the first question should be answered in the affirmative, the second question should be answered in the affirmative, and the third question should be answered in the negative, and it is

So ordered.

VALDES *v.* CENTRAL ALTAGRACIA,
INCORPORATED.CENTRAL ALTAGRACIA *v.* VALDES.APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR PORTO RICO.

Nos. 193, 196. Submitted March 6, 1912.—Decided May 13, 1912.

The record in this case shows that the court below did not err in bringing this case to a speedy conclusion and avoiding the loss occasioned by the litigation to all concerned.

A litigant cannot, after all parties have acquiesced in the order setting the case for trial and the court has denied his request for continuance, refuse to proceed with the trial on the ground that the time to plead has not expired, and when such refusal to proceed is inconsistent with his prior attitude in the case.

The granting of a continuance is within the sound discretion of the trial court, and not subject to be reviewed on appeal except in cases of clear error and abuse; in this case the record shows that the refusal to continue on account of absence of witness was not an abuse, but a just exercise, of discretion.

Under the circumstances of this case, and in view of the existence of an equity of redemption under prior transfers, *held*, that a transfer of all the property of a corporation to one advancing money to enable it to continue its business was not a conditional sale of the property but a contract creating security for the money advanced, and on liquidation of the assets the transferee stood merely as a secured creditor.

The mere form of an instrument transferring property of a debtor cannot exclude the power of creditors to inquire into the reality and substance of a contract unrecorded although required by law to be recorded in order to be effective against third parties.

Under the general law of Porto Rico, machinery placed on property by a tenant does not become immobilized; when, however, a tenant places it there pursuant to contract that it shall belong to the owner, it becomes immobilized as to that tenant and his assigns with notice, although it does not become so as to creditors not having legal notice of the lease.

In this case, *held* that the lien of the attachment of a creditor of the tenant on machinery placed by the tenant on a sugar Central in Porto Rico is superior to the claim of the transferee of an unrecorded

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lease, even though the lease required the tenant to place the machinery on the property.

5 Porto Rico Fed. Rep. 155, affirmed.

THE facts are stated in the opinion.

Mr. F. Kingsbury Curtis, Mr. Hugo Kohlmann and Mr. Martin Travieso, Jr., for Valdes, appellant in No. 193 and appellee in No. 196.

Mr. N. B. K. Pettingill and Mr. Frederick L. Cornwell, for Central Altagracia, appellee in No. 193 and appellant in No. 196.

Mr. Francis H. Dexter for Nevers & Callaghan.

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

These cases were consolidated below, tried together, a like statement of facts was made applicable to both and the court disposed of them in one opinion. We shall do likewise. Stating only things deemed to be essential as shown by the pleadings and documents annexed to them and the finding of facts made below, the case is this: Joaquin Sanchez owned in Porto Rico a tract of land of about twenty-two acres (cuerdas) on which was a sugar house containing a mill for crushing cane and an evaporating apparatus for manufacturing the juice of the cane into sugar. All of the machinery was antiquated and of a limited capacity. The establishment was known as the Central Altagracia, and Sanchez, while not a cane grower, carried on the business of a Central—that is, of acquiring cane grown by others and manufacturing it into sugar at his factory. On the eighteenth day of January, 1905, Sanchez leased his land and plant to Salvador Castello for a period of ten years. The lease gave to the tenant (Castello), the right to install in the plant “such machinery as he may deem convenient, which said machinery, at the end

of the years mentioned (the term of the lease) shall become the exclusive property" of the lessor, Sanchez. The tenant was given one year in which to begin the work of repairing and improving the plant, and it was provided that "upon the expiration of this term, if the necessary improvements shall not have been begun by him (Castello), then this contract shall be null and void, and no cause of action shall accrue to any of the contracting parties by reason thereof." Further agreeing on the subject of the improved machinery which was to be placed in the plant, the contract provided: "Upon the expiration of the term agreed on under this contract, any improvement or machinery installed in the said Central shall remain for the benefit of Don Joaquin Sanchez and Don Salvador Castello shall have no right to claim anything for the improvements made." The rental was thus provided for: "After each crop such profits as may be produced by the Central Altagracia shall be distributed and twenty-five per cent. (25%) thereof shall be immediately paid to Don Joaquin Sanchez as equivalent for the rental of said Central and of the twenty-two (22) cuerdas of land surrounding the same. The remaining seventy-five per cent. (75%) shall belong to Don Salvador Castello, who may interest therein whomsoever he may wish, either for the whole or part thereof." It was stipulated, however, that in fixing the profits no charge should be made for repairs of the existing machinery or for new machinery put in, as the entire cost of these matters was to be borne by the lessee, Castello. The lease provided, moreover, that in case of the death of Sanchez the obligations of the contract should be binding on his heirs, and in the case of the death of Castello, his brother, Gerardo Castello, should take his place "and be a contracting party if he so desired. Otherwise the plantation, in such a condition as it may be at his death, shall immediately pass into the possession of its owner, Don Joaquin Sanchez." In June,

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1905, by a supplementary contract, the lease was extended without change of its terms and conditions for an additional period of ten years, making the total term twenty years. Although executed under private signature, this lease, conformably to the laws of Porto Rico, was produced before a notary and made authentic and in such form was duly registered on the public records, as required by the Porto Rican laws.

On the first day of July, 1905, Salvador and Gerardo Castello transferred all their rights acquired under the lease, as above stated, to Frederick L. Cornwell for "the corporation to be organized under the name of Central Altagracia, of which he is the trustee." This transfer bound the corporation to all the obligations in favor of the original lessor, Sanchez, provided that the corporation should issue to Castello a certain number of paid up shares of its capital stock and a further number of shares as the output of sugar from the plant increased as the result of its enlarged capacity consequent upon the improvement of the machinery by the corporation. The lease further provided for the employment of Castello as superintendent at a salary, for a substitution of Gerardo Castello, in the event of the absence or death of his brother Salvador, and, for this reason, it is to be assumed, Gerardo made himself a party to the transfer of the lease. This transfer of the lease to the corporation was never put upon the public records. The corporation was organized under the laws of the State of Maine and under the transfer took charge of the plant. The season for grinding cane and the manufacture of sugar in Porto Rico usually commences "about the month of December of each year and terminates in the months of May, June or July of the year following, according to the amount of cane to be ground." Central factories in Porto Rico usually "make contracts with the people (colonos) growing cane so that growers of cane will deliver the same to be ground, and such contracts

are usually made and entered into in the months of June, July and August." In other words, on the termination of one grinding season, in the months of June or July, it is usual in the ensuing August to make new contracts for the cane to be delivered in the following grinding season, which, as we have said, commences in December. The contract transferring the lease to the Central Altagracia, incorporated, was made in July, 1905, at the end, therefore, of the grinding season of that year. To what extent the corporation contracted for cane to be delivered to it for grinding during the season of 1905-6, which began in December, 1905, does not appear. It is inferable, however, that the corporation began the work of installing new machinery to give the plant a larger capacity within the year stipulated in the lease from Sanchez to Castello. We say this because it is certain that in the fall of 1906 (October) the corporation borrowed from the commercial firm of Nevers & Callaghan in New York city the sum of twenty-five thousand dollars (\$25,000) to enable the corporation to pay for new and enlarged machinery which it had ordered and which was placed in the factory in time to be used in the grinding season of 1906-7, which began in December, 1906. While such grinding season was progressing, on April 11, 1907, the corporation, through its president, under the authority of its board of directors, sold to one Ramon Valdes all its rights acquired under the lease transferred by Castello. This transfer expressly included all the machinery previously placed by the corporation in the sugar house, as well as machinery which might be thereafter installed during the term of redemption hereafter to be referred to and which, it was declared, conformably to the original lease "shall be a part of said factory for the manufacture of sugar." The consideration for the sale was stated in the contract to be "thirty-five thousand dollars (\$35,000) received by the corporation, twenty-five thousand four hundred dol-

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lars (\$25,400) whereof had been paid prior to this act (of sale) and to its entire satisfaction, and the balance of nine thousand six hundred dollars (\$9,600) shall be turned over to the vendor corporation by Senor Valdes immediately upon being required to do so by the former." This sale was made subject to a right to redeem the property within a year on paying Valdes the entire amount of his debt. There was a stipulation that Valdes assumed all the obligations of the lease transferred by Castello to the company.

The undoubted purpose was not to interfere with the operation of the plant by the corporation, since there was a provision in the contract binding Valdes to lease the property to the corporation pending the period of redemption. This sale was passed in Porto Rico before a notary public, but was never put upon the public records. At the time it was made there was a very considerable sum unpaid on the debt of Nevers & Callaghan. This fact, joined with the period when the sale with the right to redeem was made, that is, the approaching end of the sugar-making season of 1906 and 1907, coupled with other facts to which we shall hereafter make reference, all tend to establish that at that time, either because insufficient capital had been put into the venture or because the business had been carried on at a loss, the affairs of the corporation were embarrassed, if it was not insolvent. A short while before the commencement of the grinding season of 1907-1908, in October, 1907, in the city of New York, the corporation, through its president, declaring himself to be authorized by the board of directors, sanctioned by a vote of the stockholders, apparently made an absolute sale of all the rights of the corporation under the lease and all its title to the machinery which the corporation had put into the plant. This sale was declared to be for a consideration of sixty-five thousand (\$65,000) dollars which the company acknowledged to have received from Valdes, first, by the payment of the thirty-

five thousand dollars cash, as stated in the previous sale made, subject to the equity of redemption, and thirty thousand (\$30,000) dollars which "the company has received afterwards in cash from Valdes." There was a provision in the contract to the effect that as the purpose of the previous contract of sale, which had been made subject to the equity of redemption, was accomplished by the new sale, the previous sale was declared to be no longer operative.

A few days afterwards, likewise in the city of New York (on November 2, 1907), Valdes sold to the company all the rights which he had acquired from it by the previous sale, the price being sixty-five thousand (\$65,000) dollars, payable in installments falling due in the years 1908, 1909, 1910 and 1911 respectively. This transfer was put in the form of a conditional sale which reserved the title in Valdes until the payment of the deferred price and upon the stipulation that any default by the corporation entitled Valdes *ipso facto* to take possession of the property. Neither this act of sale from Valdes to the corporation nor the one made by the corporation to Valdes were ever put upon the public records.

Prior to the making of the sales just stated, or about that time, the corporation defaulted in the payment of a note held by Nevers & Callaghan for a portion of the money which they had loaned the corporation under the circumstances which we have previously stated, and that firm sued in the court below the corporation to recover the debt.

The grinding season of 1907-1908 commenced in December, 1907, and was obviously not a successful one, for the debt of Nevers & Callaghan was not paid, and in May, 1908, a judgment was recovered by them against the corporation for about seventeen thousand dollars with interest, and in the same month execution was issued and levied upon the machinery in the sugar house. Previous to or not long subsequent to the time Nevers & Cal-

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laghan commenced their suit, the precise date not being stated in the record, the heirs of Sanchez, the original lessor, brought a suit in the court below against the corporation. The nature of the suit and the relief sought is not disclosed, but it is inferable from the facts stated that the suit either sought to recover the property on the ground that there was no power in Castello to transfer the lease, or upon the ground of default in the conditions as to payment of profits as rental which the lease stipulated. It would seem also at about the same time either one or both of the Castellos brought a suit against the company, presumably upon the theory that there had been a default in the obligations assumed in their favor by the corporation at the time it took the transfer of the lease. In the meanwhile also, probably as the result of the want of success of the corporation, discord arose between its stockholders and a suit growing out of that state of things was brought in the lower court.

This litigation was commenced in June, 1908, by the bringing by Valdes of an action at law in the court below to recover the plant on the ground that by the default in paying one of the installments of the price stated in the conditional sale, the right to the relief prayed had arisen. On the same day Valdes commenced a suit in equity against the corporation in aid of the suit at law. The bill alleged the default of the corporation, the bringing of the suit at law, the confusion in the affairs of the corporation, the judgment and levy of the execution by Nevers & Callaghan, and the threat to sell the machinery under such execution; the refusal of the corporation to deliver possession of the property, the waste and destruction of the value of the property which would result if there was no one representing the corporation having power to contract for cane to be delivered during the next grinding season, etc., etc. The prayer was for the appointment of a receiver to take charge of the property with au-

thority to carry on the same, make the necessary contracts for cane for the future, it being prayed that the receiver should be empowered to issue receiver's certificates to the extent necessary to the accomplishment of the purposes which the bill had in view.

On the same day a bill was filed on behalf of the corporation against Valdes. This bill attacked the sale made to Valdes and by him to the corporation. It was charged that the price stated to have been paid by Valdes as a consideration of the conditional sale was fictitious, and that the only sum he had advanced at that time was the thirty-five thousand dollars which it was the purpose to secure by means of the sale with the equity of redemption. That at that time Valdes exacted as a consideration for his loan that he be made a director and vice-president of the company. The bill then stated that it having become evident in the following autumn that the corporation would require more money to increase its plant, to pay off the sum due Nevers & Callaghan, and for the operation of the plant, Valdes agreed to advance the money if he were made president of the company at a stipulated salary, given a bonus in the stock of the company and upon the condition that the papers be executed embodying the so-called sale of the company to Valdes and the practically simultaneous conditional sale by Valdes to the company. The bill then alleged that Valdes, having thus become the president of the company, failed to carry out his agreement to advance the money, failed to provide for the debt of Nevers & Callaghan, mismanaged the affairs of the property in many alleged particulars, and did various acts to the prejudice of the company and to his own wrongful enrichment, which it is unnecessary to recapitulate. The necessity of contracting for cane during the contract season, in order that the plant might continue during the next operating season to be a going concern and the waste and loss which would otherwise

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be occasioned, were fully alleged. Valdes and the firm of Nevers & Callaghan and the individual members of that firm were made defendants. The prayer was for the appointment of a receiver and with power to carry on the business of the Central, with power for that purpose to contract for cane for the coming season, with authority to issue receiver's certificates for the purpose of borrowing the money which might be required.

The judge being about to leave Porto Rico for a brief period, declined to appoint a permanent receiver, but named a temporary one to keep the property together until a further hearing could be had, interference in the meanwhile with the custodian being enjoined. Shortly thereafter creditors of the corporation intervened and joined in the prayer made by both of the complainants for the appointment of a receiver. In July the two suits were by order consolidated and after a hearing a receiver was appointed and authority given him to continue the property as a going concern and to borrow a limited amount of money on receiver's certificates if necessary to secure contracts for cane for the coming crop season. The execution of the Nevers & Callaghan judgment was stayed pending an appeal which had been taken to this court. The only difference which seems to have arisen concerning the appointment of the receiver grew out of the fact that a prayer of the Central Altagracia, asking the court to appoint as receiver Mr. Pettingill, a member of the bar and one of the counsel of the corporation, and who was also its treasurer, was denied. Despite this, the fair inference is that the ultimate action of the court was not objected to by anyone, because of the hope that the result of a successful operation of the plant during the coming crop season might ameliorate the affairs of the corporation and thus prevent further controversies. We say this, not only because of the conduct of the parties prior to the order appointing the receiver, but because

after that order the solicitors of the Altagracia Company and Valdes put a stipulation of record that until the following October no steps whatever should be taken in the proceedings, and not even then unless the attorneys for both parties should be in Porto Rico.

The hope of a beneficial result from the operation of the plant by the receiver proved delusive. As a result of such operation there was a considerable loss represented by outstanding receiver's certificates, with no means of paying except out of the property. Obviously, for this reason, the record contains a statement that on July 12, 1909, a conference was had between the court and all parties concerned to determine what steps should be taken to meet the situation. It appears that at that conference the counsel representing the heirs of Sanchez and of Nevers & Callaghan stated their opposition to a continuance of the receivership.

On July 17, 1909, the court placed a memorandum on the files indicating its purpose to bring the litigation, receivership, etc., to an end and to cause "immediate issue to be raised on the pleadings for that purpose." This memorandum was entitled in all the pending causes concerning the property. It directed that demurrers which had been filed in the consolidated cause of Valdes against the corporation and of the corporation against Valdes be overruled, and the defendants were required to answer on or before Monday, July 26, in order that upon the following day, the twenty-seventh of July, the issues raised might be tried before the court without the intervention of a master. It was provided in the order, however, that nothing in this direction should prevent the parties from filing such additional pleadings as it is deemed necessary for the protection of their rights by way of cross bill or amendment, etc. To make the order efficacious it was declared that nothing would be done in the suit of the heirs of Sanchez against Castello and the Altagracia

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which was pending on appeal, and that a demurrer filed to the suit of Castello against the Central would be overruled; that the demurrer in the suit at law of Valdes would remain in abeyance to await the final action of the court on the trial of all the issues in the equity causes and that a stay of the Nevers & Callaghan execution would be also disposed of when the equity cases came to be decided. This order was followed by a memorandum opinion filed on July the 21st stating very fully the position of the respective suits, the necessity for action in order to preserve the property from waste and reiterating the view that whatever might be the rights of the Central Altagracia or of Valdes under the lease, those rights would be subordinate to the ultimate determination of the suit brought by the heirs of Sanchez. To the action of the court, as above stated, no objection appears to have been made. On the contrary, between the time of that order and the period fixed for the commencement of a hearing the Central Altagracia, Valdes and Nevers & Callaghan modified their pleadings to the extent deemed by them necessary to present for trial the issues upon which they relied. In the case of the Central Altagracia this was done by filing on July 22 an amended bill of complaint in its suit against Valdes and on July 26 its answer in the suit of Valdes. The acceptance by Valdes of the terms of the order was shown by an answer filed to the bill in the suit of the company and the cross bill in the same cause; and Nevers & Callaghan manifested their acquiescence by obtaining leave to make themselves parties and asserting their rights by cross bill and answers, which it is unnecessary to detail.

When the consolidated cause was called for trial on the morning of July 27, the counsel for the Central Altagracia moved a continuance in order to take the testimony of certain witnesses in Philadelphia and New York for the purpose of proving some of the allegations of the complaint

as to the wrongdoing of Valdes in administering the affairs of the corporation. This application was supported by the affidavit of Mr. Pettingill, the counsel of the corporation. The record states that the request for continuance was opposed by all the other counsel, and the application was denied. In doing so the court stated "that the matter has been pending for more than a year and that counsel had full notice of the court's intention to press the matter to issue and trial and that it is not disposed to delay matters at this time when the admissions of the pleadings are so broad that the proofs available here in Porto Rico are probably sufficient and the amended complaint already on file in suit No. 565—*Valdes v. The Altagracia Company*—and the answer thereto and the answer recently filed in suit No. 564—*Altagracia Company v. Valdes*—as well as the cross bill also recently filed in suit No. 465 makes so many allegations and admissions as that the real issue between the parties can be plainly seen and that, in the opinion of the court, enough proof is available here in Porto Rico." The court thereupon declared that the Altagracia Company might by the next day, if it so desired, file exceptions to the answer in suit 565 and an answer to the cross complaint, indeed—that the corporation might, if it wished, treat them as filed and proceed with the cause and file them at any convenient time thereafter. Thereupon the record states: "Said counsel for the Central Altagracia stated that he desired time to file exceptions to the answer and an answer to the cross bill in suit No. 565; and the court granted until the morning of July 28 for such purpose. Later in the day of July 27, one of the counsel for Valdes having requested the court to postpone the hearing of the cause until the morning of the 29th, because of an unexpected professional engagement elsewhere, the request was communicated by the court to the other counsel in the cause. Thereupon the record again recites, "Messrs. Pettingill &

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Cornwell, attorneys for the Central Altagracia, stated that they withdrew any statement they have hitherto made in the cause in that regard and desired to be understood that they would not except to the answer in suit No. 565 or plead or answer to the cross bill therein save and except within the time which they contended the rules governing this court of equity gave them and would stand upon what they considered their rights in that regard." When the court assembled the next day, on the morning of the 28th, a statement concerning the occurrence of the previous day as to the continuance, etc., just reviewed, was read by the court in the presence of all the counsel, whereupon the record recites, "N. B. Pettingill, counsel for the Central Altagracia, in response to the same stated that he objected to proceeding to take any evidence in any of the causes at that time or the testimony of any witnesses because the same was not at issue or in condition for the taking of evidence and objected to the taking of such evidence until the issues of said causes are made up in accordance with the rules of practice applicable to equity causes." The record further recites, "which objection was overruled by the court on the ground that the action called for thereby is not necessary. That the bill was amended within three days; an answer was immediately filed to it and a cross bill also filed, the said cross bill making only the same claims as were made in suit No. 563 at law, and that any way the issue could be tried on the bill and answer in both suits. . . ." This ruling of the court having been excepted to the trial proceeded from day to day, the counsel for the Central Altagracia taking no part in the same and virtually treating the proceedings as though they did not concern that corporation.

In substance, the court decided: First, that as the result of the contracts between Valdes and the Central Altagracia, he was not the owner of the rights of that corporation under the lease, or of the machinery which

had been placed in the sugar house by the Altagracia Company or of the other assets of the corporation, but that he was merely a secured creditor. The sum of the secured debt was fixed after making allowances for some not very material credits which the corporation was held to be entitled to. Second, that the judgment in favor of Nevers & Callaghan was valid and that that firm by virtue of its execution and levy upon the machinery had a prior right to Valdes. Third, the sums due to various creditors of the corporation were fixed and the equities or priorities were classified as follows: *a.* Taxes due by the corporation and the sum of the receiver's certificates and certain costs; *b.* The judgment of Nevers & Callaghan, and *c.* The debt of Valdes; *d.* Debts due the other creditors. Without going into details it suffices to say that for the purpose of enforcing these conclusions the decree directed a sale of all the rights of the Central Altagracia in and to the lease, machinery, contract, etc., and imposed the duty upon Valdes, if he became the purchaser, to pay enough cash to discharge the costs, taxes, receiver's certificates and the claim of Nevers & Callaghan.

These appeals were then prosecuted, the one by the Central Altagracia and the other by Valdes. We shall endeavor as briefly as may be to dispose of the contentions relied upon to secure a reversal.

I. *The Central Altagracia Appeal.*—The alleged errors insisted on in behalf of that company relate to the asserted arbitrary action of the court in forcing the cause to trial without affording the time which it is insisted the corporation was entitled to under the equity rules applicable to the subject, and, second, the refusal of the court to grant a continuance upon the affidavit as to the absence of material witnesses.

We think all the contentions on this subject are demonstrated to be devoid of merit by the statement of the case which we have made. In the first place, it is mani-

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fest from that statement that the proceeding leading up to the appointment of a receiver and the power given to administer the property was largely the result of the assent of the corporation. In the second place, when the unsuccessful financial issue of the receivership had become manifest we think the statement makes it perfectly clear that the steps taken by the court for the purpose of bringing the case to a speedy conclusion, and thus avoiding the further loss which would result to all interests concerned, were also acquiesced in by all the parties in interest who complied with the terms of that order and took advantage of the rights which it conferred. We think also the statement makes it apparent that the refusal on the part of the corporation to proceed with the trial, upon the theory that the time to plead allowed by the equity rules had not elapsed, was the result of a change of view because of the action of the court in refusing the continuance on account of the absent witnesses—a change of front which was inconsistent with the rights which the corporation had exercised in accord with the order setting the cause for trial and with the rights of all the other parties to the cause which had arisen from that order and from the virtual approval of it, or at least acquiescence in it, by all concerned.

Considering the assignments of error in so far as they relate alone to overruling of the application for continuance based upon the absence of witnesses, it suffices to say that the elementary rule is that the granting of a continuance of the cause was peculiarly within the sound discretion of the court below, a discretion not subject to be reviewed on appeal except in case of such clear error as to amount to a plain abuse springing from an arbitrary exercise of power. Instead of coming within this latter category, we think the facts as to the refusal to continue and the conduct of the parties make it clear that there was not only no abuse but a just exercise of discretion.

II. *As to the Appeal of Valdes.*—Two propositions are relied upon, first that error was committed in treating Valdes merely as a secured creditor, and in not holding him to be the absolute owner of the rights and property alleged to have been transferred by the so-called conditional sale. Second. That in any event error was committed in awarding to Nevers & Callaghan priority over Valdes.

The first proposition is supported by a reference to the Porto Rican Code and decisions of the Supreme Court of Spain and the opinions of Spanish law writers. But the contention is not relevant, and the authorities cited to sustain it are inapposite to the case to be here decided, because the argument rests upon an imaginary premise, that is, that the ruling of the court below denied the right under the Spanish law to make a conditional sale or held that such a sale if made would not have the effect which the argument insists it was entitled to. This is true because the action of the court was solely based upon a premise of fact, viz., that under the circumstances of the case and in view of the prior sale with the equity of redemption, the cancellation of that sale and the transfer made by the corporation to Valdes and the immediate transfer of the same rights by him to the corporation in the form of a conditional sale, the failure to register any of the contracts, and the relation of Valdes to the corporation at the time the contracts were made it resulted that whatever might be the mere form, in substance and effect no conditional sale was made but a mere contract was entered into which the parties intended to be a mere security to Valdes for money advanced and to be advanced by him. This being the case it is manifest that it is wholly irrelevant to argue that error was committed in not applying the assumed principles of the Porto Rican and Spanish law governing in the case of a conditional sale, when the ruling which the court made proceeded upon the conclusion that there was no conditional sale.

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The contention that under the Porto Rican law the form was controlling because proof of the substance was not admissible seems not to have been raised below, but if it had been is obviously without merit, as the case as presented involved not a controversy alone between the parties to the contract, but the effect and operation of the contract upon third parties, the creditors of the corporation. The contention is additionally without merit, since it assumes that the mere form of the contract excluded the power of creditors to inquire into its reality and substance even although the contract was never inscribed upon the public records so as to bind third parties. That its character was such as to require inscription we shall in a few moments demonstrate in coming to consider the second proposition, that is, upon the hypothesis that Valdes was but a secured creditor, was error committed in subordinating his claim to the prior claim of Nevers & Callaghan under their judgment and execution.

To determine this question involves fixing the nature and character of the property from the point of view of the rights of Valdes and its nature and character from the point of view of Nevers & Callaghan as a judgment creditor of the Altagracia Company and the rights derived by them from the execution levied on the machinery placed by the corporation in the plant. Following the Code Napoleon, the Porto Rican Code treats as immovable (real) property, not only land and buildings, but also attributes immovability in some cases to property of a movable nature, that is, personal property, because of the destination to which it is applied. "Things," says § 334 of the Porto Rican Code, "may be immovable either by their own nature or by their destination or the object to which they are applicable." Numerous illustrations are given in the fifth subdivision of section 335, which is as follows: "Machinery, vessels, instruments or

implements intended by the owner of the tenements for the industry or works that they may carry on in any building or upon any land and which tend directly to meet the needs of the said industry or works." See also Code Nap., articles 516, 518 *et seq.* to and inclusive of article 534, recapitulating the things which, though in themselves movable, may be immobilized. So far as the subject-matter with which we are dealing—machinery placed in the plant—it is plain, both under the provisions of the Porto Rican law and of the Code Napoleon, that machinery which is movable in its nature only becomes immobilized when placed in a plant by the owner of the property or plant. Such result would not be accomplished, therefore, by the placing of machinery in a plant by a tenant or a usufructuary or any person having only a temporary right. Demolombe, Tit. 9, No. 203; Aubry et Rau, Tit. 2, p. 12, § 164; Laurent, Tit. 5, No. 447; and decisions quoted in Fuzier-Herman ed. Code Napoleon under articles 522 *et seq.* The distinction rests, as pointed out by Demolombe, upon the fact that one only having a temporary right to the possession or enjoyment of property is not presumed by the law to have applied movable property belonging to him so as to deprive him of it by causing it by an act of immobilization to become the property of another. It follows that abstractly speaking the machinery put by the Altagracia Company in the plant belonging to Sanchez did not lose its character of movable property and become immovable by destination. But in the concrete immobilization took place because of the express provisions of the lease under which the Altagracia held, since the lease in substance required the putting in of improved machinery, deprived the tenant of any right to charge against the lessor the cost of such machinery, and it was expressly stipulated that the machinery so put in should become a part of the plant belonging to the owner without compensation to the lessee.

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Under such conditions the tenant in putting in the machinery was acting but as the agent of the owner in compliance with the obligations resting upon him, and the immobilization of the machinery which resulted arose in legal effect from the act of the owner in giving by contract a permanent destination to the machinery. It is true, says Aubry and Rau, vol. 2, § 164, par. 2, p. 12, that "The immobilization with which the article is concerned can only arise from an act of the owner himself or his representative. Hence the objects which are dedicated to the use of a piece of land or a building by a lessee cannot be considered as having become immovable by destination except in the case where they have been applied for account of the proprietor or in execution of an obligation imposed by the lease." It follows that the machinery placed by the corporation in the plant, by the fact of its being so placed lost its character as a movable and became united with and a part of the plant as an immovable by destination. It also follows that as to Valdes, who claimed under the lease, and who had expressly assumed the obligations of the lease, the machinery for all the purposes of the exercise of his rights, was but a part of the real estate, a conclusion which cannot be avoided without saying that Valdes could at one and the same time assert the existence in himself of rights and yet repudiate the obligations resulting from the rights thus asserted.

Nevers and Callaghan were creditors of the corporation. They were not parties to nor had they legal notice of the lease and its conditions from which alone it arose that machinery put in the premises by the Altagracia became immovable property. The want of notice arose from the failure to record the transfer from Castello to the Altagracia or from the Altagracia to Valdes, and from Valdes apparently conditionally back to the corporation, a clear result of § 613 of the Civil Code of Porto Rico, providing, "The titles of ownership or of other real rights relating

to immovables which are not properly inscribed or annotated in the registry of property, shall not be prejudicial to third persons." It is not disputable that the duty to inscribe the lease by necessary implication resulted from the general provisions of article 2 of the mortgage law of Porto Rico, as stated in paragraphs 1, 2 and 3 thereof, and explicitly also arose from the express requirement of paragraph 6 relating to the registry of "contracts for the lease of real property for a period exceeding six years" It is true that in a strict sense the contracts between Castello and the Altagracia Company and with Valdes were not contracts of lease but for the transfer of a contract of that character. But such a transfer was clearly a contract concerning real rights to immovable property within the purview of art. 613 of the Civil Code just previously quoted. Especially is this the case in view of the stipulations of the lease as to the immobilization of movable property placed in the plant and the other obligations imposed upon the lessee. "The sale which a lessee makes to a third person to whom he transfers his right of lease is the sale of an immovable right and not simply a sale of a movable one." See numerous decisions of the courts of France, beginning with the decision on February 2, 1842, of the Court of Cassation [*Journal du Palais* (1842), vol. 1, 171]. See also numerous authorities collected under the heading above stated in paragraph 21, under articles 516, 517 and 518 of the Code Napoleon. Fuzier-Herman ed. of that Code, p. 643.

The machinery levied upon by Nevers & Callaghan, that is, that which was placed in the plant by the Altagracia Company, being, as regards Nevers & Callaghan, movable property, it follows that they had the right to levy on it under the execution upon the judgment in their favor, and the exercise of that right did not in a legal sense conflict with the claim of Valdes, since as to him the property was a part of the realty which, as the result

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of his obligations under the lease, he could not, for the purpose of collecting his debt, proceed separately against.

As a matter of precaution we say that nothing we have said affects the rights whatever they may be of the heirs of Sanchez, the original lessor.

Affirmed.

CHASE v. WETZLAR, EXECUTOR.

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

No. 1045. Submitted April 22, 1912.—Decided May 27, 1912.

Where the jurisdiction of the Circuit Court is dependent, under § 8 of the act of 1875, upon property affected being within the jurisdiction, the defendants not being therein, the fact that the bill was dismissed because complainants failed to prove the existence of any property within the jurisdiction does not affect the right of a direct appeal to this court under § 5 of the act of 1891.

The burden of proof as to the existence of property to be affected by the decree within the jurisdiction of the Circuit Court in order to give it jurisdiction under § 8 of the act of March 3, 1875, c. 137, 18 Stat. 472, is on the complainant.

While averments of some jurisdictional facts may *prima facie* be taken as true where the questions do not address themselves to want of all foundation of jurisdiction, and in such cases the burden is on the one assailing sufficiency or verity, the burden of proving an averment of a fact absolutely necessary to the exertion of the power of the court to render a binding decree is on the party pleading.

The jurisdiction conferred by § 8 of the act of 1875 rests upon a real and not an imaginary or constructive basis.

The Circuit Court does not have jurisdiction of a suit against an absent executor in the State where the will was probated, unless the property to be affected by the decree is actually within the jurisdiction of the court.

The fact that the state court might by virtue of its authority in a particular contingency exert jurisdiction over an absent executor

of a will probated in the courts of that State as to the disposition of property beyond its territorial jurisdiction does not clothe a Circuit Court of the United States with jurisdiction under § 8 of the act of 1875.

THE facts, which involve the jurisdiction of this court under § 5 of the act of 1891 and of the Circuit Court under § 8 of the act of 1875, are stated in the opinion.

Mr. Charles H. Burr and Mr. Frederic W. Frost for appellant.

Mr. Howard S. Gans, Mr. Paul M. Herzog and Mr. Julius Walerstein for appellee.

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

Suing as a citizen of Pennsylvania, Chase, who was complainant below, made defendants to the bill by which this cause was commenced, Emil Wetzlar and William P. Bonn, alleged to be "alien subjects of the Emperor of Germany, residing in Frankfort-on-the-Main, executors of the estate of Gustave J. Wetzlar, deceased." It was averred that the testator, a naturalized citizen of the United States and a resident of the city of New York, died in 1898; that his will was probated on February 1, 1899, in the Surrogate's Court of the county of New York, and that letters testamentary were duly issued to the defendants. It was further averred that by virtue of the fourth paragraph of the will Julius G. Wetzlar, a son of the testator, was entitled on reaching the age of 25 years to receive a sixth part of the principal of the residuary estate; that such share was invested by the defendants, as executors, in railroad bonds, and they "held the said bonds in the city of New York, as executors, subject to the jurisdiction of your Honorable Court" (the Circuit Court). It was further averred that Julius G. Wetzlar

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reached the age of twenty-five years on August 23, 1908, at which time the one-sixth part of the entire residuary estate exceeded in value the sum of one hundred thousand dollars; and that about three years theretofore Julius had mortgaged an undivided one-third interest of such share, to secure the payment of a promissory note for five thousand dollars, bearing interest. On default in payment, it was alleged, the interest so mortgaged was sold in February, 1909, at public auction for the sum of three thousand dollars; and Chase, claiming through the purchaser at the sale, became vested on June 20, 1910, with and entitled to the immediate possession of the said one-third of one-sixth of such residuary estate. The defendants, as executors, it was charged, neglected and refused to pay to Chase the share of the estate in question. A copy of the will was attached to the bill as a part thereof. In the will the defendants were stated to be residents of the German Empire, and express power was conferred upon them to remove the trust estate at any time from the State of New York. The specific relief asked was that complainant might be declared entitled to the immediate possession of one-third of one-sixth of the residuary estate of Gustave J. Wetzlar, deceased, and also to payments of income of the said one-third interest from August 23, 1908, "and may pay your orator the said portion of the said share of Julius G. Wetzlar as may be found to have been unlawfully withheld or diverted from him." There was also a prayer for general relief.

To obtain an order for service outside of the district, an affidavit was made in which it was averred that the bill had been filed to determine disputed claims to a fund which the defendants as executors and trustees held within the jurisdiction of the court, and that defendants were alien subjects of the Emperor of Germany and resided within that Empire, and that neither was within the district and neither had voluntarily appeared in the action.

The court, reciting that it appeared "both by the averments contained in the bill . . . and by the affidavit of . . . complainant . . . that the suit was commenced to enforce equitable liens upon, or claims to the title of personal property within this district, and that all of the defendants are not inhabitants thereof," entered an order on October 25, 1910, requiring the defendants on or before a date named to appear, plead, answer or demur to the bill, and that on or before a named date a certified copy of the order and of the bill should be served upon them wherever found. Presumably in consequence of such service having been made upon him at his residence in Germany, Emil Wetzlar, one of the defendants, appearing specially for the sole purpose of challenging the jurisdiction of the court, filed a plea verified by his attorney and moved the dismissal of the cause upon the ground "that no portion of the property of the estate of Gustave J. Wetzlar and no portion of the trust fund of said estate referred to in the bill therein, is now or has been for at least five years prior hereto, within the city, county or State of New York nor within the southern district of New York nor within the United States, but is and has been in Germany in the possession and control of the said Emil Wetzlar there residing." Argument was heard before Circuit Judge Lacombe upon the sufficiency of the plea. It was held to be "sufficient in law and form," and complainant was allowed to file a general replication thereto.

No proceeding for the examination of witnesses out of court having been taken by either party within thirty days after replication, the complainant set the cause down for hearing upon the pleadings, as authorized by court rule 109. The case was heard before Hazel, District Judge. The previous ruling of Judge Lacombe was followed. It was held that the plea was but a negative one, and that the burden was on the complainant to establish the exist-

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ence of the essential jurisdictional facts which the plea traversed, and that as no proof had been offered by the complainant, there was an absence of jurisdiction, and the bill was dismissed. This direct appeal was then taken, the assignments of error being as follows:

"First. That the court erred in sustaining the sufficiency of the plea to the bill in the above entitled cause.

"Second. The court erred in dismissing the bill after hearing upon bill, plea and replication.

"Third. The court erred in refusing to maintain jurisdiction of the above entitled cause.

"Fourth. The court erred in dismissing the bill in the above entitled cause for lack of jurisdiction."

The court also filed a certificate to the effect that the bill had been dismissed for want of jurisdiction, and that an appeal was allowed solely to review such question.

At the threshold it is insisted that there is a want of authority to entertain this direct appeal because the bill was dismissed for lack of proof, and not because of the want of power of the Circuit Court as a Federal court. The contention is without merit. *United States v. Congress Construction Co.*, 222 U. S. 199. As the defendants were without the territorial jurisdiction of the Circuit Court, its authority was dependent upon the property sought to be affected being within the district, as contemplated by § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472, which authorizes the exertion of jurisdiction as to property of absent defendants. The ruling clearly, therefore, concerned the power of the court as a Federal court—that is, under the statute—to entertain the case under the circumstances presented.

As, in order to dispose of the merits, it becomes essential to fix the meaning of § 8 of the act of 1875 above referred to, the section is excerpted in the margin.¹

¹ Section 8 of act of March 3, 1875, c. 137, 18 Stat. 472:

SEC. 8. That when in any suit, commenced in any circuit court of

All the errors pressed upon our attention will be disposed of by considering two questions, the correctness of the ruling of the court below as to the burden of proof, and whether, under the hypothesis that the court correctly held that the burden was on the complainant,

the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

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nevertheless error was committed in dismissing the bill in view of the averments therein contained and the admissions made by the plea.

First. *As to the burden of proof.*

On this subject the contention is that although the averment of the bill that the property sought to be affected was within the district was traversed by the plea, nevertheless the defendant was bound to prove the allegations of his plea and hence it was error, in the absence of proof, to dismiss the bill on the assumption that the burden was on the complainant to prove that the case was within the jurisdiction of the court. The theory as to the burden of proof being on the defendant, on which this proposition proceeds, it is insisted, is sanctioned by the following decisions of this court: *Sheppard v. Graves* (1852), 14 How. 505; *De Sobry v. Nicholson* (1865), 3 Wall. 420; *Wetmore v. Rymer* (1898), 169 U. S. 115, and *Hunt v. New York Cotton Exchange* (1907), 205 U. S. 322. And a decision of the Circuit Court of Appeals for the Eighth Circuit in *Hill v. Walker*, 167 Fed. Rep. 241, is also referred to as containing a full summary of the decided cases on the subject. None of the cases relied upon, however, involved a question of jurisdiction under § 8 of the act of 1875. On the contrary, they all concerned merely the sufficiency or verity of allegations as to the citizenship of parties or the value of the matter in dispute. The cases rested, therefore, upon the proposition that averments concerning such matters were *prima facie* to be taken as true, and hence the burden of proof was cast upon the one assailing the sufficiency or want of verity of such averments. We do not deem it necessary to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875 requiring a Federal court of its own motion to dismiss a pending suit

when it is found not to be really within its jurisdiction—see *Roberts v. Lewis*, 144 U. S. 653, and the cases cited in the dissenting opinion in *Hill v. Walker*, *supra*—because we think in any view the doctrine is here inapplicable. We say this because while questions concerning the sufficiency or verity of averments as to citizenship or amount in dispute assail the jurisdiction of the court they do not address themselves to the want of all foundation for judicial action because of an entire absence of elements which are essential to the existence of any jurisdiction whatever—that is, the presence of persons or property within the jurisdiction of the court over which its authority may be exerted. The character of the questions involved in the cases relied on and the nature of the rule as to *prima facie* presumption as to the adequacy of averments concerning such subjects, and the resultant burden of proof is at once demonstrated by the well-settled rule that questions of that character do not go to the power of the court to make a binding decree. *Cutler v. Huston*, 158 U. S. 423, 430; *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 198 U. S. 188, 198.

On the other hand, in a case like the one at bar, the existence of the property within the jurisdiction is essentially necessary to the exertion of the power of the court to render a binding decree. The statute does not leave this to implication, since it expressly provides that the decree to be rendered shall be limited to the property within the jurisdiction which, therefore, forms the sole basis of the power to judicially act. The prerequisite and absolute limitation on power which arises from these considerations is aptly illustrated by the rule enunciated in *Thompson v. Whitman*, 18 Wall. 457, and *Pennoyer v. Neff*, 95 U. S. 714, and the numerous cases which have enforced the doctrine there laid down. And this wide distinction, in the very nature of things, precludes the possibility of the application here of the *prima facie* pre-

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sumption upon which the cases relied upon proceeded and therefore also demonstrates the inapplicability of the theory of burden of proof applied in those cases. In other words, even putting aside for the sake of argument the effect on the doctrines announced in the decisions relied upon of the enactment of the act of 1875 as to the duty to dismiss to which we have referred, the burden of proof to establish that the court was vested with power to act, we think, in a case like this, in the nature of things rested upon the complainant.

Second. *Even although the court rightly applied the burden of proof, did it nevertheless err in dismissing the bill?*

The insistence on this subject is in substance this, that as the plea admitted the probate of the will, the appointment of the executors in New York, and the purchase and possession of the bonds, even although there was no proof that the bonds were actually within the district, the pleadings were adequate to show property within the district, even under the requirements of § 8 of the act of 1875. Asserting that what was sought was a decree establishing "the title" of the complainant to property within the district, counsel argue as follows:

"This narrows the question down to what is meant by property within the district; and it is submitted that for all purposes connected with the administration of an estate, at least that portion of the personal property which was received by the executor within the district is within the meaning of the law within that district. . . . The decree sought is only a determination of the rights of complainant against the estate of Gustave J. Wetzlar, deceased. This estate is, in the eye of the law, within the County of New York, where any and all suits pertaining to the distribution of the estate, and to accounting therefor, must be brought. Respondent cannot, certainly, by setting up an absolutely illegal act (removing the property to Germany), be heard to deny that within the

contemplation of law the estate is for purposes of distribution within the County of New York. . . . The proceeding in this case is a proceeding to enforce an equitable lien upon personal property which is within the intendment of the law *in gremio legis* within this district, and therefore within the jurisdiction of the United States Circuit Court for the Southern District of New York."

It requires no close analysis to sustain the interpretation given by the court below to the statute, viz., that it exclusively deals with property which is within the district where a suit is brought and which property is therefore capable of being made subject to the dominion and resulting control of the court. No other interpretation is in reason possible in view of the terms of the section causing its provisions to come into play only when there is "real or personal property within the district where such suit is brought." The meaning is additionally illustrated by the requirement that the service of the order to appear, etc., must be made not only upon the absent defendant or defendants "wherever found," but also "upon the person or persons in possession or charge of said property," that is, the property within the district and within the dominion of the court which is made the essential foundation for the jurisdiction to be exercised over the property in a case where the court cannot acquire personal jurisdiction because of the absence of the defendant. The meaning of the statute and the limited jurisdiction which it confers is further clearly shown by the provision that an adjudication against an absent defendant or defendants shall "affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

We think there is no basis for the contention that the section contemplates the exercise of jurisdiction by a Federal court upon the assumption of its control over property when there is no property subject to control within

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the jurisdiction. In other words the power conferred rests upon a real not an imaginary base. This being true, we are of opinion that a Federal court has not jurisdiction over a person not within its territorial jurisdiction or over property in the custody of such person not within such territorial jurisdiction, merely because a state court may as to such person and such property, because of some proceeding pending before it, have the authority to treat both the person and property as constructively present and subject to its jurisdiction. The power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace. Indeed, if because a state court had the power to treat in a given case a person and his property outside of the territorial jurisdiction as constructively within it in order to afford particular relief, a like power must be imputed to a Federal court under the act of Congress it would result that in such a case the act of Congress, would become inapplicable, since there would be no absent defendant, as the person as well as the property would be constructively present.

Affirmed.

SEXTON, TRUSTEE IN BANKRUPTCY OF KESSLER & COMPANY, *v.* KESSLER & COMPANY, LIMITED.

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

No. 92. Argued December 12, 13, 1911.—Decided May 27, 1912.

The conduct of business men acting without lawyers and in good faith, attempting to create a personal security for an actual debt, should be fairly construed as actually effecting what the parties meant; and so *held*, in this case, that an escrow of securities made by a banking firm in New York to secure its drafts upon a foreign bank amounted to a lien on the securities to be preferred to the claim of the trustee in bankruptcy, notwithstanding that the New York firm retained physical power over the securities, as agent for the foreign house, and had the right to substitute other securities for those withdrawn and sold.

Under the decisions of this court, and the courts of New York, a customer has such an interest in securities carried for him by a broker that a delivery to him after the insolvency of the broker is not necessarily a preference under the bankruptcy law. *Richardson v. Shaw*, 209 U. S. 365.

172 Fed. Rep. 535; 97 C. C. A. 161, affirmed

THE facts, which involve the question of whether under the Bankruptcy Act of 1898, certain transfers of securities by the bankrupt constituted a fraudulent preference, are stated in the opinion.

Mr. John Larkin, with whom *Mr. Alexander S. Andrews*, was on the brief, for appellant:

There was no valid legal pledge to the defendants because possession was not given until October 25, 1907. *Casey v. Caveroc*, 96 U. S. 467; *Wilson v. Little*, 2 N. Y. 443; *Buffalo German Ins. Co. v. Third National Bank*, 162 N. Y. 170; *Security Warehousing Co. v. Hand*, 206 U. S. 415.

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Possession is of the essence of a pledge; without it no privilege can exist as against third persons. *Casey v. Caveroc*, 96 U. S. 467; *Casey v. Natl. Park Bank*, 96 U. S. 492; *Casey v. Schuhardt*, 96 U. S. 494.

The legal pledge having failed, it cannot be supported either as an equitable pledge, an equitable mortgage or a declaration of trust. There was no equitable pledge. *In re Great Western Mfg. Co.*, 18 Am. B. R. 259; *Page v. Rogers*, 211 U. S. 575; *Wilson v. Nelson*, 183 U. S. 191; *Security Warehousing Co. v. Hand*, 206 U. S. 415; *Fourth Street Bank v. Millburne*, 172 Fed. Rep. 177; *Re Sheridan*, 98 Fed. Rep. 406; *Copeland v. Barnes*, 147 Massachusetts, 388; *Bank of Leavenworth v. Hunt*, 11 Wall. 394; *Griswold v. Sheldon*, 4 Comst. 581; *Wood v. Lowry*, 17 Wendell, 492.

A court of equity will not uphold, on the theory of equitable lien, an attempted pledge which fails at law, when the rights of creditors are involved. *Casey v. Caveroc*, 96 U. S. 467; *Security Warehousing Co. v. Hand*, 206 U. S. 415; *Wilson v. Little*, 2 N. Y. 446; *Buffalo G. I. Co. v. Third Natl. Bank*, 162 N. Y. 163; *Ryttenberg v. Schefer*, 11 Am. Bk. Rep. 664; *Nisbit v. Macon Bank*, 12 Fed. Rep. 686; *Fourth St. Natl. Bank v. Milburne Mills Co.*, 172 Fed. Rep. 177; *Zartman v. Bank*, 189 N. Y. 267.

What the courts have defined as "the inexorable rule of law" is that possession of the pledge must be in the pledgee. Van Zile's *Bailments and Carriers*, § 237a; *Skelton v. Codington*, 185 N. Y. 88; *Frank v. Volkommer*, 205 U. S. 529.

There is no such thing as an equitable pledge; one either has made a pledge or he has not. Support for the existence of such a contradiction as "equitable pledge" must be found, if at all, in the fact that equity in some circumstances will consider as done what was agreed to be done. But that doctrine has no application where bankruptcy intervenes.

The bankrupts never agreed to give nor did Manchester stipulate to receive, possession (except after financial embarrassment had intervened)—and hence there was no contract, relative to possession, for equity to enforce by deeming it performed.

There was no equitable mortgage, as held by a majority of the Court of Appeals.

The parties did not intend to create a mortgage, but only a pledge with peculiar features, viz., possession to remain in the pledgor with absolute power of disposal.

In New York, as elsewhere, a mortgage of personal property is a transfer of title subject to be divested on condition subsequent, viz., by payment of the debt. The parties intended no such thing.

The intention of the parties is shown by their correspondence.

Even if the parties had intended to make a mortgage it would have been invalid in so far as it purported to cover after-acquired property; and *in toto* because of provisions in it, and in the method of carrying it out, that made it fraudulent in law and absolutely void as to creditors. The *Zartman Case*, 189 N. Y. 271.

The word "escrow" has usually to do with the passing of title, but it has to do with the passing of title only upon delivery, and prior to the delivery of the escrow the rights of the parties as to title remain exactly as before the escrow was created.

The Chattel Mortgage Act of New York (Lien Law, § 90) provides that all mortgages of "goods and chattels" shall be absolutely void unless there is an actual and continued change of possession, or the mortgage is filed.

Stackhouse v. Holden, 66 App. Div. 433; *Risley v. Phenix Bank*, 83 N. Y. 318; *Hudson River Bank v. Chaskin*, 28 App. Div. 311, can all be distinguished.

The learned judge was in error in stating that there was no fraud in the transaction here, and that, as no rights

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of purchasers or attaching creditors intervene, the taking possession by the Manchester house was entirely legal and proper; such is not the law of New York. *Parshall v. Eggert*, 54 N. Y. 18; *Skilton v. Coddington*, 185 N. Y. 86; *Sabin v. Camp*, 98 Fed. Rep. 97, are not authority as a declaration of the laws of the State of New York.

There was no declaration of trust.

Whether there was a declaration of trust, and a consequent transfer of the title, is just as much a question of local law as the other questions, namely, those of pledge and equitable mortgage. As to the law of New York, on this subject, see *Martin v. Funk*, 75 N. Y. 137; *Matter of Totten*, 179 N. Y. 112; *Young v. Young*, 80 N. Y. 422; *Barry v. Lambert*, 98 N. Y. 300; *Matter of Bolin*, 136 N. Y. 177; *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135.

Unless, therefore, Kessler & Co. of New York by their letters, certificates and acts intended to divest themselves of all beneficial interest in the securities and to hold the whole interest therein for the benefit of Kessler & Co. of Manchester, the transaction cannot be sustained as a declaration of trust.

If a pledge, imperfect or invalid because of want of delivery of the pledged property, can be sustained as a declaration of trust, the result will practically be to abolish technical pledges, "whose very essence" is the possession of the pledged property by the pledgee. *Young v. Young*, 80 N. Y. 422.

The cases where equity has given relief in insolvency cases are generally where the claimant's money has produced the very thing sought to be subjected to the lien. *National Bank v. Rogers*, 166 N. Y. 380; *Hauselt v. Harri-son*, 105 U. S. 401; *Hurley v. Atcheson &c. R. R.*, 213 U. S. 126.

The transaction between Kessler & Co. of New York and Kessler & Co. of Manchester was inequitable and in

bad faith and deceived existing as well as prospective creditors.

The law is in favor of the appellant without respect to the appellee's good or bad faith. *Robinson v. Elliott*, 22 Wall. 525.

The New York house held themselves out to all the world as the owners of the securities, as the arrangement expressly authorized. The result was a credit with various bankers and customers, fictitious in fact and fraudulent in law.

This case is not one of fraud based upon express misrepresentation, and it is not necessary for the trustee in bankruptcy to show that the defendants made express representations false in fact. But the case is full of evidence to show that with the knowledge and consent of the Manchester house the New York house represented itself as the owner of the securities over which the Manchester house claimed a secret lien. *Martin v. Mathiot*, 14 Serg. & R. 214.

The agreement between the parties was fraudulent as a matter of law irrespective of good or bad faith, and was void as against creditors.

Clauses permitting the debtor to use the securities as his own make the agreement fraudulent in law and void *ab initio* as to creditors; and if the debtor and creditor act in such a way that the debtor uses the property as his own, the result is the same. *Zartman v. Bank*, 189 N. Y. 267, 273; *Skilton v. Codington*, 185 N. Y. 80; *Bowditch v. Page*, 153 N. Y. 104; *Scherl v. Flam*, 129 App. Div. 561; *Hangen v. Hachemeister*, 114 N. Y. 566; *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168; *Russell v. Winne*, 37 N. Y. 591; *Mandeville v. Avery*, 124 N. Y. 376; *Wood v. Lowry*, 17 Wend. 492; *Chatham Bank v. O'Brien*, 6 Hun, 231; *Griswold v. Sheldon*, 4 N. Y. 584; *Gardner v. McEwen*, 19 N. Y. 123; *Brackett v. Harvey*, 91 N. Y. 214; *Bainbridge v. Richmond*, 47 Hun, 391.

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When an agreement for security or protection is thus fraudulent in law and void, it may be attacked by any creditor, whether having a judgment or not, if it is impracticable or useless to obtain a judgment. *Skilton v. Codington*, 185 N. Y. 80, 86, 89; *Russell v. St. Mart*, 180 N. Y. 355, 359, 360; *Karst v. Gane*, 136 N. Y. 316, 323; *Stephens v. Perrine*, 143 N. Y. 476; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545.

Mr. Abram I. Elkus and *Mr. F. C. McLaughlin*, with whom *Mr. Rufus W. Sprague, Jr.* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by a trustee in bankruptcy to set aside an alleged fraudulent preference. The Circuit Court of Appeals reversed a decree of the District Court for the plaintiffs and dismissed the bill. 172 Fed. Rep. 535. 97 C. C. A. 161. It will be enough for our decision to state the following facts: The appellee was an English company and the bankrupts a New York firm intimately connected with it which for many years had drawn upon it. In February, 1903, the English house requested the New York firm to set aside securities for their drawing credit. The New York firm wrote on June 30 that they had that day placed in a separate package in their safe deposit vaults certain securities named, the package being marked 'Escrow for account of Kessler & Co., Limited, Manchester;' adding 'This escrow is intended as a protection against our long drawings against your good selves.' This letter was acknowledged and it was added "If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality." In

December of the same year the English house suggested a form of certificate as follows: "We certify that we have specially set aside and hold for your account, on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities. Name secs. and market value." This was conformed to and the New York house also entered the securities and all substitutions on their loan book. Substitutions were made from time to time and the English house notified. The securities always were either negotiable by delivery or indorsed in blank. They were marked and kept as stated in the letter upon a separate shelf of the New York firm's vault, and they never were removed except in 1905 and 1906 when they were taken to the office to be examined and checked off by representatives of the English company. Business went on in this way until the panic of 1907. On October 25 of that year, the stability of the New York firm being in doubt, it handed over the escrow securities to an agent of the English company then in New York and he deposited them in a safe deposit vault in the name of the company. On November 8 a petition of bankruptcy was filed and on November 27 the New York firm was adjudged bankrupt. Notwithstanding arguments to the contrary it may be assumed that the arrangement between the parties was made in good faith and intended and believed to be valid, and on the other hand that at the time of the change of custody on October 25, within four months of the petition, the New York firm was insolvent and that the English company had reasonable cause to believe that a preference was intended if its rights began only on that date.

So far as the interpretation of the transaction is concerned it seems to us that there is only one fair way to deal with it. The parties were business men acting without lawyers and in good faith attempting to create a present security out of specified bonds and stocks. Their

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conduct should be construed as adopting whatever method consistent with the facts and with the rights reserved is most fitted to accomplish the result. If an express declaration of an equitable lien, or again a statement that the New York firm constituted itself the servant of the English company to maintain possession for the latter, or that it held upon certain trusts, or that a mortgage was intended, or any other form of words, would effect what the parties meant, we may assume that it was within the import of what was done, written and said. So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or at least one that is to be preferred to the claim of the trustee.

The bankruptcy law by itself does not avoid the transaction. *Thompson v. Fairbanks*, 196 U. S. 516. *Humphrey v. Tatman*, 198 U. S. 91, 95. A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment. *York Manufacturing Co. v. Cassell*, 201 U. S. 344. *Zartman v. First National Bank of Waterloo*, 216 U. S. 134, 138. The most obvious objection is that the continued physical power of the New York firm over the securities and its right to withdraw and substitute admittedly reserved are inconsistent with a title or lien of the English house in any form. But the decisions of this court and of New York agree that there may be title in a stronger case than this. When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet as he is bound to keep stock enough to satisfy his contracts, as the New York

firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference. *Richardson v. Shaw*, 209 U. S. 365. *Markham v. Jaudon*, 41 N. Y. 235. So a depositor in a grain elevator may have a property in grain in a certain elevator although the keeper is at liberty to mix his own or other grain with the deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned.

Whether enough has been done to give a right of any kind in certain property is a question of more or less. See *Union Trust Co. v. Wilson*, 198 U. S. 530, 537. In the case of ordinary goods and chattels, where, for instance, a man mortgages his stock in trade as it may be from time to time, retaining possession and full power to sell and replace or not as he sees fit, it well may happen that the security fails. *Skilton v. Codington*, 185 N. Y. 80. *Zartman v. First National Bank of Waterloo*, 189 N. Y. 267. So a general promise to give security in the future is not enough. But the present was a more limited and cautious dealing. It was confined to specific identified stocks and bonds on hand, and purported to give an absolute present right, qualified only by possible substitution and perhaps by a right of partial withdrawal if the remaining securities had risen sufficiently in value. It purported not to promise but to transfer; and the subject-matter was not goods and chattels in the sense of the New York mortgage law as we understand that law to be interpreted by the New York courts. The transaction was not void as against creditors irrespective of attachment, as in *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545. *Niles v. Mathusa*, 162 N. Y. 546. There can be no doubt, as was said by the court below, that before the bankruptcy the English house had an equitable right at least to possession if it wanted it. While the phrase equitable lien

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Counsel for Parties.

may not carry the reasoning further or do much more than express the opinion of the court that the facts give a priority to the party said to have it, we are of opinion that the agreement created such a lien at least, or in other words, that there is no rule of local or general law that takes from the transaction the effect it was intended to produce. *Hurley v. Atchison, Topeka & Santa Fe Ry. Co.*, 213 U. S. 126, 134. When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York and in the absence of any controlling statute to the contrary such we understand to be what the law should be. *Parshall v. Eggert*, 54 N. Y. 18. *National Bank of Deposit v. Rogers*, 166 N. Y. 380.

Decree affirmed.

SOUTHERN RAILWAY COMPANY v. BURLINGTON LUMBER COMPANY.

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

No. 236. Argued May 3, 1912.—Decided May 27, 1912.

Decided on authority of *Southern Railway Company v. Reid*, 222 U. S. 424, and *Southern Railway Company v. Reid & Beam*, 222 U. S. 444.

THE facts are stated in the opinion.

Mr. John K. Graves, with whom *Mr. Alfred P. Thom* was on the brief, for plaintiff in error.

No appearance for defendant in error on the argument. *Mr. W. H. Carroll* and *Mr. Lee S. Overman* subsequently filed a brief for defendant in error.

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MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover penalties under a statute of North Carolina for refusal to receive goods for shipment. As the statute is the same that was held bad, so far as it concerns commerce among the States, in *Southern Railway Co. v. Reid*, 222 U. S. 424, and *Southern Railway Co v. Reid & Beam*, 222 U. S. 444, a short statement will be enough. On January 26, 1907, the Burlington Lumber Company tendered to the Railway Company at Burlington, North Carolina, certain machinery for shipment to Saginaw, Michigan, on a through bill of lading. Saginaw was not on the Railway Company's line, the company had no rates to Saginaw and the agent had to delay in order to inquire of his superiors. The result was that the through bill of lading was not issued until April 3. The suit, as we have said, is for the penalty and nothing else. The Supreme Court of the State decided against the Railway on the same ground that it did in the decisions already reversed. In the circumstances it seems unnecessary to discuss the case more at length.

Judgment reversed.

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Syllabus.

RAILROAD COMMISSION OF OHIO *v.* WORTHINGTON, RECEIVER OF WHEELING & LAKE ERIE RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION; AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 505, 776. Argued April 15, 16, 1912.—Decided May 27, 1912.

In cases of intervention in foreclosure suits, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case, but petitions in original proceedings to enforce rights and protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247.

Where the petition of the receiver, appointed in a case dependent on diverse citizenship, invokes the jurisdiction of the Circuit Court not only as ancillary to the receivership but also to protect the estate on grounds involving alleged infractions of the Federal Constitution and rights secured thereby, the case is not one in which the judgment of the Circuit Court of Appeals is made final by the act of 1891, and an appeal lies to this court where the amount in controversy exceeds one thousand dollars.

Where the case can be taken to the Circuit Court of Appeals, the fact that it involves grounds that warrant a direct appeal to this court does not deprive the Circuit Court of Appeals of jurisdiction.

Under the Constitution of the United States, the National Government has exclusive authority to regulate interstate commerce, and any attempt by the State to regulate rates for interstate transportation is void. *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27.

An order made by a state commission under assumed authority of the State, which directly burdens interstate commerce, will be enjoined. *McNeill v. Southern Railway Co.*, 202 U. S. 543.

A rate fixed on that part of interstate carriage which includes the actual placing of the shipment into vessels ready to be carried beyond the state destination is, as to merchandise intended for points beyond the State, a burden on interstate commerce and beyond the power of the State to impose, even if the merchandise is billed from a point within the State to the point where the vessel is. *Gulf, Colorado & Santa Fe Railway Co. v. Texas*, 204 U. S. 403, distinguished. Through billing to the point beyond the State is not always necessary to determine that a shipment is interstate. *Southern Pacific Terminal Co. v. Young*, 219 U. S. 498.

A rate fixed by the Ohio Railroad Commission for coal from state points to "on board" vessels at the port of Huron, Ohio, and intended for shipment to some point beyond the State undetermined at time of shipment, and, for convenience, billed to the shippers' own order at Huron, *held* to be a rate affecting interstate shipment and void under the commerce clause of the Constitution as an attempt to regulate interstate commerce.

Quære: whether transportation under the circumstances of this case is such a transportation within the State or to points without the State, partly by railroad and partly by water, as to be within the jurisdiction and control of the Interstate Commerce Commission.

187 Fed. Rep. 965, affirmed.

THE facts, which involve the validity of an order of the Railroad Commission of the State of Ohio fixing and establishing a rate on "lake-cargo coal" and whether such order was void as an attempted regulation of interstate commerce, are stated in the opinion.

Mr. Thomas H. Hogsett, with whom *Mr. Timothy S. Hogan*, Attorney General of the State of Ohio, *Mr. Frank Davis, Jr.*, and *Mr. Chas. C. Marshall* were on the brief, for appellant.

Mr. W. M. Duncan and *Mr. William B. Sanders* for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

The case originated in a bill filed in the United States Circuit Court for the Northern District of Ohio, Eastern Division, against the Railroad Commission of Ohio and

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other parties to enjoin the enforcement of an order of the Commission fixing and establishing a rate of seventy cents a ton on what is called "lake-cargo coal," transported from the Number Eight Coal Field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie, for carriage thence by lake vessels. A permanent injunction was granted in the Circuit Court against the enforcement of the rate, on the ground that it was a regulation of interstate commerce. An appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, and that court affirmed the decree of the Circuit Court. (187 Fed. Rep. 965.) From the decree of the Circuit Court of Appeals an appeal was taken to this court. An appeal was also prayed and allowed from the Circuit Court directly to this court, being case No. 505 on the docket of this term, which is submitted with the present case. A petition for a writ of certiorari to the decree of the Circuit Court of Appeals has also been filed and submitted upon briefs.

The first question to be dealt with is one of jurisdiction. The question of the jurisdiction of the Circuit Court of Appeals was raised and decided in that court, which held that it had jurisdiction of the case, also intimating that there were grounds of jurisdiction which might have warranted a direct appeal to this court, and that court allowed the present appeal to this court.

The argument that the jurisdiction of the Circuit Court of Appeals is final is based upon the contention that, as Worthington, the complainant in the present case, was appointed receiver of The Wheeling & Lake Erie Railroad Company in a suit in equity in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, wherein jurisdiction depended upon diversity of citizenship, and since the jurisdiction to entertain an appeal in an ancillary proceeding is that of the original case, therefore, under the Circuit Court of Appeals Act,

the decree of the Court of Appeals is final. It is undoubtedly true that in cases of intervention in foreclosure suits, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case. It is equally true that petitions in original proceedings to enforce rights and to protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247, and the many previous cases in this court therein cited.

An examination of the bill in this case, which was filed under the authority of the Circuit Court, shows that the order of the Commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the Federal Constitution. It further was alleged that the owners of the property constituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit, which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the Circuit Court of Appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the Circuit Court of Appeals of jurisdiction. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277; *Macfadden v. United States*, 213 U. S. 288.

The question then is: Is this one of the cases made final in the Circuit Court of Appeals by the act creating that court? The sixth section of that act provides that the judgment of the Circuit Court of Appeals "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." In all other cases there is a right of review by this court if the matter in controversy exceeds one thousand dollars. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of \$5,000. The case is therefore one not made final in the Circuit Court of Appeals, and the appeal to this court was properly allowed. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397; *Macfadden v. United States*, 213 U. S. 288, 294; *Standard Paint Co. v. Trinidad Asphalt Manufacturing Company*, 220 U. S. 446, 460.

Case No. 505 is dismissed and the petition for writ of certiorari is denied.

Coming now to the merits of the case, the Circuit Court found the facts to be as follows:

"It appears that bituminous coal, such as is mined in the No. 8 District, is classified by the complainant, for tariff purposes, as (a) railway fuel, being coal sold to railroad companies; (b) lake-cargo coal, that is, coal intended for shipment by lake to points in the Northwest; and (c) commercial coal, comprising coal for commercial and domestic use, not included in the first two classes.

"The No. 8 Coal District of Ohio is situated in Jefferson, Harrison and Belmont Counties, and the members of the Pittsburg Vein Operators' Association of Ohio are interested in mining coal in that district. The traffic is large, about 400,000 tons of lake-cargo coal being shipped over

the complainant's railroad from that district in 1909, and transshipped by vessel to points in the Northwest.

"At and prior to the time of the complaint being lodged with the Railroad Commission by the Operators' Association, the tariff rate in force on the complainant's railroad on lake-cargo coal from the No. 8 District to Huron and Cleveland, Ohio, f. o. b. vessel, was ninety cents per ton. The rate covers, in addition to the rail transportation, the service of unloading the coal from the cars into vessels and trimming it in the holds of the vessels, so that they can safely proceed.

"The rate on commercial coal to Huron or Cleveland is \$1.00 per ton.

"The vessels for lake-cargo coal are generally furnished by the operators, but the coal is sometimes sold f. o. b. vessel, the title to the coal in that case passing to the purchaser upon being properly loaded into the vessel.

"The coal in question is shipped from the mines to Huron or Cleveland, principally Huron, where the complainant has large dock facilities and expensive machinery and appliances for unloading coal into vessels, during the season of navigation, simply marked 'Lake coal' consigned to the operator, or to some office employé whose name is used as a mere matter of convenience for the purpose of designating a particular grade of coal. The operator notifies the railroad that at a certain time a vessel will be at Huron to load so many tons of a particular grade of coal. The railroad then picks up such cars of the operator's coal as are necessary to fill the cargo and moves them on to the dock alongside of the vessel, loads the vessel, trims or distributes the coal properly in her hold, and furnishes the shipper with a cargo statement showing the car numbers and weights and total tons of coal in the vessel, on which information the bill of lading for the vessel shipment is made out.

"It appears that all the coal shipped at the lake-cargo

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rate remains on the cars of the complainant until unloaded into a vessel, unless it should be diverted en route and devoted to some other purpose, but in that case the lake-cargo rate does not apply. For instance, if it should be diverted to commercial use at Huron, the rate on commercial coal, which is \$1.00 a ton, would govern.

"There is testimony to the effect that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what particular ultimate destination it will go, and that sometimes such coal is sold and vessels arranged for after the coal is at Huron, but it is subject to demurrage charge if it remains on the cars beyond a specified time.

"All coal thus loaded in vessels is, and must practically be, carried to points in other States—or to Canada. The lake ports in Ohio receive coal by rail from interior points, but not by boat from other Ohio ports. It might be that a quantity of coal, so small as to be negligible, is unloaded on one of the Ohio islands in Lake Erie, but no substantial importance is claimed for this circumstance nor could be given to it."

This finding of fact was practically approved and adopted in the Circuit Court of Appeals, and we have no occasion to dissent from its correctness.

The question thus presented is: Was the Railroad Commission of Ohio authorized to put in force the rate in question as to lake-cargo coal? It is not necessary to review the cases in this court which have settled beyond peradventure that the National Government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well settled proposition that over interstate commerce transportation rates the State has no jurisdiction and that an attempt to regulate such rates by the State or under its authority is void. *Louisville & Nashville Railroad Company v. Eubank*, 184 U. S. 27.

And an order made by a state commission under assumed authority of the State, which directly burdens or regulates interstate commerce, will be enjoined. *McNeill v. Southern Railway Company*, 202 U. S. 543.

The question is, then, one of fact. Does the transportation which the rate prescribed by the Railroad Commission of Ohio covers constitute interstate commerce?

It is true that the shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron on Lake Erie. The so-called "lake-cargo coal" is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the State, usually to upper lake ports, and then and only then the seventy-cent rate fixed by the Commission applies. This seventy-cent rate covers the transportation of the coal to Huron, the placing of it on board vessels and, if necessary, trimming it for the continuance of its interstate journey. It is true, as argued by the learned counsel for the Commission, that this coal may be accumulated in large quantities at Huron, and only taken out of the accumulated lots from time to time, when it is to be put upon vessels and shipped out of the State, but it must always be remembered that this seventy-cent rate applies solely to such coal as is in fact placed upon vessels for carriage to beyond the state points, and, as the Circuit Court said, the substance of things is not changed by the fact that a small part may be unloaded at one of the Ohio islands in Lake Erie. The situation then comes to this, that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels and thence carried to upper lake ports beyond the State. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here is applicable

alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage.

Much stress is laid in argument for the Commission upon the fact that the coal is billed only to Huron, and it is said that in that aspect of the case it is controlled by *Gulf, Colorado & Santa Fe Railway Company v. Texas*, 204 U. S. 403. There it was sought to hold a railroad company upon a shipment of corn from Texarkana to Goldthwaite, Texas, for a violation of the regulations of the state railroad commission applicable to intrastate carriers. The company contended that the shipment was in fact an interstate carriage from Hudson, South Dakota, to Goldthwaite, Texas. The facts showed that the corn was carried upon a bill of lading from Hudson to Texarkana, and that afterwards, some five days later, it was shipped from Texarkana to Goldthwaite, both points in the State of Texas. This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for, as this court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment. It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the state destination.

That the test of through billing is not necessarily determinative is shown in the late case of *Southern Pacific Terminal Company v. Interstate Commerce Commission and Young*, 219 U. S. 498. In that case Young bought cotton seed cakes at various points in Texas and shipped them to himself at the port of Galveston, where they were prepared for export. This court held that such transportation was within the jurisdiction of the Interstate Commerce Commission and that the special privileges given by the Southern Pacific Terminal Company to Young on the wharf at Galveston were undue preferences in his favor. As to the fact that the shipments were not made on through bills of lading, but were to Galveston from other places in Texas, this court said (p. 527):

"It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol*, 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation.'"

It is contended that this transportation of the coal under the rate fixed by the Railroad Commission is not within the power and authority of the Interstate Commerce Commission under § 1 of the Act to Regulate Commerce, which makes the provisions of the act inapplicable to the transportation of property wholly within one State, and not shipped to or from a foreign country from or to a State or Territory; and, furthermore, that a transportation

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of the character here in question is only within the jurisdiction of the Interstate Commerce Commission when it is a transportation partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; and therefore that the subject-matter in question is left within the state jurisdiction. On the other hand, it is contended that this transportation is within the jurisdiction of the Commission under the Act to Regulate Commerce. It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce and is therefore beyond the power of the State or a commission assuming to act under its authority.

We therefore reach the conclusion that under the facts shown in this case the Railroad Commission, in fixing the rate of seventy cents for the transportation above described, attempted to directly regulate and control interstate commerce, and, for that reason, the enforcement of its order should be enjoined.

Decree affirmed.

BIGELOW v. OLD DOMINION COPPER MINING AND SMELTING CO.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE
OF MASSACHUSETTS.

Nos. 191, 192. Argued March 5, 6, 1912.—Decided May 27, 1912.

One of two joint tort-feasors was sued in the Circuit Court of the United States for New York, jurisdiction being based solely on diversity of citizenship, and the bill was dismissed; the other joint tort-feasor, who resided in Massachusetts, and was not, and could not, be made a party defendant in the New York suit, having been sued in the state court of Massachusetts, set up the New York judgment,

claiming that under the full faith and credit clause of the Constitution of the United States the judgment dismissing a suit based on the same cause of action against one alleged to be his joint tort-feasor was a bar to the suit, and that the Massachusetts courts were bound to give to the judgment the same effect as an estoppel as against subsequent suits on the same cause of action. *Held* that:

Although one of two joint tort-feasors may be individually interested in the result of a suit against the other, the result is merely that of precedent and not of *res judicata*, and the courts of another State are not under obligation to follow the decision.

Assistance by one of two joint tort-feasors in the defense of a suit against the other, because of interest in the decision as a judicial precedent affecting a case pending against him in another State, does not create an estoppel as to the one so assisting in the defense.

Where the cause of action against joint tort-feasors is *ex delicto*, and several as well as joint, one of the tort-feasors not sued is not a privy to one that is sued so that a judgment dismissing the case against the latter is a bar to another suit against the latter.

Where the remedy of the plaintiff in a suit against one of two joint tort-feasors depends upon the defendant's own culpability, failure to recover in a prior suit on the same facts against the other is not a bar.

When dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property, and while there is diversity of opinion as to whether the estoppel can be expanded so as to include joint tort-feasors not parties, the sounder reason, as well as weight of authority, is that failure to recover against one is not a bar to a suit or an individual cause of action against the other.

Where the jurisdiction of the Circuit Court of the United States depends entirely upon diversity of citizenship, that court administers the law of the State, and its judgment is entitled to the same sanction as would attach to a judgment of a court of that State, and is entitled in the courts of another State to the same faith and credit which would be given to a judgment of the court of the State in which the Circuit Court which rendered it was sitting.

Where a judgment of the court of another State is set up as a bar, the effect of that judgment in the courts of the State which rendered it is a question of fact to be determined by the court in which it is set up.

Although a judgment dismissing the bill against one of two joint tort-feasors may be a bar in the State where rendered against a suit on

the same cause of action against the other joint tort-feasor, the courts of another State may, without denying full faith and credit to such judgment, determine for itself under principles of general law whether or not such judgment is a bar to suits against the other tort-feasor.

Under § 1 of Art. IV of the Constitution and § 905, Rev. Stat., the judgment of a court of one State when sued upon or pleaded in estoppel in the courts of another State is put upon the plane of a domestic judgment in respect to conclusiveness of the facts adjudged; otherwise it would be reëxaminable as only *prima facie* evidence of the matter adjudged as is the case with foreign judgments.

The full faith and credit clause is to be construed in the light of the other provisions of the Constitution, none of which it was intended to modify or override.

The courts of one State are not required to regard as conclusive any judgment of the court of another State which had no jurisdiction of the subject or the parties; and the courts of the State in which the judgment is set up has the right to inquire whether the court rendering it had jurisdiction to pronounce a judgment which would conclude the parties themselves or those claiming that the judgment was effective as an estoppel.

The privity that exists between a stockholder and the corporation that makes a judgment against the corporation conclusive as against the stockholder does not exist as between joint *tort-feasors*. *Hancock National Bank v. Farnum*, 176 U. S. 640, distinguished.

188 Massachusetts, 315, affirmed.

THE facts, which involve the question of whether the Massachusetts courts gave to a New York judgment pleaded as a bar in a Massachusetts suit the full faith and credit which is required by § 1 of Art. IV of the Constitution of the United States and § 905, Revised Statutes, are stated in the opinion.

Mr. John C. Spooner, with whom *Mr. George Rublee*, *Mr. Joseph P. Cotton, Jr.*, *Mr. Charles H. Tyler*, *Mr. Owen D. Young*, *Mr. Burton E. Eames* and *Mr. William C. Rice* were on the brief, for plaintiffs in error:

The decrees of the Massachusetts court involve a denial of full faith and credit to the Lewisohn decree in the New York case.

The judgment of a Federal court sitting in New York is entitled in another State to the same faith and credit as a decree of a state court in New York. *Embry v. Palmer*, 107 U. S. 3; *Live Stock Co. v. Butchers' Union*, 120 U. S. 141; *Metcalf v. Watertown*, 153 U. S. 671; *Hancock Bank v. Farnum*, 176 U. S. 640; *Deposit Bank v. Frankfort*, 191 U. S. 499; *Riverdale Cotton Mills v. Alabama Mfg. Co.*, 198 U. S. 188.

The decree of a Federal court in a State must be given the same effect by the courts of that State as a decree of the state court. Cases *supra*, and see *National Foundry Works v. Oconto Co.*, 183 U. S. 216; *Central National Bank v. Stevens*, 169 U. S. 432; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498; *Oceanic Co. v. Compania Translantica Espanola*, 134 N. Y. 461.

The fact that the Lewisohn decree was rendered on a demurrer does not detract from its efficacy as a bar. *Nor. Pac. Ry. Co. v. Slaght*, 205 U. S. 122, 130; *Yates v. Utica Bank*, 206 U. S. 181; *Bissell v. Spring Valley*, 124 U. S. 225; *Gould v. Evansville R. R. Co.*, 91 U. S. 526; *Alley v. Nott*, 111 U. S. 472; *Bouchaud v. Dias*, 3 Denio (N. Y.), 235, 244.

The opinions of the Circuit Court and Circuit Court of Appeals and of this court show that the bill in the Lewisohn suit was dismissed on the merits. *National Foundry Works v. Oconto Co.*, *supra*, at p. 234; *Baker v. Cummings*, 181 U. S. 117.

It is immaterial that the present suits were begun prior to the suit against Lewisohn. *Mitchell v. First National Bank*, 180 U. S. 471; *Nugent v. Traction Co.*, 87 Fed. Rep. 251; *United States v. Dewey*, 6 Biss. 501; *Rogers v. Odell*, 39 N. H. 452; *Sharon v. Hill*, 26 Fed. Rep. 337, 344.

The full faith and credit clause requires that the law and usage of New York should control not only as to what is decided by the decree, but also as to who is entitled to the benefit thereof. This is the plain meaning of the

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language used. *Hancock Bank v. Farnum*, 176 U. S. 640; *Laing v. Rigney*, 160 U. S. 531; *Tilt v. Kelsey*, 207 U. S. 43.

This result cannot be defeated by the technical Massachusetts rule which denies to alleged joint tort-feasors the benefit of former adjudication as a bar. *Renaud v. Abbott*, 116 U. S. 277; *Hanley v. Donoghue*, 116 U. S. 1; *Laing v. Rigney*, *supra*.

The question of the jurisdiction of the Federal court to render the Lewisohn decree is not to be determined by the law of Massachusetts, but by the law of New York, subject to the limitation that that law must comply with the standards of general jurisprudence. *D'Arcy v. Ketchum*, 11 How. 165; *Pennoyer v. Neff*, 95 U. S. 714; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289; *Huntington v. Attrill*, 146 U. S. 657; *Embry v. Palmer*, 107 U. S. 3; *Renaud v. Abbott*, 116 U. S. 277, 288; *Rogers v. Alabama*, 192 U. S. 226, 231; *German Savings Society v. Dormitzer*, 192 U. S. 125.

Since the New York court had undoubted jurisdiction over the plaintiff in the Lewisohn suit, there is no jurisdictional objection to giving effect to that decree as against it in Massachusetts. The rule of mutuality is subject to well-recognized exceptions. There is no requirement of mutuality of estoppel in cases like the present where the plaintiff, after failing on the merits to maintain its action, brings another suit upon the same cause of action against another defendant who acted jointly with the first defendant in the transaction. *Portland Mining Co. v. Stratton's Independence*, 158 Fed. Rep. 63; *Emma Mining Co. v. Emma Mining Co. of New York*, 7 Fed. Rep. 401; *People v. Stevens*, 51 How. Pr. (N. Y.) 235, *aff'd*, 71 N. Y. 527; *Spencer v. Dearth*, 43 Vermont, 98; *Williams v. McGrade*, 13 Minnesota, 39; *King v. Chase*, 15 N. H. 9; *Sonnentheil v. Moody* (Tex. Civ. App., 1900), 56 S. W. Rep. 1001; *Sonnentheil v. Texas Guarantee Co.*, 23 Tex. Civ.

App. 436; *Atkinson v. White*, 60 Maine, 396; *Hill v. Bain*, 15 R. I. 75; *Ferrers v. Arden*, Cro. Eliz. 668; 2 Black on Judgments (2d ed., 1902), § 781; *Green v. Van Buskirk*, 7 Wall. 139; *Featherston v. Turnpike Co.*, 71 Hun, 109; *Krolik v. Curry*, 148 Michigan, 214; *State v. Coste*, 36 Missouri, 436; *Hesselbach v. St. Louis*, 179 Missouri, 505; *Delaplain v. Kansas City*, 109 Mo. App. 107; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Indiana Nitroglycerine Co. v. Lippincott Glass Co.*, 165 Indiana, 361; *Hayes v. Chicago Telephone Co.*, 218 Illinois, 414; *Bradley v. Rosenthal*, 154 California, 420; *Logan v. Railway Co.*, 82 S. Car. 518; *Rookard v. Atlanta Ry. Co.*, 84 S. Car. 190; *Biggs v. Benger*, 2 Ld. Raymond, 1372; *Marks v. Sullivan*, 8 Utah, 406, 410; *New Orleans Railroad Co. v. Jopes*, 142 U. S. 18; *Doremus v. Root*, 23 Washington, 710; *Stevick v. Nor. Pac. Ry.*, 39 Washington, 501; *Anderson v. Fleming*, 160 Indiana, 597; *Anderson v. Street Railroad Co.*, 200 Illinois, 329; *Muntz v. Algiers &c. Co.*, 116 Louisiana, 236; *McGinnis v. Chicago &c. Co.*, 200 Missouri, 347; *Chicago &c. Co. v. McManigal*, 73 Nebraska, 580; *Tyng v. Clark*, 9 Hun, 269; *Miller v. White*, 50 N. Y. 137; *Jackson v. Griswold*, 4 Hill, 522.

The present cases do not involve any question of joint tort or liability *ex delicto*. These cases are clearly distinguishable from the cases where the facts alleged if proved would amount to a tort, since it was decided in the Lewisohn Case that all the facts set up do not state a cause of action. The issue in the present cases under the full faith and credit clause is the effect of the Lewisohn decree in New York, and in the Federal courts, and in that jurisdiction neither Bigelow nor Lewisohn is liable *ex delicto*, or at all. Promoters' liability, in any event, is only that of a fiduciary, and in the absence of moral wrong there is a right of contribution. *Jacobs v. Pollard*, 10 Cush. 287; *Palmer v. Wick Shipping Co.*, A. C. (1894), 318; *Armstrong County v. Clarion County*, 66 Pa. St. 218;

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First National Bank v. Avery Co., 69 Nebraska, 329; *Eaton & Prince Co. v. Trust Co.*, 123 Mo. App. 117; *Castle v. Noyes*, 14 N. Y. 329; *Coventry v. Barton*, 17 Johns. 142; *Oceanic Steam Co. v. Compania Transatlantic*, 134 N. Y. 461; *Andrews v. Murray*, 33 Barb. 354; *Peck v. Ellis*, 2 Johns. Ch. 131, 136; *Kolb v. National Surety Co.*, 176 N. Y. 233; *Getty v. Devlin*, 54 N. Y. 403; *Loudenslager v. Woodbury Land Co.*, 58 N. J. Eq. 556; *Emma Mining Co. v. Grant*, 11 Ch. D. 918 (940).

The principle claimed by the defendant in error that estoppels must be mutual, has, in any event, no place in the constitutional law as against the express requirement of full faith and credit.

By the law and usage of New York, the present actions against plaintiff in error, had they been pending in New York, would have been barred by the Lewisohn decree. Cases *supra*, and *Woodhouse v. Duncan*, 106 N. Y. 527; *Bates v. Stanton*, 1 Duer, 79.

Plaintiff in error is, in any event, entitled to the benefit of said decree because he was privy with Lewisohn, not only under the law of New York, but under the general principles of law. The Lewisohn action was based upon the identical subject-matter and transaction as the cases at bar. *Ferrers v. Arden*, Cro. Eliz. 668.

Defendant in error, by its own choice of forum and of remedy, has litigated and determined that the title to the shares of stock, which it claims were wrongfully issued to Bigelow and Lewisohn, was rightfully in them free from any interest or equity in its favor. *Bates v. Stanton*, *supra*; *Kessler v. Eldred*, 206 U. S. 285; *Bush v. Knox*, 2 Hun, 576.

Lewisohn was trustee, agent and representative of Bigelow in the thirty-thousand share transaction, which was the subject-matter of the Lewisohn suit in New York. *Re Straut Estate*, 126 N. Y. 201; *Bracken v. Atlantic Trust Co.*, 36 App. Div. 67; *aff'd*, 167 N. Y. 510; *Russell v. Lasher*,

4 Barb. 232; *Emma Mine Case*, *supra*; *Castle v. Noyes*, 14 N. Y. 326; *King v. Barnes*, 109 N. Y. 267; *Wilcox v. Pratt*, 125 N. Y. 688; *Getty v. Devlin*, 54 N. Y. 403; 70 N. Y. 504; *Carter v. Bowe*, 41 Hun, 516; Freeman on Judgments, § 173; New York Code Civ. Proc., § 449; Bliss, N. Y. Ann. Code (1902), note "L."; *Lawrence v. Schaefer*, 19 Misc. 239; *Seymour v. Smith*, 114 N. Y. 481; *Duncan v. China Mutual Ins. Co.*, 129 N. Y. 237; *Coffin v. Grand Rapids Co.*, 136 N. Y. 655; *Hoffman House v. Foote*, 172 N. Y. 348; 1 Greenleaf on Evidence, p. 523; *Lichty v. Lewis*, 63 Fed. Rep. 535; 77 Fed. Rep. 111.

Plaintiff in error participated in the defense of the Lewisohn suit with the knowledge of all parties. *Carleton v. Lombard*, 149 N. Y. 137; *Van Koughnet v. Dennie*, 68 Hun, 179; *Woodhouse v. Duncan*, 106 N. Y. 527; *Demarest v. Darg*, 32 N. Y. 281; *Leavitt v. Wolcott*, 95 N. Y. 212, 221; *Oceanic Navigation Co. v. Compania Transatlantic*, 144 N. Y. 663; *Rumford Chemical Works v. Hygienic Chemical Co.*, 159 Fed. Rep. 436; *Port Jarvis v. First National Bank*, 96 N. Y. 550.

The Lewisohn decree is equally a bar to the one hundred thousand share suit. The question of liability in these two suits depends upon identical facts, and both suits involve parts of a single transaction. *Old Dominion Co. v. Bigelow*, 203 Massachusetts, 159.

Where two separate suits relate to separate properties, but the rights of the parties depend upon identical facts, adjudication in one is a bar to the other. *Bissell v. Spring Valley*, 124 U. S. 225; *New Orleans v. Citizens' Bank*, 167 U. S. 371; *Southern Pac. Ry. Co. v. United States*, 168 U. S. 1; *Nor. Pac. Ry. Co. v. Slaght*, 205 U. S. 122; *United States v. Land Company*, 192 U. S. 355; *Green v. Bogue*, 158 U. S. 478; *Dimock v. Revere Copper Co.*, 117 U. S. 559; *Forsyth v. Hammond*, 166 U. S. 506; *Johnson Co. v. Whar-ton*, 152 U. S. 252; *Bouchaud v. Dias*, 3 Denio, 238; *Doty v. Brown*, 4 N. Y. 71; *Pray v. Hegeman*, 98 N. Y. 351; *Park*

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Hill Co. v. Herriot, 41 App. Div. 324; *Pakas v. Hollingshead*, 184 N. Y. 211; *Hirshbach v. Ketchum*, 84 N. Y. App. Div. 258.

The decree of the Massachusetts court involved denial of full faith and credit to the laws of New York and New Jersey. The full faith and credit clause requires full faith and credit to the statutory and common law of other States, as well as to their judgments. *Elliot's Debates I*, 80, 149, 272; *V*, 487, 504; *Chicago & Alton R. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615; *Smithsonian Institution v. St. John*, 214 U. S. 19, 28; *Banholzer v. N. Y. Life Ins. Co.*, 178 U. S. 402; *Allen v. Alleghany Co.*, 196 U. S. 458; *Johnson v. N. Y. Life Ins. Co.*, 187 U. S. 491; *Glenn v. Garth*, 147 U. S. 360; *Finney v. Guy*, 189 U. S. 335, 340; *Louisv. & Nashv. R. R. v. Melton*, 218 U. S. 36.

In the present cases full faith and credit has been denied to the common law and statutes of New York and New Jersey. Since the court below took judicial notice of the laws of New Jersey, this court should do so likewise. *Renaud v. Abbott*, 116 U. S. 277, 285, 286; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 445; *Eastern Building Association v. Williamson*, 189 U. S. 122.

Under the statutes and decisions of New Jersey, the Old Dominion Company was fully organized and of full capacity to make the contract which was made with the plaintiff in error and Lewisohn. See authorities discussed *post*.

The decisions of New York were put in evidence at the trial in Massachusetts.

The Massachusetts decrees involve an impairment of the obligation of the contract between the plaintiff in error and Lewisohn on the one side, and the defendant in error on the other side.

The question whether a valid contract existed is to be determined by this court, when it is claimed that the obligation of such contract is impaired. *McCullough v.*

Virginia, 172 U. S. 102; *Douglas v. Kentucky*, 168 U. S. 488; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 492.

The corporation was fully organized and existing and competent, under the laws of the State of its organization, to make this contract. This court will take judicial notice of the foreign law where the court below did so. See authorities *supra*. The Massachusetts court fully considered the New Jersey law relating to the organization and capacity of the defendant in error.

See opinion below, especially dissenting opinion by Mr. Chief Justice Knowlton.

Under the New Jersey law the corporation was fully organized and competent to bind itself by this contract. *Old Dominion Co. v. Lewisohn*, 210 U. S. 206; *Old Dominion Co. v. Bigelow*, 203 Massachusetts, 159.

The discussion on this point in *Bigelow v. Old Dominion Company*, 74 N. J. Eq. 457, was *obiter*, and not supported by the authorities cited. The transaction between the plaintiff in error and Lewisohn on the one side and the defendant in error on the other side gave rise to a valid and binding contract. The contract was created in the State of New York, by the vote of the Board of Directors accepting the offers to convey the property. The rule that validity of the contract was to be governed by the law of the place of performance is always applied in aid of the contract and never for the purpose of finding it invalid. *Pritchard v. Norton*, 106 U. S. 124, 137; *Hall v. Cordell*, 142 U. S. 116; *London Assurance Co. v. Companhia De Moagens*, 167 U. S. 149; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 458.

The contract was fully executed by the parties and, as an executed contract, it was as far immune from attack under the laws of New York as while it was executory. *Fletcher v. Peck*, 6 Cranch, 87, 136; Cooley on Con. Lim., 7th ed., pp. 384, 385.

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before this contract was entered into made this contract valid and not voidable. *Parsons v. Hayes*, 14 Abb. N. C. 419; *Barr v. Railroad Company*, 125 N. Y. 263; *Seymour v. Cemetery Ass'n*, 144 N. Y. 333; *Thornton v. Wabash Ry. Co.*, 81 N. Y. 462; *King v. Barnes*, 109 N. Y. 267, 288; *Langdon v. Fogg*, 18 Fed. Rep. 5; *Stewart v. St. Louis R. R. Co.*, 41 Fed. Rep. 736; *DuPont v. Tilden*, 42 Fed. Rep. 87; *Wood v. Water Works Co.*, 44 Fed. Rep. 146; *Foster v. Seymour*, 23 Fed. Rep. 65; *McCracken v. Robinson*, 57 Fed. Rep. 375.

Many cases subsequent to the present contract sustain the same rule. *Hutchinson v. Simpson*, 92 App. Div. 382; *Insurance Press v. Montauk Wire Co.*, 103 App. Div. 472; *Blum v. Whitney*, 185 N. Y. 232.

There is a vital distinction between "future allottees" who supply money through the payment for their stock which is to go into the pockets of the promoters in payment for the property conveyed by them to the corporation, and cases like the present where the issue of stock to "future allottees" is independent of the initial transaction and does not benefit the promoters. The Massachusetts decrees involve an impairment of the contract within the decisions of this court. The liability imposed upon the plaintiff in error by the Massachusetts decrees, necessarily involves a denial of the binding force of the contract, not by reason of any extensive equity, but upon a finding in substance that the defendant in error never became bound. *Old Dominion Company v. Bigelow*, 188 Massachusetts, 315, 328, 329.

Such avoidance of the contract which was valid by the laws under which it arose, constitutes an impairment. The question of impairment of contract by judicial decision has been found to exist in many cases originating in the Circuit Courts of the United States. *Gelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa County*, 3 Wall. 294; *Township of Pine Grove v. Talcott*, 19 Wall. 666;

Pleasant Township v. Aetna Life Insurance Co., 138 U. S. 67; *Butz v. Muscatine*, 8 Wall. 575; *Anderson v. Santa Anna*, 116 U. S. 356; *Folsom v. Ninety-six*, 159 U. S. 611; *Stanley County v. Coler*, 190 U. S. 437; *Harris v. Jex*, 55 N. Y. 421; *Douglass v. County of Pike*, 101 U. S. 677; *Great Southern Fire Proof Hotel Company v. Johnson*, 193 U. S. 532.

The *Great Southern Hotel Case* involved a purely private contract. The same rule as to impairment by judicial decision has recently been established by this court in similar cases coming here by writ of error to the state court. *Muhlker v. New York & Harlem R. R. Co.*, 197 U. S. 594; *Sauer v. City of New York*, 206 U. S. 536.

The *Muhlker Case* involved merely the reversal of the rule of the common law by the state court and not the interpretation of any statute. The present case is stronger in favor of the plaintiff in error than the *Muhlker Case*, because the plaintiff in error is not seeking a reversal of the rule established in New York, but rather its enforcement; and the present case involves the actual setting aside of the New York contract by the courts of another State. See opinion of Mr. Justice Holmes in *Old Dominion Company v. Lewisohn*, 210 Massachusetts, 206. The Massachusetts decrees also constitute an impairment of the contract, in that they deny the power or capacity of the defendant in error under the laws of New Jersey to bind itself with respect thereto, and thereby they misinterpret the statutes of New Jersey relating to corporations. General Statutes of New Jersey, 1895, Vol. 1, pages 907 *et seq.*; dissenting opinion of Mr. Chief Justice Knowlton in the present case below; *Bickley v. Schlag*, 46 N. J. Eq. 533, 535; *Donald v. American Smelting Company*, 62 N. J. Eq. 729, 733.

The Massachusetts decrees involve denial to the plaintiff in error of due process of law.

The due process clause operates not only as a limita-

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tion upon state legislatures, but also to restrain the state courts from denying the substance of due process, even though after hearing and after compliance with all the jurisdictional forms. *Virginia v. Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Scott v. McNeal*, 154 U. S. 34; *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U. S. 226; *Reynolds v. Chicago Traction Co.*, 207 U. S. 20.

Due process is denied by judicial decision (as distinguished from mere error) whenever fundamental principles are disregarded or vested rights acquired under settled rules of local law are divested by reversal of such settled rules, or by a decision in violation thereof. *Muhler v. New York & Harlem R. R. Co.*, *supra*; *In re Kemmler*, 136 U. S. 436, 448; *Davidson v. New Orleans*, 96 U. S. 97; *Hurtado v. California*, 110 U. S. 516; *Brown v. Levee Commissioners*, 50 Mississippi, 468; *Wulzen v. San Francisco*, 101 California, 15; *In re Ah Lee*, 5 Fed. Rep. 899; *Duke of Norfolk's Case*, 3 Ch. Cas. 1, 33.

The Massachusetts decrees involve retroactive judicial legislation, impairing rights of the plaintiff in error which were vested under the settled rules of law in New York. (The laws of New York and New Jersey have been examined in the preceding section.) This court will decide for itself as to the New York law. *Huntington v. Attrill*, 146 U. S. 657, 683, 684; *Scott v. McNeal*, 154 U. S. 34, 35; *Laing v. Rigney*, 160 U. S. 531; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329; *Eastern Building Ass'n v. Williamson*, 189 U. S. 122, 127; *Finney v. Guy*, 189 U. S. 335, 340; *Harding v. Harding*, 198 U. S. 317, 331, 335; *Tilt v. Kelsey*, 207 U. S. 43, 57, 58.

Retrospective laws cannot be enacted to deprive parties of property rights previously vested. *Medford v. Learned*, 16 Massachusetts, 215; *Addams v. Marx*, 50 N. J. Law, 253; *Towle v. Eastern Railroad*, 18 N. H. 547.

The decision of the Massachusetts court falls within

the same prohibition. *Old Dominion Company v. Lewisohn*, 210 U. S. 206.

The Massachusetts decrees create a fictitious obligation to the defendant in error as to the transaction in question *nunc pro tunc* by virtue of subsequent acts, although at the time of the transaction it fully consented thereto and although the subsequent acts involved no breach of duty toward it.

The Massachusetts decrees also involve a denial of due process in holding the plaintiff in error liable *in solido*.

The rule of promoters' liability has always rested upon the principle that the promoter is a fiduciary. His obligation is purely equitable and does not rest upon the theory that he commits a tort. Any profit received by him is charged with a constructive trust. The Massachusetts decision holds the plaintiff in error liable for what he did not receive. The case is not one involving defalcation or loss to a trust estate, and so is not within those cases which hold one trustee liable for defaults of his co-trustee. No such rule existed when the contract in question was made, and it is now attempted to be imposed retroactively by a judicial decision of the Massachusetts court.

Mr. Edward F. McClennen and *Mr. Louis D. Brandeis* for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

The question upon which these cases have been brought to this court is whether the Massachusetts court gave to a New York judgment pleaded as a bar to a Massachusetts suit that full faith and credit required by the first section of Art. IV of the Constitution of the United States, and § 905, Revised Statutes, enacted in pursuance thereof.

The *Old Dominion Copper and Smelting Company*, hereafter designated the *Copper Company*, a corporation

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of New Jersey, filed two bills in an equity court of Massachusetts against the plaintiff in error, Albert S. Bigelow, to recover secret profits realized by him, and an associate, one Lewisohn, as organizers or promoters of the Copper Company, in selling the mining properties of another corporation, called the Baltimore Company, and certain neighboring properties, designated in the transcript, "outside properties."

The two sales were for distinct considerations. The bills alleged that when these sales were made the Copper Company was under the absolute control of the two promoters, Bigelow and Lewisohn, and that they divided the profits between them. The fundamental facts in each case were the same. The two cases were heard together in the state courts, and are now heard as if one case, though upon separate writs and distinct records.

Demurrers were interposed and overruled. The allegations of the bills are fully shown in 188 Massachusetts, 315, where one of the cases was considered on demurrer. Answers were then filed and a great mass of evidence taken. Upon a full hearing the allegations of the respective bills were held to be sustained by the proofs and final decrees were rendered for the plaintiff in sums aggregating \$2,178,673.33. The decrees were affirmed in the Supreme Judicial Court.

The Federal question, upon which the judgment of this court is sought, arose in this wise: Bigelow, the plaintiff in error here, was a citizen of Massachusetts, and was, therefore, sued in the courts of that State. Lewisohn, who was Bigelow's associate promoter, was a citizen of New York. He was, therefore, sued separately in the Circuit Court of the United States for the Southern District of New York. The bills filed there were identical in every essential with those filed in Massachusetts. In the two sets of bills it was alleged that Bigelow and Lewisohn were joint promoters of the Copper Company, and

as such made the sales to it while under their entire control, and that they had realized fraudulent profits. Demurrers were interposed in the New York cases, which were sustained, and the bills dismissed. These judgments were affirmed in the Circuit Court of Appeals for the Second Circuit. The judgment in one of these cases (*Old Dominion Copper Co. v. Lewisohn*), that relating to the sale of the "outside properties," was brought to this court by certiorari and affirmed, the opinion being by Mr. Justice Holmes, 210 U. S. 206, where the facts of the case are stated.

The final decree in one of the New York cases was pleaded in a supplemental answer in the pending Massachusetts cases as a bar to the suits against Bigelow. The Massachusetts court adjudged that Bigelow was neither a party nor a privy to the New York suits, and was, therefore, not protected by the judgment therein.

To conclude Bigelow by the New York judgment, it must appear that he was either a party or a privy. That he was not a party to the record is conceded. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was, therefore, a stranger, and was not concluded by that judgment as a party thereto. That he was indirectly interested in the result because the question there litigated was one which might affect his own liability as a judicial precedent in a subsequent suit against him upon the same cause of action is true, but the effect of a judgment against *Lewisohn* as a precedent is not that of *res judicata*, and the Massachusetts court was under no obligation to follow the decision as a mere judicial precedent. Nor would assistance in the defense of the suit, because of interest in the decision as a judicial precedent which might influence the decision in his own case, create an estoppel as to Bigelow. *Stryker v. Goodnow*, 123 U. S. 527. Also *Rumford Chem. Works v. Hygienic Chem. Co.*, 215 U. S. 156.

But it is said that if Bigelow was not in every sense a party, he was privy to Lewisohn, who was, and that the estoppel of the adverse judgment in the suit against Lewisohn protected Bigelow as well.

But would that judgment, if it had been for the plaintiff in that case, have bound Bigelow in a subsequent suit by the same plaintiff upon the same facts? If not, upon what principle may he claim the advantage of it as a bar to the present suit? The cause of action was one arising *ex delicto*. It was several as well as joint. The right of action against both might have been extinguished by a settlement with one, or by a judgment against one, and satisfaction. But the claim has come in substance to this, that although the plaintiff had a remedy against Lewisohn and Bigelow severally or jointly, a failure to recover in an action against one is a bar to his action against the other, the facts being the same, although there has been no satisfaction for the injury done. The only basis upon which such a result can be asserted is that Bigelow would have been bound by the judgment if it had been adverse to Lewisohn, and may, therefore, shelter himself behind it since it was favorable to his joint wrongdoer.

It is a principle of general elementary law that the estoppel of a judgment must be mutual. *Railroad Co. v. National Bank*, 102 U. S. 14; *Keokuk & W. Railroad v. Missouri*, 152 U. S. 301; Freeman on Judgments, § 159; Greenleaf on Evidence, 13th ed., vol. 1, § 524. The mutuality of estoppel by judgment is fully recognized in both the New York and Massachusetts decisions: *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Brigham v. Fayerweather*, 140 Massachusetts, 411, 415; *Nelson v. Brown*, 144 N. Y. 384.

An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependant upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the

same plaintiff. See *Portland Gold Mining Co. v. Stratton's Independence*, 158 Fed. Rep. 63, where the cases are collected. The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee.

The principle upon which one may avail himself of the effect of a judgment adverse to the plaintiff in a former suit, against the immediate actor, is thus stated in *New Orleans & N. E. R. R. Co. v. Jopes*, 142 U. S. 18, 24, 27:

"It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to like immunity. . . . If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? . . . The question carries its own answer; and it may be generally affirmed that if an act of an employ   be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn, but upon Bigelow's own wrong, whether alone or in co  peration with Lewisohn. The liability of each was several as well as joint, and a failure to recover against one is no bar to a suit against the other upon the same facts. But a judgment not only estops those who were actually parties but also such persons as were represented by those who were or claim under or in privity with them.

What is privity? As used when dealing with the es-

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toppel of a judgment, privity denotes mutual or successive relationship to the same right of property. *Litchfield v. Goodnow*, 123 U. S. 549. The ground upon which privies are bound by a judgment, says Prof. Greenleaf, in his work upon Evidence, 13th ed., vol. 1, § 523, "is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

But it is said that the relationship of joint tort-feasors is such as to constitute privity, and that a judgment in a suit in favor of one upon the same identical cause of action, is a bar to a suit by the same plaintiff against the other wrongdoer. Whether the estoppel of a judgment is to be confined to those who were actually parties or privies in estate or interest, or may be expanded so as to include joint tort-feasors, not actually parties, is a question concerning which there is some diversity of opinion. But, as we shall later see, the sounder reason, as well as the weight of authority, is that the failure to recover against one of two joint tort-feasors is not a bar to a suit against the other upon the same facts.

Passing this for the time, we come to a consideration of the contention that whatever the general law upon this subject, if such was the effect of such a judgment under the law of New York, it was the duty of the Massachusetts court, under the full faith and credit clause, to give it like effect in the present suit.

That the judgment in question is entitled to the same sanction which would attach to a like judgment of a court of the State of New York, is plain. The United States court was in the exercise of jurisdiction to administer the laws of the State, since its jurisdiction depended solely upon diversity of citizenship. Its judgment is, therefore, entitled in the courts of another State to the

same faith and credit which would attach to a judgment of a court of the State of New York. *Dupassey v. Rochereau*, 21 Wall. 130; *Deposit Bank v. Frankfort*, 191 U. S. 499, 514. What, then, is the effect of such a judgment, under the law of New York, as an estoppel in a subsequent suit upon the same facts by the same plaintiff against Bigelow. This was a question of fact in the Massachusetts court: *Hanley v. Donoghue*, 116 U. S. 1. Expert legal opinion is favorable to the view urged by the plaintiff in error, though the ground upon which such a consequence rests is by no means clear. The highest courts of New York have not clearly decided the precise question here presented. The cases referred to or commented upon by the witnesses cannot be said to clearly point to the conclusion claimed. Nevertheless, the Massachusetts court, treating the question as one of fact, accepted the view that under the law of New York this judgment would have been a bar to another suit upon the same facts against Bigelow, in the courts of New York. We shall do likewise. The Massachusetts courts held that under the general law, which was the applicable law of Massachusetts, the New York court had no such jurisdiction over the person of Bigelow as to affect him, either as a party who might have controlled the case or appealed from the judgment, and that he was in no sense such a privy as to be bound by it. Upon the general law as to the estoppel of such a judgment, that court said:

"This can hardly be regarded as an open question in this Commonwealth. In *Sprague v. Oakes*, 19 Pick. 455, which was an action for trespass *quare clausum fregit*, it was said, respecting such a defense, 'The defendant was neither a party nor privy to that judgment, was not bound by it, nor could he take advantage of it.' This case has never been overruled or questioned and must be regarded as stating the law of this Commonwealth. There are other authorities to the same point. *Lansing v.*

Montgomery, 2 Johns. 382; *Marsh v. Berry*, 7 Cowen, 344; *Moore v. Tracy*, 7 Wend. 229; *Gittleman v. Feltman*, 122 App. Div. (N. Y.) 385; *Atlantic Dock Co. v. Mayor and Aldermen of New York*, 53 N. Y. 64; *Tyng v. Clark*, 9 Hun, 269; *Calkins v. Allerton*, 3 Barb. 171, 174; *Goble v. Lillon*, 86 Indiana, 327; *Thompson v. Chicago, St. Paul & Kansas City Railroad*, 71 Minnesota, 89; *Three States Lumber Co. v. Blanks*, 118 Tennessee, 627. The reasons upon which these decisions rest is that there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties. It requires no discussion to demonstrate that a judgment in the Lewisohn suit against the defendant would not have fixed liability upon the present defendant. Hence there can be no estoppel under our law or under the general principles of jurisprudence, because it is not mutual. *Brigham v. Fayerweather*, 140 Massachusetts, 411, 415; *Dallinger v. Richardson*, 176 Massachusetts, 77, 83; *Worcester v. Green*, 2 Pick. 425, 429; *Biddle & Smart Co. v. Burnham*, 91 Maine, 578; *Moore v. Albany*, 98 N. Y. 396. 'Estoppels to be good must be mutual.' *Litchfield v. Goodnow*, 123 U. S. 549, 552; *Nelson v. Brown*, 144 N. Y. 384, 390. Bigelow could not have appeared as of right and made a defense to that suit. No judgment can be regarded as *res judicata* as to any matter where the rights in the subject-matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice. *Brabrook v. Boston Five Cents Savings Bank*, 104 Massachusetts, 228, 233. There is no privity between joint wrongdoers, because all are jointly and severally liable. *Corey v. Havener*, 182 Massachusetts, 250; *Feneff*

v. *Boston & Maine Railroad*, 196 Massachusetts, 575, 581; *Pinkerton v. Randolph*, 200 Massachusetts, 24, 28. There is no right of contribution between joint wrongdoers, where they are in *pari delicto* with each other. *Churchill v. Holt*, 127 Massachusetts, 165. They are equally culpable, and the wrong complained of results from their joint effort."

The cause of action was one arising *ex delicto* and the liability of Lewisohn and Bigelow was several as well as joint. In many cases this court has held that a judgment without satisfaction against one of two joint trespassers is no bar to another action against the other for the same tort. The common law imposes upon each joint tort-feasor the burden of bearing the entire loss which he, in coöperation with another, has inflicted. The injured person may sue those who coöperated in the commission of the tort together, or he may sue them singly. He may recover against less than all if he sue them jointly, and may have a judgment for unequal sums against all who are joined in the suit. Or, if he sue one such wrongdoer and recover judgment, he is not estopped from suing another upon the same facts unless his first judgment has been fully satisfied. *Lovejoy v. Murray*, 3 Wall. 1; *Sessions v. Johnson*, 95 U. S. 347, 348; *The Beaconsfield*, 158 U. S. 303. If Lewisohn and Bigelow were severally liable, and a judgment against one without full satisfaction was not a bar to a suit against the other, it is difficult to see why a failure to obtain a judgment against one should be an answer to a suit against the other, who was not a party to the first suit. That a failure to recover in one suit against one such tort-feasor is not a bar to a suit in the courts of another State against another, who was not a party to the first suit, seems to be supported by considerations of justice and the weight of authority.

But did the Massachusetts court deny full faith and credit to the New York judgment by denying to it the

effect of estoppel which attached to it in the courts of New York, or may it determine for itself under principles of general law whether the judgment was a bar to the suit against Bigelow?

The answer must turn upon the construction and effect of the full faith and credit clause of the Constitution, and the act of Congress giving effect thereto. Section 1, Article IV of the Constitution reads as follows:

“Full faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

The act of Congress of May 26, 1790 (1 Stat. 122, c. 11), now § 905, Revised Statutes, reads as follows:

“The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”

The effect of this clause is to put the judgment of a court of one State, when sued upon, or pleaded in estoppel, in the courts of another State, upon the plane of a domestic judgment in respect of conclusiveness as to the facts adjudged. But for this provision such state judgments would stand upon the footing of foreign judg-

ments which are examinable when sued on in the courts of another country, being only *prima facie* evidence of the matter adjudged. *D'Arcy v. Ketchum*, 11 How. 165, 175. Thus in *Hanley v. Donoghue*, 116 U. S. 1, 4, it is said:

"Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being reëxaminable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Citing *Buckner v. Finley*, 2 Pet. 592; *M'Elmoyle v. Cohen*, 13 Pet. 312, 324; *D'Arcy v. Ketchum*, 11 How. 165, 176; *Christmas v. Russell*, 5 Wall. 290, 305; *Thompson v. Whitman*, 18 Wall. 457.

The requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice protected by other constitutional provisions which it was never intended to modify or override.

It is therefore well settled that the courts of one State are not required to regard as conclusive any judgment of the court of another State which had no jurisdiction of the subject or of the parties. *D'Arcy v. Ketchum*, 11 How. 165; *Board of Public Works v. Columbia College*, 17 Wall. 521, 528; *Thompson v. Whitman*, 18 Wall. 457; *Hanley v. Donoghue*, 116 U. S. 1, 4; *Huntington v. Attrill*, 146 U. S. 657, 685; *Hall v. Lanning*, 91 U. S. 160.

Mr. Justice Story, in his commentaries on the Conflict of Laws, § 609, says:

"It (the Constitution) did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority, or privilege, or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to

them by its own laws in their character of foreign judgments."

The general effect of a judgment of a court of one State when relied upon as an estoppel in the courts of another State is that which it has, by law or usage, in the courts of the State from which it comes. But the faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment, or its right to bind the persons against whom the judgment is sought to be enforced.

Referring to the case of *Mills v. Duryee*, 7 Cranch, 481, where the language used was supposed to indicate that the effect to be given to the judgment of one State by the courts of another was in all respects that which attached to domestic judgments, Mr. Justice Bradley, speaking for this court in *Thompson v. Whitman*, 18 Wall. 457, 462, said that *Mills v. Duryee* had never been departed from "where the questions were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in *Mills v. Duryee*, in his *Commentary on the Constitution*, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one State in every other State, adds: 'But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer (upon the States) a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'"

The conclusiveness of the judgment relied upon in *Thompson v. Whitman* depended upon the locality of a certain seizure by the authorities of New Jersey under an act regulating the fisheries of that State. The question

was whether a record finding of jurisdictional facts could be contradicted. The holding of the court was that the jurisdiction could be assailed by evidence of facts contradicting those found to exist by the record pleaded as an estoppel. That case has since been accepted as determining that the binding effect of a judgment of one State, when pleaded as an estoppel in the courts of another, is open to challenge by assailing an officer's return of service, or the authority of one who assumed to accept service, or to enter an appearance, even though the judgment includes a finding of the facts necessary to confer jurisdiction. It would seem to follow that the Massachusetts court had the legal right to inquire, not only whether Bigelow was a party to the New York judgment in the sense that he might have appeared and defended, or appealed from it, but whether the cause of action and the relation of Bigelow to it, or to the parties, was such that the New York court could pronounce a judgment which would bind him, or conclude the plaintiff from suing him upon the same facts. *Knowles v. Gaslight Co.*, 19 Wall. 58; *Cooper v. Newell*, 173 U. S. 555, 556.

Bigelow was a citizen of and domiciled in Massachusetts. He was not found within the State of New York. Indeed, the pleadings in the New York court stated that he was not sued because he did not reside within the State. A judgment rendered upon constructive service against one domiciled within the State may be a good judgment *in personam* in that State, though void when sued upon outside the State. *Pennoyer v. Neff*, 95 U. S. 714. In *Goldey v. Morning News*, 156 U. S. 518, 521, it is said:

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appear-

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ance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."

See also the thorough discussion of this question in *Haddock v. Haddock*, 201 U. S. 562, 567, 573.

The New York court had no jurisdiction to render a judgment *in personam* against Bigelow. He was confessedly not a party. He did not voluntarily appear. He had no legal right to appear, no right to introduce evidence, control the proceedings, nor appeal from the judgment. To say that nevertheless the judgment rendered there adverse to the plaintiff in that case may be pleaded by him as a bar to another suit by the same plaintiff upon the same facts, because such is the effect of that judgment by the usage or law of New York, would be to give to the law of New York an extra-territorial effect, which would operate as a denial of due process of law. Whatever the effect of that judgment as an estoppel under the law of New York, it cannot be held an estoppel in a suit in the courts of another State between the same plaintiff and a different defendant who was not a party to the first suit. *D'Arcy v. Ketchum*, 11 How. 165, is clearly in point. Under a New York statute a court of that State entered judgment against a non-resident defendant who was not served and did not appear. The judgment was entered under authority of a statute permitting judgment against joint debtors where only one was notified. The non-resident defendant was sued upon this judgment, perfectly good under the decisions of New York, in the courts of Louisiana. This court, after full consideration, held that the jurisdiction of the New York court to render a personal judgment against a non-resident was open to inquiry, and that it was not to be given the effect it plainly had under the law of New York, because that court had no jurisdiction over the person of the defendant. This

case was followed in *Board of Public Works v. Columbia College*, 17 Wall. 521, 527, which involved the effect of a joint judgment against five persons as joint debtors, two of whom were non-residents, and were not served and did not appear. This judgment was held not to be evidence against the partners who had not appeared. Touching the effect of that judgment, this court said:

"It is sufficient for the disposition of this case that the judgment is not evidence of any personal liability of Withers outside of New York. It was rendered in that State without service of process upon him, or his appearance in the action. Personal judgments thus rendered have no operation out of the limits of the State where rendered. Their effects are merely local. Out of the State they are nullities, not binding upon the non-resident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this court and of the state courts."

"The judgment in New York, it is true, is a joint judgment against all of the partners, against those summoned by publication as well as those who were served with process or appeared, but this joint character cannot affect the question of its validity as respects those not served. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit."

Hall v. Lanning, 91 U. S. 160, was an action in a United States court for the District of Illinois upon a New York judgment against a New York partnership. It appeared that the suit in which the judgment sued upon was obtained was against all of the members of a firm upon a joint liability. The members of the partnership who were residents and were actually served assumed the right to

enter the appearance of certain non-residents, who were not and could not be notified. In the action upon this joint judgment one of the defendants claimed the right to deny the jurisdiction of the New York court to pronounce a judgment against him upon the ground that he had not been summoned, had not personally appeared and was not concluded by an appearance entered for him by his co-partners, the firm having theretofore been dissolved. The case was distinguishable from *D'Arcy v. Ketchum* and *Board of Public Works v. Columbia College*, because the partners actually served assumed authority to enter the appearance of the non-residents who were not served. The debt sued upon was a partnership debt. The contention was that the relation of partnership conferred upon partners, even after dissolution, the right to appear for their co-partners in a suit against the firm. As a question of general law, this court held that although the judgment was valid under the laws and usage of New York, at the common law no such right existed after dissolution and that the requirement of full faith and credit did not compel the courts of another State to give effect to the judgment as against the non-resident member of the firm who had not been served.

From these cases it is clear that the conclusive effect of a judgment *in personam* which is to be recognized when questioned in the courts of another State depends upon whether it is the judgment of a court which had jurisdiction over the person of the defendant sought to be bound. The estoppel here insisted upon is grounded not upon actual notice or appearance, but upon a theory as to the relation between joint tort-feasors under the laws of New York. If the Massachusetts court was of opinion that under the general law that relationship was not such as to make Bigelow a party by either privity or representation, it was under no obligation to treat the New York judgment as a bar to the suit in which it was pleaded.

The binding effect of the judgment sued upon in *Hall v. Lanning*, cited above, turned upon the implied power of one member of a dissolved firm to enter the appearance of his non-resident partners in a suit upon a joint debt. Under the decisions of the New York courts such a judgment bound the members whose appearance was so entered. But this court held that full faith and credit was not denied by a determination of the power of one partner to so enter the appearance of a non-resident partner and held that no such power existed.

In *Bagley v. General Fire Extinguisher Co.*, 212 U. S. 477, 480, the facts were these: A tenant recovered judgment against his landlord resulting from the melting of sprinkler heads in an automatic sprinkler put up in plaintiff's building by the defendant. The plaintiff gave the defendant notice to defend, which it ignored. The suit was to recover the money so paid by the landlord. It was claimed that negligence in construction was made out by the judgment rendered against the plaintiff in favor of the tenant in a court of the State of Michigan. That judgment was relied upon as estopping the defendant, who it was claimed had notice, and was, under its contract, bound to defend. The court said:

"The defendant was no party to that judgment, and there is nothing in the Constitution to give it any force as against strangers. If the judgment binds the defendant it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. The ground of decision in both courts below was that there was no such estoppel, the duty and responsibility of the defendant being limited by the words that we have quoted from the contract, excluding any obligation other than those set forth. The decision, in other words, turned wholly on the construction of the contract as excluding a liability over in the event that happened. Even if wrong,

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it did not deny the Michigan judgments their full effect, but denied the preliminary relation between the defendant and the party to them, without which the defendant remained a stranger to them, in spite of the notice to defend."

In support of the contention that the full faith and credit clause gives to this judgment the effect, as an estoppel, which would be given to it in New York, counsel have cited the case of *Hancock Nat. Bk. v. Farnum*, 176 U. S. 640, 643, where it is said that the "local effect must be recognized everywhere." But that was said in respect of a Kansas judgment in favor of a creditor of a Kansas corporation, in a suit by the creditor in another State against a stockholder of the Kansas corporation to subject him to liability as a shareholder to an amount equal to his stock. But under the law of Kansas and the general law a stockholder is represented by the corporation in all actions against the corporation for corporate liabilities. The stockholder is by the very law of corporate existence an integral part of the corporation, and is bound by a judgment against it in respect of any matter within the scope of corporate powers. See *Glenn v. Liggett*, 135 U. S. 533; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 336. In the *Farnum Case*, as in all cases of that class, there is a privity in interest and a representation in law of the stockholder by the corporation of which he is a member. The conclusiveness of such a judgment as binding each stockholder does not, however, extend to matters in which the corporation cannot be said to represent him. Thus it is said in the *Farnum Case*:

"We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity,

as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it."

There is no parallel between the relation of joint tortfeasors and that of a stockholder to his corporation. In the latter case, the stockholder, by the organic law of his corporation, is a member and represented by it so long as it keeps within its corporate powers. In the other instance one wrongdoer when sued does not represent those not sued, although they had coöperated in the wrong and were both liable.

The conclusion we reach is that the Massachusetts court did not deny full faith and credit to the New York judgment, and its decrees are therefore

Affirmed.

MR. JUSTICE HUGHES took no part in the hearing or consideration of these cases.

STALKER v. OREGON SHORT LINE RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 225. Argued April 24, 1912.—Decided May 27, 1912.

The act of March 3, 1875, 18 Stat. 482, c. 152, granting rights of way and station grounds for railroads through the public lands was a grant *in presenti* of lands to be thereafter identified. *Railroad Co. v. Jones*, 177 U. S. 125.

The right of way becomes definitely located by actual construction, which is unmistakable evidence and notice of appropriation.

A selection and location of station grounds under the act of March 3, 1875, filed with the Secretary of the Interior after construction of the

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railroad, is subject to approval by the Secretary, but the approval relates back to the date of filing and thereupon the selection becomes superior to the intervening claim of an entryman initiated while the selection was pending approval. *Northern Pacific R. R. Co. v. Doughty*, 208 U. S. 251, where the station grounds selection was made prior to actual construction of the railroad, distinguished.

The construction now given to the act of March 3, 1875, is in accordance with the settled practice of the Land Department; any other construction would defeat the purpose of Congress in regard to encouraging the building of railroads through the public lands.

The failure of a subordinate of the Land Department to comply with the regulations of the department and note selections properly made by a railroad company cannot affect the rights of the company and permit the entry of the land pending approval of the selections by the Secretary. *Van Wyck v. Knevals*, 106 U. S. 360.

A patent, issued to an entryman whose claim was initiated while the selection of a railroad company was pending for approval, is not an adjudication, but if, as in this case, the selection is approved, such a patent is issued in violation of law and is inoperative to pass title.

16 Idaho, 362, affirmed.

THE facts, which involve the construction of the act of March 3, 1875, granting station grounds on the public lands to railroad companies, and the conflicting rights of a company claiming thereunder and an entryman, are stated in the opinion.

Mr. Carl A. Davis, for plaintiffs in error, submitted.

Mr. Maxwell Evarts, with whom *Mr. P. L. Williams* and *Mr. A. A. Hoehling, Jr.*, were on the brief, for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action brought by the railroad company under a statute of the State of Idaho to quiet title to four certain lots in the town of Meridian, Idaho. The judgment in the trial court for the railroad company was affirmed in the Supreme Court of the State.

The defendant in error, as successor in title to the Idaho Central Railway Company, claims that the property in question is a part of the station grounds granted to its predecessor under the act of Congress of March 3, 1875, which grant in part conflicts with a preëmption entry made by one Joseph G. Reed, under whom the plaintiffs in error claim. The lands in question had been surveyed and were open for entry long prior to the initiation of either of the claims here involved. The conflicting rights arose in this way: The Idaho Central Railway was duly qualified under the act of Congress of 1875 to acquire a right of way and station grounds. In June, 1887, its directors formally adopted a route between Nampa and Boise City, which corresponded precisely with the route upon which the railroad was later constructed. This adoption was followed up by the filing of profile maps, which were approved by the Secretary of the Interior on February 17, 1888, and sent back to the proper land office at Boise City. These maps did not include grounds for station purposes. By September 1, 1888, the railroad was constructed along the route first adopted, and at that date was in actual operation. On September 12, 1888, the company filed in duplicate with the Register of the Land Office at Boise City, a plat of ground adjacent to its right of way, desired for station purposes, which selection included the lots here in controversy. This plat was received by the Secretary of the Interior on September 20, 1888, and approved on December 15, 1888. A copy was then transmitted to the register at Boise City. That official received it, but failed and neglected to "note the same upon the plats in the said land office," as it was his duty to do, and it is now stipulated that it has since been lost or mislaid and cannot be found. A blue print of the original map of the station grounds as selected by the plaintiff, with its certificates and endorsements, was stipulated into the record.

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The plaintiffs in error claim through Joseph G. Reed, a qualified entryman, who on October 18, 1888, filed a preemption claim upon a quarter section adjacent to the railroad right of way. Later he made final proofs, and, on August 4, 1891, a patent issued. This preemption included about twelve acres of the ground which the railroad company had theretofore selected for station purposes. There is no evidence of occupation of the portion here involved, and no plea of innocent purchaser, for value, without notice. The question was decided by the state court upon the rights resulting from the facts stated.

The case must turn upon the interpretation of the act of Congress of March 3, 1875, 18 Stat. 482, c. 152. The relevant sections are the first and fourth, which are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

* * * * *

"SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after

the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The uniform construction of this act has been that it is a grant "*in præsenti* of lands to be thereafter identified." *Jamestown & N. Railroad v. Jones*, 177 U. S. 125. In that case the question was whether the right of way became definitely located by the actual construction of the railroad, or only upon the filing of a map of location, which was much later. The conclusion was that by the actual construction of the railroad the boundaries of the grant were fixed by the rule of the statute, which granted a strip one hundred feet wide on each side of the center of the track. That had been the construction of the act by the Interior Department, and was followed by the court below. Mr. Justice McKenna, for this court, said (p. 131): "The ruling gives a practical operation to the statute, and we think is correct. It enables the railroad company to secure the grant by an actual construction of its road, or in advance of construction by filing a map [of its road] as provided in section four. Actual construction of the road is certainly unmistakable evidence and notice of appropriation." It was therefore held that an entry made after construction but before filing a map of location was subject to the prior right of the railroad.

Possibly station grounds might also have been secured

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by the actual marking of the boundaries and the construction of station houses, side tracks, etc. This we need not decide. But the fourth section of the act provides a method for securing the benefits of the act in advance of actual construction.

Prior to the initiation of any right here involved the Land Department put in force certain regulations to be followed by railroad companies desiring to secure the benefits of a grant in advance of actual construction, as provided by the fourth section of the act. One of these required that upon the location of any section, not exceeding twenty miles in length, the company should file with the register of the land district in which the land lay "a map for the approval of the Secretary of the Interior, showing the termini of such portion and its route over the public lands," etc. Another of these departmental regulations provided that "if the company desires to avail itself of the provisions of the law, which grants the use of ground adjacent to the right of way for station buildings . . . it must file for approval, in each separate instance, a plat showing in connection with the public surveys, the surveyed limits and area of the grounds desired." These regulations require that "a copy" of the approved map of "definite location," and of the "approved plat of grounds selected by a company, under the act in question, for station purposes," shall be transmitted to the register of the land office where the land lies. Upon the receipt of the map of alignment, the land office is required "to mark upon the town-ship plats the line of the route of the road as laid down on the map," and to note in pencil on the tract books opposite the tract of public land cut by said lines of railroad, "that the same is disposed of subject to the right of way," etc., and to write upon the face of any certificate disposing of said lands, after the filing of such approved map of location, "that it is allowed subject to the right of way." A like duty is

put upon the register when an approved station ground plat is received.

The plat of the station grounds selected by the railroad company in this case was filed in the local land office on September 12, 1888, and reached the Secretary of the Interior on September 20, 1888. Both dates are antecedent to the filing of the preëmption claim. But the selection pended in the office of the Secretary of the Interior until December 15, 1888, on which date it was approved. While thus pending the preëmption right of Reed was initiated.

There can be no doubt that the provisions of the fourth section, for securing in advance of construction the benefits of the act, have application to the station grounds, as well as to the right of way proper. The "benefits" to be secured cover one as well as the other. The prerequisites for securing either right, in advance, is the filing of a map of location, whether it be for a right of way or for station grounds. But until approved the appropriation stands suspended.

The act of 1875 confers upon the railroad company the "right to take" from the public lands adjacent to its right of way, ground for station purposes. This "right to take" in advance of construction, is subject to the approval of the Secretary of the Interior. When, therefore, the railroad company has exercised its "right to take" a particular tract for station purposes, by filing a survey and plat of the ground selected, the Secretary of the Interior is called upon to interpret the law under which the right to take is claimed, and to determine the lawfulness of the taking, as of the time when the right was asserted by the filing of the plat and survey. When he acts and for the Government consents, by approving the plat, his approval operates to give effect to the grant, the land upon which it operates being thereby definitely determined. Therefore it is that a claim by another initiated pending his

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conclusion is cut off, by giving effect to the approval as of the date when his action was invoked. The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled that while no vested right against the United States is acquired until the actual approval of the list of selections, the company does acquire a right to be preferred over such an intervenor. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in *Weyerhaeuser v. Hoyt*, 219 U. S. 380, and we can add nothing to the conclusiveness of that case.

But, it is said that the doctrine of relation does not apply to the benefits to be acquired under the fourth section of the act of March 3, 1875, because a railroad desiring a right of way in advance of construction must do three specific things: first, make a definite location of its route; second, file a profile map of its line with the register of the land office for the district; and third, obtain the approval of that map by the Secretary of the Interior; and that the act makes each of these things a prerequisite to the acquirement of any right, by expressly declaring that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

In *Minneapolis &c. Railroad v. Doughty*, 208 U. S. 251, the question was whether a homestead application filed

after the railroad company had surveyed and staked out its route across the quarter-section claimed, but before the road had been constructed or its map of location filed, was entitled to preference over the right later secured by the approval of a map of alignment, following the route which had been staked. The claim was that the approval by the Secretary of the Interior of the map of location related in date to the date when the route was staked out, and thus cut out the homestead claim. This court held that the mere surveying and staking of a route was not such actual possession and appropriation as to give effect to the grant and bring the case under the authority of *Jamestown & N. Railroad v. Jones*, 177 U. S. 125.

The distinction and essential difference between a mere staking out of a route, which, being the act of the company alone, is changeable at its will, and actual construction, which necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given, is very obvious, and was carefully pointed out in the opinion of the court in the case referred to.

Another point was involved and decided in the *Doughty Case*, namely, that the approval of the map of alignment by the Secretary of the Interior would not relate to the date of the surveying and staking out of the route. This was manifestly so, since that survey and staking was subject to change at any time before the permanent line was located by the filing of a map of such locations for the approval of the Secretary of the Interior. Therefore it is that the doctrine of relation has always been applied in reference to the date when the official action of the Department was invoked to confirm the location thus permanently settled. These points were conclusive against the railroad company and were the only questions for decision. The case was therefore rightly decided.

But that case does not control this. Here we are required to say whether a preëmptor whose claim was

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initiated while the Secretary of the Interior had under consideration the approval of a map of station grounds thereby obtained a right to be preferred. True, this approval did not occur until after the rights of the plaintiffs in error had been initiated; but the patent to the pre-emptor did not issue until long after that approval. Upon what principle can it be held that the grant, which, under any view of the case, is prior in date to the patent under which plaintiffs in error claim, is subordinate in right as to the overlap? Neither should the case of *Railroad v. Doughty* be regarded as construing the fourth section of the act as holding that pending the approval of a map of final location, any right may be initiated which will be superior to the title which vests upon such approval. No such question was involved in that case. What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the Land Office, and the approval thereof by the Secretary of the Interior—and that “*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way,” refers to the non-vesting of any right *as against the United States*, and not as denying the priority of right in the acquisition of the premises as *between parties* growing out of priority of application.

Any construction of the fourth section of the act of 1875 which would permit rights initiated while the Secretary of the Interior was considering the approval of a map of location of a right of way over public lands, or a plat of survey of depot grounds, to prevail over rights resulting from the prior commencement of proceedings for the acquisition of title, would be in conflict with the settled practice of the Land Department and the repeated rulings of this court under other acts. *Shepley v. Cowan*, 91 U. S. 330; *Weyerhaeuser v. Hoyt*, 219 U. S. 380.

Any other conclusion would lead to great confusion and

tend to defeat the purpose of the fourth section by inviting intervenors to initiate rights made desirable by the disclosure of the land most available to the railroad company, and rights presumably hurtful to the railroad enterprise, which Congress intended to encourage and promote.

The principle applicable is fully discussed in *Shepley v. Cowan*, cited above, where, after discussing certain prior cases, the court said (p. 338):

"But whilst, according to these decisions, no vested right as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

The initiatory act, to which the final act of approval relates, is the filing with the Secretary of the Interior of the map of definite location. The mere surveying and staking of a route is the tentative act of the railroad. It might at will select a different route and move its stakes. But when it adopts a route definitely and then causes a map of such route to be filed in the land office of the district, in duplicate, and then filed with the Secretary of the Interior, a right is thereby initiated which, until disposed of, rightly precludes the creation of a later right and gives to the company, as prior in time, priority in right. The foundation for this doctrine of relation is so fully stated and so thoroughly vindicated by the opinion in *Weyerhaeuser v. Hoyt*, cited above, that we need say nothing more.

It is next said that the register did not, after a copy of the approved map of station grounds had been transmitted

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to him, mark the proper township plat and tract books, as required by the regulations of the Land Department, so as to show the station land selected. This notation on the books of the local land office is for the purpose of giving notice to future enterers. But this was not required to be done until the receipt in the Land Office of the approved plat of station grounds. That approval did not occur until December 15, 1888. Reed filed his right of preëmption October 18, 1888, a date antecedent to any possible notation. He could not, therefore, have been misled but, on the other hand, had the constructive notice which came from the then pending proceedings before the Secretary of the Interior. But aside from this, there are two answers to the contention: First, if we are right in holding that the grant vested in the company when the plat was approved, as of the date when filed, the failure of the officer in the district land office to properly mark the plat could not operate to defeat the grant; and, secondly, the railroad company having done everything which it was required by law to do, should not be affected by the negligence of the register in not doing a duty upon which the vesting of title as against the United States did not depend. If the taking effect of the grant had been made to depend upon his properly marking the plat books, there would be no room for the doctrine of relation to the initiatory step of filing the plat of selection. As that is not the case, his neglect to do something not vital to the vesting of title will not defeat the title so vested.

When the plat of station grounds was approved by the Land Department, the grounds so selected were segregated from the public lands, and it was the duty of the Land Department to withdraw the land so granted from the market. If a subordinate failed to make the proper notation by which this withdrawal would have been recorded, it was not the fault of the railroad company. In *Van*

Wyck v. Knevals, 106 U. S. 360, 367, this court said of the effect of the approval of a map of definite location:

"No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land-officers."

We therefore conclude that the subsequent issue of a patent to the land entered by Reed was subject to the rights of the railroad company theretofore acquired by approval of its station ground map. The patent is not an adjudication concluding the paramount right of the company, but insofar as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title.

Certain other questions have been touched upon in the briefs. None of them need special notice.

We find no error in the judgment of the Idaho court, and it is, therefore

Affirmed.

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Syllabus.

CHICAGO & ALTON RAILROAD COMPANY *v.*
KIRBY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 226. Argued April 25, 1912.—Decided May 27, 1912.

The implied agreement of a common carrier is to carry safely and deliver at destination within a proper time; evidence of diligence and no unreasonable delay excuses.

A carrier who agrees to expedite assumes a more burdensome liability and can exact a higher rate than where mere carrier's liability exists.

An interstate carrier can assume an extra liability for expediting, provided it makes and publishes a rate therefor and opens it to all.

To agree with a particular shipper to expedite a shipment at regular rates, where no rate has been published for special expediting, is a discrimination and as such a violation of the Elkins Act of February 19, 1903, 32 Stat. 847, c. 708, and relief on the contract will be denied.

The broad purpose of the Commerce Act to compel the establishment of reasonable rates and uniform application will not be defeated by sanctioning special contracts giving special advantages to particular shippers.

To guarantee a particular connection and transportation by a particular train amounts to giving a preference when not open to all and provided for in the published tariffs, and under the Elkins act is an illegal discrimination.

A shipper is presumed to know what the published rates are, and if they do not contain provisions for the special service guaranteed to him he must be taken as having contracted for a rate discriminatory in his favor.

Where plaintiff sues only on a special contract for prompt delivery by specified train, and there is no count for negligence as a carrier only, his claim for damages based on such negligence is not presented, and cannot be considered, on the record.

242 Illinois, 418, reversed.

THE facts, which involve the validity under the Elkins Act of a special contract for prompt delivery of goods by an interstate carrier, are stated in the opinion.

Mr. Garrard B. Winston and Mr. William Patton, with whom Mr. Silas H. Strawn was on the brief, for plaintiff in error:

The guarantee of special delivery upon which alone this suit was brought is an unlawful discrimination, and, therefore, void. *New Haven R. R. Co. v. Int. Com. Comm.*, 200 U. S. 361, 391.

The case was brought in assumpsit, not upon the common-law obligation of the railroad to carry within a reasonable time without negligent delay, but upon a special contract of guarantee to connect Kirby's car of horses with the "Horse Special" of the Michigan Central Railroad Company. *Armour Packing Co. v. United States*, 209 U. S. 56, 80.

The contract set out in the declaration being for a special service not noted in, but on the contrary prohibited by, the published tariffs, even if made, was void, as being in violation of the sections of the Interstate Commerce Act prohibiting discrimination, and no recovery can be had thereon. *Tex. & Pac. Ry. Co. v. Cotton Oil Co.*, 204 U. S. 439.

No service, privilege or facility may be extended to a shipper by a carrier which is not provided for and set out in the filed and published tariff.

The facility and service of specially expedited transportation, or transportation by a particular connection or train, is such that it requires publication to be lawful. *Barnes on Interstate Transp.*, § 415; *Elliott on R. R.* (2d ed.), § 1684; *Shiel v. I. C. R. Co.*, 12 I. C. C. Rep. 211; *Diamond M. Co. v. B. & M. R. Co.*, 9 I. C. C. Rep. 311; *St. L., H. & G. Co. v. M. & O. R. Co.*, 11 I. C. C. Rep. 90; *Re Rates and Practices of M. & O. R.*, 9 I. C. C. Rep. 373, 380; *Re Rates on Cotton*, 8 I. C. C. Rep. 121; *Com. Club of Duluth v. N. P. R. Co.*, 13 I. C. C. Rep. 288; *Victor Fuel Co. v. A., T. & S. F. R. Co.*, 14 I. C. C. Rep. 119; *K. C. Hay Co. v. St. L. & S. F. R. Co.*, 14 I. C. C. Rep.

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631; *Follmer & Co. v. G. N. R. Co.*, 15 I. C. C. Rep. 33; *Nat. L. Co. v. S. P. L. A. & S. L. R. Co.*, 15 I. C. C. Rep. 434; *Barrett Mfg. Co. v. Cent. R. Co.*, 17 I. C. C. Rep. 464; *Armour Car Lines v. So. Pac. R. Co.*, 17 I. C. C. Rep. 461; *Beale & Wyman, R. R. Rate Reg.*, § 748.

The giving of a greater service in consideration of the tariff rate than is noted in the tariff is unlawful. See the Hepburn Act of 1906, which provides specifically against the very thing which the Commission had already provided against by construction of the act before that amendment. *Tex. & Pac. Ry. Co. v. Cotton Oil Co.*, 204 U. S. 447.

The Alton had complied in every respect with the provisions of the act with reference to filing and publishing its joint tariffs.

These tariffs consisted of three documents, all of which must be construed together to arrive at the rate, and the service to be given for that rate, viz., the Official Classification, the Joint Interstate Tariff, and the List of Stations Taking Percentage Rate Bases.

These documents must be read together to arrive at the rate and service to be performed for the rate. *Man. Ins. Co. v. Erie & W. T. Co.*, 75 N. W. Rep. 62.

The classification sheet is binding on both carrier and shipper. *Smith v. Gt. N. Ry. Co.*, 107 N. W. Rep. 56.

The elements of classification are those that "affect either the cost or risk of carriage to the carrier, or the value of carriage to the shipper."

So the elements must necessarily be important which impose a greater degree of care on the carrier. *Beale & Wyman, R. R. Rate Reg.*, § 586; *Millinery Jobbers' Asso. v. Am. Exp. Co.*, 20 I. C. C. Rep. 498.

The contract for the shipment of the horses was that implied by the law from the rate quoted, and no other condition or term could be added to that contract in consideration of that rate, and hence Kirby cannot re-

cover. *Smith v. Great Northern R. Co.* (N. Dak.), 107 N. W. Rep. 56.

If the rate is duly published and thus called to the attention of shippers and consignees, they cannot depend for the lawful rate or charge on what may be quoted by the carrier's agent, but must be guided by the published tariffs themselves. *Suffern v. I. D. & W. R.*, 7 I. C. C. Rep. 185; *So. Ry. v. Harrison*, 119 Alabama, 539; overruling *M. & O. R. v. Dismukes*, 94 Alabama, 131; *Kinnavey v. Term. Asso.*, 81 Fed. Rep. 802; *B. & O. v. Hamburger*, 155 Fed. Rep. 849. See also *Man. Ins. Co. v. Erie & W. T. Co.*, 75 N. W. Rep. 62; *Church v. Minn. &c. R. Co.*, 14 So. Dak. 443.

The shipper is presumed to know, upon proof of the due filing and publication of the schedules, that they were in existence, open for his inspection. 16 Am. & Eng. Ency. (2d ed.), 161; *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 690, etc.; *Gulf &c. R. Co. v. Hefley*, 158 U. S. 98; *Tex. & P. R. Co. v. Cotton O. Co.*, 204 U. S. 426, 439; *Armour P. Co. v. United States*, 209 U. S. 56, 72, 80, 81; *Tex. & P. R. Co. v. Mugg*, 202 U. S. 242; *L. & N. R. Co. v. Mottley*, 219 U. S. 467, 476.

A contract to perform an additional and special service for a shipper for the regular schedule rate is a discrimination in his favor as completely as if he were given the regular schedule service for a lower rate than the tariff rate, or for a different compensation. *Wight v. United States*, 167 U. S. 512; *Railroad Co. v. Mottley*, 219 U. S. 467.

No action can be maintained in which the plaintiff, to make out his case, must necessarily invoke aid from an illegal demand or contract.

For a distinction between the cases in which a contract in contravention of a statute can be enforced and when it cannot, see *Connolly v. U. S. P. Co.*, 184 U. S. 540; *Miller v. Ammon*, 145 U. S. 421; *C. & O. R. R. Co. v. Maysville B.*

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Co., 116 S. W. Rep. 1183; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

Where the action is to affirm a contract made in violation of the Interstate Commerce Act, and to recover for a breach thereof, the court will deny any remedy. *R. & G. R. Co. v. Swanson*, 39 L. R. A. 275; *B. & O. R. Co. v. Hamburger*, 155 Fed. Rep. 849; *S. F. & W. Ry. Co. v. Bundick*, 21 S. E. Rep. 995. See also *C. & D. R. Co. v. Maysville B. Co.*, 116 S. W. Rep. 1183, 1185, 1186.

The only contract authorized by the rate paid was for liability subject to official classification, i. e., limited to \$100 per animal, or \$1,200 per carload. *Beale & Wyman*, R. R. Rate Reg., §§ 590 *et seq.*, 926; 17 Am. & Eng. Ency. (2d ed.), 133.

Carriers may make their rates depend on the value of the animals given by the shipper. *Hart v. Pa. R. R. Co.*, 112 U. S. 331; *Duntley v. B. & M. R. Co.*, 66 N. H. 263; 20 Atl. Rep. 327; *Squire v. N. Y. Cent. R. Co.*, 98 Massachusetts, 245; *T. & P. R. Co. v. Abilene C. O. Co.*, 204 U. S. 439.

Neither can claim more than grows out of the payment of the rate, which has annexed to it a valuation basis. *Mannheim Ins. Co. v. E. & W. T. Co.*, 75 N. W. Rep. 602.

The question was not raised or passed upon in the case of *Penn. R. Co. v. Hughes*, 191 U. S. 477.

This rate, so imposed, cannot be departed from until changed by the legal method. *Poor Grain Co. v. C., B. & Q. R. Co.*, 12 I. C. C. Rep. 418.

There was an erroneous construction and application of Federal cases by the Supreme Court of Illinois.

Mr. Albert Salzenstein, with whom *Mr. James M. Graham* was on the brief, for defendant in error:

There was no unlawful discrimination under the Interstate Commerce Act. *Southern Pacific Co. v. Int. Com. Comm.*, 200 U. S. 585, does not deny the right of common

carriers to adopt a rule under which the right of routing beyond its own terminal is reserved to the initial carrier, as the condition of guaranteeing the through rates of the shipper.

The shipper having the right to use the Horse Special in shipping had the right to select the place he desired to connect with it, and in according him that right no privilege or preference of any kind was given him, but he was given what he or any shipper had a right to demand.

This being true it cannot be said that if the carrier agrees with such shipper to handle his shipment so as to connect with the Horse Special at such place selected by him, such agreement constitutes a contract prohibited by the Interstate Commerce Act.

There was nothing in this arrangement which in any way violated either the spirit or letter of the Interstate Commerce Act. *Foster v. Cleveland, C., C. & St. L. Ry. Co.*, 56 Fed. Rep. 434; *Texas & P. R. Co. v. Int. Com. Comm.*, 162 U. S. 197; *Int. Com. Comm. v. B. & O. Ry. Co.*, 43 Fed. Rep. 37, aff'd, 145 U. S. 263. The language of this case is quoted with approval and applied in subsequent cases. *Cincinnati, N. O. & T. P. R. Co. v. Int. Com. Comm.*, 162 U. S. 197; *Int. Com. Comm. v. Cincinnati & C. R. Co.*, 167 U. S. 479, 493; *Int. Com. Comm. v. Alabama Midland R. Co.*, 168 U. S. 144, 165; *Southern Pacific Co. v. Int. Com. Comm.*, 200 U. S. 536, 554; *Int. Com. Comm. v. Chicago, G. W. R. Co.*, 209 U. S. 108, 119; *Gamble-Robinson Com. Co. v. C. & N. W. Ry. Co.*, 94 C. C. A. 217; 168 Fed. Rep. 16; *United States v. Oregon R. & N. Co.*, 159 Fed. Rep. 975; *Int. Com. Comm. v. C. G. N. Ry. Co.*, 141 Fed. Rep. 1003; Hutchinson on Carriers (3d ed.), § 538.

If the contract had violated the Interstate Commerce Act the right to recover damages occasioned by the neglect and failure of the railroad to notify the Michigan Central in reasonable time to provide for the connection,

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would still exist. *Merchants' Cotton Press Co. v. Insurance Co. of N. A.*, 91 Tennessee, 538; *S. C.*, 151 U. S. 368; *Central of Georgia v. Sim* (Ala.), 53 So. Rep. 826; *Standard Oil Co. v. United States*, 164 Fed. Rep. 376.

The general rule that an illegal contract is void and unenforceable is qualified by the exception that where a contract is not evil in itself and its invalidity is not denounced as a penalty by the express terms or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law-making power. *Dunlap v. Mercer*, 156 Fed. Rep. 545, 551; *Logan Bank v. Townsend*, 139 U. S. 67; *Fritts v. Palmer*, 132 U. S. 282; *Xenia Bank v. Stewart*, 107 U. S. 676; *Bank v. Mathews*, 98 U. S. 621; *Fackler v. Ford*, 24 How. 322; *Harris v. Runnels*, 12 How. 79; *People v. Rose*, 219 Illinois, 46, 63; *Bea v. People*, 101 Ill. App. 132; *Pangborne v. Westlake*, 36 Iowa, 546; *Wenninger v. Mitchell*, 139 Mo. App. 420; *Hobbs v. Boatright*, 195 Missouri, 663; *Duval v. Wellman*, 124 N. Y. 156; *Mitchner v. Watts* (Ind.), 96 N. E. Rep. 127; *Brady v. Central Western R. Co.* (Neb.), 130 N. W. Rep. 575; 9 Cyc. 550.

There is nothing in the holding of the Illinois courts that the limitation of recovery to \$100 for each animal was not binding, that in any way conflicts with any provisions of the Interstate Commerce Act.

In Illinois, the law is well established that a carrier cannot limit its common-law liabilities unless the shipper knowingly assented and agreed to such limitation, and whether there was such assent or not, is a question of fact. *Chicago & Northwestern Railway Co. v. Calumet Stock Farm*, 194 Illinois, 9; *C., C., C. & St. L. Ry. Co. v. Patton*, 203 Illinois, 376; *Wabash Railroad Co. v. Thomas*, 222 Illinois, 337. See also *Richmond A. R. Co. v. Patterson T. Co.*, 169 U. S. 311; *Latta v. Chicago, St. P. & M. O. Ry.*

Co., 172 Fed. Rep. 850; 97 C. C. A. 198; *Cranmer v. C. R. I. & P. Ry. Co.* (Ia.), 133 N. W. Rep. 387; *L. & N. R. Co. v. Warfield*, 6 Ga. App. 550; *Kissinger v. Fitzgerald*, 152 N. Car. 247.

MR. JUSTICE LURTON delivered the opinion of the court.

Action in assumpsit to recover damages for the breach of a special contract for the shipment of a carload of high-grade horses from Springfield, Illinois, to New York city. There was a jury, verdict and judgment, which was affirmed by the Supreme Court of Illinois. The facts essential to be here stated are these: Kirby was engaged in developing high-grade horses, and desired to send a carload to be sold at a public sale to be held in Madison Square Garden, New York city. Several routes were available, and the published live-stock rates for carload shipments were the same by each route. It was, however, desirable to send them by the route which would insure their arrival in the shortest time after delivery to the carrier.

The declaration in substance avers that the plaintiff in error knowing the anxiety of the shipper for quick transportation, and that the horses were to enter the horse sale to be held late in the month, did, on January 24, 1906, contract and agree to carry a car, rented by defendant in error, loaded with horses, for the consideration of \$170.60, over its own rails from Springfield to Joliet, Illinois, and there deliver so that it would be carried by a fast stock train known as the "Horse Special," over the M. C. Railroad, through to New York. Said Horse Special was run but three times each week, and was due to leave Joliet the following morning. It is then alleged that the defendant in error, as directed by the railroad company, delivered and loaded his horses on the afternoon of the twenty-fourth; but that the company did not promptly carry and deliver the same to the said fast stock train on

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the morning of the twenty-fifth, as it had guaranteed to do, having failed to make connection with that train; and, that, as a consequence, the car was forwarded by a later and much slower train, and the horses were delivered in New York forty-eight hours after they would have arrived had they been carried by the Horse Special, as the plaintiff in error undertook. As a result of this prolonged transportation, the horses did not reach New York in time to be put in proper condition for the horse sale, whereby the defendant in error sustained damages, aggregating several thousand dollars.

The plaintiff in error pleaded the general issue and under this presented certain defenses which we shall pass by, as not constituting questions of law or fact open to review upon a writ of error to a state court.

The single Federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet to be carried through to New York by the Horse Special, leaving Joliet on the twenty-fifth of January.

That the railroad company had established and published through joint rates and charges upon carload shipments of live stock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York.

By the third section of the original act of February 4, 1887, 24 Stat. 379, it is made unlawful to give any undue or unreasonable "preference or advantage," to any particular person, or to subject any particular person to "any undue or unreasonable prejudice or disadvantage in any respect whatever." By the sixth section of the same act it is required that the carriers subject to the act shall

print and keep for public inspection schedules showing the rates, charges and classifications, "and any rules or regulations, which in any wise change or affect or determine any part or the aggregate of such aforesaid rates and fares and charges." The same section also provides as follows: "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation, for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedules of rates, fares, and charges as may at the time be in force."

By the act of February 19, 1903, known as the Elkins Act, amending the act of 1887, 32 Stat. 847, c. 708, it is made "unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced."

The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the

action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.

In *Armour Packing Company v. United States*, 209 U. S. 57, 72, Mr. Justice Day, dealing with a violation of the act by carrying out a contract for a rate, after the rate had been changed by publication of a higher rate, said:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs. The general scope and purpose of the act is so clearly pointed out in *New York, N. H. & H. Railroad Company v. Interstate Commerce Com.*, 200 U. S. 361, 391, and in *Texas & P. Railroad Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, as to need no reiteration.

That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others. *Texas & P. Railway Co. v. Mugg*, 202 U. S. 242.

The claim that the defendant in error may recover upon the carrier contract, stripped of the illegality, under *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, is not presented by this record. The declaration counted only upon the breach of a special contract which was illegal. There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering. The judgment was rested upon the damages resulting from the breach of the special contract, and not at all upon the liability of the carrier otherwise.

For the error in not holding the special contract invalid under the Interstate Commerce Act, the judgment must be reversed and the case remanded for such further proceedings as are not inconsistent with this opinion.

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JORDAN v. COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 519. Argued April 16, 1912.—Decided May 27, 1912.

Subject to the requirement of due process of law, the States are under no restriction as to their methods of procedure in the administration of public justice. *Twining v. New Jersey*, 211 U. S. 78, 111.

Due process of law implies a tribunal both impartial and mentally competent to afford a hearing; but due process is not denied when a competent state court refuses to set aside a verdict because the sanity of one of the jurors which has been questioned is established, after an inquiry in accordance with the established procedure of the State, only by a preponderance of evidence.

In this case *held*, that one convicted by a jury and sentenced to death was not denied due process of law because after the verdict one of the jurors became insane and the court, after an inquiry had in accordance with the established procedure of the State, found by a preponderance of evidence that the juror was of sufficient mental capacity during the trial to act as such and therefore refused to set the verdict aside.

The practice of the Massachusetts courts in this case was not inconsistent with the rules of the common law in regard to determining the mental capacity of jurors.

207 Massachusetts, 259, affirmed.

THE facts, which involve the question of whether one convicted in a state court by a jury, a member of which was possibly insane at the time, was denied due process of law, are stated in the opinion.

Mr. Harvey H. Pratt and *Mr. Arthur Thad Smith*, with whom *Mr. Charles W. Bartlett* and *Mr. Jeremiah S. Sullivan* were on the brief, for plaintiff in error:

The trial court in refusing to set aside the verdict de-

prived defendant of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen.

A defendant cannot be deprived of any of his fundamental rights by a form of procedure. There is a limit beyond which state courts cannot go. *Fayerweather v. Ritch*, 195 U. S. 276; *Chicago, B. &c. R. R. v. Chicago*, 166 U. S. 226; *Brown v. New Jersey*, 175 U. S. 172, 175.

Due process of law requires an unquestionably competent tribunal before whom a citizen is tried; a tribunal unquestionably incompetent to render judgment upon him because it contains among its members a person who was unqualified mentally to render a verdict does not constitute due process. *Chicago, B. &c. R. R. v. Chicago*, *supra*.

Any matter relating to the character of the tribunal before which a person is to be tried is one of substance and not one of form. *Thompson v. Utah*, 170 U. S. 343.

The refusal of the trial court to set aside the verdict and sentence of death based upon the verdict of a jury, one of the members of which was incompetent mentally, deprived defendant of one of his fundamental rights.

There is the clearest line of demarcation between the mental disqualification of a juror and the disqualifications and irregularities that have been declared by this court to be within the power of the States to pass upon, and with which this court will not interfere. *Kohl v. Lehlback*, 160 U. S. 293; *Wassum v. Feeney*, 121 Massachusetts, 93; *Commonwealth v. Wong Chung*, 186 Massachusetts, 231, do not apply.

In Massachusetts there are certain grounds for a new trial that require a new trial to be granted as matter of law and which if they exist do not permit the court to refuse a new trial as a matter of discretion. *Read v. Cambridge*, 124 Massachusetts, 567; *Sargent v. Roberts*, 1 Pick. 337; *Shea v. Lawrence*, 1 Allen, 167; *Merrill v. Nary*, 10 Allen, 16.

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Under the Fourteenth Amendment the duty of seeing to it in the first instance that due process of law is observed in the trial of the citizen, devolves, necessarily, on the State. The conduct of the courts and the procedure therein is placed exclusively in the power of the State and to the State is entrusted the duty of seeing to it that the constitutional rights of citizens are retained for them. *Allen v. Georgia*, 166 U. S. 138, 140; *Chicago &c. R. R. v. Chicago*, 166 U. S. 226, 234, 235; *Thompson v. Utah*, 170 U. S. 343, 350-355; *Hill v. People*, 16 Michigan, 351, 357; *West Virginia v. Cartwright*, 20 W. Va. 32, 45; *State v. Prescott*, 7 N. H. 287, 292.

Upon the *voir dire*, if the prisoner challenges a juror, even for a disability extrinsic of his mental qualifications, all that is necessary for him to do is to introduce evidence that is sufficient to create a reasonable doubt in the mind of the court; and it is then the duty of the Government to show beyond a reasonable doubt that the juror is a proper one. *Holt v. People*, 13 Michigan, 224, 226, 227.

If it appears that a situation exists in which there is any possibility that the jurors were not mentally in condition to perform their duties, the verdict must as a matter of law be set aside. *Commonwealth v. Roby*, 12 Pick. 496, 512, 519; *Ryan v. Harrow*, 27 Iowa, 494; *Leighton v. Sargent*, 31 N. H. 119, 137; *State v. Greer*, 22 W. Va. 800, 825, 830; *Kellogg v. Wilder*, 15 Johns. 455; *State v. Baldy*, 17 Iowa, 39; *Gregg v. McDavid*, 4 Harr. 367; *State v. Bullard*, 16 N. H. 139; *People v. Ransom*, 7 Wend. 417; *Hogshead v. State*, 6 Humph. 59; *Wilson v. Abrahams*, 1 Hill, 207; *State v. Robinson*, 20 W. Va. 85, 145, 152; *Monroe v. State*, 5 Georgia, 85, 145-153; *State v. Prescott*, 7 N. H. 287; *Jumpertz v. People*, 21 Illinois, 375, 411-414; *Maher v. State*, 3 Minnesota, 444, 447; *McLain v. State*, 10 Yerger, 241; *Woods v. State*, 43 Mississippi, 364; *State v. Evans*, 21 La. Ann. 321; *Organ v. State*, 26 Mississippi, 78; *State v. Dolling*, 39 Wisconsin, 396.

Due process of law is not observed if a defendant in a capital case be tried before a less than the constitutional number of jurors, even though the defendant himself consent to such procedure. *Hill v. People*, 16 Michigan, 351, 358; *Thompson v. Utah*, 170 U. S. 343, 349.

The duty to furnish a constitutional tribunal and to see that due process of law within the meaning of the Constitution is followed throughout the whole proceeding, rests solely upon the State; and where the jury ceases to be a constitutional tribunal, at the suggestion of the prisoner or anyone else, even though the State has at the outset furnished a competent and constitutional tribunal, it is the duty of the State, of its own motion, whether the defendant acquiesce affirmatively or does nothing to stop the proceeding, to undo what has been done. See *Thompson v. Utah*, 170 U. S. 143; *Hopt v. Utah*, 110 U. S. 574, 590; *Cancemi v. People*, 18 N. Y. 128; *Dickinson v. United States*, 159 Fed. Rep. 801; *Hill v. People*, 16 Michigan, 351.

Mr. James M. Swift, Attorney General for the Commonwealth of Massachusetts, with whom Mr. Walter A. Powers, Assistant Attorney General, was on the brief, for defendant in error:

The state court cannot be charged with error in its findings of fact, *King v. West Virginia*, 216 U. S. 92, 100; nor in its interpretation of the Massachusetts law of procedure in criminal trials, *Twining v. New Jersey*, 211 U. S. 78, 91; but the contention that when in a capital case the question of a juror's sanity is raised after verdict, unless the prosecution proves beyond a reasonable doubt that the juror was sane, the due process clause of the Fourteenth Amendment requires that the accused be granted a new trial, is not valid.

The words "due process of law" do not prescribe particular rules or forms of procedure for state trials, *Hurtado v. California*, 110 U. S. 516, nor afford a trial by

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jury, *Maxwell v. Dow*, 176 U. S. 581; *Hallinger v. Davis*, 146 U. S. 314; *Howard v. Kentucky*, 200 U. S. 164. See also *Missouri v. Lewis*, 101 U. S. 22, 31; *Louisville & Nashville R. R. Co. v. Schmidt*, 177 U. S. 230, 236.

Due process of law requires only that the conduct of the case be in accordance with the regular procedure of the State, and that such procedure shall not deprive the accused of a fundamental right. *Walker v. Sauvinet*, 92 U. S. 90, 93; *Allen v. Georgia*, 166 U. S. 138, 140; *Howard v. Kentucky*, 200 U. S. 164, 173.

Conformance to the Massachusetts law of procedure does not afford an accused a right to have a new trial unless the juror's sanity is proved beyond a reasonable doubt. This pronouncement of the law of Massachusetts by its Supreme Judicial Court is conclusive. *Twining v. New Jersey*, 211 U. S. 78, 90; *Howard v. Kentucky*, *supra*; *Leeper v. Texas*, 139 U. S. 462, 467.

By this settled course of procedure the plaintiff in error has not been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, for, that an accused should be granted a new trial unless the juror's sanity is proved beyond a reasonable doubt, is not a fundamental right. *Allen v. Georgia*, *supra*; *Twining v. New Jersey*, 211 U. S. 78, 110.

A State may regulate the number of challenges in criminal cases, *Hayes v. Missouri*, 120 U. S. 68; may prescribe the qualifications of jurymen in criminal cases, *In re Jugiuro*, 140 U. S. 291; and the number of jurors in criminal cases, *Maxwell v. Dow*, *supra*; and if it is within the power of the State to say both the number and qualifications of jurors in a criminal case, it may well prescribe that eleven jurors and one who qualifies by a fair preponderance of the evidence as to his sanity shall constitute the trial jury. *Hayes v. Missouri*, *supra*.

In the Federal courts, the denial of a new trial is not

assignable error. *Pickett v. United States*, 216 U. S. 456; *Bucklin v. United States*, 159 U. S. 682.

There is no rule of the common law which prescribes that in a capital case, unless it be proved beyond a reasonable doubt that the juror was sane, a new trial shall be granted. In England at common law a person convicted of a capital felony had no right to a new trial. 4 Blackstone's Com. 375, 376. This rule continued in force as to capital felonies until after the Revolution in America. See *Rex v. Mawbey*, 6 Term. R. 638; *Commonwealth v. Green*, 17 Massachusetts, 515, 533.

In Massachusetts, although the rule was changed and it was decided in 1822, in *Commonwealth v. Green*, *supra*, that a new trial could be granted in capital cases, yet there was no intimation as to what species of irregularity would operate as a ground for a new trial. See *Commonwealth v. Roby*, 18 Pick. 496.

The common-law rule in America, as evidenced by the decisions of the other States where this question has arisen, does not afford a new trial as claimed by the plaintiff in error. *State v. Howard*, 118 Missouri, 127; *State v. Scott*, 1 Hawks (8 N. Car.), 24; *Surles v. State*, 89 Georgia, 167; *Wall v. State*, 126 Georgia, 549; *Burik v. Dundee Woolen Co.*, 66 N. J. L. 420. *Hogshead v. State*, 6 Humph. 59, distinguished.

It appears that the rule of procedure in force in Massachusetts conforms to the settled usage of the common law, and this has always been held to fulfill the constitutional requirement of "due process." *Hurtado v. California*, *supra*; *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272, 280.

MR. JUSTICE LURTON delivered the opinion of the court.

The plaintiff in error was convicted of the crime of murder in the first degree and sentenced to death, and the judgment was affirmed by the Supreme Judicial Court

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of the Commonwealth of Massachusetts. The case is brought here upon a single question, namely, that the plaintiff in error has been denied due process of law under the Fourteenth Amendment, because he was tried by a jury which included one Willis A. White, concerning whose sanity it is said there existed reasonable doubt.

The jury had been selected in the usual way, and White had been accepted without knowledge by the State or the defendant of any question concerning his mental fitness. It was impanelled on April 20, 1909. On May 4 it was charged, and on the same day returned a verdict. On May 10, a motion for a new trial was made, based upon the suggestion by counsel for the prisoner that the juror White, during the hearing and at the time the verdict was agreed upon, was insane and incompetent to participate as a juror. The motion was heard by two of the trial Justices of the Superior Court, and much oral evidence bearing upon the sanity of the juror was introduced, all of which has been preserved by a bill of exceptions. At the conclusion of the evidence the prisoner presented no less than seventy-two requests for rulings and findings, made part of the record. The court found and ruled as follows (207 Massachusetts, 274):

"We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion.

"Having found the above fact, we deem it unnecessary to consider the requests for rulings."

The numerous requests for rulings and special findings all relate to the burden of proof and the rules for the weighing of evidence upon the issues presented.

The Supreme Judicial Court, after a consideration of

the evidence upon which this finding was based, ruled that it could not be said that there was not evidence warranting the conclusion of the trial judge.

We shall assume that both the trial court and the Supreme Judicial Court have sustained the verdict of the jury because they were of opinion that it was not essential that the sanity of the juror under the circumstances of this case should be established by more than a fair preponderance of the evidence. The insistence is that thereby the constitutional guarantee of due process of law found in the Fourteenth Amendment has been violated.

That the procedure in this case was in conformity with the constitution and law of Massachusetts is determined by the judgment and opinion of the Supreme Judicial Court.

Subject to the requirement of due process of law, the States are under no restriction as to their method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned. "Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law." *Twining v. New Jersey*, 211 U. S. 78, 111.

In *Allen v. Georgia*, 166 U. S. 138, 140, it is said:

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not

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the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In *Felts v. Murphy*, 201 U. S. 123, it appeared that a deaf person was tried and convicted of murder. It was claimed that he had been denied due process of law because he had not heard a word of the evidence, and that the evidence should have been repeated to him through an ear trumpet, although it was not clear that he could have been made to understand by that means. After saying that the state court had jurisdiction of the person and of the subject-matter, this court said (p. 129):

"The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution. That amendment, it has been said by this court, 'did not radically change the whole theory of the relations of the state and Federal Governments to each other and of both governments to the people.' In *re Kemmler*, 136 U. S. 436. 448; *Brown v. New Jersey*, 175 U. S. 172, 175.

"We are unable to see how jurisdiction was lost in this case by the manner of trial. The accused was *compos mentis*. No claim to the contrary is made. He knew he was being tried, on account of the killing of the deceased. He had counsel and understood the fact that he was on trial on the indictment mentioned, but he did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court."

In *Louisville & Nashville R. Co. v. Schmidt*, 177 U. S. 230, 236, it was said:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa Central Railway v. Iowa*, 160 U. S. 389; *Wilson v. North Carolina*, 169 U. S. 586."

Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent state court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence, would be to enforce an exaction unknown to the precedents of the past, and an interference with the discretion and power of the State not justified by the demands of justice, nor recognized by any definition of due process.

In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict. Indeed the requirement of due process does not deprive a State of the power to dispense with jury trial altogether. *Hurtado v. California*, 110 U. S. 516; *Maxwell v. Dow*, 176 U. S. 581. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.

Touching the power of the States over their procedure for the administration of their police power, Mr. Justice Moody, in *Twining v. New Jersey*, cited above, said (p. 114):

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"The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

The proceeding here in question was in absolute conformity to the Massachusetts law of criminal procedure, and no fundamental principle of justice was violated by a determination of the mental capacity of the juror by a preponderance of the evidence. Neither is there any established rule of the common law inconsistent with the practice adopted in this case. There are many decisions in accord with the Massachusetts view of the law, among them being: *State v. Scott*, 1 Hawks. N. C. 24; *Burik v. Dundee Woolen Co.*, 66 N. J. Law, 420; *State v. Howard*, 118 Missouri, 127; *Surles v. State*, 89 Georgia, 167.

In *Hogshead v. State*, 6 Humphrey (Tenn.), 59, the Supreme Court of Tennessee held that the trial court erred in not granting a new trial when it appeared "probable" that a juror was insane. But in Tennessee the denial of a new trial is assignable as error and reversible upon writ of error.

Our conclusion is that the plaintiff in error has not been denied due process of law, and the judgment is,

Affirmed.

MR. JUSTICE PITNEY took no part in the hearing or consideration of this case.

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NATIONAL BANK OF NEWPORT, NEW YORK, v.
NATIONAL HERKIMER COUNTY BANK OF
LITTLE FALLS.

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

No. 172. Argued February 28, 29, 1912.—Decided May 27, 1912.

To constitute a preference under the Bankruptcy Act it is not necessary that the transfer be made directly to the creditor; it may be made to another for his benefit, and if preferential circuity of arrangement will not avail to save it.

Unless, however, the creditor takes by virtue of a disposition by the insolvent debtor of his property for the benefit of the creditor so that the estate is diminished the creditor cannot be charged with receiving a preference.

Where the endorser of the bankrupt's note, which is under discount at a bank and secured by the endorser's own collateral, pays the note, thereby recovering his collateral and charges the payment to the bankrupt to whom he is indebted in a larger sum on open account, there is no preferential payment to the bank which the trustee can recover from it as such, it not appearing that the bank was concerned with, or had any knowledge of, the relations between the endorser and the maker of the note.

172 Fed. Rep. 529, affirmed.

THE facts, which involve the question of whether a payment was an illegal preference under the Bankruptcy Act of 1898, are stated in the opinion.

Mr. Henry J. Cookinham for appellant:

Payment of the note was preferential.

The uncontradicted evidence shows that the debtor was insolvent at the time of the payment. There was a payment or transfer of property to defendant or for its benefit. The payment or transfer of property was a preference and the recipient received more, upon its debt, than the other creditors of the bankrupt. The creditor knew or had reasonable cause to believe, that a preference

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was intended. The transfer was made within four months of filing the petition in bankruptcy.

The fact that the note was paid before due raises the presumption that the payment was preferential. No evidence was given to overcome the presumption.

Any payment, out of the ordinary course of business, is presumptive evidence of the intent of the insolvent to give a preference. *Graham v. Stork*, Fed. Cas. No. 5678; *Walbrun v. Babbitt*, 16 Wall. 577; *Hardy v. Gray*, 144 Fed. Rep. 922; *Dokkin v. Page*, 147 Fed. Rep. 438; *In re Gesas*, 146 Fed. Rep. 734.

The bank took what was virtually a general assignment from the Sheard Company.

The statute has reaffirmed the common law in regard to the knowledge of an agent being imputed to the principal.

It is not necessary that the transfer or payment should be direct to the defendant. If the effect of any transfer or payment is to prefer one creditor to his knowledge over the others, the transfer or payment will be set aside, for the benefit of the general creditors, no matter by what subterfuge it was effected. *In re Sanderson*, 149 Fed. Rep. 273; *In re Hockney v. Raymond*, 10 A. B. Rep. 213; *In re Beerman*, 112 Fed. Rep. 663; *Western Tie & Lumber Co. v. Brown*, 129 Fed. Rep. 728; *Benjamin v. Chandler*, 142 Fed. Rep. 217.

It is not necessary to show that a creditor has actual knowledge that the debtor is insolvent. The circumstances which would lead an ordinary prudent man to believe that a preference was intended is sufficient. *Sundheim v. Ridge Ave. Bank*, 138 Fed. Rep. 951; *In re Himes*, 144 Fed. Rep. 543; *In re Virginia Hard Wood Mfg. Co.*, 139 Fed. Rep. 209; *Parker v. Black*, 143 Fed. Rep. 560; *Webb v. Sachs*, Fed. Cas. No. 11,325; *Coder v. McPherson*, 152 Fed. Rep. 951.

The facts bring this case under the rule as to what will be considered knowledge or reasonable cause to believe

the debtor insolvent and that a preference is intended. *Thomas v. Adelman*, 136 Fed. Rep. 973; *West Philadelphia Bank v. Dixon*, 95 U. S. 180; *Merchants' National Bank v. Cook*, 95 U. S. 342; *Rogers v. Palmer*, 102 U. S. 263; *Sage v. Wynkoop*, 104 U. S. 319; *In re Eggert*, 102 Fed. Rep. 735.

The rule is that it is not necessary to show that a creditor has actual knowledge that the debtor is insolvent. The circumstances which would lead an ordinary prudent man to believe that a preference was intended is sufficient. In this case, however, the creditor had actual knowledge that the Newport Knitting Company was insolvent at the time of the payment. *Sundheim v. Ridge Ave. Bank*, 138 Fed. Rep. 951; *In re Himes*, 144 Fed. Rep. 543; *In re Virginia Hard Wood Mfg. Co.*, 139 Fed. Rep. 209; *Parker v. Black*, 143 Fed. Rep. 560; *Webb v. Sachs*, Fed. Cas. No. 11,325; *Coder v. McPherson*, 152 Fed. Rep. 951.

Mr. Myron G. Bronner for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought in the District Court of the United States for the Northern District of New York by Charles B. Mason, as trustee in bankruptcy of the Newport Knitting Company, to recover the amount of an alleged preference. Decree for the complainant was reversed by the Circuit Court of Appeals, which remanded the cause with instructions to dismiss the bill. *Mason v. National Herkimer County Bank*, 172 Fed. Rep. 529. Subsequently, the trustee assigned the claim in suit to the National Bank of Newport, New York, which was substituted as complainant and brought this appeal.

The bankrupt, the Newport Knitting Company, was organized in 1900, by Titus Sheard and his associates, and was engaged in the manufacture of knit goods at Newport, New York. Proceedings for its voluntary dissolution were begun in October, 1903, and on December 30, 1903, a

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petition in bankruptcy was filed against it. It was adjudged a bankrupt on January 23, 1904.

Several of the officers and directors of this company were also officers and directors of a corporation known as the Titus Sheard Company, which manufactured knit goods at Little Falls. Titus Sheard was the leading spirit in both corporations; in each his son-in-law was the secretary and his nephew the general manager. The books of the Newport Knitting Company were kept at the office of the Titus Sheard Company. It does not appear that either company held stock in the other, nor is it shown to what extent the same persons had a stock interest in both. And upon the record the conclusion must be that, while the management of the two concerns was largely in the same hands, they were distinct organizations conducting separate businesses.

The Titus Sheard Company had a deposit account and discounted its paper with the defendant, the National Herkimer County Bank of Little Falls, of which Sheard was a director. The Newport Knitting Company was not a customer of the defendant bank, but kept its account with the National Bank of Newport.

The transaction which is alleged to constitute a preference was as follows: On January 7, 1901, the Newport Knitting Company gave its note for \$5,773.05, at four months, to the Titus Sheard Company to pay for machinery and supplies. The Titus Sheard Company endorsed the note and had it discounted by the defendant bank, receiving the avails for its own use. The note was reduced by part payment to \$5,000, and for this sum it was renewed every four months with like endorsement, the last renewal of this sort being on May 11, 1903.

In August, 1903, the defendant bank held a large amount of paper made or endorsed by the Titus Sheard Company and insisted upon security. Thereupon the Titus Sheard Company submitted to the bank a statement of its af-

fairs and on August 11, 1903, executed an instrument, also signed by Mr. Sheard and certain other officers individually, by which, after reciting the determination to liquidate its business, they purported to pledge its "mill property, all the machinery in the same, and the warehouse, together with all our assets of our Company, and also the individual properties, as per list hereto attached, to secure the National Herkimer County Bank for all notes of ours which they now hold, or may hereafter hold, and for all paper endorsed by us now held by the Bank, or that may be held by it in the future." This agreement evidently contemplated that the Titus Sheard Company should continue in possession of its property and should have charge of the winding up of its affairs on the understanding expressed, which was, in substance, that the property should be speedily converted into money, that bills payable held by creditors other than the bank should be renewed so far as possible, and that "all surplus moneys as fast as collected, not required to pay the outstanding notes held by other creditors," should be applied in payment of the indebtedness to the bank. It was declared to be the intention to dispose of the property so that all the indebtedness should be paid before January 1, 1904.

On August 22, 1903, there was substituted for the above-mentioned note of the Newport Knitting Company, endorsed by the Titus Sheard Company and held by the bank, a new three months' note of the Newport Knitting Company for the same amount, similarly endorsed; and the Titus Sheard Company secured this note by the delivery to the bank of specific assignments of its bills receivable, amounting to \$6,300. On September 26, 1903, before maturity, the Titus Sheard Company paid to the bank the amount of this note, less accrued interest, \$4,953.33, and took up the note and collateral. This payment was made by the Titus Sheard Company acting in its own behalf by a check drawn against the funds to

its credit in the bank. The amount so paid was then charged by that company to the Newport Knitting Company to which it was indebted on open account in a larger sum; and on the books of the Newport Knitting Company a corresponding credit was given to the Titus Sheard Company. So far as appears, this charge of the sum paid on the note against the amount owing to the Newport Knitting Company was not known to the bank.

It is insisted that this transaction amounted to a preference of the bank by the Newport Knitting Company. It is said that "the bankrupt parted with property to the amount of the note and the bank received it and was benefited to that amount," to the detriment of the other creditors of the Newport Knitting Company, then insolvent; or, as the District Court put it, that "a short cut was taken by common consent and the check was passed to the bank and the amount charged to the Knitting Company so that it in fact paid the note."

The pertinent provisions of the Bankruptcy Act as they stood at the time the transaction occurred, were as follows:

"Sec. 60. Preferred Creditors.—*a.* A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. . . .

"*b.* If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. A "transfer" includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Sec. 1 (25). It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The "accounts receivable" of the debtor, that is, the amounts owing to him on open account, are of course as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference whether he procures the payment to be made on his behalf by the debtor in the account—the same to constitute a payment in whole or part of the latter's debt—or he collects the amount and pays it over to his creditor directly. This implies that, in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent and is simply complying with the directions of the latter in paying the money to his creditor.

But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer. *Western Tie & Timber Company*

v. *Brown*, 196 U. S. 502, 509; *Rector v. City Deposit Bank*, 200 U. S. 405, 419. "These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate." *N. Y. County Bank v. Massey*, 192 U. S. 138, 147.

Here, the payment to the bank did not proceed from the bankrupt, the Newport Knitting Company. The Titus Sheard Company had a standing quite apart from its relation to the Newport Knitting Company as a debtor in the account. In the transaction with the bank, the Titus Sheard Company acted on its own behalf. As the holder of the original note, that company had endorsed it to the bank, taking for its own benefit the proceeds of the discount. Its obligation as endorser was continued by the renewals, and to secure the bank on the last renewal it had deposited its own collateral. It took up the note with its own funds and received back the security. Neither directly nor indirectly was this payment to the bank made by the Newport Knitting Company, and the property of that company was not thereby depleted.

The fact then is not, as it is contended, that "the bankrupt parted with property to the amount of the note and the bank received it," but rather that the bankrupt parted with nothing, and the bank received the money of the endorser and redelivered to the endorser the paper and collateral. When the Titus Sheard Company took up the note, it was credited with the amount of the payment in its account with the Newport Knitting Company. But the question, in the circumstances disclosed, of the right of the Titus Sheard Company to a set-off against its indebtedness on the account is distinct from the question whether the bank received a preference. *Western Tie & Timber Company v. Brown*, *supra*. It would be only by the allowance of such a set-off that the bankrupt estate would be diminished. And, as was said by the Circuit

Court of Appeals, "if the Sheard Company, knowing the Newport Company to be insolvent, acquired the note with a view to using it as a set-off or counterclaim against its debt, it could not legally do so (Bankruptcy Law, sec. 68b)." The amount of the indebtedness of the Titus Sheard Company could still be collected by the trustee.

It is urged that by virtue of the instrument already mentioned, which was executed by the Titus Sheard Company on August 11, 1903, all the assets of that company had been assigned to the bank, and hence that the security placed with the bank on the last renewal of the note was already held under this instrument and continued to be so held after the note was taken up, despite the surrender of the specific assignments. It is said further that as a result of the execution of this instrument, the bank "stepped into the place of the Sheard Company," and knew the condition of the account with the Newport Knitting Company and the charge that was made to it.

The argument attributes to the instrument undue importance and an effect which it did not accomplish. It was far from being an adequate legal security. Apparently, the Titus Sheard Company was left in the possession of the property, and its officers continued its management with freedom to sell, to collect accounts, to pay outstanding notes held by others than the bank (so far as they could not be renewed), and generally to liquidate the business in accordance with the expressed intention to convert the assets into money as speedily as possible and thus to meet all the obligations to the bank. To this end, the company and its officers were to "work faithfully" and the surplus moneys as fast as realized were to be devoted to the payment of the indebtedness. It was natural that the bank should require security for the note of a more definite and satisfactory character, that is, proper collateral. And when the bank received the specific collateral deposited by the Titus Sheard Company on the

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renewal, the bank obtained a control over it which otherwise it did not possess, and this control it surrendered on the redelivery. In view of the effort that was being made to reduce the obligations of the company held by the bank, it cannot be thought surprising that the note with the collateral was taken up before maturity. It was not shown that the bank had anything to do with the credit to the Titus Sheard Company in its account with the Newport Knitting Company. Nor does it appear that the bank knew of the condition of this account or had any reason to believe that it was proposed to set off the payment against an indebtedness to the bankrupt.

The bank dealt with the Titus Sheard Company as the endorser of the paper; and the trustee failed to establish any right to recover the moneys it received.

Decree affirmed.

ANDERSON v. PACIFIC COAST STEAMSHIP
COMPANY, CLAIMANT OF THE STEAMSHIP
"QUEEN."

JORDAN v. PACIFIC COAST COMPANY, CLAIM-
ANT OF THE STEAMSHIP "UMATILLA," ETC.

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

Nos. 641, 642. Argued February 21, 1912.—Decided May 27, 1912.

When the Federal Constitution was adopted each State had its own pilotage regulations.

State pilotage laws are regulations of commerce, but they fall within that class of powers which may be exercised by the States until Congress shall see fit to act.

The provisions of former Federal statutes relating to pilotage were incorporated in §§ 4401 and 4444, Rev. Stat., which are still in force. In adopting the Revised Statutes change of arrangement from earlier

statutes will not be regarded as altering their scope and purpose; an intent of Congress to change the effect of prior law will not be presumed unless clearly expressed.

Distinctions between registered and enrolled vessels and history of statutes relating to state pilotage of registered and coastwise vessels reviewed and *held* that:

Coastwise sea-going vessels sailing under register and having officers with Federal pilot's licenses are not free from liability for pilotage fees under state laws, by virtue of § 51 of the act of February 28, 1871, 16 Stat. 440, c. 100, as reenacted in §§ 4401 and 4444, Rev. Stat.

There are no provisions in Title 52 of the Revised Statutes which may be construed as exempting coastwise sea-going vessels sailing under register, whose officers have Federal pilot's licenses, from liability for pilotage fees under state laws, under the rule of construction laid down in the last sentence of § 51 of the act of February 28, 1871.

Congress did not intend to classify with the coastwise vessels referred to in the last proviso of § 51 of the act of February 28, 1871, as reenacted in § 4444, Rev. Stat., registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage.

The wisdom of establishing Federal rules as to port pilotage for such registered vessels now exempted is a question for Congress to determine.

In this case *held* that American registered steam vessels sailing from San Francisco clearing for final destination to American ports and return, but stopping at foreign ports en route for less than ten per cent of the traffic, are subject on entering and leaving the port of San Francisco to the state pilotage laws of California as contained in §§ 2468, 2466 and 2432 of the Political Code of that State.

THE certificate in these cases is as follows:

"The libels in the above cases involve the question of power of a State to make pilotage regulations for certain classes of registered sea going steam vessels when entering and leaving harbors within the confines of the State.

"The steamers 'Queen' and 'Umatilla' were regularly sailing under register and were either on a voyage from the port of San Francisco in the State of California to a United States port on Puget Sound or from a United

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States port on Puget Sound to said port of San Francisco, but in either such case said vessels did while en route between said ports of the United States stop at the port of Victoria, B. C., to and from which port of Victoria she did then carry and did then and there deliver and receive both passengers, mail and freight. Both vessels sailed direct to Victoria from San Francisco and direct to San Francisco from Victoria. At least ninety (90) per cent of passengers and cargo was carried between the United States ports and the parties stipulated that the voyage for which the vessels cleared was between Puget Sound ports of the United States and San Francisco, with the right to stop and trade en route at Victoria. The stop at Victoria on each occasion was for about an hour. The officers of each vessel had federal pilot's licenses and each vessel was in fact piloted in entering and leaving the port of San Francisco by such an officer. Each of the vessels was tendered pilotage services—the 'Umatilla' on leaving port and the 'Queen' on entering—by a resident bar pilot of the port of San Francisco, duly commissioned, and acting under the law of the State of California. In each case the tender was declined. The ships refused to pay the pilotage fees imposed by the following sections of the Political Code of the State of California:

“ ‘2468. Pilotage and half pilotage. All vessels sailing under an enrollment, and licensed and engaged in the coasting trade between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six (2466) of this code.

“ ‘2466. Rates of pilotage at San Francisco. The following shall be the rates of pilotage into and out of the

harbor of San Francisco: All vessels under five hundred (500) tons three (\$3.00) dollars per foot draught; all vessels over five hundred (500) tons three (\$3.00) dollars per foot draught and three (3c.) cents per ton for each and every ton registered measurement; and every vessel spoken inward or outward bound except as hereinafter provided shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a union jack or by night displaying a torch or flare up within a distance of three (3) miles of the vessel. In all cases where inward bound vessels are not spoken until inside of the bar the rates of pilotage herein provided shall be reduced fifty (50) per cent. Vessels engaged in the whaling or fishing trade shall be exempt from all pilotage except where a pilot is actually employed.

“‘2432. Vessel, owner, etc., liable for pilotage. All vessels, their tackle, apparel and furniture, and the master and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction.’

“On February 28, 1871, Congress enacted an act ‘for the better protection of persons on vessels propelled in whole or in part by steam, etc.,’ section 51 of which is pertinent to these cases. This section was in 1873 re-enacted in sections 4401 and 4444 of the revised statutes. The portions of the section and its subsequent codification on which the court’s questions are based are printed in parallel columns as follows:

“‘An act to Provide for the Better Security of Life on Board of Vessels Pro- pelled in Whole or in Part by Steam.’	“Revised Statutes Title LII. ‘Regulation of Steam Vessels.’
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“‘SECTION 51. And be it further enacted that . . .	“R. S. 4401. ‘. . . and every coastwise sea going
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every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. . . . Nor shall any pilot charges be levied by any such (State) authority upon any steamer piloted as herein provided Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State.'

"(The above in a single paragraph.)

"The pilots, appellants here, libelled the vessels in the United States District Court for the Northern District of California. The two cases were consolidated for trial in

the District Court. It was contended that there was a conflict between the Federal and the state law as to the control of the vessels for purposes of bar pilotage. The libelants relied upon the state law giving the resident state bar pilotage control of the vessels in question when entering or leaving port. The District Court held that the Federal law excluded these vessels from state control and the libels were dismissed.

"On appeal to this court it has become apparent that the decision of the two cases involves a question of conflict of jurisdiction between the State and the Federal Government as to the pilotage of all steam vessels touching at both foreign and domestic ports on the one voyage and also as to the pilotage of the large number of registered steam vessels now engaged in traffic between ports of the Atlantic and the Pacific coasts of the United States, both by way of the Isthmus of Tehuantepec and the Isthmus of Panama and around South America. The decision will also affect the very large number of steam vessels which may reasonably be expected to sail between American ports on the Atlantic and the Pacific Oceans, via the Panama Canal.

"In determining the intent of Congress in passing the Act of February 28, 1871, the court had under consideration the following statutes: the Act of August 7, 1789, codified in section 4235 of the Revised Statutes, recognizing and adopting the pilotage regulations of the various States so far as bar and entrance pilotage is concerned; section nine, paragraph nine and ten of the Steamship Act of August 30, 1852, creating a certain class of Federal pilots, (10 Statutes at Large, 67, reënacted in chapter 100, sections 18 and 14 of Act of February 28, 1871, (codified in Revised Statutes 4442 and 4438); Act of May 27, 1848, (codified in Revised Statutes 3126), permitting registered vessels sailing between ports of the United States to trade with foreign ports; section twenty of the Act of Febru-

ary 18, 1793 (1 Stats. 313, codified in Revised Statutes, 4361), providing for the regulation and duties of officers on registered vessels as to the carriage of foreign goods and distilled liquors and the making of manifests.

"The members of the court are unable to agree as to the interpretation of the cited portions of section 51 of the Act of February 28, 1871, codified in Revised Statutes, sections 4401 and 4444, and for this reason, and because of the importance of the interests affected, both governmental and commercial, the Circuit Court of Appeals for the Ninth Circuit certify the following questions to the United States Supreme Court, and request its instructions upon them.

"1. Are coastwise sea going steam vessels, sailing under register, and having officers with federal pilot's licenses, free from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, by virtue of section 51 of the Act of February 28, 1871, entitled 'An Act to provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam,' as reenacted of date December 1, 1873, in sections 4401 and 4444 of the Revised Statutes?

"2. Are there any provisions of title 52 of the Revised Statutes which may be construed as exempting coastwise sea going steam vessels sailing under register, whose officers have federal pilot's licenses from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, State of California, under the rule of construction laid down in the last sentence of section 51 of the Act of February 28, 1871, entitled 'An Act to Provide

for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam,' and as reënacted in section 4444 of the Revised Statutes?

"3. Did Congress intend to classify with the 'coastwise vessels' referred to in the last proviso of section 51 of the Act of February 28, 1871, entitled 'An Act for the Better Security of Life on Vessels Propelled in Whole or in Part by Steam,' and reënacted in section 4444 of the Revised Statutes, registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage?

"4. Did Congress, in enacting the last proviso of section 51 of the Act of February 28, 1871, reënacted in section 4444 of the Revised Statutes, intend to exempt registered steam vessels whose officers have federal pilot's licenses, from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon proper tender of services of resident bar pilots of the State pilotage establishment, on entering or leaving the port of San Francisco on regular voyages, on which they steamed to Victoria, British Columbia, and carried cargo, mail and passengers direct thereto and direct therefrom; when, after leaving Victoria, British Columbia, on the outward voyage, they steamed to Puget Sound ports of the State of Washington, for which they had originally cleared, and returned therefrom to Victoria, British Columbia; when the stop at Victoria, British Columbia, is for about an hour on each occasion; when at least ninety (90) per cent of the passenger and cargo traffic for the outward and inward voyages is between the port of San Francisco and the ports of Washington; and when the traffic with the foreign port may be deemed en route between the domestic ports?"

Mr. William Denman for Anderson and Jordan.

Mr. Graham Sumner, with whom *Mr. George W. Towle*,

Mr. Thomas Thacher, Mr. Thomas D. Thacher and Mr. Le-land B. Duer were on the brief, for Steamship Companies.

MR. JUSTICE HUGHES, after making the above statement, delivered the opinion of the court.

When the Constitution of the United States was adopted, each State had its own regulations of pilotage. While this subject was embraced within the grant of the power "to regulate commerce with foreign nations, and among the several States" (Art. I, § 8), Congress did not supersede the state legislation, but by the act of August 7, 1789, c. 9, § 4 (1 Stat. 53, 54; R. S., § 4235), it was enacted that "all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." This was "a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exercise its power, it should be left to the legislation of the States;" and it has long been established by the decisions of this court that, although state laws concerning pilotage are regulations of commerce, they fall within that class of powers which may be exercised by the States until Congress shall see fit to act. *Cooley v. Board of Wardens*, 12 How. 299, 319, 321; *Steamship Company v. Joliffe*, 2 Wall. 450, 459; *Ex parte McNeil*, 13 Wall. 236, 240; *Wilson v. McNamee*, 102 U. S. 572; *Olsen v. Smith*, 195 U. S. 332, 341. In 1837 (5 Stat. 153), it was provided that a master of a vessel entering or leaving a port situate upon waters which are the boundary between two States, might employ a pilot licensed by either State. There was no other Federal legislation upon the subject of pilots until 1852;

and thus "for more than sixty years" it was "acted on by the States, and the systems of some of them created and of others essentially modified during that period." *Cooley v. Board of Wardens, supra*, p. 321.

The act of August 30, 1852, c. 106 (10 Stat. 61), contained provisions for the licensing of pilots of steam vessels (§ 9, *Ninth, id.* 67). In *Steamship Company v. Joliffe, supra*, it was contended that the statute of the State of California of May 20, 1861, providing for port pilots at San Francisco, was in conflict with this act; but the court took the contrary view, holding that the Federal law did not relate to port pilots. The court said (pp. 460, 461): "The act of 1852 was intended, as its title indicates, to provide greater security than then existed for the lives of passengers on board of vessels propelled in whole or part by steam. . . . The act contains few provisions relating to pilots; indeed, it was not directed to the remedy of any evils of the local pilot system. There were no complaints against the port pilots; on the contrary, they were the subjects of just praise for their skill, energy, and efficiency. The clauses respecting pilots in the act relate, in our judgment, to pilots having charge of steamers on the voyage, and not to port pilots; and the provision that no person shall be employed or serve as a pilot who is not licensed by the inspectors has reference to employment and service on the voyage generally, and not to employment and service in connection with ports and harbors."

In 1866, Congress passed a more comprehensive statute embracing port pilotage (act of July 25, 1866, c. 234, 14 Stat. 227). After defining the vessels subject to the navigation laws of the United States, it enacted (§ 9) that "every sea-going steam vessel," so subject, should "when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted." In the following

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year, however, this section was amended by the addition of a proviso that the act should not be construed to "annul or affect any regulation established by the existing law of any State requiring vessels entering or leaving a port in such State" to take a state pilot (act of February 25, 1867, c. 83, 14 Stat. 411). The existing state laws respecting port pilotage again became operative. *Sturgis v. Spofford*, 45 N. Y. 446, 451; *Henderson v. Spofford*, 59 N. Y. 131, 133.

The acts of 1852 and 1866 were repealed by the act of February 28, 1871, c. 100 (16 Stat. 440), the provisions of which were reënacted in Title 52 of the Revised Statutes. This act prescribed general regulations with respect to the licensing of pilots of steam vessels (§§ 14, 18; R. S. 4438, 4442) similar to those of the act of 1852. The requirement as to the port pilotage of coastwise sea-going steam vessels were set forth in § 51, to which reference is made in the questions propounded in the certificate. This section was as follows:

"SEC. 51. *And be it further enacted*, That all coastwise sea-going vessels, and vessel [s] navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam-vessels in passing, as provided by this act; and every coastwise sea-going steam-vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. And no State or municipal government shall impose upon pilots of steam-vessels herein provided for any obligation to procure a State or other license in addition to that issued by the United States, nor other

regulation which will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided, and in no case shall the fees charges for the pilotage of any steam-vessel exceed the customary or legally established rates in the State where the same is performed: *Provided, however, That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State.*"

These provisions were incorporated in §§ 4401 and 4444 of the Revised Statutes, which are still in force.¹ The

¹ SEC. 4401. All coastwise sea-going vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam-vessels in passing, as provided by this Title; and every coastwise sea-going steam-vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.

SEC. 4444. No State or municipal government shall impose upon pilots of steam-vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this Title; nor shall any pilot-charges be levied by any such authority upon any steamer piloted as provided by this Title; and in no case shall the fees charged for the pilotage of any steam-vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this Title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State.

change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed. *United States v. Ryder*, 110 U. S. 729, 740; *United States v. LeBris*, 121 U. S. 278, 280; *Logan v. United States*, 144 U. S. 263, 302; *United States v. Mason*, 218 U. S. 517, 525.

It will be observed that the requirement of § 51 of the act of 1871 (R. S. § 4401), as to the piloting of coastwise sea-going steam vessels, is limited and explicit. It is that "every coastwise sea-going steam-vessel subject to the navigation laws of the United States and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats." This covers port pilotage, for it relates to such vessels "when under way, except on the high seas;" and it applies only to those "*not sailing under register.*"

American vessels are of two classes, those registered, and those enrolled and licensed. "The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license. The distinction between these two classes of vessels is kept up throughout the legislation of Congress on the subject, and the word register is invariably used in reference to the one class and enrolment, in reference to the other." *The Mohawk*, 3 Wall. 566, 571. See *Huus v. New York & Porto Rico Steamship Co.*, 182 U. S. 392, 395. The act of December 31, 1792 (1 Stat. 287, c. 1), applicable exclusively to vessels engaged in foreign commerce and to their

registry, and the act of February 18, 1793 (1 Stat. 305, c. 8), relating to vessels engaged in the coasting trade and fisheries, and to their enrollment, constituted the basis for the regulations of the two classes. The latter act contained a provision (§ 20, *id.* 313; R. S. § 4361) that any registered vessel when employed in going from one district in the United States to any other district should "be subject (except as to the payment of fees) to the same regulations, provisions, penalties, and forfeitures" as those prescribed in the case of vessels licensed for carrying on the coasting trade. This, however, had no reference to pilotage, for Congress had not made regulations upon that subject. In 1848 (act of May 27, 1848, 9 Stat. 232, c. 48; R. S. § 3126) it was provided that any vessel, "on being duly registered," might engage in trade between ports of the United States "with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers and their baggage, and letters, and mails."

Thus, at the time of the passage of the act of 1871, there were coastwise sea-going steam vessels sailing under register and having this privilege of touching at foreign ports, and also coastwise sea-going steam vessels, which were enrolled and licensed, not sailing under register. It was with respect to the vessels of the latter sort that Congress imposed the requirement of § 51 to use Federal pilots. The reason for the distinction may be found in the fact that the registered vessels, under the conditions of trade then existing, would presumably be engaged in the longer voyages, touching at foreign ports where Federal pilots would not avail and at domestic ports for all of which the ship's pilot might not hold a Federal license; and, as Congress did not create local Federal establishments for port pilotage, it was evidently deemed unwise to compel registered vessels in entering and leaving ports to be under the control of Federal pilots. Certainly the distinction was made; and

the necessary effect of the limitation of the requirement was to exempt the coastwise sea-going steam vessels, which did sail under register, from its terms.

As these registered vessels were free from this Federal regulation, they would be under no compulsion whatever as to port pilotage save by virtue of the operation of state laws. And it is an inevitable conclusion, on considering the prior history of pilotage regulations in this country and the policy which has been maintained with respect to the exercise of state authority, that, as Congress did not see fit to require Federal pilots, it left the regulation of port pilotage as to such vessels to the States.

It is contended, however, that although the employment of Federal pilots was not made compulsory for coastwise sea-going steam vessels sailing under register in entering and leaving ports, still they had an option to use such pilots, and, if in fact such a vessel was piloted by a Federal pilot, she could not be required to take a state pilot. The argument is based on the following provisions of § 51 (now found in R. S. § 4444):

“And no State or municipal government shall impose upon pilots of steam-vessels herein provided for any obligation to procure a State or other license in addition to that issued by the United States, nor other regulation which will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided,”

This language gives no support to the contention. Wherever the regulations of the statute applied, they were absolute. The “pilots of steam-vessels herein provided for” were those whom, under the provisions of the statute, the vessels described were bound to use. It was upon the pilots, whose use was made compulsory by the Federal law, that “no State or municipal government” was to impose any obligation to procure a state or other

license, or any regulation which would impede them "in the performance of their duties, as required by this act." The "steamer piloted as herein provided" was the steamer required to be so piloted, and it was upon such steamer that no pilot charges were to be levied by state authority. The same construction must be given to these provisions as reenacted in § 4444 of the Revised Statutes, where the words "piloted as provided by this Title" take the place of the words "piloted as herein provided." The Federal requirement as to port pilotage of coastwise sea-going steam vessels was applicable only to those "not sailing under register;" as to those which sailed under register, there were no port pilots provided for, and the regulation of pilotage in the case of such vessels entering and leaving the state ports was left to the States. The fact that a vessel of this sort had on board a pilot holding a Federal license when the services of such a pilot were not required by the Federal law, did not oust the State of the power to compel the use of a state pilot.

Nor was the proviso in § 51 of the act of 1871 (now the last sentence of R. S. § 4444) a restriction of this state authority. This proviso was as follows:

"Provided, however, That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

Manifestly, this did not enlarge the scope of the requirement as to Federal pilotage contained in the preceding portion of the section. The words "other than coastwise steam-vessels" did not mean that the State could not require port pilots for coastwise sea-going steam vessels sailing under register. For this would be to impute to Congress the intent to withdraw from the State the power to

act in the cases omitted from the Federal regulation. Even on the construction of the statute for which the appellees contend, it is conceded that "a coastwise steam vessel sailing under register which is not piloted by a federal pilot may be compelled by the State to take a State pilot when entering or leaving port." And, if in any case the vessel might be forced to take a pilot under the state law, it would necessarily follow that it is not excluded by the proviso from the operation of that law. The natural interpretation of the proviso is that it was intended to prevent misapprehension as to interference with local rules—to declare the continued efficacy of those rules when not in conflict with the Federal authority—and not to introduce an independent limitation of state power over port pilotage with respect to registered steam vessels, where the Federal control had not been asserted. The enacting clause and the proviso are to be read together "with a view to carry into effect the whole purpose of the law." *White v. United States*, 191 U. S. 545, 551. So read, the words "other than coastwise steam-vessels" must be deemed to refer to those "not sailing under register," to which the requirement of Federal pilots applied. The same meaning must be ascribed to this clause as it now appears in § 4444 of the Revised Statutes, taken as it must be in connection with § 4401.

The statute was thus construed in *Murray v. Clark* (1874), 4 Daly, 468, affirmed, 58 N. Y. 684, where a steamer sailing under register between New York and New Orleans, and touching at a foreign port as was her privilege, was held to be subject to the law of the State of New York as to pilotage in entering the port of New York, although at the time she was under the control of her master who was a pilot licensed by the Federal inspectors. In *Joslyn v. Nickerson* (1880), 1 Fed. Rep. 133, while it was held that a libel for pilotage could not be sustained, for the reason that the law of Massachusetts,

in question, was not by its terms applicable, Judge Lowell said (page 135): "This statute" (referring to the Federal act of 1866) "has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels not sailing under a register. Rev. St., § 4401; *Murray v. Clark*, 4 Daly, 468, affirmed, 58 N. Y. 684. This vessel, therefore, was not bound to carry such a pilot, and was bound by any law of Massachusetts which might require her to take a local pilot. Rev. St., § 4444." In *Sprague v. Thompson*, 118 U. S. 90, 96, where a claim for pilotage under the law of Georgia was disallowed, the steamer "was a coastwise sea-going steam vessel," and "was not sailing under register." In *Huus v. New York & Porto Rico Steamship Co.*, 182 U. S. 392, 394, after quoting from §§ 4401 and 4444 of the Revised Statutes, the court said: "The general object of these provisions seems to be to license pilots upon steam vessels engaged in the *coastwise* or interior commerce of the country, and at the same time, to leave to the States the regulation of pilots upon all vessels engaged in *foreign* commerce." There, the steamer was enrolled and licensed for the coasting trade under the laws of the United States and was engaged in trade between Porto Rico and New York after the treaty of cession. It was held that she was not within the pilotage laws of New York.

The provisions of the Political Code of the State of California, set forth in the certificate, do not apply to coastwise sea-going steam vessels "not sailing under register" and are not in conflict with the statutes of the United States. Their enforcement is simply a recognition of the limits which Congress has thus far set to the exercise of the unquestioned Federal power. The criterion is not whether the stops of registered vessels at foreign ports may be deemed en route between domestic ports, and is not to be found in the length of such stops or in the relative amount of foreign trade. The statute made the dis-

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tion, in the light of the well-known conditions of trade which existed at the time of its enactment, between coastwise sea-going steam vessels, not sailing under register, and those which did sail under register. Whether or not it is wise to establish Federal rules as to port pilotage for the registered vessels exempted from this regulation is a question for Congress to determine.

We conclude that each one of the questions certified should be answered in the negative.

It is so ordered.

UNITED STATES FIDELITY AND GUARANTY
COMPANY v. BRAY.

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

No. 111. Argued December 15, 1911.—Decided May 27, 1912.

Section 7 of the Court of Appeals Act of 1891, as amended April 14, 1906, 34 Stat. 116, c. 2627 provides for an appeal to the Circuit Court of Appeals from certain interlocutory decrees of the Circuit Court, and in this respect establishes an exception to the general rule in Federal courts that an appeal lies only from a final decree.

Where the jurisdiction of the Circuit Court is invoked not solely on the ground of diverse citizenship but also because the case is one arising under an act of Congress, an appeal lies from the Circuit Court of Appeals to this court, and by § 6 of the Act of 1891 the time within which to take the appeal is one year; the limitation of thirty days under § 7 applies only to appeals to the Circuit Court of Appeals from the Circuit Court.

A distinct purpose of the Bankruptcy Act is to subject the administration of estates of bankrupts to the control of tribunals having authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are bankruptcy courts. Under the Bankruptcy Act, the jurisdiction of the bankruptcy court in all proceedings in bankruptcy is intended to be exclusive of all other courts; such proceedings include matters of administration, such as allowance and rejection of claims, reduction of the estate

to money and its distribution, preferences and priorities to be accorded to claims and supervision and control of the trustee.

The Circuit Court cannot entertain a bill in equity which invokes a reconsideration of the referee's order allowing claims as preferred and of determinations of the bankruptcy court as to rights of holders of claims and as to charges that the trustee was speculating in claims; those matters are for the bankruptcy court and fall within its exclusive jurisdiction; nor can it surrender its control thereover or confide them to another tribunal.

A bill in equity attempting to seek an adjudication on matters within the exclusive jurisdiction of the bankruptcy court cannot be sustained as to matters dependent upon the principal matters alleged and which could not have been made the subject of a separate bill within the jurisdiction of that Circuit Court.

170 Fed. Rep. 689, affirmed.

THE facts, which involve the distribution of funds in the hands of a trustee in bankruptcy of a government contractor, are stated in the opinion.

Mr. B. M. Ambler, with whom *Mr. W. W. Van Winkle* and *Mr. M. G. Ambler* were on the brief, for appellant.

Mr. V. B. Archer and *Mr. William M. Hall*, with whom *Mr. J. A. Dupuy* and *Mr. L. T. Michener* were on the brief, for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This appeal brings up for review a decree of the Circuit Court of Appeals for the Fourth Circuit reversing a decree of the Circuit Court for the Northern District of West Virginia in a suit in equity which was intended, *inter alia*, to affect a fund of \$26,000 in the hands of the trustee of a bankrupt's estate then in the course of administration in the District Court of that district. The decree reversed was an interlocutory one granting an injunction, but the decree of reversal was final, for it directed not only dissolution of the injunction but also the dismissal of the bill.

The complainant, the United States Fidelity and

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Guaranty Company, is a Maryland corporation; three of the defendants, the Second National Bank of Parkersburg, the Farmers and Mechanics National Bank of the same place, and the Nicolette Lumber Company, are citizens of West Virginia, resident in the district in which the suit was brought; seven of them, Jacob Eichel and Laura Eichel, his wife, the City National Bank of Evansville, the First National Bank of Evansville, the Citizens National Bank of Evansville, the First National Bank of Rockport, and the Farmers Bank of Rockport, are citizens and residents of Indiana; another, the Riter-Conley Company, is a Pennsylvania corporation; and M. J. Bray, the trustee of the bankrupt's estate, who was sued in that capacity and also as an individual, is a citizen and resident of Indiana. The bankrupt, the Evansville Contract Company, was an Indiana corporation. Of course, the national banks are Federal corporations, but their citizenship and places of residence are, for jurisdictional purposes, as just stated. Act August 13, 1888, 25 Stat. 433, c. 866, § 4.

The jurisdiction of the Circuit Court was invoked on the ground of diversity of citizenship, and on the further ground that the case was one arising under the act of August 13, 1894, 28 Stat. 278, c. 280, amended February 24, 1905, 33 Stat. 811, c. 778; and the right to bring the suit in that district against the defendants who were not resident therein was rested upon § 8 of the act of March 3, 1875, 18 Stat. 470, 472, c. 137, on the theory that the suit was one to enforce a lien and claim upon personal property within the district, that is, upon the fund in the hands of the trustee, which he then had on deposit in the two Parkersburg banks. Section 23a of the bankruptcy act was also relied upon as sustaining the jurisdiction.

The case made by the bill and its exhibits was this: About 1902 the Evansville Contract Company, which will be spoken of as the contractor and as the bankrupt, entered into four several contracts with the United States

for the construction of certain river improvements, one in South Carolina, two in the Western District of Pennsylvania, and another in the Northern District of West Virginia. Each contract contained, among others, provisions that a designated percentage of the moneys earned thereunder should be retained by the Government until the completion of the contract, and that in case of default by the contractor the Government should have the right to take possession of the work and plant and prosecute the work to completion. The complainant, the United States Fidelity and Guaranty Company, which will be spoken of as the surety company, became the surety on the bonds given by the contractor for its performance of the contracts. Each bond, conformably to the act of August 13, 1894, *supra*, was conditioned that the contractor should fully perform the contract according to its terms and should promptly make full payment to all persons supplying it with labor or materials for the prosecution of the work named in the contract. As an inducement to the execution of each bond the contractor agreed with the surety company as follows:

“ . . . and it does hereby bind itself, its successors and assigns, to indemnify the said The United States Fidelity and Guaranty Company against all loss, costs, damages, charges and expenses whatever, resulting from any of its acts, default or neglect that said The United States Fidelity and Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof. And it does further agree, in the event of its being unable to complete or carry on the aforementioned contract, to assign, and does hereby assign, such plant as it may own, or have upon said work to the said The United States Fidelity and Guaranty Company, under the aforesaid obligation, together with vouchers or other evidence of payment, of all costs and expense whatever incurred by said The United States

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Fidelity and Guaranty Company in adjusting such loss or in completing said contract, as conclusive evidence against it, its successors and assigns, of the fact and extent of its liability under said obligation to the said The United States Fidelity and Guaranty Company. And it does further agree in the event of any breach or default on its part in any of the provisions of the contract hereinbefore mentioned, that The United States Fidelity and Guaranty Company as surety upon the aforesaid bond shall be subrogated to all its rights and properties as principal in said contract, and that deferred payments and any and all moneys and properties that may be due and payable to it at the time of such breach or default or that may thereafter become due and payable to it on account of said contract, shall be credited upon any claim that may be made upon The United States Fidelity and Guaranty Company under the bond above mentioned."

The contractor partially performed each contract, but became embarrassed, and in February, 1904, on the petition of creditors, was adjudged a bankrupt by the District Court for the Northern District of West Virginia, which appointed three trustees of its estate, M. J. Bray being one. The trustees took charge of its property, and, by an order of the referee having the approval of the creditors, were authorized to complete the contracts, to borrow \$75,000 on trustee's certificates, which were to be a first lien on the property and moneys of the estate, to pay the annual premiums accruing to the surety company and to save it harmless from any liability on the bonds, to collect from the Government the contract price and all retained percentages, and to employ Jacob Eichel, who had been the president of the contractor, to assist in completing the contracts and looking after the interests of the creditors. At first the surety company was disposed to object to such an order, but the seven banks before mentioned,

which were unsecured creditors having claims aggregating \$115,000, overcame its objection and secured its express consent to the order by executing to it a bond in the sum of \$75,000, whereby they undertook to indemnify and hold it harmless from all liability accrued or to accrue by reason of its suretyship. The terms of this bond were such that the liability of the banks thereunder was to be several, not joint, and was to be confined to specified proportions of its penalty.

Thereafter the trustees carried all the contracts to completion, received from the Government the entire contract price and the retained percentages, sold the bankrupt's property, paid all the certificates issued under the order before mentioned, and on December 19, 1905, had on hand a balance of \$36,602.96, subject to allowances and costs of administration yet undetermined. The completion of the contracts was undertaken in the expectation of all concerned that a profit to the estate would result therefrom, but the expectation was not realized. In March, 1906, M. J. Bray became the sole trustee; and on September 21, 1907, when the bill was filed, the net amount remaining in the trustee's hands, after deducting the allowances and costs of administration, was about \$27,600, of which \$26,000 was held on deposit in equal amounts in the two Parkersburg banks.

The total liabilities of the contractor at the time it was adjudged a bankrupt were about \$200,000, and of these \$42,164.89 were allowed by the referee, November 19, 1904, as preferred claims for labor and materials furnished the bankrupt in the prosecution of the work under the contracts. Most of the claims allowed as preferred were purchased, at much less than their face value, from the original claimants by Philip W. Frey, who was counsel for the trustees. His purchases were principally in advance of the allowance, but in some instances were made thereafter. The allowance, however, was in the names of the

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original claimants. Later Frey assigned these claims to Laura Eichel, wife of Jacob Eichel, the cost to her being \$27,037.39, although the face value was \$35,663.82. She acquired them with money obtained from Bray under an arrangement whereby both were to share in the profits realized upon their ultimate payment. These transactions, it is alleged, were in pursuance of a wrongful conspiracy between Bray, Frey and Jacob Eichel, were in violation of their fiduciary relations to the estate, and were had with the purpose of making Bray the real but secret owner, the name of Laura Eichel being used as a mere cover; and it is also alleged that some of these claims are excessive and unjust, that others are not for labor or materials, and that Bray, Frey and Jacob Eichel wrongfully procured or acquiesced in their allowance as preferred claims so that Bray and his associates might profit thereby.

In February, 1906, after it became evident that the net proceeds of the estate would not be sufficient to pay the preferred claims for labor and materials, the surety company filed in the cause in bankruptcy a petition asserting, *inter alia*, a lien upon the funds in the hands of the trustees and a right to have the same applied to the payment of the claims for labor and materials upon which recourse could be had against it as the contractor's surety, and praying that such lien and right be respected and enforced, that the court would ascertain what claims were for labor and materials and would direct that the funds remaining be applied to them. The trustees demurred to this petition and the demurrer was overruled. Bray, on becoming the sole trustee, answered, evidence was taken, and the matter is still pending before the referee.

In March, 1907, separate actions were commenced against the surety company in the Common Pleas Court of Allegheny County, Pennsylvania, in the name of the United States for the use of Laura Eichel, on the claims

assigned to her as before stated; and in August, 1907, like actions were commenced on these claims in the Circuit Court of the United States for the Western District of Pennsylvania. Both sets of actions are still pending, and it is alleged that they were brought at the instance of Bray and were really for his use and benefit. These actions were not confined to claims arising under the contracts which were to be performed in that district, but included claims arising under the other contracts which were to be performed elsewhere.

Substantially all the claims against the bankrupt's estate, save those of the defendants the Riter-Conley Company and the Nicolette Lumber Company, each of which has a preferred claim for labor or materials, have been acquired and are now held by Bray and the two Eichels, or one or more of them, and these parties are endeavoring, as is alleged, to compel the surety company to pay claims that are unjust, and to divert the funds in the hands of the trustee from the payment of just claims for labor and materials to the payment of general claims as to which recourse cannot be had to the bond of the contractor. The seven banks which gave the indemnity bond to the surety company are no longer creditors of the bankrupt's estate, their claims being now held by Bray or one or both of the Eichels.

By the bill the surety company asserts (1) that under the indemnity agreements made with it by the contractor, under the contracts with the Government and the bonds given pursuant to the act of August 13, 1894, *supra*, for their performance, and under the equitable doctrine of subrogation it has a lien on the fund remaining in the hands of the trustee, is entitled to have that fund applied to the payment of just claims for labor and materials as to which recourse can be had against it as surety, and is entitled to every right and remedy which the Government or those who furnished the labor and materials

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would have against such fund; (2) that Bray and the Eichels are not entitled to be paid on any claim held by them, or any of them, more than the sum actually paid therefor; and (3) that the surety company is entitled to have these matters, as also its liability as a surety and the liability of the several indemnitor banks on their bond to it, litigated and determined in one comprehensive suit.

The prayer of the bill is that an accounting be had to ascertain the several amounts justly due for labor and materials furnished the contractor in respect of each of the contracts with the Government; that the surety company's liability on each of the bonds be fixed and apportioned as to each party in interest; that the fund in the hands of the trustee be declared subject to a lien for the payment of all just claims for such labor and materials, and the net amount of the fund be applied on such claims; that no claim held by Bray or either of the Eichels be paid in an amount in excess of the sum actually expended for it; that each of the indemnitor banks be held liable to the surety company according to the terms of their bond to it, and the amount of the liability of each bank be fixed and payment thereof directed; that Bray and the Eichels be enjoined from maintaining any of the actions theretofore begun against the surety company and from instituting any other like action against it; and that it be granted such other relief as may be appropriate to the occasion.

Before the bill was filed, the District Court having charge of the estate of the bankrupt entered an order granting leave to the surety company to begin the suit in the Circuit Court.

In the Circuit Court all the defendants save the Riter-Conley Company challenged in various ways the jurisdiction of that court, but an interlocutory decree was entered overruling the objections to the jurisdiction and enjoining Bray and the Eichels, until the further order of the court, from prosecuting or maintaining any of the

actions against the surety company then pending in the courts, Federal and state, in Pennsylvania, and from beginning any other like action against it. All the defendants, save the Riter-Conley Company and the Nicolette Lumber Company, appealed to the Circuit Court of Appeals, which reversed the interlocutory decree and directed that the injunction be dissolved and the bill dismissed, without prejudice, upon the ground that the Circuit Court was without jurisdiction to entertain it. 170 Fed. Rep. 689. The case is here on the appeal of the surety company.

In the Federal courts an appeal, as a general rule, lies only from a final decree. But § 7 of the act of March 3, 1891, 26 Stat. 826, c. 517, as amended April 14, 1906, 34 Stat. 116, c. 1627, establishes an exception by providing for an appeal to the Circuit Court of Appeals from an interlocutory decree granting or continuing an injunction or appointing a receiver. It was under this section that the appeal to that court was taken, and on that appeal the court was authorized to review the whole of the interlocutory decree, not merely the part granting the injunction, and also to determine whether there was any insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and, if there was, to direct a final decree dismissing the bill. *Smith v. Vulcan Iron Works*, 165 U. S. 518; *In re Tampa Suburban Railroad Co.*, 168 U. S. 583; *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485; *Ex parte National Enameling Co.*, 201 U. S. 156. In the exercise of this authority the Circuit Court of Appeals reached the conclusion that the suit could not be maintained in the Circuit Court, and directed both that the injunction be dissolved and that the bill be dismissed. That was a final decree, and as the jurisdiction of the Circuit Court had been invoked not solely upon the ground of diverse citizenship, but also upon the ground that the suit was one arising under the act of Congress

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whereunder the bonds upon which the complainant was surety were given, a further appeal to this court was rightly allowed under § 6 of the act of March 3, 1891, *supra*, the amount in controversy being in excess of \$1,000, exclusive of costs. *Henningsen v. United States Fidelity and Guaranty Co.*, 208 U. S. 404; *Howard v. United States*, 184 U. S. 676, 680. The time prescribed in that section for taking such an appeal is one year, and this appeal was taken within that time. The thirty-day limitation in § 7 applies only to appeals thereunder to the Circuit Court of Appeals. These views make it necessary to deny a motion to dismiss by which the appellees challenge the jurisdiction of this court.

An examination of the bill discloses that its primary purpose is to obtain an adjudication of certain claims presented against the estate of the bankrupt, now in the course of administration in the bankruptcy court, and of the priority to be accorded to them in the distribution of a fund belonging to the estate and now in the control of that court. That this fund arose in the due administration of the estate, is lawfully in the custody of the bankruptcy court, and is awaiting distribution among such of the creditors as are entitled to participate therein, is a necessary conclusion from the allegations of the bill, and is conceded. The complainant does not assert a title to it, but at most only an equitable right to have it applied to just claims for labor and materials, for which the complainant is liable as the bankrupt's surety under the act of August 13, 1894, *supra*. The real controversy is over the merits of some of those claims, the right of the present holders to assert them for their full amount, and the priority to be accorded to them in the distribution. By an intervening petition in the bankruptcy proceeding the complainant voluntarily submitted its asserted equitable right to the court of bankruptcy for determination, and the matter is now pending before the referee. But by

the present plenary bill in equity it is sought to take from the bankruptcy court the adjudication of the claims in question and the decision of what priority shall be accorded to them. The Circuit Court of Appeals holds that this cannot be done consistently with the Bankruptcy Act, and the correctness of its holding is the principal question presented by this appeal.

We are not here concerned with a suit by a trustee to recover property in the possession of another who claims it adversely, nor with a suit against a trustee to recover property in his possession claimed by another, and therefore the jurisdictional questions incident to suits of that character need not be considered. But we are concerned with a suit against a trustee, the purpose of which is to control the distribution of a fund in his possession, admittedly belonging to the bankrupt's estate, and to determine to what extent and in what order the several creditors shall participate therein.

Section 2 of the Bankruptcy Act invests the courts of bankruptcy "with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction in *bankruptcy proceedings*, . . . to

* * * * *

(2) "Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

* * * * *

(6) "Bring in and substitute additional persons or parties in *proceedings in bankruptcy* when necessary for the complete determination of a matter in controversy;

(7) "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

* * * * *

(13) "Enforce obedience by bankrupts, officers, and

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other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

* * * * *

(15) "Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

And the section concludes by saying: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 23a provides: "The United States circuit courts shall have jurisdiction of all controversies at law and in equity, *as distinguished from proceedings in bankruptcy*, between trustees as such and *adverse claimants* concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

And § 57k reads: "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.

The allegations of the bill, other than those relating to the actions brought against the complainant in Pennsylvania and to its contingent claim against the indemnitor banks, are intended to invoke (1) a reconsideration and modification of the referee's order of November 19, 1904, allowing certain claims as preferred claims for labor and materials, (2) a determination of the right of the present holders of those claims to have them rated and paid at their face value, (3) an inquiry into the charge that the trustee and others who were employed to assist him in the management of the estate have been speculating in claims against it and procuring or acquiescing in their improper allowance and classification, and (4) a direction that the just claims for labor and materials be accorded a preference in the distribution. These matters are rightly subjects for proceedings in bankruptcy and therefore fall within the exclusive jurisdiction of the court of bankruptcy. A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks.

Of the fact that the suit was begun in the Circuit Court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration or to confide them to another tribunal.

The portions of the bill seeking an adjudication of the

contingent liability of the indemnitor banks to the complainant, and an injunction against the prosecution of the actions against it in Pennsylvania, and against the institution of other like actions, must fall with the rest of the bill. They were brought into it in a secondary and dependent way, and could not then have been made the subjects of a separate bill in that jurisdiction. Further discussion of them is therefore unnecessary.

The decree of the Circuit Court of Appeals is

Affirmed.

UNITED STATES *v.* COLORADO ANTHRACITE CO.

APPEAL FROM THE COURT OF CLAIMS.

No. 227. Argued April 25, 1912.—Decided May 27, 1912.

An assign within the meaning of § 2 of the act of June 16, 1880, 21 Stat. 287, c. 244, is one who becomes invested with the entryman's right in the land through the voluntary act of the latter.

While a mere quitclaim deed does not pass after acquired title, the equitable title of one who was also trustee to acquire the title for the grantee will pass by such a deed.

Equity usually looks upon that as done which ought to have been done. The act of June 16, 1880, proceeds upon equitable principles and should be administered accordingly.

A remedial statute, such as § 2 of the act of June 16, 1880, should be interpreted with appropriate regard to the spirit which prompted it; and that act is therefore construed so as to return money erroneously paid for an entry that cannot be confirmed to the party entitled to receive it.

One for whom an entryman initiates and obtains an allowance for an entry, and to whom the entryman gives a quitclaim deed is an assign within the meaning of § 2 of the act of June 16, 1880, and entitled to recover the purchase price if the entry cannot be confirmed, provided the arrangement was not forbidden by law.

Under § 2 of the act of June 16, 1880, the assign of an entryman can-

not recover the purchase price paid if there was any fraud practiced by it in connection with the entry; an entry fraudulently obtained is not one erroneously allowed.

Under §§ 2347-2352, Rev. Stat., providing for coal-land entries, one cannot enter for another who has had the full benefit of the law; but, in the absence of evasion of restrictions as to quantity, there is no prohibition, express or implied, against an entry by a qualified person for the benefit of another person fully qualified to make the entry in his, or, if a corporation, in its, own name.

A corporation is an association of persons within the meaning of the coal-land entry provisions of §§ 2347-2352, Rev. Stat.

Where it does not appear that a corporation had previously entered its full amount of coal lands under §§ 2347-2352, Rev. Stat., an entry made on its behalf by a qualified entryman is not illegal; and an affidavit that the latter was not making the entry for another, the falsity of which is disclosed on a contest, becomes harmless and does not affect the right of the entryman or his assign to recover the price paid under § 2 of the act of June 16, 1880.

The rule that fraud is not presumed and that one basing his defense thereon should prove it, applies to the Government; and if the answer contains no allegation of fraud, silence in the findings of the court below will be taken as showing that none was proved, and an affirmative finding that there was no fraud is not necessary to sustain the judgment.

45 Ct. Cl. 614, affirmed.

THE facts, which involve the validity of an entry for coal land under § 2348, Rev. Stat., and the right of an assign of the entryman to recover the amount paid to the United States, are stated in the opinion.

Mr. Assistant Attorney General John Q. Thompson for the United States.

Mr. Charles A. Keigwin, with whom *Mr. E. W. Spalding* was on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action, under the act of June 16, 1880, 21 Stat. 287, c. 244, § 2, for the repayment of the purchase

price paid to the Government for 160 acres of public coal lands, the entry of which was subsequently canceled. The plaintiff prevailed in the Court of Claims, 45 C. Cl. 614, and the Government has appealed, claiming that on the findings the judgment should have been in its favor.

Briefly stated, the material facts shown by the findings are as follows: One Stoiber, who claimed a preference right of entry under Rev. Stat., § 2348, filed in the proper local land office the requisite declaratory statement, and thereafter made application to enter the land. Accompanying the application was an affidavit, made by his agent, stating that Stoiber was making the entry for his own use and benefit, and not directly or indirectly for another. Other applications for the same land resulted in a contest proceeding before the local land office, and after the hearing therein the register and receiver sustained Stoiber's application, accepted the purchase price of the land, which was \$3,200, and issued to him the usual duplicate receipt. This, in the nomenclature of the public-land laws, was the allowance of an entry. The other parties to the contest appealed to the Commissioner of the General Land Office, who, upon the same evidence that was submitted to the local office, ruled that Stoiber's application ought not to have been sustained; that his entry had been erroneously allowed and could not be confirmed, and therefore that it must be canceled. That decision was affirmed by the Secretary of the Interior, and the entry was canceled accordingly. In filing the declaratory statement and making the entry Stoiber was not seeking to acquire the land for himself but for the Colorado Anthracite Company, the plaintiff here, to which he already had given a quitclaim deed. This was not denied or concealed at the hearing in the contest, but, on the contrary, was admitted and was affirmatively shown by the testimony of the witnesses for Stoiber, including the agent who made the affidavit before mentioned. The purchase price paid at the time of the

entry, which was after the hearing, was furnished by the company because the entry was being made for its benefit. No conveyance of the land was made by Stoiber other than the quitclaim deed just mentioned, and the purchase money so paid was covered into the Treasury and is still held by the Government. After the cancellation of the entry the company applied to the Secretary of the Interior for repayment to it of the purchase price, and Stoiber and the company executed a relinquishment of all claims to the land and surrendered the duplicate receipt; but the application was denied on the theory that the company was not an assign of the entryman within the meaning of the act. Stoiber then applied to the Secretary for repayment, and, the application being refused, brought suit in the Court of Claims, which gave judgment for the Government on the ground that the purchase price had been paid by the company and not by Stoiber. 41 Ct. Cl. 269, 275. Thereupon the company brought the present suit, with the result before stated.

As reasons for asking a reversal of the judgment the Government contends that the facts as found disclose, first, that the company is not an assign within the meaning of the act, and, second, that the entry was procured fraudulently, in contravention of the coal-land laws, and therefore that repayment cannot be allowed.

The act of 1880, in § 2, provides that where, from any cause, an entry of public land "has been erroneously allowed and cannot be confirmed," and is duly canceled by the Commissioner of the General Land Office, "the Secretary of the Interior shall cause to be repaid *to the person who made such entry, or to his heirs or assigns*, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land."

As we think Stoiber is the person who made the entry in

the sense of this act, even although he made it for the benefit of the company and paid the purchase price with money furnished by it, we come at once to the question, whether on the findings the company is his assign within the meaning of the act. It is said that the answer must be in the negative, because there was no conveyance of the land from him to the company while the entry was in force, that is, after its allowance and before its cancellation. By the decisions of this court in *Hoffeld v. United States*, 186 U. S. 273, and *United States v. Commonwealth Title Insurance & Trust Co.*, 193 U. S. 651, it is settled that an assign, within the meaning of the act, is one who becomes invested with the entryman's right in the land through some voluntary act of his; and it must be conceded that, generally speaking, a mere quitclaim deed passes only such interest as the grantor possesses at the time and does not reach an after-acquired title. But here there was something more than a mere quitclaim deed, executed in advance of the acquisition of any interest by the entryman. The entry was made at the instance of the company, with its money and for its benefit, and, unless the coal-land law forbade it, the entryman, by his voluntary action in that regard, became a trustee for the company and charged with an obligation to convey the land to it. *Irvine v. Marshall*, 20 How. 558; *Ducie v. Ford*, 138 U. S. 587, 592; *Smithsonian Institution v. Meech*, 169 U. S. 398, 406. Not only so, but equity, which usually looks upon that as done which ought to have been done, would regard such a conveyance as actually made, and therefore treat the company as an assign. We speak of the view which equity would take of the matter, because it is manifest that the act of 1880 proceeds upon equitable principles and is intended to be administered accordingly. Like other highly remedial statutes, it should be interpreted with appropriate regard to the spirit which prompted it. And, when it is so interpreted, we think the term "assigns" includes

one in the company's situation, if only the arrangement between it and Stoiber was not forbidden by law.

We are thus brought to the question, whether the facts found disclose that Stoiber and the company were engaged in an effort to acquire the land fraudulently, in contravention of the coal-land law, Rev. Stat., §§ 2347-2352. If they were, the company is not entitled to repayment, first, because it then would not be entitled to invoke the equitable maxim before stated, without the aid of which it could not be deemed an assign within the meaning of the act, and, second, because the right to repayment is restricted by the act to instances in which the entry has been "erroneously allowed," an expression which denotes some mistake or error on the part of the land officers whereby an entry is allowed when it should be disallowed, and not some fraud or false pretense practiced on them whereby an applicant appears to be entitled to the allowance of an entry when in truth he is not. Of this expression it is said, correctly, we think, in the regulations of the Land Department adopted under § 4 of the act soon after its enactment and ever since in force:

"This cannot be given an interpretation of such latitude as would countenance fraud. If the records of the Land Office, or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be 'erroneously allowed.' But if a tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was 'erroneously allowed;' and in such case repayment would not be authorized."

While the coal-land law does not expressly prohibit an entry by one person for the benefit of another, it does limit the quantity of land that may be acquired thereunder by one person to 160 acres, and the quantity that may be acquired by an association of persons to 320 acres

and, in exceptional instances, 640 acres; and it declares that its sections "shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions." These restrictions, as this court has held, forbid individuals and associations from acquiring public coal land in excess of the quantities prescribed, whether directly by entries in their own names or indirectly by entries made for their benefit in the names of others. And so, one person cannot lawfully make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit thereof, or in the interest of a person or an association where he or it has not had such benefit but is seeking, through entries made or to be made by others in his or its interest, to acquire a greater quantity of land than is permitted by the law. *United States v. Trinidad Coal and Coking Co.*, 137 U. S. 160; *United States v. Keitel*, 211 U. S. 370; *United States v. Forrester*, 211 U. S. 399; *United States v. Munday*, 222 U. S. 175. But there is no prohibition, express or implied, against an entry by a qualified person for the benefit of another person or association where he or it is fully qualified to make the entry in his or its own name, and is not seeking to evade the restrictions in respect of quantity.

A corporation is an association of persons within the meaning of the law, *United States v. Trinidad Coal and Coking Co.*, *supra*, and therefore the company here, which was a Colorado corporation, lawfully could have made the entry in question in its own name, unless it or some member of it had had the benefit of the coal-land law or

was seeking, through this and other like entries, to acquire coal land in excess of the quantity prescribed. In other words, the fact that the entry was made in the name of Stoiber for the benefit of the company does not, without more, establish that it was forbidden or fraudulent. There is no finding that the company or any member of it had had the benefit of the law or was seeking to acquire more than this 160 acres. So, for aught that appears, there was no legal obstacle to the entry being made in the company's name, and the fact that it was not may have been due to matters not affecting its validity or integrity. We do not overlook the finding that the application was accompanied by an affidavit stating that Stoiber was making the entry for his own use and benefit, and not directly or indirectly for another. Of course, the other findings show that that statement was untrue. Had it remained uncorrected it probably would have deceived the officers of the land office and prevented any inquiry into the qualifications of the company. But, according to the findings, it did not remain uncorrected, and could not have deceived the officers, for at the hearing in the contest, which preceded the allowance of the entry, it was admitted and shown that Stoiber was not seeking to acquire the land for himself, but for the company, to which he already had given a quitclaim deed. The statement in the affidavit therefore became harmless, for it was upon the evidence given in the contest that the entry was allowed. It follows that upon the findings it cannot be said that the arrangement between Stoiber and the company was forbidden by law or that the entry was fraudulently procured.

But it is said that an affirmative finding that the entry was not fraudulently procured is essential to sustain the judgment. To this we cannot agree. Fraud is not presumed, and one who bases a right or defense upon it should allege and prove it. The Government's answer

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contains no allegation of fraud, and the silence of the findings may rightly be taken as showing that none was proved. The findings fully respond to the issues presented by the pleadings, and, we think, sustain the judgment.

Judgment affirmed.

JOHANNESSEN v. UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 230. Submitted April 22, 1912.—Decided May 27, 1912.

Prior decisions of this court holding that a judgment of a competent court admitting a person to citizenship is, like every other judgment, competent evidence of its own validity, go no further than protecting the judgment from collateral attack.

Congress may authorize direct proceedings to attack certificates of citizenship on the ground of fraud and illegality; and § 15 of the act of June 29, 1906, 34 Stat. 596, 601, c. 3592, providing for such cases, is a valid exercise of the power of Congress under Art. I, § 8 of the Constitution of the United States.

The foundation of the doctrine of *res judicata* or estoppel by judgment is that both parties have had their day in court, *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 48; and where a certificate of naturalization was issued without the Government appearing there is no estoppel against it, nor is such a certificate conclusive against the public.

Certificates of naturalization, like patents for land or inventions, when issued *ex parte* can be annulled for fraud.

How the judicial review of a certificate of naturalization should be conducted rests in legislative discretion.

Quære as to the conclusive effect of a certificate of naturalization issued after appearance and cross-examination by the Government.

Quære: Whether, in the absence of statute such as the act of June 29, 1906, a court of equity could set aside, or restrain the use of, a certificate of naturalization.

The act of June 29, 1906 is not unconstitutional as an exercise of judicial power by the legislative branch of the Government, nor is it unconstitutional because retrospective.

The *ex post facto* provision of the Constitution is confined to laws affecting punishment for crime and has no relation to retrospective legislation of any other description.

An alien has no legal or moral right to retain citizenship obtained solely by fraud, and an act permitting the cancellation of a certificate so obtained is not a punishment but simply nullifies that which the party had no right to.

THE facts, which involve the power of the court under the act of June 29, 1906, c. 3592, to cancel a certificate of naturalization on the ground that it was fraudulently issued, are stated in the opinion.

Mr. Edward J. McCutchen and Mr. Samuel Knight for appellant:

A decree of naturalization is a judgment of a court, and, therefore, subject to all the rules of law regarding judgments as such. *Spratt v. Spratt*, 4 Pet. 393; 2 Black, Judg., § 804; *McCarthy v. Marsh*, 5 N. Y. 263; *The Acorn*, Fed. Cas. No. 29; *Charles Green's Son v. Salas*, 31 Fed. Rep. 106; *In re Bodek*, 63 Fed. Rep. 813; *Pintsch Com. Co. v. Bergin*, 84 Fed. Rep. 140; *Ex parte Knowles*, 5 California, 300; *Tinn v. United States Dist. Atty.*, 148 California, 773; *Matter of Christern*, 43 N. Y. Sup. Ct. 523; *S. C.*, 11 Jones & Spencer, 523; *Matter of Clark*, 18 Barb. 444; *United States v. Gleason*, 78 Fed. Rep. 396; 90 Fed. Rep. 778.

A court of equity will not set aside a judgment on the ground that it is founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. *United States v. Throckmorton*, 98 U. S. 61; *Vance v. Burbank*, 101 U. S. 514; *Steel v. St. Louis Smelting & Co.*, 106 U. S. 447; *Moffat v. United States*, 112 U. S. 24; *Hilton v. Guyot*, 42 Fed. Rep. 249, 252; *S. C.*, 159 U. S. 113;

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United States v. Gleason, 78 Fed. Rep. 396; *S. C.*, 90 Fed. Rep. 778.

The act of 1906, under which it is sought to cancel defendant's certificate of citizenship, operates as an *ex post facto* law, and is, therefore, within the prohibition of § 9 of Art. I of the Constitution of the United States. *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277; *Kring v. Missouri*, 107 U. S. 221; *Commonwealth v. Edwards*, 39 Kentucky (9 Dana), 447; *United States v. Starr*, 27 Fed. Cas. No. 16,379; *Green v. Shumway*, 39 N. Y. 418.

If the act of June 29, 1906, authorizes the impeachment of the judgment of a coördinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature. *Wieland v. Shillock*, 24 Minnesota, 345; *Roche v. Waters*, 72 Maryland, 264; *Re Handley's Estate*, 15 Utah, 212; *Cooley's Const. Lim.*, 6th ed., 111; 1 Black on Judgments, 298; *Atkinson v. Dunlap*, 50 Maine, 111; *United States v. Aakervik*, 180 Fed. Rep. 137; *Davis v. Menasha*, 21 Wisconsin, 497; *State v. Flint*, 61 Minnesota, 539; 63 N. W. Rep. 113.

A statute should be construed to have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. *Calder v. Bull*, 3 Dall. 386; *Cooley's Const. Lim.* 529; 8 Cyc. 1022; 28 Am. & Eng. Ency. Law, 693.

Mr. Assistant Attorney General Harr for the United States:

The last paragraph of § 15 of the act of June 29, 1906, expressly applies not only to certificates of citizenship issued under the provisions of that act, but to all certificates theretofore issued by any court under prior laws.

Under §§ 2165, 2170, Rev. Stat., the continuous residence of an alien within the United States for the requisite

length of time was, under the old law, as under the act of June 29, 1906, a matter which went to the power of the court to act. If he could not meet this requirement, the court had no jurisdiction in the premises. The contention, therefore (based on *United States v. Throckmorton*, 98 U. S. 61), that if, as in the present case, a court was induced to naturalize an alien by a misrepresentation of the facts as to his residence, Congress has no authority to authorize a judicial proceeding for the cancellation of his certificate of naturalization so obtained, is manifestly untenable. It amounts to saying that one could by fraud confer jurisdiction upon the courts to do that which Congress had expressly withheld from them, and which they had no power to do except by virtue of authority from Congress. *United States v. Throckmorton*, 98 U. S. 61, 68.

But even if Congress has no greater power to authorize proceedings to cancel a judgment of naturalization than is possessed by a court of equity with respect to ordinary judgments or decrees the *Throckmorton Case* is inapplicable, because that case has reference only to proceedings *inter partes*, and has no application to *ex parte* proceedings by which a grant is obtained from the Government. *Moffatt v. United States*, 112 U. S. 24, 32; *United States v. Minor*, 114 U. S. 233; *United States v. Am. Bell Telephone Co.*, 128 U. S. 315; *Hilton v. Guyot*, 159 U. S. 207; *United States v. Am. Bell Telephone Co.*, 167 U. S. 224, 240.

A naturalization proceeding (at least prior to the act of June 29, 1906, § 11, which gives the Government the right to be heard therein) was entirely *ex parte*. There was no contest by the Government, and no adversary proceedings. It was therefore similar in all substantial respects to an application to the Government for a patent for land.

Prior to the act of June 29, 1906, the power of the Federal court to cancel a certificate of naturalization obtained by fraud was recognized. *In re McCoppin*, 5

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Argument for the United States.

Saw. 630, 632; *United States v. Norsch*, 42 Fed. Rep. 417.

The constitutionality of the act of June 29, 1906, and the jurisdiction of the United States courts thereunder to cancel a certificate of naturalization, whether issued by a state or Federal court, where it appears that the certificate has been procured without compliance with the requirement of the law as to residence in the United States, has been sustained in the following cases: *United States v. Nisbet*, 168 Fed. Rep. 1005; *United States v. Mansour*, 170 Fed. Rep. 671; *United States v. Simon*, 170 Fed. Rep. 680; *United States v. Meyer*, 170 Fed. Rep. 983; *United States v. Spohrer*, 175 Fed. Rep. 440; *United States v. Luria*, 184 Fed. Rep. 643.

Appellant must rest entirely upon *United States v. Gleason*, 78 Fed. Rep. 396, affirmed, 90 Fed. Rep. 778, Judge Wallace dissenting.

In *Campbell v. Gordon*, 6 Cranch, 176, and *Spratt v. Spratt*, 4 Pet. 392, on which that decision was based held merely that a judgment of naturalization could not be collaterally attacked. Here, the issue is whether the Government, which made the grant, can authorize a direct proceeding for the purpose of having it set aside for fraud. See 3 Moore, Int. Law Dig. 500.

The view that naturalization is a judicial act because it is done by judges (*United States v. Dolla*, 177 Fed. Rep. 101, 105), rather than because of the nature of the act, is apparent when the nature of the act is analyzed, and is confirmed by the fact that in most countries it is performed by administrative officers. In England naturalization is conferred upon application to one of the principal secretaries of state; in France, by the President of the Republic; in Russia, by the minister of the interior; in Prussia, by the police authorities; in Norway, by the Storting; in Turkey, by the minister of foreign affairs; and by the chief executive authority in all other European

countries. (Report to the President of the Commission on Naturalization, H. Doc. No. 46, 59th Cong., 1st sess., p. 18.)

Naturalization under our Constitution is in all substantial respects like a patent for land or for an invention—an act of grace on the part of the Government, conditioned upon compliance with certain express requirements. In neither the one case nor the other can fraud or misrepresentation as to the existence of the requisite conditions give the grantee an indefeasible right to the grant as against the Government. See *Wallace v. Adams*, 204 U. S. 415.

The contention that § 15 of the act of June 29, 1906, is an *ex post facto* law hardly merits serious consideration.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a proceeding under § 15 of the act of June 29, 1906, c. 3592, 34 Stat. 596, 601, instituted by the district attorney of the United States for the Northern District of California, to cancel a certificate of citizenship, granted to the appellant by a state court long prior to the passage of the act referred to, on the ground that it had been fraudulently and illegally procured. The case was heard upon demurrer to an amended petition, which demurrer was overruled; and thereupon, no answer being filed, the court proceeded to make a decree setting aside and canceling the certificate. The appellant brings that decree here for review.

The facts, as set forth in the amended petition and admitted by the demurrer, are as follows: Johannessen, the appellant, is a native of Norway, and arrived in the United States for the first time in the month of December, 1888. Less than four years thereafter, and on October 6, 1892, he applied to the Superior Court of Jefferson County, in the State of Washington, under § 2165 of the Revised Statutes of the United States, to be admitted to

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citizenship, and procured from that court a certificate admitting him to such citizenship. This certificate was based upon the perjured testimony of two witnesses, to the effect that Johannessen had resided within the limits and under the jurisdiction of the United States for five years at least then last past. The facts were not discovered by the Government until June 29, 1908, when Johannessen made a voluntary statement to the Department of Justice in the form of an affidavit, which is made a part of the amended petition, and wherein he admits that the certificate of citizenship was illegally procured, in that he had not been a resident of the United States for five years at the time it was issued.

The petition contains all necessary averments to show the jurisdiction of the District Court over the present action, leaving only the merits in controversy.

The provisions of law in force at the time Johannessen thus applied for and procured admission to citizenship are contained in §§ 2165 and 2170 of the Revised Statutes, which, so far as pertinent, are as follows:

"SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.

"Second. He shall, at the time of his application to be admitted, declare, on oath, before some one of the

courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

"Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of a good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence."

* * * * *

"SEC. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States."

The act of June 29, 1906, contains a revision of the naturalization laws, together with some additional provisions, among which are the following:

"SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of

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citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

* * * * *

“Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

“The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.”

The principal contentions in the argument for appellant are, that a decree of naturalization is a judgment of a competent court and subject to all the rules of law regarding judgments as such; that a court of equity could not, prior to June 29, 1906, set aside or annul such a judgment

for fraud intrinsic the record, that is, founded upon perjured testimony, or any matter which was actually presented and considered in giving the judgment; and that if the act of June 29, 1906, authorizes the impeachment of the preëxisting judgment of a coördinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature.

It was long ago held in this court, in a case arising upon the early acts of Congress which submitted to courts of record the right of aliens to admission as citizens, that the judgment of such a court upon the question was, like every other judgment, complete evidence of its own validity. *Spratt v. Spratt*, 4 Pet. 393, 408. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack. See also *Campbell v. Gordon*, 6 Cranch, 176.

It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by § 15 of the act of 1906. Appellant's contention involves the notion that because the naturalization proceedings result in a judgment, the United States is for all purposes concluded thereby, even in the case of fraud or illegality for which the applicant for naturalization is responsible. This question may be first disposed of.

The Constitution, Art. I, § 8, gives to Congress power "to establish an uniform Rule of Naturalization." Pursuant to this authority it was enacted, as above quoted from the Revised Statutes, that an alien might be admitted to citizenship "in the following manner and not otherwise"; § 2165 requiring proof of residence within the United States for five years at least; and § 2170 declaring a continued term of five years' residence next preceding his admission to be essential. An examination of this legislation makes it plain that while a proceeding

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for the naturalization of an alien is in a certain sense a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the Government a party nor to give any notice to its representatives.

The act of June 29, 1906, in § 11 (34 Stat. 599), declares that the United States shall have the right to appear in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of naturalization. No such provision was contained in the act as it formerly stood. For present purposes we assume, however, that the Government had such an interest as entitled it, even without express enactment, to raise an issue upon an alien's application for admission to the privileges of citizenship. What may be the effect of a judgment allowing naturalization in a case where the Government has appeared and litigated the matter does not now concern us. (See 2 Black, Judgts., § 534, a.) What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the Government and without opportunity, to say nothing of duty, on the part of the Government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship. In view of the great numbers of aliens thus

applying at irregular times in the various courts of record of the several States and in the Federal Circuit and District Courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the Government of the United States or to the public, it is of course impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation when conducted at the instance of and controlled by the interested individual alone.

The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgts., §§ 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48:

"That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies."

Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public. Such a certificate, including the "judgment" upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land (Rev. Stat., § 2289, etc.), or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., § 4883, etc.).

Judicial review of letters patent, looking to their cancellation when issued unlawfully or through mistake or when procured by fraud, is very ancient—possibly antedating the establishment of the court of equity in England.

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3 Black. Com. 47, 48. As pointed out by Mr. Justice Grier, speaking for this court in *United States v. Stone*, 2 Wall. 525, 535; the original mode was by writ of *scire facias*, the bill in equity being afterwards adopted as a more convenient remedy. In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 281; previous cases were reviewed and the practice discussed. In *United States v. Beebe*, 127 U. S. 338, 342; Mr. Justice Lamar, speaking for this court, said: "It may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked." See also *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 175, and cases cited.

United States v. Throckmorton, 98 U. S. 61, is not opposed in principle, for, as pointed out in *United States v. Minor*, 114 U. S. 233, 241, the patent was issued on the confirmation of a Mexican grant after judicial proceedings, where there were pleadings and parties, and witnesses were examined on both sides, with the right to appeal. *Vance v. Burbank*, 101 U. S. 514, 519, was likewise a contested case in the Land Department, as the report shows.

The doctrine that a patent issued *ex parte* may be annulled for fraud has been repeatedly applied to patents for inventions. *United States v. Bell Telephone Co.*, 128 U. S. 315, 361; *Same v. Same*, 167 U. S. 224, 238.

Whether the judicial review of a certificate of naturalization should be conducted in one mode or another is a matter plainly resting in legislative discretion. Section 15 of the act of June 29, 1906 (34 Stat. 601), provides for a proceeding in a "court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit," upon fair

notice to the party holding the certificate of citizenship that is under attack. No criticism is made of this mode of procedure.

The views above expressed render it unnecessary for us to go into the question whether on general principles and without express legislative authority, a court of equity, at the instance of the Government, might set aside a certificate of citizenship or restrain its use, for fraud or the like. In *United States v. Norsch*, 42 Fed. Rep. 417, it was declared that the Government could sue in a Federal court for the cancellation of a certificate that had been procured by fraud in a state court, but it was held that the facts set forth in the bill did not make out a sufficient case of fraud. In *United States v. Gleason*, 78 Fed. Rep. 396, 90 Fed. Rep. 778, the contrary conclusion was reached upon the main question. These two cases arose prior to the act of 1906.

Since the passage of that act, the district courts have quite generally sustained the action for a cancellation of fraudulent certificates. *United States v. Nisbet*, 168 Fed. Rep. 1005; *United States v. Simon*, 170 Fed. Rep. 680; *United States v. Mansour*, 170 Fed. Rep. 671; *United States v. Meyer*, 170 Fed. Rep. 983; *United States v. Luria*, 184 Fed. Rep. 643; *United States v. Spohrer*, 175 Fed. Rep. 440. In the latter case Judge Cross used the following pertinent language (at p. 442): "An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not

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he takes nothing by his paper grant. Fraud cannot be substituted for facts." And again, at p. 446: "That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled, and, if that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner."

The contention that the act of June 29, 1906, in authorizing the impeachment of certificates of naturalization theretofore issued for fraud consisting of the introduction of perjured testimony, is unconstitutional as an exercise of judicial power by the legislative department, is in effect disposed of by what has been said. The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers. *Sampeyreac v. United States*, 7 Pet. 222, 239; *Freeborn v. Smith*, 2 Wall. 160, 175; *Garrison v. New York*, 21 Wall. 196, 202; *Freeland v. Williams*, 131 U. S. 405, 413; *Stephens v. Cherokee Nation*, 174 U. S. 445, 478.

An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued. As was well said by

Chief Justice Parker in *Foster v. Essex Bank*, 16 Massachusetts, 245, 273, "there is no such thing as a vested right to do wrong."

The remaining points taken by the appellant may be briefly disposed of. One is that the provisions of § 15 of the act of 1906 are not retrospective. This is refuted by a reading of the closing paragraph of the section. Finally it is insisted that, if retrospective in form, the section is void, as an *ex post facto* law within the prohibition of Art. I, § 9 of the Constitution. It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. Cooley's Const. Lim. (6th ed.), 319; *Calder v. Bull*, 3 Dall. 386, 390; and Rose's Note thereon. The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. We do not question that an act of legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed would be void as an *ex post facto* law. *Cummings v. Missouri*, 4 Wall. 277, 321; *Ex parte Garland*, 4 Wall. 333, 378. But the act under consideration inflicts no such punishment, nor any punishment, upon a lawful citizen. It merely provides that, on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings. The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never right-

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Counsel for Parties.

fully his. Such a statute is not to be deemed an *ex post facto* law.

The decree under review should be

Affirmed.

R. J. DARNELL (INCORPORATED) v. ILLINOIS
CENTRAL RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TENNESSEE.

No. 887. Submitted April 1, 1912.—Decided June 7, 1912.

Under § 5 of the act of 1891, the jurisdiction of the Federal court as such must be involved. The direct writ will not lie if the question is one which might arise in a court of general jurisdiction, such as insufficiency of the pleadings.

Under the act of June 18, 1910, 36 Stat. 539, 554, c. 309, the state courts as well as the appropriate Federal courts can take cognizance of a claim based on an award of reparation of the Interstate Commerce Commission.

Whether plaintiff's declaration in a case for reparation for excessive rates is sufficient without an averment of previous action by the Interstate Commerce Commission is a question which would arise in any court, state or Federal, in which the case was brought and does not go to the jurisdiction of the Federal court as such; a direct writ of error therefore will not lie from this court under § 5 of the Court of Appeals Act of 1891.

Writ of error from 190 Fed. Rep. 656, dismissed.

THE facts, which involve the construction of § 5 of the act of 1891 and direct appeals thereunder to this court, are stated in the opinion.

Mr. Charles N. Burch and Mr. Blewett Lee for defendants in error, in support of the motion.

Mr. W. A. Percy, for plaintiff in error, in opposition thereto.

Memorandum opinion by direction of the court. By
MR. CHIEF JUSTICE WHITE.

On motion to dismiss: Plaintiff in error, a Tennessee corporation, was the plaintiff below. One of the defendants is an Illinois and the other a Mississippi corporation. The action was commenced on June 24, 1911, to recover the excess over a reasonable rate exacted by the defendants from the plaintiff for the carriage of hard-wood lumber, such excess being alleged to be two cents per hundred pounds on more than thirty-five million pounds of such lumber shipped by plaintiff between January 20, 1905, and August 1, 1908. It was averred that the excess of the rate exacted over what would have been a reasonable rate to the extent claimed had been determined by the Interstate Commerce Commission in a proceeding before that body by shippers of hard-wood lumber other than the plaintiff, and that in consequence of the order of the Commission made in the proceeding referred to a reasonable rate had been made effective by the defendants on August 1, 1908. A demurrer of both the defendants was sustained, for the reason that the declaration failed to allege that plaintiff had made application for reparation to the Interstate Commerce Commission, and that this right to reparation had been sustained by that body. The plaintiff declining to plead further, a judgment of dismissal was entered. Thereafter the court filed a certificate to the effect that the cause had been dismissed solely upon the ground of want of jurisdiction. This direct writ of error was then sued out.

The motion to dismiss must prevail. As stated in the certificate of the court below, the order of dismissal was "based solely on the ground that the declaration . . . discloses the infraction of no right arising under or out of the Federal laws or Constitution, of which this court now has jurisdiction." It is plain, from the record, that

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this was but the equivalent of saying that the declaration did not state a cause of action because of the failure to allege the existence of a supposed condition precedent to recovery in a court of law, viz: a finding by the Interstate Commerce Commission that a right to reparation was possessed by the plaintiff. But the right to take cognizance of a claim based upon an award of reparation made by the Commission is not confined solely to an appropriate Circuit Court of the United States, but is equally possessed by state courts having general jurisdiction. See amendment to § 16 of the Act to Regulate Commerce resulting from the act of June 18, 1910, chap. 309, 36 Stat. 539, 554. Under these circumstances it is clear that the question of whether the plaintiff was entitled to the relief prayed in the absence of an averment of previous action by the Interstate Commerce Commission involved merely the determination of whether there was a cause of action stated, and hence that under these circumstances this issue did not call in question the jurisdiction of the court below, as a Federal court, becomes equally clear when it is considered that exactly the same question concerning the sufficiency of the averments to justify affording relief would have arisen for decision had the suit been pending in a state court of general authority having jurisdiction over the person. When the controversy comes to be rightly understood, it is obvious that its determination was within the scope of the jurisdiction of the court below, and that its decision on the issue presented is susceptible of being reviewed in the regular course of judicial proceeding and does not come within the purview of the authority to directly review in certain cases conferred upon this court by the act of 1891. *Bache v. Hunt*, 193 U. S. 523; *Fore River Shipbuilding Company v. Hagg*, 219 U. S. 175; *United States v. Congress Construction Company*, 222 U. S. 199.

Writ of error dismissed.

CRESWILL *v.* GRAND LODGE KNIGHTS OF
PYTHIAS OF GEORGIA.

ERROR TO THE SUPREME COURT OF GEORGIA.

No. 235. Argued May 2, 3, 1912.—Decided June 10, 1912.

Where defendant sets up the claim that it enjoys right or privilege sought to be enjoined under authority of an act of Congress and the state court denies the right, the judgment is reviewable here under § 237 of the new Judicial Code (§ 709, Rev. Stat.).

Whether persons have a right to be incorporated in a State as a state branch of an organization incorporated in the District of Columbia under an act of Congress is a non-Federal question.

Quære: Whether the principles applicable to use of trade-marks and trade-names are applicable to the use of names of fraternal organizations having a main organization with branches in the several States.

The doctrine of laches applies to the use of a name of a fraternal corporation and equity will not grant relief against the use of the name by parties who have been using it for many years without objection, at the instance of the older organization, there not appearing to be any fraud or intent to deceive the public.

While this court does not as a general rule review findings of fact of the state court on writ of error, where a Federal right has been denied as a result of a finding of fact and it is contended there is no evidence to support that finding and the evidence is in the record, the resulting question is open for decision; and where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to require the facts to be analyzed and dissected so as to pass on the Federal question this court has power to do so.

In this case *held* that:

There was no evidence to support a finding that the defendants below were attempting by their application for incorporation in a State to use the name Knights of Pythias so as to deceive the public and work pecuniary damage to the older organization of that name, the complainant.

The long-continued acquiescence of the older organization of the Knights of Pythias in the use of the name by the junior organization prior to the attempt of the latter to have this par-

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ticular state branch incorporated amounted to laches and under such conditions equity could not grant relief.

The existence of laches in this case is incompatible with a finding of injury to property and deceit to the public.

133 Georgia, 837, reversed.

THE facts, which involve the right of two associations to use the name "Knights of Pythias" and to be incorporated thereunder in one of the States, are stated in the opinion.

Mr. Alton B. Parker and *Mr. C. L. Pettigrew*, with whom *Mr. Samuel A. T. Watkins* was on the brief, for plaintiffs in error:

Defendants in error are not entitled to the relief sought, on account of their own acquiescence in the use by the plaintiffs in error of the name under which they were chartered. They could have made the question in 1880, when the first lodge was organized, and subsequently in 1886, when the first subordinate lodge was organized in Georgia, and in 1889 when the charter was granted under the same law that granted the charter of the defendants in error, all of which were done in the open and with the knowledge of the defendants in error, who uttered no word of complaint for over a quarter of a century or until the application for a charter was made in 1906.

No principle in equity is better established than that the right of action is lost by laches.

In *Ancient Order of United Workmen v. Graham*, 96 Iowa, 592; *S. C.*, 31 L. R. A. 113, a lapse of ten years was held to bar a benevolent association from an injunction. See also, *Thompson on Corporations*, 8192, 8196; *Bacon on Benefit Societies*, 1904, § 48A; *Burke v. Bishop*, 144 Fed. Rep. 838.

For other cases in which the right to enjoin was lost by laches, see *Grand Hive L. O. M. v. Supreme Hive L. O. M.*, 97 N. W. Rep. 779; 9 N. W. Rep. 26; 88 N. W. Rep. 882; *Holt v. Parsons*, 118 Georgia, 895; *Walker v. Phillips*,

120 Georgia, 728; *Reynolds v. Martin*, 116 Georgia, 495; *Hollingshead v. Bank*, 104 Georgia, 250; *Marshall v. Means*, 12 Georgia, 61; *Atkins v. Hill*, 7 Georgia, 573; *Waterlot Co. v. Bucks*, 5 Georgia, 315; *City of Elberton v. Pearl Mills*, 123 Georgia, 1; *Whitley v. James*, 121 Georgia, 521; *McWhorter v. Cherry*, 121 Georgia, 541; *Cole v. Burke*, 35 Georgia, 280; *Knox v. Yow*, 91 Georgia, 367.

As to the doctrine of laches, no arbitrary rule exists, but the question is decided upon the circumstances of each case. 16 Cyc. 152, and cases cited.

Lapse of time alone, and together with circumstances, especially circumstances injuring the defendant, preclude relief. Prejudice to defendant precludes relief where the change in circumstances is due to the voluntary act of defendant, or the result of delay itself. If plaintiff sleeps on his rights until the progress of events and change of circumstances render it impossible to grant relief with equal justice to defendants, he is guilty of laches. 16 Cyc. 162, and cases cited; *Prince Metallic Paint Co. v. Prince Mfg. Co.*, 57 Fed. Rep. 938; *Boston Rubber-Shoe Co. v. Boston Rubber Co.*, 149 Massachusetts, 436; *Colonial Dames v. Colonial Dames*, 60 N. Y. Supp. 302; *S. C.*, 173 N. Y. 586; *Richards v. McKall*, 124 U. S. 183; *Sullivan v. Portland R. Co.*, 94 U. S. 806.

Mr. Hamilton Douglas and *Mr. John P. Ross* for defendants in error.

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

A secret fraternal and benevolent order known as the Knights of Pythias was organized as a voluntary association in Washington, District of Columbia, in 1864. Pursuant to the authority conferred by an act of Congress approved May 5, 1870 (16 Stat. 98, c. 80), authorizing the formation of corporations in the District of Columbia,

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the persons composing the Supreme Lodge, the governing body of the order, became incorporated as the Supreme Lodge Knights of Pythias by filing in the proper office the certificate required by the act. Among other things required to be stated in the certificate was the name or title by which the society was to be known in law and the particular business and objects of the society. The statute provided that upon the filing of the certificate the persons signing and acknowledging the same, and their associates and successors, "shall be a body politic and corporate, by the name stated in such certificate;" The life of the corporation thus created, it would seem, expired by limitation in 1890. On June 29, 1894 (28 Stat. 96, c. 119), however, by a special act of Congress, the Supreme Lodge was again made a corporation of the District of Columbia by the name of the Supreme Lodge Knights of Pythias, and still exists as such. Membership in the order is restricted to white males. In addition to a Grand Lodge and subordinate lodges in each State to which it has been extended, the order conducts an insurance branch known as the Endowment Rank and a military branch known as the Uniform Rank. The Grand Lodge of Georgia was instituted by the Supreme Lodge on March 20, 1871.

An order of Knights of Pythias of the same general nature as that above described, consisting of members of the colored race, was established in Mississippi on March 26, 1880. It became a corporation of the District of Columbia on or about October 10, 1889, by virtue of the general incorporation act of Congress of May 5, 1870, already referred to, under the name and style of "The Supreme Lodge Knights of Pythias, North and South America, Europe, Asia and Africa." The order was introduced into Georgia in June, 1886, and a Grand Lodge was instituted in that State by the Supreme Lodge on December 15, 1890. The corporation of October 10, 1889,

was reincorporated December 14, 1903, under the same general law of May 5, 1870, by the name of "Knights of Pythias of North America, South America, Europe, Asia, Africa and Australia." After such reincorporation, on January 15, 1905, the Supreme Lodge issued a new charter to the Grand Lodge of Georgia.

The Supreme Lodge of Knights of Pythias which as heretofore stated was finally incorporated in 1894 by special act of Congress, the Grand Lodge of Georgia, which was subject to its jurisdiction, and the officers of such Grand Lodge were parties complainant in an amended petition in this litigation commenced in the Superior Court of Fulton County, Georgia. The defendants were the officers of the Grand Lodge in Georgia of the other body, who had made application to the court in which this suit was commenced to be incorporated as a domestic corporation of Georgia under the name and style of "The Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa and Australia, jurisdiction of Georgia." The petition filed in the cause recited the organization of the order of the plaintiffs substantially as heretofore stated, and the defendants were alleged to be wrongfully attempting to incorporate under a name which infringed that of plaintiffs' order, and to be unlawfully styling themselves Knights of Pythias, and to be fraudulently using the insignia, emblems, etc., of the plaintiffs' order. The averments of the petition and the amended petition as to damage sustained by the alleged unlawful acts of the defendants and their associates were stated in general terms to constitute a wrong and injury to petitioners and to the membership in Georgia and to be a fraud upon the public. The relief prayed was in substance a permanent injunction enjoining the prosecution of the application for incorporation, and the use by the defendants and the members of the subordinate lodges under their jurisdiction of the name Knights of

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Pythias and of other names, insignia, emblems, etc., which would be like or a colorable imitation of those in use by the plaintiffs' order.

By their answer the defendants put the plaintiffs to proof of the material averments of the petition, set up the origin, growth and purposes of the order of which they were members and especially stated that it was confined to the "negro race and the Asiatic races." The incorporation of the order under the general incorporation act of Congress of 1870 was also averred, and the claim was made of lawful right to the use of the names, signs, symbols, emblems, insignia and the other paraphernalia adopted by the corporation, and the good faith of the corporation and all concerned in the matter was averred. It was further stated that the membership of the order in the United States aggregated 80,747 and in the State of Georgia 11,805, and that there never had been an attempt to confuse the order with that of which the plaintiffs were members and that no such confusion in fact had ever arisen or could arise, the field of operation of the orders being absolutely different. Laches of the plaintiff was pleaded in bar of any relief on the ground that the existence of the order and its operations had been publicly known and was matter of common knowledge for many years.

The case came on for hearing on a motion for preliminary injunction, and after hearing the evidence and argument of counsel the court denied an injunction and quashed a preliminary restraining order. The plaintiff took the case by a bill of exceptions to the Supreme Court of Georgia. That court in disposing of it referred to the fact that the Supreme Lodge of the order represented by plaintiffs was a corporation of the District of Columbia and that by amendment of the petition it had been joined as a plaintiff. It further stated:

"That the defendants have been operating and are

seeking to be incorporated in this State under a name which is claimed to be an infringement of the name of the plaintiff's association, and the question is involved whether and how far the plaintiff, which is a foreign corporation, might be affected by the State's granting a charter to the defendants as a domestic corporation in the name and for the purpose asked, and also whether there is a fraudulent purpose or design to so infringe."

It was next observed that "the presiding judge should have enjoined the defendants from obtaining the charter applied for, so as to preserve the status in respect thereto until, on final jury trial, all of the questions of law and fact can be fully adjudicated." The court held that error had been committed in refusing to grant an injunction as to the charter applied for," and the "ruling of the Chancellor denying the injunction in other matters" was allowed "to stand until the final trial or further order of court, leaving open all the other questions for future determination." 128 Georgia, 775. There followed a hearing of the case before the court and a jury, and evidence, both oral and documentary, was introduced. The evidence showed, without contradiction, that in addition to being incorporated as stated in the answer, the defendant order had also organized on May 24, 1905, as a fraternal beneficial association by its corporate name under the insurance laws of the District of Columbia; that the laws enacted by the order were such as were common to a fraternal body; that the rituals of the order and its emblems, flags, badges, pins and jewelry adornment were on public sale free to be purchased by anyone; that the membership of the order throughout the United States aggregated 300,000; that there had been collected and disbursed to the members of the order between July 1, 1906, and July 1, 1907, more than \$500,000; that the collections in Georgia during the existence of the order there aggregated \$180,232.21; that there had been paid

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to the widows and orphans of deceased members in Georgia \$148,680, and that the collections in Georgia aggregated \$51,000 a year, excluding the expense of burying their dead which was \$9,000 more. After instructing the jury as to the law deemed to be applicable and observing that the case was of a character wherein the law provided that questions might be propounded to be answered by the jury, such answers to stand as their verdict, the court submitted fourteen questions to be answered by the jury. The questions, with the answers given, are copied in the margin.¹

¹ (Questions & Verdict.)

GEORGIA, *Fulton County*:

(1) Is the proposed corporate name of the defendants an infringement on the name of the plaintiff's association?

Yes.

(2) If it is such an infringement would it affect or injure plaintiff in any property right? If so, what?

Yes, in name.

(3) If so, is there any fraudulent purpose or design to (in?) so infringing?

Yes, there is.

(4) Are any of the emblems or insignia of defendants the same as any of those used by plaintiffs, and if so, does such use injure plaintiff in any property right?

Yes.

(5) Has the plaintiff acquiesced in the use by defendants of the name and insignia, &c., and if so, how long?

No.

(6) Is it true that since the organization of the Order represented by petitioners and its introduction into the State of Georgia, it has been called the Order of Knights of Pythias, and that its members have been known as Knights of Pythias or Pythian Knights indifferently?

Yes.

(7) Is it true that "Pythias" is the distinctive word in the name of the Order represented by petitioners, which ordinarily distinguishes it from the name and style of other fraternal orders in the State of Georgia and in the United States?

Yes.

(8) Is it true that the name set forth in defendants' petition for in-

Subsequently a final decree was entered granting the relief prayed by the complainants. A copy of the decree is excerpted in the margin.¹

corporation is substantially identical with the name and style of your petitioners the Grand Lodge Knights of Pythias of Georgia?

Yes.

(9) Is it true that the name set forth in defendants' said petition for incorporation is a colorable imitation of the name and style of your petitioner, the Grand Lodge Knights of Pythias of Georgia?

Yes.

(10) Is it true that the use by defendants and their associates of the name which they are seeking incorporation would work a fraud upon your petitioners and their associates and the public, in that the name under which defendants propose to incorporate is a colorable imitation of the name of petitioners?

Yes.

(11) Is it true that defendants can not show any organization of any kind until 1880, and until long after the Grand Lodge Knights of Pythias of petitioners was organized in the State of Georgia?

Yes.

(12) Is it true that the use of the word "Pythias" immediately in conjunction with the words "Knights of" in the name under which defendants and their associates are seeking incorporation is a colorable imitation of the name of your petitioner, the Grand Lodge Knights of Pythias of Georgia?

Yes.

(13) Is it true that defendants of the "Supreme Lodge of the Knights of Pythias of North America, South America, Europe, Asia, Africa and Australia" are wearing emblems and insignia identical in color, design and lettering with the emblems and insignia of petitioners, the Grand Lodge Knights of Pythias of Georgia; and is it true that the wearing and use of such insignia and emblems work a fraud upon either petitioner or their associates or the public?

Yes.

(14) Have the defendants used the name Knights of Pythias or the letters K. of P. without any affix or suffix thereto?

Yes.

May 27, 1908.

G. W. FOOTE, *Foreman*.

¹ (*Final Decree*.)

GEORGIA, *Fulton County*:

Upon considering the pleadings, evidence and verdict in the above-

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Reciting that they were dissatisfied with the verdict of the jury upon the questions submitted, the defendants moved for a new trial upon the ground that the verdict

stated case, it is thereupon ordered, adjudged and decreed by the Court as follows:

(1) That the defendants, Chas. D. Creswill, Geo. N. Stoney, Geo. R. Hutto, N. B. Williamson, Columbus J. Smith, Fred. N. Cohen, Boss W. Warren, Geo. W. Brown, Jas. W. Davis, Edwin J. Turner, Garrett Taylor and Lucius L. Lee, and each of them and their associates, confederates and successors, be and they are hereby perpetually enjoined as in said petition prayed, and especially as follows:

A. That said defendants and their associates, confederates and successors are hereby perpetually enjoined from prosecuting their petition for incorporation, and from further proceeding to become incorporated in Fulton County, or elsewhere in the State of Georgia, under the name and style of "The Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa and Australia, Jurisdiction of Georgia," or using any name or title embracing the word "Pythias" in immediate conjunction with the words "Knights of," or under any name or title in which the word "Pythias" is the distinctive and cardinal word, or under any name which is substantially identical with, or a colorable imitation of the name of the petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia.

B. That said defendants, their associates and successors and each of them be, and they are hereby perpetually enjoined from further using in their voluntary organization said name of the Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa and Australia, Jurisdiction of Georgia, and in the conduct of its affairs, using any name embracing the word "Pythias" in immediate conjunction with the words "Knights of," or embracing said word "Pythias" as the cardinal distinctive word of the name or any other name which is substantially identical with or in colorable imitation of the name of the petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia. The said defendants, their associates and successors and each of them are further perpetually enjoined from instituting subordinate lodges under the name and designation of the Order of Knights of Pythias, and from further authorizing the continued existence of subordinate lodges under the jurisdiction of said voluntary organization, of which defendants and their associates are members, using the name and designa-

was contrary to the evidence and without evidence to support it, that it was strongly and decidedly against the weight of evidence and was contrary to law and the principles of equity. Nearly six months afterwards, by leave of court, defendants amended the motion by adding thirty-six additional grounds, attacking specifically each of the

tion of Knights of Pythias, or any name in which the word "Pythias" is the cardinal and distinctive word, or any name which is a colorable imitation of the name of petitioners, the Supreme Lodge Knights of Pythias, and the Grand Lodge Knights of Pythias of Georgia, and of subordinate lodges instituted by said petitioner's authority. And said defendants, their associates and successors, and each of them, are further perpetually enjoined from designating and calling themselves, and from authorizing their associates and members of subordinate lodges organized and existing by authority of the voluntary organization of which said defendants are members to designate and call themselves Knights of Pythias or Pythian Knights, or any other name that is a colorable imitation thereof, and from designating their voluntary organization or its subordinate lodges by the initials K. P. or K. of P., and from using a seal which is a colorable imitation of the seal of the petitioners, the Grand Lodge Knights of Pythias of Georgia, and from using and wearing emblems and insignia, buttons, pins, rings, and watch charms which in color and design are substantially similar to or a colorable imitation of the emblems and insignia, buttons, pins, rings and watch charms adopted, used and worn by the members of petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia, and the members of the subordinate lodges organized by authority of said petitioners; and the said defendants, and each of them, their successors and associates are perpetually enjoined from authorizing or permitting the further use and wearing of such emblems and insignia by members of subordinate lodges instituted by and existing under the authority of said voluntary organization of which the defendants are officers and members.

C. That said defendants and each of them and their associates and successors be, and they are perpetually enjoined from using the words Knights of Pythias in immediate conjunction, or the word "Pythias" as the cardinal distinctive word in any name, or as a designation of any insurance, military or other branch of the voluntary organization of which said defendants and their associates are officers and members;

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answers to the questions, charging each to be not only contrary to the evidence, but contrary to the charge of the court, and in addition error was alleged in the charge as given and to the failure to instruct the jury as pointed out in some of the specifications of error. The omission to specifically instruct the jury that the defendants claimed

and from using any name, flags, emblems, and insignia that are substantially identical with or a colorable imitation of the name, flags, emblems, or insignia of petitioners, the Supreme Lodge Knights of Pythias and the Grand Lodge Knights of Pythias of Georgia, in any insurance and military branches of said petitioners, in connection with any society or corporation of which defendants are officers or members.

(2) In order that the voluntary organization of which the defendants are officers and members may have a reasonable time in which to select and adopt some other name and make such changes in the laws as may be necessary in obedience to this decree, and not hereby disorganize said organization which defendants are members of, or stop its said association from the prosecution of the work in which it is engaged:

It is hereby adjudged and decreed: That the injunction decreed in subsections B and C, paragraph one hereof, shall be in abeyance and no penalty shall be visited upon the defendants, their associates and successors, for disobedience thereof until the first day of June, 1909. And that on and after said first day of June, 1909, this suspension of said injunction shall cease and determine, and said injunction shall be of full and final force and effect, perpetually after said date, and the defendants and each of them, their associates and successors are and shall be subject to all the pains and penalties provided for any disobedience of said injunction.

(3) That this decree shall have the force and effect of the State's writ of injunction, without issuance of such writ; provided, however, that the writ of injunction, according to the terms of this decree, shall issue out of this court, and be further served upon the defendants and their associates and successors, at any time on motion of petitioners.

(4) That the petitioners have and recover of the defendants all of the costs in this behalf incurred, to wit: — dollars, to be taxed by the clerk of this court.

In open court, this tenth of June, 1908.

J. T. PENDLETON,
Judge C. S. A. C.

a right to their name under a charter from the District of Columbia by virtue of an act of Congress and the answers of the jury to certain of the questions were alleged to violate defendants' rights under the charter and to be repugnant to the due faith and credit clause of the Constitution of the United States, and the decree was alleged also to constitute a violation of the general incorporation act under which the order of which defendants were a part had been incorporated. The motion for a new trial was overruled. A bill of exceptions was soon afterwards allowed, which was certified to contain "all the evidence" and the material portions of the record. The case was then taken by a writ of error to the Supreme Court of the State, where the judgment was affirmed. 133 Georgia, 837. This writ of error was then prosecuted.

In the trial court, in various forms, plaintiffs in error, defendants below, invoked the right to the use of its corporate name and the incidental right to the designation Knights of Pythias and the use of insignia, emblems, etc., appropriate to the order. As this right or privilege was claimed in virtue of the authority to incorporate conferred by the general incorporation act of May 5, 1870, enacted by Congress, it constituted a right or privilege claimed under an authority exercised under the United States which, being denied by the state court, is reviewable here by virtue of the provisions of § 237 of the new Judicial Code, § 709, Rev. Stat. *Dupasseur v. Rochereau*, 21 Wall. 130; *Embry v. Palmer*, 107 U. S. 3; *Ferris v. Frohman*, 223 U. S. 424, 431, and cases cited. The fact that corporations created by the general law of 1870 and the special act of Congress of 1894 heretofore referred to derived their rights and powers under a law of the United States is recognized in the following cases which were removed from state courts: *Supreme Lodge Knights of Pythias v. Kalinski*, 163 U. S. 289; *Same v. Withers*, 177 U. S. 260, and *Same v. Beck*, 181 U. S. 49.

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Whether or not the defendants below and their successors were entitled to prosecute in the state court the application to be made a domestic corporation of Georgia is, in our opinion, plainly a question non-federal in character, and we therefore pass its consideration. The question, however, whether the right or privilege arising from the authority exercised under legislation of Congress was invaded by the decree complained of so far as it forbade the use of the corporate name or a designation containing the distinctive words Knights of Pythias and the use of the emblems and insignia of such order being within our competency to review, we come to the consideration of the question whether the asserted right or privilege was properly denied.

It is manifest from the record that the existence within the State of Georgia of two bodies of Knights of Pythias controlled by corporations of the District of Columbia and the authority exerted over the membership in that State by the governing body of each order was not contrary to any state statute and the Supreme Court of Georgia in determining the right to relief applied what it conceived to be the applicable principles of general law. Speaking in a general sense, it is true to say that the Supreme Court of Georgia deemed the case before it to be controlled by the principles of law applicable to trademarks and trade-names, and in substance held, *a.* That an association whose primary object was fraternal or benevolent, first appropriating and using an arbitrary or fanciful name acquires an exclusive right to the same; *b.* That a subsequent unauthorized use by others of such name or a colorable imitation thereof would be unlawful; *c.* That in the absence of laches if as a result of such wrongful use injury was occasioned to the rightful owner by the unlawful appropriation and use of the name, equity would afford relief. Coming to apply these principles the court held, *first*, that there had been a lawful appro-

priation of the name by the plaintiff corporation, and an unauthorized and wrongful use thereof by the defendants, indeed, that such use was made "with a fraudulent purpose and design;" *second*, that the unlawful appropriation had inflicted injury upon the property rights of the lawful appropriator. On this subject, the court said (p. 844):

"The plaintiffs' order, while primarily fraternal and benevolent, has certain property and business attributes and activities, including the acquiring and ownership of large amounts of property and the conducting of a department of insurance protection. Under the evidence, the element of injury is sufficiently shown."

The conclusion of the court that there had been as a matter of fact no such laches as should prevent a court of equity from affording relief was thus stated (p. 850):

"Taking into consideration that the subject of controversy in this case is in the nature of a trade-name, and that the contest is between two secret societies whose relations to each other, during the period from the appropriation of the name by one to the institution of the suit for injunction by the other, was not the usual relation that one person ordinarily sustains to another, we cannot say that the finding of the jury that the plaintiffs had not acquiesced in the use of their name by the defendants is not supported by the evidence. The suit was filed promptly after the defendants came out into the open and by petition duly published asked the court to give legal sanction to their use of the plaintiffs' name."

We do not stop to consider whether the court was right under principles of general law in applying to organizations like those here involved the rules applicable to trademarks and trade-names and unfair competition in trade, a subject as to which there is conflict in the decisions, because under the view we take of the case we propose, for the sake of argument only, to indulge in the hypothesis

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that the conception which the court entertained on the subject was correct. It is indisputable that the court was clearly right, as a matter of law, in holding that a court of equity in any event would not afford relief where there had been such laches as would cause it to be inequitable to do so. *Saxlehner v. Eisner & M. Co.*, 179 U. S. 19, 35. The question then is, Can the decree of the court be maintained consistently with the doctrine of laches which the court expounded and which we have accepted as correct beyond all controversy? As the inquiry which we thus state rests upon the premise that all the propositions of law applied by the court are to be taken as correct, it follows that there is no possibility of deciding there was material error unless it is to be found in the application which the court made of the principle of law which it applied to the facts established by the evidence, all of which is in the record in connection with the findings made by the jury. While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City So. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co. v. Cedar Rapids*, *Ib.* 655, 668; *State of Washington ex rel. v. Fairchild*, 224 U. S. 510. The contentions here made bring this case under the first category, since the insistence here is that there was not any evidence

justifying the findings made by the court concerning fraudulent purpose, injury to property, deception of the public, etc.

On examining the evidence we are compelled to say we do not think it has any tendency to prove an intent on the part of the defendant order by the adoption of the designation given to their body or the use of the emblems, insignia, etc., employed to make it appear that their order and that of the complainant is one and the same, or that it tends to show that the use of the corporate name or the distinctive words Knights of Pythias and the emblems, etc., of that order operated in any degree to deceive the public or to work pecuniary damage to the complainant order within or without the State of Georgia. But strong as are our convictions as to these subjects, we prefer not to rest our conclusion upon them, but rather to place the decree of reversal which we shall render, upon the application to the facts of the well-settled doctrine on the subject of laches. As we have observed, the court below in considering the facts on that subject made no reference to the evidence, but assumed that it must be that the findings of the jury were sustained by evidence and indulged in the assumption that it was natural to suppose that the long-continued existence and development of the defendant order had not been interfered with by the complainant corporation because not known until the defendants came into the open by making an application to be made a domestic corporation of Georgia. The facts, however, which we have stated concerning the establishment of the order, its lodgment in Georgia, its vast expansion, its years of duration and its volume of transactions were not disputed in any particular whatever, and therefore leave no room for any other but the legal conclusion of laches. This, we think, in the most conclusive way demonstrates the violation of the elementary principles of equity which would result from the enforcement of the in-

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junction which the court awarded. And the conclusion just stated renders it unnecessary to point out the incompatibility between the holding on the one hand that there was injury to the property rights of the plaintiff corporation and a deceit of the public arising from the existence of the defendant order and its activities, and the holding on the other hand that laches cannot be imputed to the plaintiff corporation as a result of its inaction during the many years in which the defendant corporation existed and exercised its attributes and functions, because the wrongs thus being publicly inflicted could not be presumed to have been known until the defendant order came out into the open by the application for incorporation under the law of the State of Georgia.

The judgment of the Supreme Court of Georgia is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES with whom concurred MR. JUSTICE LURTON dissenting:

When a Federal right is held by a state court to have been lost by subsequent conduct that of itself involves no Federal question I think we are not at liberty to re-examine the decision unless we can say that the state court in substance is denying the right. So it has been held or strongly intimated as to *res judicata*, *Northern Pacific R. Co. v. Ellis*, 144 U. S. 458, estoppel, *Hale v. Lewis*, 181 U. S. 473, the statute of limitations, *Rector v. Ashley*, 6 Wall. 142. and laches, *Moran v. Horsky*, 178 U. S. 205, 214, 215, *Pierce v. Somerset Ry.*, 171 U. S. 641, and the principle was recognized only the other day in *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 470, 471. I do not see the distinction by which we can review the decision in the opposite case, where it is held that the right is not lost or that it cannot be interfered with because of laches on the other side. In a case where the state court held that there

was no defense under the statute of limitations or estoppel, the writ of error was dismissed. *Carothers v. Mayer*, 164 U. S. 325. I will content myself with saying that I do not see how the decision can be reversed on the ground of laches.

MR. JUSTICE LURTON concurs in this view and is of opinion that the writ should be dismissed.

NORFOLK & SUBURBAN TURNPIKE COMPANY
v. COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
OF VIRGINIA.

No. 962. Submitted April 8, 1912.—Decided June 10, 1912.

Although a State may not be named as a party in the original proceeding, if it was really begun and prosecuted on its behalf and the State is named in all the papers on appeal and the State's attorney appears in this court generally, even if inadvertently, a motion to dismiss on the ground that the State is not a party will not prevail.

Where the highest court of the State refuses a writ of error because, in its opinion, the judgment below is plainly right, doubt exists as to whether it is a refusal to take jurisdiction or an exercise of jurisdiction and affirmance; under the circumstances of this case, however, the Chief Justice of the state court having allowed the writ of error for review by this court, *held* that the judgment was on the merits and the writ of error runs to the highest court. *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364, distinguished.

Where the refusal of the highest court of the State to allow a writ of error is also a refusal to take jurisdiction the writ of error from this court runs to the lower court.

Hereafter this court will regard the refusal of the highest court of the State to allow a writ of error to review the judgment of a lower court as a refusal to take jurisdiction and not as an affirmance unless the contrary plainly appears on the face of the record.

A State does not take property of a turnpike company by opening the gates when its road is out of repair; nor is the enforcement of a statute which makes the keeping of a toll road in repair a condition precedent to the right to collect tolls an unconstitutional taking of property without due process of law; and in this case so *held* as to the enforcement of such a statute which has been in force in the State of Virginia since 1817.

THE facts, which involve the jurisdiction of this court under § 709, Rev. Stat., and the power of a State under the Fourteenth Amendment to suspend tolls on a turnpike pending the making of repairs properly ordered by state authority, are stated in the opinion.

Mr. Samuel W. Williams, Attorney General of the Commonwealth of Virginia, with whom *Mr. J. D. Hank* was on the brief, for defendant in error, in support of the motion.

Mr. Nathaniel T. Green, for plaintiff in error, in opposition thereto.

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

On April 24, 1911, as authorized by the laws of Virginia, the judge of the Circuit Court of Princess Anne County, Virginia, of his own motion, appointed three persons, styled viewers, to examine and report upon the condition of three turnpikes, situated in the county and owned by the plaintiff in error. The viewers reported the turnpikes to be in bad condition and made recommendations as to the work necessary to be done to put them in good order. The Turnpike Company appealed from the report of the viewers to the Circuit Court. On the hearing of the appeal various motions were made on behalf of the Turnpike Company, to the overruling of which exception was taken, and which will be hereafter referred to, and an order was

entered as authorized by a statute suspending the taking of tolls on the turnpike until they were put in proper repair. The effect of the order, however, was suspended by the making of an application to the Supreme Court of Appeals of Virginia for the allowance of an appeal and a writ of error to the order of the Circuit Court. The application however was rejected by an order reading as follows:

"In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond on Thursday, the 11th Day of January, 1912.

"The petition of the Norfolk & Suburban Turnpike Company, a corporation, for a writ of error and super-sedeas to a judgment or order entered by the Circuit Court of Princess Anne County, on the 12th day of December, 1911, in certain proceedings, pending in said court, whereby the collection of tolls by the said petitioner on certain sections of a turnpike located in said county was suspended, having been maturely considered and the transcript of the record of the judgment or order aforesaid seen and inspected, the court being of opinion that the said judgment or order is plainly right, doth reject said petition."

A writ of error addressed to the Supreme Court of Appeals of Virginia was then allowed by the President of that court. It was therein recited that the Supreme Court of Appeals of Virginia had "refused a writ of error, thereby affirming said judgment of said Circuit Court of Princess Anne County, Virginia." The same judicial officer also approved the bond and signed the citation. The Commonwealth of Virginia, however, was named as the obligee in the bond, and the citation was directed to that State as the "defendant in error." The Attorney General of the State, who states in his brief that he inadvertently signed as "Commonwealth's attorney of Princess Anne County," acknowledged service of the citation and entered the appearance of the Commonwealth in this court "without ad-

mitting that the Commonwealth of Virginia is a proper party and reserving all rights."

Appearing for the defendant in error, the Attorney General of Virginia moves to dismiss the writ of error, "because this court has no jurisdiction," or to affirm the order and judgment below "because the questions on which jurisdiction depend are so frivolous as not to need further argument."

The motion to dismiss is based upon the contention that the appearance in this court is a qualified one and "that the appeal was improvidently awarded in this case, that the Commonwealth of Virginia has nowhere in the proceedings been made a party, and is not now a proper party in this case." But although the Commonwealth of Virginia was not named as a party to the proceedings initiated by the judge of the Circuit Court, it is not claimed that those proceedings were not in reality begun and prosecuted on behalf of the Commonwealth, which in effect must have been the conclusion of the President of the Supreme Court of Appeals of Virginia when he approved the bond and allowed the citation, as shown by the recitals in those papers to which we have heretofore referred. The grounds of the motion are therefore without merit. *Pearson v. Yewdall*, 95 U. S. 294.

But aside from the propositions on which the motion to dismiss rests and which we have disposed of, there is an additional ground to which on our own motion we deem it necessary to refer, that is, the existence of a possible doubt as to our jurisdiction begotten by the form in which the court expressed the action taken by it concerning the proceedings to review the order or judgment of the trial court. Thus although the Supreme Court of Appeals of Virginia denied a writ of error to the Circuit Court because it was of opinion that the order of the lower court was "plainly right," it does not affirmatively appear whether, by this action, the court was merely declining

to take jurisdiction of the case or in effect was asserting jurisdiction and disposing of the case upon the merits by giving the sanction of an affirmance of the judgment of the trial court. This writ of error runs to the Supreme Court of Appeals and not to the trial court. In view of the ambiguity it is unquestioned that the writ of error would have to be dismissed if we applied the ruling in the *Western Union Telegraph Company v. Crovo*, 220 U. S. 364, 366. It will be seen, however, that the court below in acting upon the application presented to it to review the judgment of the trial court conformed to what was held to be an exercise of jurisdiction by affirmance in *Gregory v. McVeigh*, 23 Wall. 294. It is clear, therefore, that we cannot apply the rule announced in the *Crovo Case* and the one previously declared in the *Gregory Case*, because the two could not be consistently made here applicable. The difference between the cases, however, is not one of principle, but solely depends upon the significance to be attributed to the particular form in which the action of the court below is manifested. In other words, the apparent want of harmony between the rulings of this court has undoubtedly arisen from the varying forms in which state courts have expressed their action in refusing to entertain an appeal from or to allow a writ of error to a lower court and the ever-present desire of this court to so shape its action as to give effect to the decisions of the courts of last resort of the several States on a subject peculiarly within their final cognizance. A like want of harmony resulted from similar conditions involved in determining what was a final judgment of a state court susceptible of being reviewed here, and the confusion which arose ultimately led to the ruling that the face of the judgment would be the criterion resorted to as the only available means of obviating the great risk of confusion which would inevitably arise from departing from the face of the record and deducing the principle of finality

by a consideration of questions beyond the face of the alleged judgment or decree which was sought to be reviewed. The wisdom of that rule as applied to a question like the one before us is, we think, apparent by the statement which we have made concerning the rule in the *Crovo Case* and the previous decisions. Despite the ambiguity involved in the form in which the court below expressed its action, we do not think that ambiguity should be solved against the existence of jurisdiction, because, in our opinion, there is little or no room for doubt that when the form of expression used by the court below is read in the light of the previous rulings it becomes quite clear that the court deemed that it was exercising jurisdiction over the cause and virtually affirming the judgment and was expressing its action in such a way as to clearly indicate that such was its intention. This is fortified by the fact that the writ of error was allowed by the presiding judge of the court. While, therefore, in this case, for the reasons stated, we entertain jurisdiction and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo Case*, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action.

Upon the merits, we are of opinion that the alleged Federal questions are so plainly wanting in merit as not to justify the retention of the cause for oral argument. The supposed Federal questions are embodied in three motions made in the Circuit Court. By motion No. 1 the Circuit Court was asked to dismiss the proceedings because, as the statute, in the event the report of the viewers was confirmed, authorized the public until the turnpikes were put in repair to use the same for the purpose of travel and passage without payment of toll or other compensation, a taking of the property of the plaintiff in error for public use without just compensation was authorized, in violation of the due process clause of the Fourteenth Amendment. Motion No. 2 embodied a request that the court should not enter judgment affirming the report of the viewers because, for the same reasons specified in the first motion, the judgment would operate to deprive the plaintiff in error of its property without due process of law, in violation of the Fourteenth Amendment. By motion No. 3 it was in effect claimed that the turnpikes in question were not profitable, that plaintiff went into possession of the roads in July, 1908, and had operated the same continuously; that no complaint had theretofore been made as to the condition of the roads; that the statute under which the proceeding was prosecuted fixed the tolls to be charged, and that substantially all the revenue derived from the tolls had been judiciously employed in keeping the roads in repair, and that they had been kept "in as good repair as possible with the revenue received therefrom." It was alleged that to enter a judgment suspending the collection of tolls under such circumstances would violate the due process clause of the Fourteenth Amendment. The refusal of the court to hear evidence to substantiate the claim made in this motion and the overruling of the motion were duly excepted to. It nowhere appears in the record that there was even a suggestion that the

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statute in question invaded contract rights as to the tolls to be charged, nor was it claimed that since the acquisition by plaintiff in error of his rights therein the legislature of Virginia in regulating the turnpikes had altered the tolls. On the contrary in the brief of counsel for the Commonwealth the statement is made that "this statute has been a law of Virginia, with little change, since February 7, 1817," and there has been no denial of this statement. The motions below did not, therefore, amount to a claim against the rates *per se*, but simply asserted that as the travel on the turnpikes was not sufficient to cause their operation to be profitable, that is to say, to produce a sufficient revenue to enable the roads to be kept in good order, therefore the obligation imposed by the statute and voluntarily assumed ought not to be enforced. The mere statement of this proposition is sufficient to establish its entire want of merit. To suspend the taking of tolls while the roads were out of repair manifestly was not a taking of property, but was simply a method provided by statute to enforce the discharge of the public duty respecting the safe and convenient maintenance of a public highway. In other words, as observed by the Attorney General for the Commonwealth, the burden of keeping the turnpikes in repair was made a condition precedent to the right to collect tolls.

Affirmed.

RAILROAD COMMISSION OF THE STATE OF
MISSISSIPPI *v.* LOUISVILLE & NASHVILLE
RAILROAD COMPANY.

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

No. 903. Submitted May 13, 1912.—Decided June 7, 1912.

A mere conflict between courts concerning the right to adjudicate upon a particular matter growing out of a priority of jurisdiction in another forum involves a question of comity, which there is no right to consider on a direct appeal to this court under § 5 of the act of 1891. *Courtney v. Pradt*, 196 U. S. 89.

In this case *held*, that the Circuit Court in taking jurisdiction and deciding the cause on the merits, notwithstanding there was a partial demurrer to the jurisdiction, maintained its power and jurisdiction as a Circuit Court, and also necessarily decided questions arising under the Constitution expressly alleged in the bill.

Where in rendering a decree on the merits the court necessarily decided the constitutional question expressly alleged in the bill, the issue on that subject is open in this court, whether the jurisdictional question be certified or not.

THE facts are stated in the opinion.

Mr. Henry L. Stone, Mr. G. L. Smith, Mr. Marcellus Green and Mr. Garner Wynn Green, for appellee, in support of motion.

Mr. Hannis Taylor, Mr. Claude Clayton and Mr. W. D. Anderson for appellants, in opposition thereto.

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

This case is before us on a motion to dismiss or affirm. The confused state of the record requires, in order to make clear the considerations which control us in dispos-

ing of the motion, a fuller statement than otherwise would be necessary.

On August 5, 1908, a suit in equity was commenced in the Chancery Court of Hancock County, Mississippi, against the Louisville & Nashville Railroad Company to compel obedience to an order of the State Railroad Commission of Mississippi requiring the stoppage of certain interstate trains at a particular place. Upon the ground of diversity of citizenship, the railroad company removed the cause into the appropriate Circuit Court of the United States. Thereupon proceedings were commenced in the Chancery Court of Harrison County, Mississippi, against the railroad company to enforce an act of the legislature of Mississippi approved March 20, 1908, known as the anti-removal statute, by perpetually enjoining the company from engaging in intrastate commerce within the State of Mississippi and by subjecting it to large pecuniary penalties. It was specifically averred in the bill that the railroad company was a corporation organized and existing under the laws of the State of Kentucky, and that it had never been incorporated under the laws of Mississippi.

This case was then commenced on behalf of the railroad company in the court below against the Railroad Commission and various officials of the State of Mississippi to enjoin the commencement of any other proceeding than that pending in Harrison County, having for its object the enforcement of the forfeiture and penalty provisions of the act of 1908, which act was assailed as repugnant to the commerce clause, the contract clause and to specified provisions of the Fourteenth Amendment. The Chancery Court of Harrison County was also averred to be without jurisdiction of the suit pending before it. The complainant railroad company was alleged to be a corporation created and organized under the laws of Kentucky and a citizen of said State, having its principal place of business at Louisville, Kentucky. The defendants were alleged to

be citizens of the State of Mississippi. It was further alleged that the complainant, as a corporation as aforesaid, owned and operated as a common carrier a railroad between Cincinnati and New Orleans passing through various counties in the State of Mississippi, and that it had been for more than twenty-five years engaged in the operation of a portion of its road so situated in Mississippi. Evidently for the purpose of laying the basis for a claim of contract right the facts concerning the construction of the road operated by the complainant in the State of Mississippi were stated in substance as follows: In 1866 the legislature of Alabama incorporated what was known as the New Orleans, Mobile and Chattanooga Railroad Company, and authorized it to build a railroad from Mobile to New Orleans; an act of the legislature of Mississippi, passed in 1867, which was attached as an exhibit to the bill, authorized and empowered the Alabama corporation "to exercise and enjoy its corporate power and franchise in the State of Mississippi." An act of the legislature of Louisiana authorized the same corporation to construct its road from the Mississippi state line to New Orleans; and an act of Congress approved in March, 1868 (March 2, 1868, 15 Stat. 38, c. 15), empowered the corporation in the construction of its road to build bridges over navigable waters in the State of Mississippi. There were also averments of the placing by the Alabama corporation of a mortgage upon its property and the subsequent construction of the road from Mobile to New Orleans; a change of the name of the railroad by the legislature of Alabama to the name of the New Orleans, Mobile and Texas Railroad; default in the payment of bonds; a foreclosure sale; the incorporation of the purchasers by the name of the New Orleans, Mobile and Texas Railroad Company, as reorganized. It was then specifically alleged that said company "thereafter, on October 5, 1881, sold and conveyed all of its property and franchises of every kind and

description except the franchise to be and exist as a corporation, to complainant, who has ever since owned said railroad and operated it as a common carrier of interstate and intrastate freight and passengers as aforesaid."

Proceedings contained in the transcript, to which we shall hereafter have occasion to refer, as well as the index to the transcript as filed, contained in the printed transcript, establish that a demurrer was filed to the bill of complaint, which is not in the printed record, and we do not therefore refer to the same. Nearly three years after the filing of the bill what was styled "Partial Demurrer to Original Bill" was filed in the cause. This demurrer charged, first, that the court was without jurisdiction because on the face of the bill it was shown "that the complainant, the Louisville & Nashville Railroad Company, is a Mississippi corporation, and that the defendants are also citizens of Mississippi, and that therefore there is no diversity of citizenship between the parties to give the court jurisdiction of the cause." This claim was solely attempted to be supported by argumentative statements in the demurrer as to the effect of the averments in the bill concerning the history of the portion of the road in Mississippi, its construction by an Alabama corporation, the legal effect of the Mississippi act of 1867 authorizing the Alabama corporation to build a road in Mississippi and the supposed operation of an act of the legislature of Mississippi of 1882 upon the purchase of the road built in that State following the foreclosure, which, it was averred, took place in 1883 after the passage of the act of 1882, instead of in October, 1881, as averred in the bill. As an additional and independent ground of demurrer, it was claimed that the suit should be dismissed because "at the time the suit in the case of *State v. Louisville & Nashville Railroad Company* was filed in the Chancery Court of Hancock County, Mississippi, there was no Federal question on the face of the bill which authorized its removal under

the Constitution and Laws of the United States, and said suit is made an exhibit to this demurrer for the purpose of considering the same."

On the day the "Partial Demurrer" was filed an answer was filed, which was divided into numbered paragraphs corresponding to the numbered paragraphs of the bill. The citizenship of the plaintiff was neither admitted nor denied, and we think it suffices from the view we take of the case to say that the answer in one mode or another dealt mainly with the averments of the bill respecting the history of the organization of the New Orleans, Mobile & Chattanooga Railroad Company, the construction of the road in Mississippi, the sale under foreclosure, the purchase, etc. A few days afterwards a general replication was filed, and on the same day a stipulation was entered into between counsel in the first paragraph of which it was provided as follows:

"That this cause may be submitted and heard at the May term, 1911, of said court at Jackson, and that the time for taking proof under the rules is waived, and that said cause may be heard on the original bill, partial demurrer, and partial demurrer and replication by the Court, and that setting the cause for hearing under this agreement shall not operate to admit the allegations of the answer."

The foregoing was followed, in the next paragraph of the stipulation, by a provision for a hearing of the cause "upon the bill and answer and replication upon the testimony theretofore taken by affidavits . . . and any other evidence that may be offered orally by either side on the hearing," and various specified printed charters and statutes which were enumerated and which concerned facts alleged in the bill and answer were stipulated to be admitted in evidence.

While it is certain that on or before October 24, 1911, the court entered a final decree in favor of the complainant, perpetually enjoining the enforcement of the Missis-

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issippi statute complained of, the exact form of that decree is not disclosed, for although there is a paper in the record which in one aspect apparently states the terms of the decree, in another aspect it is uncertain whether the paper referred to is anything but a motion made by the defendants for the modification of the decree. Be this as it may, the record leaves no doubt that on October 28, on the motion of the defendants, a new and changed form of final decree was entered, which was deemed to conform to the stipulation for submission. In this new decree it was first recited that the case had been submitted to and considered by the court primarily upon the partial demurrer, and that on such demurrer being overruled the defendant had elected to stand thereon, and had not excepted to the final decree on the merits. There was a recital in the concluding paragraph of the decree that a direct appeal to this court was allowed, notwithstanding the objection of the complainant.

In the printed transcript there is a paper styled Specifications of Error, which is undated and uncertified, but which we will assume was filed at the time the appeal was allowed. This paper is confined to a reiteration of the contentions as to want of jurisdiction of the court below as stated in the Partial Demurrer, adding the following:

“And, because, the bill shows on its face that the Federal Court is without jurisdiction, and could not hear and determine the issues raised by the said bill of complaint because the Louisville and Nashville Railroad is a Mississippi Corporation, and the Act of 1908, which prevents the removal of causes of foreign corporations to the Federal Court, had no reference and application to the said Louisville and Nashville Railroad Company, which is a domestic corporation; and because the Act of 1908, referred to in said Bill of complaint, enacted by the Mississippi Legislature is unconstitutional and void, and in contravention of the Federal Constitution.”

The appellee moves to dismiss or affirm and in the brief of counsel the ground for the motion to dismiss is thus stated:

"The appeal in this case should be dismissed because the jurisdiction of the Circuit Court is the sole question raised, and such question has not been certified by the Circuit Court to this Court."

The appellants, while concurring that jurisdiction is the sole question involved, insist that that question is adequately presented by the action of the court or sufficiently appears upon the face of the record to give power to review, and, meeting the motion to affirm, it is insisted that the court below erred in holding that there was a sufficient averment of diversity of citizenship in the bill to give jurisdiction as a Federal court and that even if this were not the case the court erred in taking jurisdiction because the subject-matter of the controversy prior to the institution of the suit below, as shown by the bill, was involved in and pending before a state court as the result of the action brought against the railroad company to enforce the Mississippi statute. The appellee, replying to these contentions and reiterating that the jurisdictional question was the sole question presented, yet proceeds to urge that even if the view be taken that the court below was wrong in deciding that adequate diversity of citizenship was alleged, nevertheless the judgment should be affirmed because of the existence of the constitutional question concerning the repugnancy of the Mississippi statute to the Constitution of the United States as to which the decision of the court was clearly right and not objected to. It becomes at once apparent when the contentions of the parties are thus summed up that the propositions urged on both sides are conflicting and irreconcilable one with the other, since both in effect insist that the sole question on which the direct appeal may rest is one of jurisdiction and yet at the same time urge that the juris-

dictional question is not the sole question because of the existence of one involving the construction of the Constitution of the United States. This is so obviously true as to the position taken by the appellee as to need only statement. That it is also true as to the position of the appellants is demonstrated by observing that it has long since been settled that a mere conflict between courts concerning the right to adjudicate upon a particular subject-matter growing out of a priority of jurisdiction in another forum involves a question of comity, which there would be no right to consider if the direct appeal involved solely a question of jurisdiction. *Courtney v. Pradt*, 196 U. S. 89, 91, and cases cited.

The confusion in the contentions of the parties which thus appears, in our opinion will be dispelled and the questions for decision be made apparent by a consideration of the statement heretofore made. From that statement we think there is no real room for controversy: First. That the court below in taking jurisdiction of the cause and deciding it notwithstanding the partial demurrer maintained its power and jurisdiction as a Federal court; Second. That in rendering a decree on the merits the court necessarily decided the question or questions under the Constitution expressly alleged in the bill. This conclusion dispenses with the necessity of considering the question of certificate as to jurisdiction, since the issue on that subject, whether certified or not, is open, in view of the constitutional questions raised in the bill. *Chappell v. United States*, 160 U. S. 499, 509.

While logically this view would adversely dispose of the motion to dismiss, it would undoubtedly, as a general proposition, require the granting of the motion to affirm without passing upon the question of diversity of citizenship, since, from the statement we have made of the case, it appears that the correctness of the decision below as to the constitutional question was in effect conceded. We

think, however, there is room for concluding that the argument on behalf of the appellants, upon the theory that it is justified by the record, proceeds upon the hypothesis that if there was no diversity of citizenship, the statute assailed in the bill was on its face so plainly inapplicable to the situation as to cause the assertion of its repugnancy to the Constitution to be unsubstantial and frivolous and therefore insufficient to afford a basis either for jurisdiction in the court below or to warrant an affirmance by this court of the decree which was made below. As even although the premise upon which this proposition rests be not conceded, the demonstration of its unsoundness would require a consideration of the subject of diversity of citizenship and the relation of that subject to the assault made by the bill upon the statute, to avoid unnecessary analysis we come at once to consider the sufficiency of the averments of the bill as to the diverse citizenship of the complainant.

The whole argument as to the citizenship of the complainant turns not upon an express denial by the appellants in any form of the Kentucky citizenship of complainant directly alleged in the bill, but upon an insistence that the express averment upon that subject is so qualified by the subsequent allegations recounting the history of the road in Mississippi as at least to engender doubt sufficient to destroy the effect of such positive averment. No statement in the bill directly and expressly giving rise to such result is relied upon, but the whole contention is that by inference or subtle analysis of various paragraphs of the bill it must follow that the result above stated arises. Without, however, undertaking to restate the passages in the bill relied upon or to follow the forms of statement by which the result claimed to arise from the bill is sought to be demonstrated, we content ourselves with saying that we think the conclusion deduced from them is unwarranted, for the following reasons: *a.* Because the passages

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in the bill relied upon to create the doubt or inconsistency when construed in connection with the context had reference to the alleged impairment of the obligation of a contract and were not addressed to the subject of citizenship; *b.* Because it would do violence to the very purpose of the bill to attribute to it the self-destructive effect which would result from upholding the contention insisted upon, especially in view of the nature and character of the litigation and the relation of the parties to the subject-matter in controversy. We say this because the very object of the bill was to prevent the State from enforcing against the company, as a foreign corporation owning and operating the road in Mississippi, a forfeiture and penalties which it is admitted would not have been applicable to the corporation if it was a domestic corporation of Mississippi. Nothing could make the conditions stated clearer than to recall the argument, heretofore adversely disposed of, which was pressed upon our attention by counsel for appellants to demonstrate that the court erred in exerting jurisdiction because of the pendency of the suit in the state court brought by the State of Mississippi wherein it was expressly averred that the railroad company was a corporation of the State of Kentucky and that it had never been incorporated in the State of Mississippi.

From these considerations it results that the judgment below must be and it is

Affirmed.

PROCTER & GAMBLE COMPANY *v.* UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 780. Argued January 11, 12, 1912.—Decided June 7, 1912.

Subdivision 2 of § 1 of the act creating the Commerce Court, now § 207 of the new Judicial Code, giving the Commerce Court jurisdiction of cases brought to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission, confers on that court jurisdiction only to entertain complaints as to affirmative orders of the Commission.

Under the act, the Commerce Court is not given jurisdiction to redress complaints based exclusively, as in this case, on the ground that the Commission has refused the relief asked on the ground that it could not award it.

To construe the act creating the Commerce Court so as to give it jurisdiction to originally interpret the administrative features of the Interstate Commerce Act and to construe a refusal of the Commission to grant relief as an affirmative order would frustrate the legislative policy which led to the adoption of the act and would multiply the evils which it was designed to prevent.

The act creating the Commerce Court was intended to be a part of the existing system for regulating interstate commerce. While originally the duty of determining whether an order of the Commission should be enforced carried with it the obligation to consider both the facts and the law, it had come to pass prior to the adoption of the act creating the Commerce Court that the jurisdiction of courts over orders of the Commission is confined to determining whether they were in violation of the Constitution or failed to conform to statutory authority, and to ascertaining whether power had been arbitrarily exercised beyond the power conferred.

Under the express reservation in the last paragraph of § 207, Judicial Code, a claim that a constitutional right asserted in a petition to the Interstate Commerce Commission has been denied by that body, if independent of all questions of rights and remedies under the Inter-

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state Commerce Act, is beyond the jurisdiction of the Commerce Court.

Where the constitutional question is dependent upon provisions of the Interstate Commerce Act, it is subject to the precedent action of the Commission, as to which the Commerce Court only has jurisdiction in case of a prior affirmative order of the Commission.

The Commerce Court has no jurisdiction over a claim made by the owner of private cars to recover on a money demand based on the illegality of charges alleged to have been wrongfully exacted by the railroad companies and which the Commission had refused to allow. 188 Fed. Rep. 221, reversed.

THE facts, which involve the construction of the statute creating the Commerce Court and the determination of extent of jurisdiction of that court, are stated in the opinion.

Mr. George H. Warrington for appellants.¹

Mr. Francis B. James, for appellants in Nos. 773 and 774, argued simultaneously herewith. See p. 302, *post*.

Mr. Assistant Attorney General Denison, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States:¹

The Commerce Court was given no jurisdiction to set aside the order of the Commission which merely refused relief and dismissed the petition. The Commerce Court is given no jurisdiction not heretofore possessed by the Circuit Courts; and there is no precedent in the common law for a suit in equity to establish a future reasonable rate, or to enjoin the future operation of a rule of a railroad on the ground that it was unreasonable.

Nor has there been any instance in which, since the establishment of the Interstate Commerce Commission, any Federal court has undertaken that power, or has been asked to undertake it.

¹ See also abstract of argument of appellant in Nos. 773 and 774, p. 303, *post*.

Even the Interstate Commerce Commission itself had no authority to establish reasonable rates for the future, prior to the express grant of that power by the Hepburn Act.

The legislation of Congress clearly shows that no such jurisdiction was intended to be given either to the Circuit Courts by the Hepburn Act, or to the Commerce Court by the Commerce Court Act.

The Hepburn Act shows in several sections that only affirmative orders of the Commission, that is to say, orders which required some change from existing conditions, were the subject of jurisdiction in the Circuit Courts.

Similarly, the Commerce Court Act in several sections indicates the same intention.

This particular petition asked as one element of relief that the Commerce Court should require the railroads to pay money to the petitioners. The court had no power to take jurisdiction of such a claim for money, because such claims are left by the Commerce Court Act to the Circuit Courts. The Commerce Court would have been given the aid of a jury system if it had been intended to have this jurisdiction.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Edward Barton for the Cincinnati, Hamilton & Dayton Railway Company, appellee.

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

Having three manufacturing plants, one at Ivorydale, Ohio, a second at Port Ivory, New York, and a third at Kansas City, Kansas, in which they carried on the business of refining cottonseed and other oils and of manufacturing soap and other products from grease and oil, the Procter &

Gamble Company, to facilitate the transportation to their factories of the substances required for their operation and of shipping out the finished products, became the owner of about five hundred railroad tank cars. The cars were exclusively devoted to the business of the company in the following manner: On the property of the company in the yards about their factories there were railroad tracks belonging to the company which served for holding empty or loaded cars, the cars thus situated being held for storage and for movement from place to place, as business required. At each of the factories there was also an interchange track connected with the tracks in the yards and with the tracks of the railroad company or companies through whom the business of shipping in interstate commerce to and from the factories was carried on. The movement of cars to the interchange tracks for outward shipment and from the interchange tracks when they were left there by railroad companies was at two of the factories carried on by the company through its own employes and motive power. At the other one this work was done by a railroad company, who made an independent and special charge for the service. The transportation of the private tank cars of the corporation by the railroad companies was governed by established rules, and the price paid to the railroads for transporting the commodities of the company in its private cars was the regular price fixed for such commodities in the established tariffs. The railroads, however, paid to the company for the use of its private cars a fixed sum per mile, this payment being also stated in the regular established tariffs in compliance with law. A portion of the carrier's rule (Rule 29), relating to the subject of compensation for hauling such private tank cars is in the margin.¹

¹ Rule 29. (Sec. 1.) In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are governed by this classification do not assume any obligation to furnish tank cars in

In 1910 among others the railroads engaged in transporting tank cars from the plants of the Procter & Gamble Company adopted a system of rules governing the payment of demurrage by shippers. The provisions of these rules pertinent to this case are excerpted in the margin.¹

The rules in question were prepared by a committee of the National Association of Railroad Commissioners composed of a representative from each State having a rail-

cases where they do not own or have not made arrangements for supplying such equipment. When tank cars are furnished by shippers or owners, mileage at the rate of three-quarters ($\frac{3}{4}$) of one cent per mile will be allowed for the use of such tank cars, loaded or empty, provided the cars are properly equipped. No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight car tariffs.

¹ Rule I.

Cars subject to Rules.

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

- (a) Cars loaded with live stock.
- (b) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.
- (c) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the order of a shipper.

NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carriers for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

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road commission and a member of the Interstate Commerce Commission, and were adopted in convention by the National Association and were subsequently approved by the Interstate Commerce Commission, although putting them in force was not imperatively prescribed by that body.

The Procter & Gamble Company, dissatisfied with the regulations concerning demurrage, in so far as they imposed in certain respects charges upon its tank cars, filed a complaint with the Interstate Commerce Commission charging the rules to be repugnant to the act to regulate commerce because unjust and oppressive and because to enforce them would create preferences and discriminations forbidden by the act. After hearing, the Commission made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce, and on the contrary conformed to that act and tended to prevent and repress unlawful preferences and discriminations. An award of relief was therefore denied. In February, 1911, the Procter & Gamble Company filed a petition in the Commerce Court of the United States making defendants the United States, the Interstate Commerce Commission and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had resulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin,¹ wherein it was also charged that the order of the

¹ Complainant avers that said order of said Interstate Commerce Commission, in dismissing its complaint as above set forth, is null and

Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of . . . said demurrage rules."

The prayer was as follows:

"Wherefore, complainant prays that the aforesaid order of said Interstate Commerce Commission made in said cause No. 3208 on November 14, 1910, be set aside and annulled, and that the defendant railway companies, and each of them, be enjoined from collecting or attempting to collect any demurrage charges upon complainant's loaded tank cars after said cars have been delivered to complainant and placed upon tracks owned or controlled by it; and further, that said defendant railway companies and each of them be required to repay to complainant herein all sums found to have been wrongfully collected by them, or any of them, under the rule here complained of; and

void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of Rule I of said demurrage; that said Rule I in so far as it provides that privately owned cars under lading on private tracks are in railroad service and subject to the demurrage charges imposed by said tariffs until the lading is removed, is unjust and unreasonable, in that it deprives complainant of the right to use its said private cars upon private tracks for its own purposes without paying the defendant railway companies demurrage charges therefor, after said private cars have been delivered to complainant and have actually ceased to be engaged in railroad service; that the charges exacted by the defendant railway companies of complainant under said provision of said rule permit said defendants to take complainant's property without compensation, and deprive it of its property without due process of law, in violation of the Constitution of the United States, and particularly of Article V in amendment thereof, and that said provision of said rule is in violation of the said Act to Regulate Commerce and particularly of §§ 1 and 15 thereof as amended June 29, 1906; that said defendants are now exacting such demurrage charges under the provisions of said rule, and will continue to do so, unless the said order of said Interstate Commerce Commission is set aside and annulled by this court, and defendant railway companies are enjoined from enforcing the provisions of said rule.

that complainant be granted such other and further relief as it may be entitled to in the premises."

The railroads answered the bill. The United States and the Interstate Commerce Commission appearing for the purpose, challenged the jurisdiction of the court to entertain the cause, and moved to dismiss, upon this general ground: "Because the order of the Interstate Commerce Commission complained of directed no affirmative relief and the negative order of the Commission dismissing the complaint affords no ground for an action in this court;" and upon the following more detailed specifications filed on behalf of the United States:

"(a) It prays that the order of the Interstate Commerce Commission be enjoined, when said order directed no action against any party and therefore the same is not subject either to enforcement or to injunction.

"(b) It prays that the defendant common carriers, who are not proper parties to this proceeding except on their own motion, be enjoined from collecting the demurrage mentioned, when no order inhibiting the same has been made by the Interstate Commerce Commission, and in the absence of such an order this court has no power to grant such relief.

"(c) It prays that the defendant common carriers be required to repay to complainant all sums heretofore wrongfully collected as demurrage, when this court has no power or jurisdiction to grant such relief, either with or without an order of the Interstate Commerce Commission directing such repayment."

The court, declining at the threshold to consider the demurrers and motion to dismiss, postponed their consideration until the hearing on the merits. There was a consent by all the defendants except the United States and the Interstate Commerce Commission that the case be heard upon the evidence and documents introduced before the Commission and the report of that body. The

United States and the Interstate Commerce Commission, however, on the overruling of its demurrer and a refusal to grant its motion to dismiss, elected to stand thereon and declined to plead further.

In disposing of the case, the court considered it in a two-fold aspect—first, as to its jurisdiction; and, second, as to the merits of the case. On the first subject it held, *a*, that it had jurisdiction of the cause, and that the refusal of the Interstate Commerce Commission to afford relief to the Procter & Gamble Company was, for the purposes of jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief, and, *b*, as a corollary of this power it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted. On the merits, however, it was decided that the Interstate Commerce Commission had rightfully refused to grant relief and that there was no foundation for the contention that the property of the company in its private tank cars was taken without due process of law by the demurrage regulations. On this subject it was declared that as the company had accepted the provisions of the published tariffs concerning the use of the tank cars, therefore those cars were submitted to the regulations which the carriers had lawfully established. In other words, the court concluded that because the company had availed of the proffer of the railroads to use the cars in transportation and pay for their use a stated sum, the company had acquired no right to disregard restrictions against preferences and discriminations embodied in the act to regulate commerce.

The case was then brought here by the appeal of the Procter & Gamble Company. That company insists that the court below erred in not awarding the relief which was asked and in dismissing the petition. On the other hand the Interstate Commerce Commission and the railroads insist that the court was right in refusing relief and dis-

missing the bill. Before we can come, if at all, to consider the merits, however, it is necessary to dispose of the question concerning the jurisdiction of the court below to entertain the petition, because the United States insists at bar, as it did in the lower court, that the court erred in overruling the demurrer to the jurisdiction and refusing to dismiss the cause for want of jurisdiction.

The provisions of the act to establish the Commerce Court fixing the jurisdiction of that court are stated in the first section of the act of June 18, 1910, 36 Stat. 539, c. 309, now § 207 of the Judiciary Act of March 3, 1911, 36 Stat. 1087, 1148. And in view of the necessity of having the provisions of the section immediately in mind we reproduce them. They are as follows:

"SEC. 207. The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as

amended, are authorized to be maintained in a circuit court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

"The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

The question to be decided is this: Does the authority with which the Commerce Court is clothed in virtue of these provisions invest that body with jurisdiction to redress complaints based exclusively upon the conception that the Interstate Commerce Commission, in a matter submitted to its judgment and within its competency to consider, has mistakenly refused, upon the ground that no right to the relief claimed was given by the act to regulate commerce, to award the relief which was claimed at its hands? In other words, the important question is, Is the authority of the Commerce Court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass on its correctness?

Turning for the elucidation of the question to the jurisdictional provisions, it is plain that although all of the four numbered subdivisions composing the section may serve to throw light upon the issue for decision the solution of the question must intrinsically be found in a correct interpretation of the second subdivision. We say this because clearly the first deals alone with cases for the en-

forcement of orders of the Commission as therein described; the third deals only with cases brought under the act of February 19, 1903, which is wholly foreign to the subject here reviewed, since the act referred to relates only to proceedings to enjoin either discriminations or departures by carriers from their published rates, and the fourth refers exclusively to the right to mandamus conformably to § 20 or 23 of the act to regulate commerce, which sections are concerned with the performance of certain duties imposed upon carriers by the act to regulate commerce. The words of this second subdivision are: "Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the Commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves. But if it be conceded for the sake of argument that the language of the provision is ambiguous a consideration of the context of the act will at once clarify the subject. Thus, the first subdivision provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by

the first paragraph. In other words, by the coöperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order. The other provisions of the act are equally convincing. Thus, § 3 (208), provides that the mere pendency of a suit to enjoin, set aside, annul or suspend an order of the Commission "shall not stay or suspend the operation of such order" but confers upon the court the power, under circumstances stated, to restrain or suspend in whole or in part the operation of an order. The same section, moreover, causes the meaning of the provision, if possible, to become clearer by making a finding that irreparable injury will result from the operation of an order sought to be enforced, essential to the granting of an order or injunction restraining or suspending its enforcement.

We might well be content to rest our conclusion upon the considerations just stated. In view, however, of the importance of the subject we do not do so, but shall consider the matter in a broader aspect for the purpose of demonstrating that to give to the statute a meaning contrary to that which we have found results from its text, and therefore to recognize the existence in the court below of the power which it deemed it possessed would result in frustrating the legislative public policy which led to the adoption of the act to regulate commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the act to regulate commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action was contemplated. It cannot be disputed that the act creating the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the

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act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission), upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of this court. That in adopting the provisions concerning the Commerce Court and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce is certain. The act creating the Commerce Court (June 18, 1910, 36 Stat. 539, c. 309) was entitled "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes." The first six sections, which called into being the Commerce Court and defined its powers, all demonstrate the purpose as above stated, that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation provided by the act to regulate commerce as it then existed.

What was then the existing system and the functions which the new court was created to perform will be conclusively shown by a brief outline of the scope and purpose of the system which arose from the enactment of the act to regulate commerce (Act February 4, 1887, c. 104, 24 Stat. 379) and its development. By that act as originally enacted many regulations and consequent duties were imposed upon carriers in the interest of the public and of shippers which did not theretofore exist, and various administrative safeguards were formulated, all of which, in their very essence, required, first, for their compulsory enforcement the exercise of official functions of an adminis-

trative nature, and, second, for their harmonious development an official unity of action which could only be brought about by a single administrative initiative and primary control. To that end the act (§ 11) created an administrative body endowed with what may be in some respects qualified as *quasi*-judicial attributes, to whom was confided the enforcement of those provisions of the act which essentially exacted unity in order that they might beneficially operate. And for the purposes stated, to the body thus created was committed the trust of enforcing the act in the respect stated, of determining, limited as to the subject-matters to which we have referred, whether the provisions of the act had been violated and if so of primarily enforcing the act by awarding appropriate relief. The statute, therefore, necessarily, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt coming within the scope of the administrative unity which we have mentioned primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. In other words, as to the subjects stated the act did not give to the courts power to hear the complaint of a party concerning a violation of the act, but only conferred power to give effect to such complaints, when by previous submission to the Commission, they had been sanctioned by a command of that body.

In the long interval which intervened between 1887 when the act to regulate commerce was enacted and June 18, 1910, when the Commerce Court act was passed we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as

to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question without previous affirmative action by the Commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or non-compliance with the provisions of the act. The subject is illustrated and made clear by the rulings in *State of Washington, ex rel. Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510; *Robinson v. Balto. & Ohio R. R.*, 222 U. S. 506; *Southern Railway Co. v. Reid*, 222 U. S. 424, and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426. The latter case especially will serve to point out that where the power of original action by a court without previous action of the Commission was insisted upon, it was based upon the conception that the particular subject-matter as to which such power was asserted was by the express terms of the act to regulate commerce not embraced within the subjects primarily confided by the act exclusively to the administrative authority of the Commission.

Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts

were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452. So also at the time the law creating the Commerce Court was passed, suits to compel obedience to orders of the Commission or to restrain an enforcement of such orders were required to be brought in the Circuit Court of the United States in the district where a carrier or one of two or more carriers to whom the order was directed had its principal operating office.

In view of the provisions of the act to regulate commerce just referred to as originally enacted, of the legislative evolution of that act, its uniform practical enforcement and the constant judicial interpretation which we have thus briefly indicated, it is impossible, we think, in reason, to give to the act creating the Commerce Court the meaning affixed to it by the court below, since to do so would be virtually to overthrow the entire system which had arisen from the adoption and enforcement of the act to regulate commerce. First, because as the previous ascertainment by the Commission on complaint made to it as to whether violations of the act had been committed, with reference to the subjects as to which previous action was required, was an essential prerequisite to a right to complain in a court, the interpretation given below would, by destroying the necessity for the prerequisite, action of the Commission, operate to create a vast body of rights which had no existence at the time the Commerce Court act was passed. Second, because the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of

the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpretation would be to bring about the contradiction and the confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against, an interpretation which would seemingly create rights hitherto non-existent and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the act creates practically valueless. Indeed, these inevitable results of the interpretation given by the court below to the act would necessarily amount to declaring that Congress in seeking to unify and perfect the administrative machinery of the act to regulate commerce and to make more beneficial its operation had overthrown the whole fabric of the system as previously existing.

The demonstration of the error of the construction adopted below is so additionally made manifest by a consideration of the general structure and the text of the act creating the Commerce Court, that in connection with the legislative history which we have previously stated, that we advert to that point of view: A. The first section of the act wherein is recited the jurisdiction of the Commerce Court which we have previously commented upon makes clear that the purpose was not to create a court with new and strange powers destructive of the previous well-established administrative authority of the Interstate Commerce Commission and in conflict with the general jurisdiction vested in the courts of the United States, but only to give to the new court the special jurisdiction then possessed by the courts of the United States for the enforcement of orders made by the Commission, and thus to unify the exertion of judicial power with reference to the enforcement of the orders of the Commission. The

opening words of the section which make this result clear are as follows: It (the Commerce Court) shall "have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: . . ." B. Because the enumeration as to the subject-matters of jurisdiction conferred which follows the words just quoted, which enumeration we have previously reproduced and commented upon, conforms to the existing law and evidently assumes its continued operation. C. Because the sedulous effort of Congress while creating the new machinery not to destroy the existing system finds expression in a two-fold way: (1) by the declaration that nothing in the fact that the existing power of the Circuit Courts as to the subjects of jurisdiction transferred to the new court should be deemed as an enlarging of those powers, and (2) by the provision that nothing in the transfer of the enumerated powers to the Commerce Court should be considered as limiting or abridging the existing jurisdiction possessed by the Circuit Courts as to things and subject-matters not embraced in the powers transferred. Thus the two provisos again serving to make clear the legislative intent that the creation of a new body to exercise a portion of the existing judicial power should not in any way enlarge the power as existing or be implied as destroying or minimizing the general scope of the judicial power possessed by the Circuit Courts where such power was not embraced within the authority transferred to the new body. D. Because the act which created the court contained in its latter sections provisions amending sections of the act to regulate commerce which when rightly interpreted were manifestly adopted to make that act more consistent with the new situation resulting from the creation of the new court and utterly inconsistent with the conception that that court had power not previously possessed by any court and the existence of which would serve to set

at naught the whole system of interstate commerce regulation.

Some suggestion is made in argument concerning the alleged claim of constitutional right asserted in the petition filed below and which the court disposed of in the manner we have stated. But what we have said suffices to point out the fallacy which the contention involves, for the following reasons: If the claim of constitutional rights concerned a subject which from its very nature and effect dominated the act to regulate commerce and therefore was wholly independent of all questions of right or remedy created by or depending upon that statute, then the issue presented a controversy not cognizable in the Commerce Court, as it could not so be without violating the express reservation and restriction as to the general power of the Circuit Courts which we have just quoted. If, on the other hand, the constitutional question was involved in or depended upon the provisions of the act to regulate commerce that question in the nature of things was subject to the precedent action of the Commission on the subjects committed to it by the act to regulate commerce and as to which the court had jurisdiction alone to act in virtue of a prior affirmative order of the Commission.

The general considerations which we have stated establish the error committed by the court below in holding that it had jurisdiction over the claim of the Procter & Gamble Company to recover on a money demand based on the illegality of the demurrage charges alleged to have been wrongfully exacted by the railroad companies. Through abundance of precaution, we, however, say that wholly irrespective of the general considerations stated we think the conclusion of the court as to its possession of jurisdiction over the subject referred to was clearly repugnant in other respects to the express terms of the act.

As it follows from what we have said that the court below erred in taking jurisdiction of the petition, it results

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that our duty is to remand the cause to the court below with directions to dismiss the petition for want of jurisdiction,

And it is so ordered.

HOOKER *v.* KNAPP ET AL., MEMBERS OF THE
INTERSTATE COMMERCE COMMISSION.

EAGLE WHITE LEAD COMPANY *v.* INTERSTATE
COMMERCE COMMISSION.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 773, 774. Argued January 11, 1912.—Decided June 7, 1912.

Decided on authority of *Procter & Gamble v. United States*, ante, p. 282.
188 Fed. Rep. 242, 256, reversed.

THE facts, which involve the jurisdiction of the United States Commerce Court, are stated in the opinion.

Mr. Francis B. James for appellants:

A shipper has equal right with a railroad corporation to bring a bill in equity to annul an order of the Commission. This right exists independent of and does not arise from statute. *Peavey v. Union Pacific Ry. Co.*, 176 Fed. Rep. 409; *Int. Com. Comm. v. Dittenbaugh*, 222 U. S. 42, 49.

United State Circuit Court and Commerce Court are both given jurisdiction of such action. Section 16, Act to Regulate Commerce, amended March 2, 1889, June 29, 1906, and June 18, 1910, and act creating Commerce Court, June 18, 1910.

"Against" means "in reference to," "concerning" or "touching" a carrier. *Silver v. Ladd* (1869), 7 Wall. 219;

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Seabright v. Seabright, 28 W. Va. 412, 465. The statute defines venue and confirms jurisdiction.

The case at bar is within the express language of statute and the order assailed is not a negative one.

Mr. Assistant Attorney General Denison, with whom *Mr. Jesse C. Adkins* and *Mr. Blackburn Esterline*, Special Assistants to the Attorney General, were on the brief, for the United States:

No principle of law required the Commission to determine the reasonableness of rates exclusively with reference to the cost of transportation by the shorter route. On the contrary, this court has held that it is the duty of the Commission not to exclude other things from its consideration. *Texas & Pacific Ry. v. I. C. C.*, 162 U. S. 197, 199; *I. C. C. v. C.*, *R. I. & P. Ry.*, 218 U. S. 103.

In this particular case the Commission had to consider not only the supposed interests of the individual petitioning shippers, but the interests of Cincinnati, of Chattanooga, of the intervening points, the relation of through rates, the rates on other lines in similar conditions, the growth and commercial needs of the country served, the value of the transportation to the shippers (which includes the possibility of their reaching the market at a profit), the commercial conditions, the effect on the communications of Cincinnati, Chattanooga, and intervening points with the West, and with the East, and many other details of fact and policy.

The question whether the Commission in determining the reasonableness of rates, shall adopt the policy of limiting its cognizance to the bee line, is a legislative and not a legal question. *Prentiss v. Atlantic Coast Line*, 211 U. S. 224; *I. C. C. v. C.*, *N. O. & T. R. Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Co. v. Jasper*, 189 U. S. 439, 440; *Burnham, Hanna, Munger Co. Case*, 218 U. S. 88, 103.

The long continued practice of the Commission on this point has been left undisturbed by Congress and should not now be disturbed by the court. See 3 Interstate Commerce Commission Reports, 502; 4 *Ibid.*, 130, *Food Products Investigation*, 15 I. C. C. 376; *Kindel Case*, 15 I. C. C. 392; *Spokane Case*, 16 I. C. C. 595.

It is not a case of an application for leave to create a new, expensive route and for leave to foster that artificially by raising the rates on the prior and cheaper line. On the contrary, the question was whether the Commission should exclude an old established trade route, now carrying one-half the traffic; and this without any intimation as to whether the short line had equipment or capacity to carry the entire traffic, or had capital within reach to obtain such equipment or capacity.

Neither was it a case in which the longer route was an unreasonably roundabout line of communication between the two points.

Under the conditions of this record the conclusion of the Commission in determining the reasonable maximum rate is a pure conclusion of fact and is not reviewable; as has been held by this court again and again.

The Commerce Court had no jurisdiction of the petition, because the Commerce Court act did not include among the orders of the Commission which the Commerce Court might set aside, annul or suspend, orders of merely negative effect. This appears from the context and history. The context and other provisions of the act show that only enforceable affirmative orders were intended to be set aside. This also appears from the fact that no process is authorized appropriate to any relief against a non-active order. The Commerce Court is a court of original jurisdiction and not an appellate court which receives a record from a tribunal below. There is no line along which a mandate from the Commerce Court could move to the Commission directing it to reopen a case and

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Opinion of the Court.

give affirmative relief; nor is there any provision for mandamus in such a situation. It is not probable that Congress, if it had intended to give the Commerce Court this jurisdiction, would have left that court without any means of bringing itself to bear and thus made its judgment mere *brutum fulmen*.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. R. Walton Moore for Cincinnati, New Orleans & Texas Pacific Railway Company.

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

The appellants in these cases originally applied to the Interstate Commerce Commission for reduction of the maximum rates between Cincinnati and Chattanooga from the 76 c. schedule to a 60 c. schedule. The Commission refused to make the full extent of this reduction. Thereupon the respective parties filed bills in the Commerce Court demanding that the Commission's order be "suspended, set aside, annulled, and declared void and of no effect" and that the individual defendants and the Commission be required by mandatory injunction to set aside and annul the said order, that the case be reopened, and the complainants given further relief. The two bills were consolidated. The individual defendants, the Commission, and the Railroad Company all demurred to the bill on the merits. The United States moved to dismiss on the ground that the court had no jurisdiction. The court took jurisdiction, but dismissed on the merits. These appeals were then prosecuted. The cases are, in all respects, controlled by the opinion announced and ruling made in the *Procter & Gamble Case*, this day de-

cided (*ante*, p. 282) and for the reasons in that case stated, these cases must be and are remanded, with directions to dismiss for want of jurisdiction, and

It is so ordered.

UNITED STATES, INTERSTATE COMMERCE
COMMISSION, AND FEDERAL SUGAR REFIN-
ING COMPANY *v.* THE BALTIMORE AND OHIO
RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 722. Argued January 15, 16, 1912.—Decided June 10, 1912.

The Commerce Court has jurisdiction of a petition of a carrier to restrain an affirmative order of the Interstate Commerce Commission that it desist from paying allowances for lighterage to one shipper unless it pays the same to other shippers, and also has power to determine whether such order was entitled to be enforced.

The Commerce Court has power to allow a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission directing the carrier to desist from paying allowances for lighterage.

An appeal to this court from an interlocutory order of the Commerce Court allowing a preliminary injunction against the enforcement of an affirmative order of the Interstate Commerce Commission lies under § 2 of the act creating the court, now § 210 of the new Judicial Code.

Under § 210 of the Judicial Code, injunction orders can be issued by the Commerce Court restraining the enforcement of an order of the Interstate Commerce Commission in the following classes of cases:

First. A temporary restraining order staying in whole or in part the operation of the order for not more than sixty days to be allowed by the court or a judge thereof.

Second. A preliminary injunction to restrain or suspend in whole or in part the operation of the Commission's order *pendente lite* to be granted by the court.

Third. A perpetual injunction upon entry of final decree.

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The requirements in § 210, Judicial Code, that a restraining order must contain a statement of facts as to irreparable damage resulting from the order of the Commission relate only to the first class of cases.

This court will not apply to the construction of the equity powers of a statutory court, general principles of equity, if the effect would be to destroy the law creating the court by expunging therefrom the very powers which Congress intended to grant; and so *held* that the power given by § 210, Judicial Code, to the Commerce Court to issue an injunction *pendente lite* was to enable that court to have proper time for consideration, and the right of appeal to this court was given as a safeguard against a possible abuse of the power to issue the order; and the order will not be reversed in the absence of such abuse.

Where Congress creates a special tribunal for a special class of cases with an appeal to this court it is the duty of this court to give effect to that purpose and uphold the lawful authority of the court so created and to also correct abuse of power when it appears.

In this case, *held*, that there was no abuse of power in issuing the order for an injunction *pendente lite* and the order is affirmed and the case remanded so that there may be opportunity to dispose of it in the forum selected by Congress for that purpose.

THE facts, which involve the jurisdiction of the Commerce Court and its power to issue restraining orders and injunctions, are stated in the opinion.

The Solicitor General for the United States:

A carrier cannot make the ownership of commodities the test of its duty to carry them or the criterion of the rates for carriage. *Interstate Com. Comm. v. Delaware, L. & W. R. R. Co.*, 220 U. S. 235. For the same reason the carrier may not inquire as to the place of origin and base its rates upon that.

A carrier may not make rules which discriminate between shippers standing in substantially the same relation to it. *Union Pacific R. R. Co. v. Updike Grain Co.*, 222 U. S. 215.

Mr. P. J. Farrell for the Interstate Commerce Commission:

A carrier may establish a separate charge for terminal

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services which are in addition to and entirely separate and distinct from the transportation; and where such separate charge is established it must be considered as applicable only to the services covered thereby as shown by the tariffs of the carrier published and filed according to law. *Interstate Com. Comm. v. Stickney*, 215 U. S. 98. And see *Southern Ry. Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297.

One provision of the Interstate Commerce Act may not be seized upon and used regardless of other provisions of the same act to justify inequalities in the treatment accorded by carriers to shippers. The act was enacted for the purpose of preventing such inequalities. *Interstate Com. Comm. v. Balto. & Ohio R. R. Co.*, 145 U. S. 263; *Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680; *Cinn., N. O. & T. P. Ry. Co. v. Interstate Com. Comm.*, 162 U. S. 184; *Texas Pacific Ry. Co. v. Interstate Com. Comm.*, 163 U. S. 197; *Interstate Com. Comm. v. Cinn., N. O. & T. P. Ry. Co.*, 167 U. S. 479; *Union Pacific R. R. Co. v. Updike Grain Co.*, 222 U. S. 215; *Wight v. United States*, 167 U. S. 512; *Interstate Com. Comm. v. Alabama Midland Ry. Co.*, 168 U. S. 144; *East Tennessee, V. & G. Ry. Co. v. Interstate Com. Comm.*, 181 U. S. 1; *New York, N. H. & H. R. R. Co. v. Interstate Com. Comm.*, 200 U. S. 361; *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Com. Comm. v. Chicago G. W. Ry. Co.*, 209 U. S. 108; *Interstate Com. Comm. v. Illinois Cent. R. R. Co.*, 215 U. S. 452; *Interstate Com. Comm. v. Delaware, L. & W. R. R. Co.*, 220 U. S. 235.

The Commerce Court erred in substituting its own judgment for that of the Commission concerning the character of the discrimination which constituted the basis of the Commission's order. *Interstate Com. Comm. v. Illinois Cent. R. R. Co.*, *supra*; *Baltimore & Ohio R. R. Co. v. United States ex rel. Pitcairn*, 215 U. S. 481; *Southern Pacific Co. v. Interstate Com. Comm.*, 219 U. S. 433; *Inter-*

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Argument for Appellees.

state Com. Comm. v. Delaware, L. & W. R. R. Co., 220 U. S. 235.

Mr. Ernest A. Bigelow for the Federal Sugar Refining Company:

The Commission's findings of fact, supported as they are by the evidence, will not be reviewed by this court, *Interstate Com. Comm. v. Delaware, L. & W. R. R. Co.*, 220 U. S. 235; and its conclusions of law were correctly drawn. See *Coe v. Erroll*, 116 U. S. 517; *L. & L. F. Ins. Co. v. R., W. & O. R. R.*, 144 N. Y. 200; *Penn. Ry. v. Int. Coal Mining Co.*, 173 Fed. Rep. 1.

The Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference, and the incidental and wholly subordinate provisions of § 15 cannot be allowed to frustrate the fundamental purpose of the act. *Interstate Com. Comm. v. Illinois Cent. Ry. Co.*, 215 U. S. 477.

As to the so-called admission made by counsel for the Federal Sugar Refining Company. Even if made with the full force and effect attributed to it, it is immaterial, as the Commission has the power in the public interests to consider the whole subject, disembarassed by any supposed admissions, even if contained in the complaint. *C. H. & D. Ry. v. Interstate Com. Comm.*, 206 U. S. 142.

On this appeal the court may properly consider and decide the whole cause on the merits. *Smith v. Vulcan Iron Works*, 165 U. S. 518; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, citing *Knoxville v. Africa*, 77 Fed. Rep. 501; *Green v. Mills*, 69 Fed. Rep. 852.

Mr. George F. Brownell, with whom Mr. Herbert A. Taylor was on the brief, for railroad companies, appellees:

The service performed by the Federal Sugar Refining Company through the medium of the Ben Franklin Trans-

portation Company is not a transportation service of the railroad companies, but is wholly accessorial and cannot lawfully be paid for by these appellees. *In re Allowances for Transfer of Sugar*, 14 I. C. C. 619; *Wight v. United States*, 167 U. S. 512; *Chicago & Alton Ry. Co. v. United States*, 156 Fed. Rep. 558; *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237; *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 I. C. C. 246.

The employment of the Jay Street Terminal to act as the public freight station of these appellees in receiving and delivering freight and to perform floatage and lighterage service was perfectly lawful. Both the Commission and the courts have held that railroads may secure and maintain freight depots by contract with shippers and that such depots thereby become legally and to all intents and purposes the freight depots of the railroads. *Central Stock Yards Co. v. L. & N. Ry. Co.*, 192 U. S. 568; *Railroad Commission v. L. & N. Ry. Co.*, 10 I. C. C. 173; *Cattle Raisers' Assn. v. C., B. & Q. R. R. Co.*, 11 I. C. C. 277.

The entering into a contract with one shipper to furnish station facilities does not result in a violation of the provisions of the Act to Regulate Commerce forbidding undue preferences and advantages, even if similar contracts are not made with all competing shippers in the same locality. *Central Stock Yards Co. v. L. & N. Ry. Co.*, 118 Fed. Rep. 113, 117; *aff'd*, 192 U. S. 568; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 136; *Butchers' & Drovers' Stock Yards Co. v. L. & N. Ry. Co.*, 67 Fed. Rep. 35; *United States v. Delaware, L. & W. R. Co.*, 40 Fed. Rep. 101; *Consolidated Forwarding Co. v. Southern P. Co.*, 9 I. C. C. 182, 206; *Worcester Co. v. Pennsylvania R. R. Co.*, 3 I. C. C. 577, 584; *Re Transportation of Fruit*, 10 I. C. C. 360.

An unjust discrimination or an undue preference is not created by the action of a railroad company in employing a shipper to perform a part of the transportation service, when the shipper is paid a compensation that is reasonable

for the performance of the service, simply because other shippers who are not in position to perform the same transportation service may be subjected to disadvantages. *Peavey & Co. v. Union Pacific R. Co.*, 176 Fed. Rep. 409; *aff'd*, 222 U. S. 42.

Mr. William N. Dykman for Jay Street Terminal and Arbuckle Brothers, intervenors:

This court reviews the findings of the Interstate Commerce Commission upon appeal from an order granting an injunction suspending the order of the Commission. *Interstate Com. Comm. v. Delaware, L. & W. R. Co.*, 216 U. S. 531; *Interstate Com. Comm. v. Northern Pacific R. Co.*, 216 U. S. 538. See, also, *Missouri, K. & T. Ry. Co. v. Interstate Com. Comm.*, 164 Fed. Rep. 645; *Kentucky Bridge Co. v. Louisville & N. Ry. Co.*, 37 Fed. Rep. 567.

On an appeal from an order granting an injunction *pendente lite* the appellant must show that no cause of action is stated in the bill. *Hudson R. T. Co. v. W. T. & R. R. Co.*, 121 N. Y. 397.

No commission, nor any court, can treat that as a public or private wrong which the Congress has authorized. *Hammersmith &c. R. Co. v. Brand*, 4 H. L. Cas. 171; *Bellinger v. N. Y. C. R. Co.*, 23 N. Y. 42.

In New York, at least, there is no doubt of the validity of a contract by which a carrier limits its common-law liability. *Bermel v. N. Y., N. H. & H. R. Co.*, 6 App. Div. 389; *aff'd*, 172 N. Y. 629; *Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460; *Wheeler v. Oceanica S. N. Co.*, 125 N. Y. 155.

When the terminal receives sugar for shipment and issues a bill of lading for and in the name of the railroad company, title to the merchandise changes from the consignor to the consignee, *Mee v. McNider*, 109 N. Y. 500; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Waldron v. Romaine*, 22 N. Y. 368; *Gilbert v. R. R. Co.*, 4 Hun, 317; *Williston on*

Sales, § 278; and the railroad journey and responsibility begins, Hutchinson on Carriers, § 158; *Abe v. Eaton*, 51 N. Y. 410. The liability of the carrier, in fact, begins as soon as it receives the merchandise for carriage, even if bills of lading have not been shipped or a journey commenced; the mere reception of the goods for the purpose of immediate transportation is sufficient to inaugurate liability. *Ames v. Fargo*, 114 App. Div. 666; S. C., 42 Hun, 332; Hutchinson on Carriers, § 113.

The sole distinction between sugar shipped by Arbuckle Brothers to themselves in one and the same car with the general merchandise of another shipper is that the carrier has contracted with the shipper to do a service and furnish an instrumentality of transportation. This the Congress, on the recommendation of the Commission, has expressly authorized.

The Commission exceeded its power in forbidding payment to the Jay Street Terminal for handling Arbuckle Brothers' sugar, because the terminal service is a part of the railroad transportation, the statute allows the carrier to hire the shipper to render such a service and furnish such instrumentality, and the allowance is conceded to be no more than is just and reasonable. *Interstate Com. Comm. v. Diffenbaugh*, 222 U. S. 42; *Union Pacific R. Co. v. Updike Grain Co.*, 222 U. S. 215.

It is beyond the power of the Commission to order payments to the Federal Company for lightering sugar to the railroad terminals. *Wight v. United States*, 167 U. S. 512; *Chicago & Alton R. Co. v. United States*, 156 Fed. Rep. 558; *General Electric Co. v. N. Y. C. & H. R. Co.*, 14 I. C. C. 237; *Solvay Process Co. v. D., L. & W. R. Co.*, 14 I. C. C. 246; *Matter of Allowance for Transfer of Sugar*, 14 I. C. C. 619.

It is not a discrimination to contract with the Jay Street Terminal to maintain a railroad freight station in Brooklyn and there to collect, receive and deliver freight,

issue bills of lading and float loaded cars between Brooklyn and Jersey City, and at the same time refuse to contract with the Federal Sugar Refining Company for lighterage from Pier 24. *Interstate Com. Comm. v. Baltimore & Ohio R. R. Co.*, 145 U. S. 276; *Central Stock Yards Co. v. L. & N. R. Co.*, 118 Fed. Rep. 113; *aff'd*, 192 U. S. 568. See, also, *Covington S. Y. Co. v. Keith*, 139 U. S. 128; *United States v. D., L. & W. R. R. Co.*, 40 Fed. Rep. 101.

It is lawful for a railroad to procure equipment by lease from one shipper and to refuse to make identical contracts with other shippers. *Consol. Forwarding Co. v. Southern Pacific Co.*, 9 I. C. C. 182; *Worcester Ex. Co. v. P. R. Co.*, 3 I. C. C. 577. See, also, *Matter of Trans. of Fruit*, 1 I. C. C. 360.

It is beyond the power of the Commission to allow more than the cost of lighterage to the Federal Company to offset less than cost paid the Jay Street Terminal for its services. *Minn. & St. L. R. Co. v. Minnesota*, 186 U. S. 257; *Matter of Allowance for Transfer of Sugar*, 14 I. C. C. 619.

It is elementary that a partner may engage with other persons in a partnership business outside the scope of his firm business, provided it does not compete therewith. *Am. & Eng. Ency. of Law*, Vol. 22, p. 118; *Gossett v. Wilson*, 3 Florida, 235; *Weaver v. Weaver*, 46 N. H. 188.

It necessarily follows that if one partner may engage in a separate and distinct business with other persons under a different partnership name, he may also engage in a separate and distinct business under a different name with the same persons who constitute the firm of which he is already a member. These two partnerships composed of the same individual members engaged in separate and distinct enterprises under different names are in the eyes of the law separate and distinct entities.

Under the Bankrupt Act a partnership is a separate and distinct legal entity from the individuals who compose it.

Collier on Bankruptcy, pp. 114, 115, 116; *In re Sunderlin*, 109 Fed. Rep. 857; *In re McMurtrey*, 142 Fed. Rep. 853.

A partnership may be adjudged a bankrupt although the partners who compose it are not so adjudicated. *In re Bertenshaw*, 157 Fed. Rep. 363.

The Bankrupt Act is merely declaratory of recognized equitable principles in the administration of insolvent partnerships. *Hewitt v. Northrup*, 75 N. Y. 506; *Wilder v. Keeler*, 3 Paige, 67.

Arbuckle Brothers and Jay Street Terminal are separate and distinct entities.

Mr. H. B. Closson filed a brief for the Brooklyn Eastern District Terminal, appellee.

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

This is a suit instituted in the Commerce Court to enjoin the enforcement of an order by the Interstate Commerce Commission.

The complainants in the bill are The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, The Erie Railroad Company, The Lehigh Valley Railroad Company, The New York, Ontario and Western Railway Company, and The Pennsylvania Railroad Company. The Brooklyn Eastern District Terminal and John Arbuckle and William A. Jamison, copartners, trading as the Jay Street Terminal, intervened and were made parties complainant, they being interested to defeat the order of the Commission.

The defendant named in the bill is the United States. The Interstate Commerce Commission appeared, and the Federal Sugar Refining Company intervened and was made a party defendant.

The order which it was the purpose of the suit to enjoin was made in a proceeding commenced before the Commission on behalf of the Federal Sugar Refining Company, to compel the railroads above named to desist and abstain from paying to Arbuckle Brothers, claimed to be operating what is known as the Jay Street Terminal, certain so-called allowances for floatage, lighterage and terminal services rendered by them to the complainants in connection with sugar transported by them in New York Harbor to and for the complainants, while at the same time paying no such allowances to the said Federal Sugar Refining Company on its sugar.

We substantially adopt as accurate a summary statement made of the subject-matter of the controversy in the brief of counsel for the railroad companies:

"The Federal Sugar Refining Company has a refinery at Yonkers, N. Y., and Arbuckle Brothers have a refinery in the Borough of Brooklyn, New York City. The railroad companies operate what are known as trunk line railroads, extending from New York to western and southern points. In order to receive and deliver freight in New York City they are obliged to transport the same across the waters of New York harbor on lighters by what is called lighterage service, or, when the freight is carried through in railroad cars, on car floats by what is called floatage service.

"At numerous points along the New York City water front within the lighterage limits they have established public stations for the receipt and delivery of freight.

"They have also established boundaries known as 'lighterage limits,' including substantially all of what may be called the manufacturing and commercial portion of the water front of New York City and the opposite shore of New Jersey and within these boundaries they receive and deliver freight at any accessible point on the water front without any additional charge above the New York rates, which are, generally speaking, the same as the rates

to and from the terminals on the New Jersey shore. At 'public' docks open to any vessel, the railroad pays the wharfage; at private docks the shipper or consignee must arrange for the necessary dockage.

"At a number of points in the Boroughs of Brooklyn and the Bronx, the railroad companies or some of them furnish public stations through arrangements made with terminal companies to furnish union public stations and terminal facilities for the receipt and delivery of freight in cars and through freight houses, and for the transportation of such freight between such terminal stations and the railroad companies' rails on the western shore of the harbor, all of which is done for and in the name of the railroad companies under provisions of their tariffs filed with the Interstate Commerce Commission under which their New York rates apply to and from such union public stations.

"One of these public terminal stations, known as the Jay Street Terminal, is owned and operated by William A. Jamison and John Arbuckle, conducting a separate business in that respect as copartners under the name and style of 'Jay Street Terminal' in accordance with the laws of the State of New York. Jay Street Terminal is named as a station of the railroad companies, appellees, in their respective tariffs, and is conducted under contract with the railroad companies like any other freight station, bills of lading being issued from and to it on behalf of the railroad companies and in their names, on the regular uniform form, charges being collected and accounts kept, the Jay Street Terminal performing the entire physical and clerical service and furnishing the necessary docks, freight yard and station buildings and equipment, excepting cars. The Jay Street Terminal also floats or lighters all shipments between the terminal and the rails of the railroad companies on the New Jersey shore. For these services and facilities each railroad company pays to the

Jay Street Terminal an aggregate compensation figured on the freight handled for it, based on the rate of $4\frac{1}{5}$ cents per hundred pounds on freight originating at or destined to points at or west of the westerly limits of Trunk Line Territory, so called, and 3 cents per hundred pounds on freight originating at or destined to points east of the westerly limit of Trunk Line Territory. The same amounts per hundred pounds are paid to other terminal companies furnishing similar service at New York.

"The refinery of Arbuckle Brothers, a copartnership composed of William A. Jamison and John Arbuckle, is within two blocks of the Jay Street Terminal, and they truck sugar from their refinery to this terminal and load it into cars at their own expense and deliver it to the Jay Street Terminal and obtain the railroad company's bill of lading for it from the Jay Street Terminal just as other shippers do with other freight.

"The refinery of the Federal Sugar Refining Company at Yonkers, New York, formerly operated by the Federal Sugar Refining Company of Yonkers, is located on the Hudson River, ten miles north of the lighterage limits. The sugar manufactured at this refinery and shipped over the lines of these appellees is loaded onto lighters of the Ben Franklin Transportation Company, an independent boat line with which the Federal Sugar Refining Company has made a contract, under which the boat line lighters its sugar to the terminals of the railroad companies for three cents per hundred pounds. The boat line brings the sugar to the terminals of the railroads on the western shore of New York harbor and delivers it to them for rail transportation.

"The Federal Sugar Refining Company's refinery at Yonkers is located directly on the tracks of the New York Central and Hudson River Railroad Company. Over this railroad the rates to the points in the shipping territory of the Federal Sugar Refining Company are with few

exceptions the same as the rates via the lines of the railroad companies. To ship at the New York rate over the lines of the roads the Federal Sugar Refining Company can deliver its shipments to the New York Central and Hudson River Railroad at Yonkers, thence to be transported by that railroad to New York and there delivered to the said railroad companies within lighterage limits. None of these railroads have lines extending to Yonkers. Because of alleged delay in the handling and transportation of shipments via this route, the Federal Sugar Refining Company sometimes prefers to deliver said shipments by lighter to the said railroad companies at their stations on the New Jersey shore of New York harbor.

"Prior to July, 1909, these shipments were carried by the Ben Franklin Transportation Company directly to the rail terminals on the Jersey shore from Yonkers without stop. Since that date the lighters stop en route at Pier 24, North River. The reason for stopping at Pier 24 is found in the decision made by the Commission in case No. 1082, brought by the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, against the same railroad companies, appellees here (17 I. C. C. 40). The complaint in that proceeding claimed a discrimination against the Federal Sugar Refining Company of Yonkers and in favor of the Jay Street Terminal and the Brooklyn Eastern District Terminal, an incorporated company operating a similar terminal station in another section of Brooklyn, because of the refusal of the railroad companies to pay it the same amounts on account of the lighterage performed by the Ben Franklin Transportation Company from Yonkers to the rail terminals of the railroad company on the western shore of New York harbor as were paid to the two terminal companies above named on account of the various services performed and terminal facilities furnished by them in connection with the transportation of sugar shipped by

Arbuckle Brothers and the American Sugar Refining Company respectively. This complaint was dismissed because the extension of the lighterage limits in New York harbor of the railroad companies was a matter of business discretion, and that the Commission had no authority to require such extension beyond the then prescribed boundaries, and that the Federal Sugar Refining Company, being located outside of the prescribed lighterage limits, was not subjected to unlawful discrimination by reason of the practice of the railroad companies in affording free lighterage on shipments originating at a distance to points within said lighterage limits while refusing to so afford on shipments of the Federal Sugar Refining Company.

"As a result of this decision of the Commission the lighters of the Ben Franklin Transportation Company were stopped en route from Yonkers at Pier 24, North River, where certain formalities with reference to shipping orders were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers, but from Pier 24, North River, a point within lighterage limits. A new complaint was filed with the Commission, setting forth the same grounds of discrimination as the prior one, but on the theory that the decision of the Commission did not apply because the shipments of the Federal Sugar Refining Company were now lightered from Pier 24, a point within lighterage limits and not from Yonkers, the Commission held as a matter of law that the stoppage of the lighters of the Ben Franklin Transportation Company for instructions at Pier 24, differentiated the case from the former one and made the following order:

"It is ordered that the above-named defendants (the appellees) be and they are hereby notified and required to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain from paying such allowances to Arbuckle Brothers

on their sugar, while at the same time paying no such allowance to said complainant (Federal Sugar Refining Company) on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.'

"The so-called 'allowances' referred to in this order are a part of the payments making up the compensation of the Jay Street Terminal, figured at the rates of three cents and $4\frac{1}{2}$ cents per hundred pounds as above described."

This is the order the enforcement of which was the subject-matter of the controversy in the court below.

The United States, the Interstate Commerce Commission and the Federal Sugar Refining Company promptly filed motions to dismiss the petition and the intervening petition of the Jay Street Terminal upon the ground of want of equity and because the order of the Commission was an adjudication of matters of fact as to which its judgment was conclusive. The petitioners, on the other hand, applied for an injunction *pendente lite* suspending the order of the Commission until the final determination of the action. The motions to dismiss were denied. On the same day, the motion for a temporary injunction—which had been heard upon the petition and intervening petitions and affidavits submitted by petitioners in support of the averments of the petition and intervening petition—was granted, and the assailed order "and its force and effect" was suspended until the further order of the court. This appeal was then taken.

There was clearly a right in the court below to entertain jurisdiction of the petition and to determine whether the affirmative order of the Commission was entitled to be enforced. There was clearly also power in the court to allow a preliminary injunction, since that authority is conferred in express terms by § 3 (208) of the act. And

the right to appeal from such an order is also in express terms conferred by § 2 (210) of the act.

It is urged on behalf of the United States and the Interstate Commerce Commission that, wholly irrespective of the merits of the petition, the order granting the interlocutory injunction must be reversed because of what is insisted to be the express requirements of the act imposing the duty on the Commerce Court or a judge of that court if a restraining order is granted under the conditions in the statute to state the facts from which it is found that irreparable injury would arise if a restraining order were not allowed. The section containing the provision relied upon is as follows:

“That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission’s order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days’ notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the

order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application."

Without ambiguity we think the statute contemplates three classes of orders: First, a temporary restraining order staying in whole or in part the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the suspensive order, to be allowed by the court or a judge thereof; second, a preliminary injunction, that is, an injunction *pendente lite*, which, to quote the words of the statute, may be granted by the court to "restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit;" third, in the nature of things a perpetual injunction upon the entry of the final decree. The order in this case, made after notice and hearing, suspending the force and effect of the order of the Commission until the further order of the court, was obviously an exercise of the power conferred to grant a preliminary injunction or injunction *pendente lite* and not of the power to allow a temporary restraining order embraced in the first of the classes stated. As we think it clear that the requirements of the statute relied upon respecting the statement of facts as to irreparable damages relate only to the first class of cases, that is, the power to issue a temporary restraining order, we hold the objection to be without merit.

This brings us to consider the scope of our reviewing authority under the right conferred by the statute to appeal from the allowance by the court below of a preliminary injunction or injunction *pendente lite*. To determine this question requires a consideration of the nature and character of the powers which the court had a right to

exert over the subject-matter presented to it by the petition filed to perpetually enjoin the enforcement of the order of the Commission.

We have determined in the *Procter & Gamble Case*, *ante*, p. 282 that the Commerce Court was but endowed in considering whether an affirmative order of the Commission should be enforced on the one hand or set aside and declared non-enforceable on the other with the jurisdiction and power existing at the time that act was passed in the Circuit Courts of the United States. And as, at that time it was conclusively settled that the courts had only authority to reëxamine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings. Under the general principles of equity, where a court is called upon to decide whether it will allow a preliminary or *pendente lite* injunction the duty arising requires it to be determined whether on the face of the papers presented there is such an equitable cause of action presented as justifies the issue of a preliminary injunction to preserve the status pending the suit, that is, to afford an opportunity for a trial of the issues presented. Necessarily it is true also that where an appeal is allowed from an order granting a preliminary injunction the reviewing court is put to the duty of determining whether on the face of the papers the court below erred as a matter of law in granting the preliminary injunction. Do these principles apply to the case before

us, is then the first consideration. The result of holding that they do will inevitably cause the expunging from the act of the express authority conferred to issue a preliminary injunction, since viewed under the general principles of equity the criteria by which to determine the rightfulness of such an order in view of the nature and character of the jurisdiction of the Commerce Court is exactly and exclusively the same criteria by which the rightfulness of a final decree of that court issuing a perpetual injunction in conformity to such decree would require to be tested. Our duty, however, is not to destroy the law but to enforce it, and in doing so to seek to discover the intention of the lawmaker, the wrong intended to be prevented and the remedy designed to be afforded by the enactment of the statute. Coming to consider the statute for this purpose, we have pointed out in the *Procter & Gamble Case* that the great remedy intended to be accomplished was the concentration in a single court of the power to consider the rightfulness of enforcing or setting aside orders of the Commission; that to prevent unnecessary delays the limitations as to restraining orders and their duration and the hearing which is commanded as to irreparable injury was enacted. It must therefore in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the Commission instead of compelling that body virtually *eo instante* upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary and unreasonable exercise of the power conferred. In other words, we think that the enlightened purpose of Congress was that the court which it created, in the exercise of the important trusts confided to its authority

and where occasion required it as a consequence of the gravity and complexity of the legal questions which might arise, should be afforded ample opportunity for due consideration and ripe judgment and that it was not intended to compel precipitate, and perhaps ill-considered, action.

Coming to consider the case presented in the light of these principles, in view of the doubt which existed as to the scope and effect of the powers conferred upon the Commission, as shown by the decision of the court in the *Procter & Gamble Case*, of the nature and character of the subject-matter here under consideration and its importance, of the action of the Commission had on that subject prior to the making of the order of the Commission which was assailed by the petition, and especially of the diversity of opinion which existed among the members of the Commission on the subject, we think there is no room for saying that the preliminary injunction issued was in excess of the power conferred upon the court, because of the plain want of necessity for it resulting from the obvious nature and character of the legal questions as to which the judgment of the court was invoked in consequence of the filing of the petition calling for the exertion of the authority conferred upon it by Congress.

It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the Commerce Court must have been the desire to interpose between the action of the Commission and this court an intermediate tribunal, having the powers which the statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court, without deviation and yet without hesitancy where there has been an abuse of discretion to correct it in the completest way. But as this case manifests no such abuse, our duty is not to reverse the action of the court but to remand the case so that

there may be an opportunity to dispose of it on the merits in the forum selected by Congress for that purpose. Of course, in saying this, we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly in our judgment appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court below to do so.

Affirmed.

INTERSTATE COMMERCE COMMISSION AND
THE UNITED STATES *v.* BALTIMORE AND
OHIO RAILROAD COMPANY, PENNSYLVANIA
RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 719. Argued January 12, 15, 1912.—Decided June 7, 1912.

An interstate carrier may not charge a different rate for the transportation of railroad-fuel coal to a given point than for the transportation of commercial coal to the same point. It would be an illegal preference or discrimination under § 3 of Act to Regulate Commerce.

Tariffs are but forms of words, and the Interstate Commerce Commission, in the exercise of its powers to administer the Act to Regulate Commerce, can look beyond the forms to what caused them and what they are intended to, and do, cause.

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Statement of the Case.

A railroad company cannot be made a favored shipper and given a lower rate on the same commodity to the same point than other persons.

A railroad company is not to be put on the same basis as a locality and entitled to preferential rates to accommodate competitive conditions. *The Import Rate Case*, 162 U. S. 197, distinguished.

THE question in the case is whether railroad companies may charge a different rate for the transportation of coal to a given point to railroads than to other shippers, the coal being intended for the use of the railroads as fuel.

The Interstate Commerce Commission held that a charge of a different rate was an unlawful discrimination against other shippers and made an order requiring a cessation of such charge. The execution of the order was enjoined by the Commerce Court.

A number of railroads are petitioners and we shall refer to them as the companies.

The companies attack in their petition the order of the Interstate Commerce Commission on several grounds, which may be summarized as follows: The movement of coal traffic from the point of origin to the point or points of junction to receiving carriers is different from the movement of coal to be delivered locally at such junction points.

The traffic is not governed by the rates published under the Act to Regulate Commerce which apply to the traffic in coal not intended for use by consuming railroads, because the charges go to the carrier itself. If the coal be shipped under a through rate applicable to other coal the actual rate upon which it moves to the rails of the consuming road is the division of the through rate going to the roads over which the traffic moves to the junction point with the rails of the consuming road. The division of the rate beyond that point goes to the consuming road itself.

All but an inconsiderable part of such coal is necessary and intended for use as fuel in locomotives. The fueling stations are often many, and are located at convenient points along the line at varying distances from the junction points, and it is not possible at the time of shipment to tell at what point a carload of coal will be needed. If made on a through rate they must be billed and transported to a point to which the through rate is published. Even if a centrally located distributing yard for fuel be established, and all shipments billed on a through rate to that yard, there must be a reverse movement of the coal between that point and the point of junction.

The fact that fuel coal on the line of a consuming carrier is not governed by the published rates makes the commercial competitive conditions different between such coal and other coal. The value to the shipper is not the same or measured by the same conditions. There is no competition between the fuel coal and other coal.

Because of the circumstances and conditions differentiating the traffic in fuel coal the companies have for a number of years past published and filed, as required by law, separate tariffs of the rates to be charged and received by them for the transportation of such coal from points of origin to the junction point of delivery to the consuming carrier. The tariffs vary in their definitions or descriptions of the traffic to which the rates apply, but in each case the traffic is such that it would move in reality, not under the published through rates, but would move under the special conditions which have been stated. Some of the tariffs apply only to coal intended for use and used for locomotive fuel. The rates named in the tariffs are open and available to all producers and shippers, if the shipments be made under the special conditions stated.

On January 4, 1910, the Interstate Commerce Commission, of its own motion, instituted an inquiry under an

order of that date entitled, "In the matter of Restrictive Rates," Docket No. 3053, making the Baltimore & Ohio and the Pennsylvania Railroad companies parties to the proceeding. The other companies from time to time were admitted as intervenors. Testimony was taken, argument heard, and the Commission entered the order complained of in which the Commission required the companies to cease and desist, on or before May 15, 1911, and for a period of two years to abstain from using the tariffs on fuel coal stated.

The Commission erred in its construction of the Act to Regulate Commerce in that it held the facts and circumstances found by it did not distinguish fuel coal from other coal, and that the different conditions of their transportation were not in law circumstances and conditions necessary or proper to be considered in applying the provisions of § 2 of the act.

The Commission erred in holding that the rates on fuel coal under § 2 should be no more nor less than rates for the shipment of other coal from the same point of origin for local delivery at the junction point, the circumstances and conditions showing conclusively that the services done in the transportation of them, respectively, are not alike nor substantially similar, within the meaning of the Act to Regulate Commerce.

The Commission erred in holding that fuel coal should be transported under through rates, as other coal, and that it was unlawful for carriers to publish or charge any rates other than the through rates agreed upon going to the line of the terminal carrier to be used by it in its business as a common carrier. And that, as the charges on such terminal carrier's line must be borne by it, the Commission erred in holding that such circumstance did not differentiate the traffic in such coal from the traffic in other coal, and did not constitute a substantial difference under § 2 in the conditions of transportation.

The Commission erred in holding, further, that any difference in the tariff for fuel coal and not applicable to all other coal was unjustly discriminatory, in violation of § 3.

It appears on the face of the report of the Commission, it is alleged, that it proceeded in making the order upon its view of §§ 2 and 3; that it did not find it necessary to consider any specific tariff or tariffs or the rates named thereby; that the difference in conditions affecting the respective tariffs could not be considered as distinguishing them. And it is alleged that the findings of the Commission are findings of law, as well in regard to the violation of the third section of the act as in regard to violation of the second section. Irreparable damage is alleged, and the alternatives presented of desisting from the carriage of fuel coal at the expense of the loss of large and valuable revenues or accepting divisions of through rates, on both fuel coal and other coal, which will give the companies, as originating or intermediate carriers, a much lower compensation for both classes of traffic than they are now receiving and would continue to receive but for the order of the Commission.

In either case the loss will amount to many thousand dollars. There will be loss, it is alleged, to the producers of fuel coal who have sold coal under contracts for future delivery at junction points, and loss also to producers and shippers who depend on the railroad-fuel business to enable them to operate their mines at all.

A final decree is prayed for the annulment of the order and a temporary injunction enjoining and suspending it pending final hearing and determination.

The petition was supported by affidavits made by a number of coal producers and shippers.

The answer of the Interstate Commerce Commission is directed principally at the third paragraph of the petition, and charges against it as follows: Its allegations relate to

comparisons between coal, on the one hand, consigned to a railroad company, and coal, on the other hand, consigned to some other party. The former is called railroad-fuel coal, the latter is known as commercial coal. In each instance, however, regardless of the consignee, the point of origin and the point of destination of the shipments is the same, but the rate charged for transporting fuel coal is much less than the rate exacted for the transportation of commercial coal over the same line, in the same direction and between the same points. Schedules or tariffs providing for such differences in rates have been heretofore established and put in force and are now maintained and enforced by the companies.

Where the destination is a junction which is a point of connection between the lines of two or more of the companies, the movement of coal, fuel and commercial, is the same, except that at such destination the cars containing fuel coal are ordinarily placed upon what is called an exchange track, which is used in common by the connecting carriers, while the cars containing commercial coal are usually placed upon the side track of the delivering carrier. The cost of delivering both kinds of coal is practically the same, depending upon the nature of the delivery facilities furnished by the companies. Therefore, the cost of delivering fuel coal may be and is less than the cost of delivering the commercial coal, but the reverse is sometimes the case. It is alleged, however, that such differences are similar to differences pertaining to some shipments of commercial coal compared with other shipments.

Generally what is called "free time" is allowed by the companies, that is to say, a certain period of time for unloading the coal is allowed. If the coal is unloaded within that time, no charge is made for the use of the car. If that time be exceeded a charge of \$1.00 for each day or fraction of a day in excess of the "free time," known as a demurrage charge, is exacted by the companies, while the

compensation paid by one carrier to another carrier for the use of a car owned by the latter is twenty-five cents a day. Where the coal transported is fuel coal no "free time" is allowed, nor is such demurrage charge exacted or collected. These differences, however, are offset, and much more than offset, by the differences in the rates of transportation between the different coals.

Where the destination of the shipment of coal is not a point of connection between the lines of two or more of the companies the circumstances and conditions pertaining to the transportation and delivery of coal are the same as above described, except that at such destination there are no exchange tracks used in common by two or more of the companies. Where the shipment passes over more than one line of railway to such destination, delivery by one of the companies to another is made in the same way and under similar circumstances and conditions regardless of whether the coal be fuel or commercial.

The lower rates established by the companies and applied by them to the transportation of fuel coal are not open alike to all shippers but are, by reason of the schedules and tariffs above mentioned and by reason of the practices of the companies, confined to shippers of fuel coal and denied to shippers of all other coal, including commercial coal.

The Commission denies the errors attributed to it, and alleges that its report shows as follows: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination."

The Commission alleges (somewhat singularly, on information and belief) that it considered all facts, circum-

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stances and conditions pertinent to the subject-matter of the order, including degrees of difference and distinction, and each and all of the tariffs and rates of the companies which are affected by the order, and did not entertain the opinion attributed to it, that the facts, circumstances and conditions affecting the particular traffic could not be lawfully considered by it as distinguishing the traffic in railroad-fuel coal from the traffic in other coal.

It is alleged that the traffic is interstate, and that fuel coal as compared with other coal, including commercial coal, is a like kind of traffic; that the services performed by the companies in connection with the transportation of fuel coal as compared to the services performed by them in connection with the transportation of other coal, including commercial coal, are alike and contemporaneous, and are performed under substantially similar circumstances and conditions. It is hence alleged that the companies are violating §§ 2 and 3 of the Interstate Commerce Act.

The final allegation of the Commission is that the matters are within its jurisdiction, and that therefore the correctness of its findings is not open to review in the Commerce Court or any other court.

Mr. P. J. Farrell for the Interstate Commerce Commission:

In failing to dismiss the bill for want of equity, and in granting the temporary injunction, the Commerce Court committed errors which should be corrected by a reversal of the decree.

Circumstances and conditions arising before traffic is delivered by the consignor to the carrier for transportation at point of origin, and those arising after the traffic is delivered by the carrier to the consignee at point of destination, cannot be used to justify disparities in rates, where, as here, the transportation is over the same line, in the same direction, and between the same points.

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Wight v. United States, 167 U. S. 512, 518; *Int. Com. Comm. v. Alabama Midland Ry. Co.*, 168 U. S. 144, 166, 167; *Int. Com. Comm. v. Delaware, L. & W. R. R. Co.*, 220 U. S. 235, 252-254. If circumstances and conditions arising after the traffic is delivered by the consignor to the carrier at point of origin and before it is delivered by the carrier to the consignee at point of destination, but which are wholly artificial and entirely created by the carriers, may be used to justify such disparities, a carrier cannot be prevented from indulging in such discriminations as it may wish to make, to the extent at least of charging one party a rate greater than the rate it contemporaneously accords to another party, for the transportation of a like kind of traffic, over the same line, in the same direction, and between the same points.

While a carrier may transport its own property at will from one point to another upon its own line, regardless of the rates named in its published schedules, provided the title to that property does not change while it is in transit; and the division of a through rate for the transportation of property from a point of origin on the line of one carrier to a point of destination on the line of another carrier are a matter of agreement by and between the carriers who perform the transportation service; a carrier who uses the property may not, for the purpose of obtaining, for the transportation of the property from such point of origin to a point of intersection between its own line and the line of such other carrier, a rate which is less than the rate contemporaneously exacted from other shippers for the transportation of a like kind of property from said point of origin to said point of intersection, ship the property from such point of origin to a point of destination on its own line, under a through rate published and filed and made applicable to such transportation, and, when the property reaches its own line, either use the property at such point of intersection or transport it to a point on its

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own line other than the point to which such through rate applies, and then pay for the transportation from such point of origin to said point of intersection, not the rate applicable to the transportation between those points, but the division of the through rate which goes to such other carrier, as aforesaid. And if it does so it thereby subjects itself to the penalties provided for in the act and made applicable to cases of false billing and misrepresentation. *Wight v. United States*, *supra*; *Capital City Gas Co. v. Central Vermont Ry. Co.*, 11 I. C. C. Rep. 104. See, also, *Matter of Contracts of Express Companies*, 16 I. C. C. Rep. 246; *Hitchman Coal & Coke Co. v. Baltimore & Ohio R. R. Co.*, 16 I. C. C. Rep. 512.

The Commerce Court erred in substituting its own judgment for that of the Commission concerning the character of the traffic, transportation services, discrimination and preference and prejudice involved. *Int. Com. Comm. v. Delaware, L. & W. R. R. Co.*, *supra*. See, also, *Balto. & O. R. Co. v. Pitcairn*, 215 U. S. 481; *Southern Pacific Co. v. Int. Com. Comm.*, 219 U. S. 433.

The court erred in entering the interlocutory decree and granting the temporary injunction, without complying with the requirements of § 3 of the Commerce Court Act of June 18, 1910.

If the Commerce Court may, simply as a matter of discretion, for its own convenience, the convenience of carriers, or some other similar reason, enjoin temporarily enforcement of an order of the Commission, it may destroy, for all practical purposes, the power of the Commission and render impossible its regulations.

Under present conditions, there appears to be nothing for this court to do except to examine the entire record and determine whether the matters included therein justify the action taken by the Commerce Court.

A construction of the law which makes necessary such a method of procedure is not reasonable, because it in-

icates that the Congress attempted to do something which is in excess of its power under the Constitution; that is, confer upon this court original jurisdiction in the premises. *Baltimore & Ohio R. R. Co. v. Int. Com. Comm.*, 215 U. S. 216; *Southern Pacific Co. v. Int. Com. Comm.*, 215 U. S. 226.

Congress neither intended to, nor could, confer upon the Commerce Court, or any other court, legislative discretion. *Int. Com. Comm. v. Illinois Cent. R. R. Co.*, 215 U. S. 452.

Mr. Assistant Attorney General Denison, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States:

In its terms the order enjoined was directed exclusively against the restriction of rates to coal of certain consignors or consignees or for designated uses; and is directly within the principle laid down in *Int. Com. Comm. v. Delaware, L. & W. R. R.*, 220 U. S. 235; *New York, N. H. & H. R. R. Co. v. Int. Com. Comm.*, 200 U. S. 361, 391-395.

The illegality of a discrimination based exclusively on identity of the shipper or consignee, or on the intention with which the goods are shipped or received, or use to which they are put, is no longer open to argument.

The finality of the conclusion of the Commission under the circumstances of this case has been repeatedly announced by this court. 206 U. S. 466; 218 U. S. 110.

Mr. W. Irvine Cross and *Mr. Hugh L. Bond, Jr.*, for appellees:

The filing of tariffs in which the traffic in railroad fuel coal is treated as a separate traffic from the traffic in commercial coal between the same points is not a violation of § 2 of the Act to Regulate Commerce.

When Congress, in the commodities clause, wished to describe the only commodities that could be transported

by a railroad without any tariff at all, it described them, identified them, by the very language that the railroads have employed to identify the commodity carried in this traffic.

A special rate cannot be given to a particular consignee based simply on his personality, but a consignee may receive a special rate on a special kind of traffic. Neither can a special rate be given because of the use to which a commodity is to be put; but it would be a strange principle that a rate could not be influenced by the place where the commodity was to be used, or the transportation it must still undergo in reaching the point of use. A railroad, as distinguished from a railroad company, is not a person. It is rather in the nature of a geographical division, and extends through long distances. A railroad's use of coal for fuel is not different from the use of it by any other consumer of fuel. The service in delivering it at the junction point differs in the fact that the coal still has to be transported through long distances to secure its use at all.

The railroad fuel rates are open and available alike for all shippers, that is, for all shippers wishing to engage in the special traffic on which the rates are made. They are not restricted to certain shippers. They are not conditioned upon the commodities being put to a certain use. They are limited to a service where the commodity is subject to further transportation under the commodities clause, before reaching the point of use. The analogy in principle of the railroad-fuel traffic to the import traffic and the export traffic is complete.

The Commission's method of filing fuel coal rates is illegal under § 6 of the Interstate Commerce Act and Elkins Act. Congress never intended that the tariffs prescribed in § 6 should cover the transportation of the carrier's own property.

The Commerce Court had power to review on appeal

the construction put by the Commission on the Act to Regulate Commerce even though the subject-matter of the order was within the jurisdiction of the Commission and the order did not violate any constitutional right.

As to whether or not import traffic constitutes a like kind of traffic with domestic traffic between the same points, see *Import Rate Case*, 162 U. S. 197.

As to the right of the Commission to ignore circumstances and conditions in fixing rates, see *Louisville &c. R. R. Co. v. Behlmer*, 175 U. S. 648; *East Tennessee &c. Ry. Co. v. Int. Com. Comm.*, 181 U. S. 1; *Southern Ry. Co. v. St. Louis Hay Co.*, 214 U. S. 297; *Int. Com. Comm. v. Northern Pac. Ry. Co.*, 216 U. S. 538; *Int. Com. Comm. v. Delaware, L. & W. R. R. Co.*, 216 U. S. 531; 220 U. S. 235.

The question whether or not the Commission can refuse to consider the features of the fuel traffic, as making it an unlike traffic with the traffic in commercial coal, is a pure question of law, difficult to distinguish in principle from that which was decided in the *Import Rate Case*, *supra*.

Traffic in railroad fuel coal is different from the traffic in commercial coal within the meaning of the term "traffic" in § 2 of the Act to Regulate Commerce, and the service performed in transporting coal destined for the railroad fuel market is not a like service to that performed in transporting coal destined for the commercial market. The values of the services are commercially different and determined by different factors.

In the *Import Rate Case*, 162 U. S. 197, circumstances and conditions arising before the traffic was delivered by the consignor to the carrier for transportation at point of origin were recognized as creating an unlike kind of traffic. See, also, *Pittsburgh Plate Glass Co. v. O. C. C. & St. L. Co.*, 13 I. C. C. Rep. 100; *Kimble v. Boston & A. R. R. Co.*, 8 I. C. C. Rep. 110.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The case involves the consideration of §§ 2 and 3 of the Interstate Commerce Act. Section 2 provides that if any common carrier shall directly or indirectly charge or receive from any person or persons a greater or less compensation than it charges or receives from any other person or persons "for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of discrimination. . . ."

Section 3 is directed against giving preferences or advantages to persons, localities or descriptions of traffic in any respect whatsoever and subjecting any person, locality or traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The companies contend that the Commission applied these sections to the facts found by the Commission, none of them being disputed, and that, therefore, the findings of the Commission are conclusions of law. On the other hand, the Commission charges that its findings are those of fact and exclusively within its jurisdiction, and not open to review by the Commerce Court or any court. Many of its assignments of error are expressions of this view. The other assignments assert in various ways and with many shades of particularity that the Commerce Court erred in disagreeing with the Commission in regard to the traffics in the different coals, not only in its decision, as indicated in its injunction, in the matters affecting such traffic, but in substituting its judgment for that of the Commission.

The facts are certainly undisputed, or, to put it differently, the circumstances and conditions which determined the order are certainly not in controversy; and while certain general inferences are disputed which may be

called inferences of fact, yet we think "power to make the order, and not the mere expediency of having made it, is the question" presented. *Int. Com. Comm. v. Illinois Cent. R. R. Co.*, 215 U. S. 452, 470. In other words, that the question presented by the petition is that the order of the Commission was not merely administrative, but proceeded from a construction of §§ 2 and 3 as applicable to the conditions which affected the traffic in the different kinds of coal and that the different charges for transportation constituted violations of those sections. The Commerce Court, therefore, had jurisdiction of the petition and jurisdiction to enjoin the order of the Commission if the court considered that the order would cause irreparable injury. Section 3 of the act creating the Commerce Court gives that court the power to "enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission, in a suit brought in the court against the United States." Whether the court erred in its judgment is now to be inquired into.

In its most abstract form the simple statement of the controversy is whether the companies may charge a different rate for the transportation of fuel coal to a given point than for the transportation of commercial coal to the same point. But when we depart from the abstract, complexities appear and attention is carried beyond the consideration of points equally distant, shippers equally circumstanced and traffic affected by similar circumstances and conditions. It is asserted that there are disparities between the traffics and qualifying circumstances which the Commission disregarded and, in error, held that traffic in fuel coal could not be distinguished from the traffic in commercial coal.

The Commission insists upon the simplicity of the problem and contends that there is nothing in the conditions of the traffic which dispenses with the clear legal duty of the companies under the Interstate Commerce Act to

carry for all shippers alike. The Commission says: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination." Its position thus expressed the Commission has supplemented, we are told by the companies, by its Conference Ruling No. 324, published June 19, 1911, as follows: "Division on Company Coal.—Upon Inquiry, Held, That it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of joint rates a railroad must be treated precisely as any other shipper is treated, and the Commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in good faith without respect to the fact that one of the carriers is the purchaser of such coal."

The issue of principle between the Commission and the companies is very accurately presented, and we come to consider whether there are differences in the traffic of fuel coal which distinguish it from traffic in commercial coal, and which, as contended by the companies, make the traffic dissimilar in circumstances and conditions, or whether the opposite is true, as decided by the Commission.

The circumstances and conditions which may so far be considered as distinguishing traffics so as to take from different transportation charges the vice of preference have been described by this court. In *Wight v. United States*, 167 U. S. 512, 518, it is said: "It was the purpose of the section [2] to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under

the same circumstances of carriage, are compelled to pay different prices therefor." These words are given more precision by the declaration "that the phrase, 'under substantially similar circumstances and conditions,' as found in section 2, refers to matters of carriage, and does not include competition." And this was repeated in *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 161, 166. The facts in both cases give significance to the rulings. In the first case the charges to the shippers were the same, but one was given extra facilities; in the second case the extraneous effect of competition was excluded as an element in the application of the section. There is also example in *Interstate Commerce Commission v. Delaware, L. & W. R. R. Co.*, 220 U. S. 235. It was there held that a carrier could not look beyond goods tendered to it for transportation in carload lots "to the ownership of the shipment" as the basis for determining the application of its established rates. Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal? It is admitted that the fact that a railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put, and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges. See *Pennsylvania R. R. Co. v. International Mining Co.*, 173 Fed. Rep. 1.

But what are the differences in the traffics which are asserted by the companies? We have already condensed them from the pleadings, but we may use the expression of their ultimate elements by the companies, omitting, for the time being, the physical differences in facilities. They say: "When the railroad-fuel coal is consigned to the junction point, as provided in the present system of tariffs, the circumstances and conditions that differentiate this traffic from the traffic in commercial coal consigned to the same point are:

"1. The fuel coal so shipped is not in competition with the commercial coal consigned to the same point.

"2. It is in competition with other coals coming upon the line of the consuming road at other points, with which the commercial coal is not in competition.

"3. The transportation service is different, in that commercial coal at the junction point has reached the point of use, while railroad-fuel coal reaching the consuming railroad at the junction point is still subject to a transportation service before reaching the point of use,—a transportation under the 'Commodities Clause' and not under tariff."

These elements the Commission disregarded, it is contended, and that while it found a similarity in the traffics it did not consider or discuss the two most important features of difference—"the two features" which make the traffics unlike, that is, that railroad-fuel coal "does not come into competition with the commercial coal, and is in competition with coals coming on the railroad's line at other points." But such features do not affect the carriage, qualify or alter the essential service, which is to get an article from one place to another. The greater or less inducement to seek the service is not the service. Such competition, therefore, is as extraneous to the transportation as the instances in the cases cited. And equally so is the other "feature" that the fuel coal may be destined for

consumption beyond the junction point. The circumstances do not alter the fact that it and commercial coal go to the same point, and are delivered at the same point. There is, it is true, a difference in the manner of delivery, depending upon the difference in the facilities possessed by the railroads and other consignees.

The Commission, as we have seen, especially disclaimed holding that the rate to the junction point must be paid on shipments going beyond that point, and insisted that it only held that the charges to that point should be the same to all shippers, and rates through that point should also be the same to all shippers. And the Commission said that the testimony established that the service as to the coals was alike when they go beyond the junction point. The Commission, therefore, considered alone the service, disregarding circumstances and conditions which were mere incidents of it and had relation only to the respective shippers.

But the companies say, in criticism of the reasoning and order of the Commission, they are permitted to do indirectly what they want to do directly, that an easy way of evasion of the prohibiting order is to make a joint rate from the point of origin of the fuel coal to its points of consumption, and thereby be enabled "to charge a lower rate for the fuel coal than for the commercial coal between the same points." And further, in display of the easiness with which this can be accomplished and "how readily the Commission's order lends itself to manipulation of rates," they say that they have only to publish a nominal delivery point beyond the real delivery point, publish a rate to that point which they do not intend to charge and call their actual rate to the junction point, based on the special circumstances and conditions, a "division." They then ask if "the Commission can so easily juggle a rate for a good purpose, will not ingenious traffic agents and coal operators do the same for their own perverse ends." If such a situa-

tion artfully produced be used as a device for giving preferences the Commission might be able to find some means to defeat it. At present we must regard its possibility as relevant as exhibiting a misconception of the Commission's purpose. The Commission has not said what the rate should be, nor has it said, as we have seen, that the local rate to the junction point should be the same as the rate beyond that point. The Commission has ordered equality and struck down what it deemed to be preferential charges, even though they were made under formal tariffs. If there may be legal or illegal evasion of the order, we may wonder at the controversy. If the difference between the effect of the order and what the companies can do or want to do be, as is contended, a "question of words"—a "question of the nomenclature to be used in tariffs"—the order of the Commission may still be valid. Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the forms to what caused them and what they are intended to cause and do cause.

There are other contentions or rather phases of those that we have considered and which seek to further emphasize the strength of competition as a circumstance or condition differentiating the traffic. For instance, it is urged that the shipment of the fuel coal to a particular railroad "for the use of that railroad" makes special the traffic. And, further, that "a railroad is not a person" but is "rather in the nature of a geographical division and extends through long distances." Pushing the argument or illustrations farther, it is urged that a railroad company may be distinguished from the physical thing, the railroad itself, and may be a locality where a commodity is used, like "a river, a county or a city," and be entitled to preferential rates to accommodate competitive conditions. The *Import Rate Case*, 162 U. S. 197, is invoked as anal-

ogous. We cannot accept the likeness nor the distinctions which are said to establish it. The railroad company cannot be put out of view as a favored shipper, and we see many differences between such a shipper receiving coal for use in its locomotives and a nation as the destination of goods from other nations for distribution throughout its expanse on through rates from points of origin.

The point is made that "the Commission's method of filing fuel coal rates is illegal under section 6 of the Interstate Commerce Act and under the Elkins Act," and the latter act and § 6 are quoted in illustration. The rather vague argument which is urged to support the point lands in the proposition that the right to violate the law as to preference in rates is justified by the law in its requirement of the filing of schedules of rates. However, counsel say that "it all goes back to the same principle" "dealt with under point 1." We have sufficiently discussed point 1.

The decree of the Commerce Court is reversed and the case remanded with direction to dismiss the petition.

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Syllabus.

HYDE AND SCHNEIDER v. UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.

No. 447. Argued October 23, 24, 1911. Reargued May 3, 1912.—Decided
June 10, 1912.

In this case the defendant applied for a writ of certiorari and the Attorney General assented to granting it on the ground that the determination of the case depends upon the principles of law governing conspiracy and it is of vital importance to the United States, as well as its citizens, to have those principles settled by this court.

While under the ancient rule of conspiracy the gist was the conspiracy itself and the crime was complete without any overt act, § 5440, Rev. Stat. prescribes as necessary to constitute an offense under it not only the unlawful conspiracy but also an overt act to effect the object by at least one of the conspirators.

Quære as to the extent of agency between persons conspiring in violation of § 5440, Rev. Stat.

There may be a constructive presence in a State, distinct from personal presence, by which a crime committed in another State may be consummated, and render the person consummating it punishable at that place.

In construing criminal laws, courts must not be in too great solicitude for the criminal to give him immunity because of the difficulty in convicting or detecting him.

In determining the place of trial there is no oppression in taking the conspirators to the place where the overt act was performed rather than compelling the victims and witnesses to go to the place where the conspiracy was formed.

The size of our country has not become too great for the effective administration of criminal justice.

Where a continuing offense is committed in more than one district, the Sixth Amendment does not preclude a trial in any of those districts. *Armour Packing Co. v. United States*, 209 U. S. 56.

Overt acts performed in one district by one of the parties who had conspired in another district in violation of § 5440, Rev. Stat., give jurisdiction to the court in the district where the overt acts are performed as to all the conspirators. *Brown v. Elliott*, p. 392, *post*.

United States v. Kissel, 218 U. S. 601, followed to the effect that a conspiracy under § 5440, Rev. Stat., may be a continuing one, and that the offense is not barred on the expiration of the period from the date of the conspiracy itself.

The fact that one of the conspirators was the servant of another conspirator does not preclude there being a conspiracy between them; and, until there is an affirmative withdrawal from the conspiracy by the servant, his acts bind his employer and co-conspirator so far as preventing the statute of limitations from running.

Until a conspirator affirmatively withdraws from a continuing conspiracy there is conscious offending that prevents the statute from running.

A disclosure to the Government by a conspirator does not amount to a withdrawal that would start the statute running if he thereafter commits overt acts, and whether there was acquiescence in the later acts of another conspirator is for the jury to determine.

Pleas in abatement on account of irregularities in selecting and impaneling the grand jury which do not relate to the competency of individual jurors must be pleaded with strict exactness and at the first opportunity. *Agnew v. United States*, 165 U. S. 36.

While there may not be a conspiracy by one person alone, it is possible that some of the evidence may be admitted as against individual defendants and not against all; and it is not error for the court to charge that the jury might convict any one of the defendants alone, if accompanied by the statement that his instructions related to the sufficiency of evidence produced as to each defendant. In this case the charge of the court in regard to the conviction of one or more of the defendants was not to their prejudice but in their interest.

Whether the conviction of one of several persons charged with conspiracy can ever be illegal will not be considered when it appears that more than one have been convicted.

An objection to the admission of testimony in a trial for conspiracy offered exclusively as against one of the defendants becomes immaterial if that defendant is acquitted.

Even if a letter addressed to one of the defendants charged with conspiracy were improperly taken from the mails the fact is not relevant to the question of the guilt of the conspirators.

While any evidence affecting a particular defendant in a trial of several for conspiracy may be important to him while on trial, it ceases to be so in the reviewing court, if that defendant was acquitted.

In this case it does not appear that the jury was coerced by the court into agreeing on the verdict or that the conviction of some of the

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defendants and acquittal of others was the result of an improper agreement between the jurors.

Where the jury render a verdict within the issues, testimony of jurors themselves should not be received to show matters which essentially inhere in the verdict and necessarily can receive no corroboration.

35 App. D. C. 451, affirmed.

THE facts, which involve the validity of a trial, conviction and sentence for conspiracy under § 5440 Rev. Stat. are stated in the opinion.

Mr. A. S. Worthington, for the petitioners.

The *Solicitor General* for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ brings up for review a judgment of the Court of Appeals of the District of Columbia affirming a conviction of petitioners for the crime of conspiracy.

The main question in the case is the jurisdiction of the Supreme Court of the District of Columbia, where the trial and conviction were had, depending upon the place where the conspiracy, if any, was formed and the overt acts, if any, were done to effect its purpose. What the indictment charges is a fundamental element in the question.

Before proceeding to consider the indictment it may be well to state the laws and conditions to which the conspiracy charged in the indictment relates. By acts of Congress dated, respectively, March 3, 1853, 10 Stat. 244, 246, c. 145, and February 14, 1859, 11 Stat. 383, c. 33, the States of California and Oregon were granted, for the purpose of public schools, all of sections 16 and 32 in each township, with certain exceptions unimportant to mention. The States authorized the sale of the land so granted for \$1.25 per acre, California limiting the right of pur-

chase by one person (of land not suitable for cultivation) to 640 acres. The limitation in Oregon was 320 acres. The States required applicants to be citizens of the United States and of the States, that the purchases be for their own benefit, and a statement from each applicant that he had made no contract for the sale or disposition of the lands applied for.

Subsequent to these grants and prior to the year 1897 most of the lands had been taken up by settlers. Those not taken up were in the mountainous regions and were regarded as valueless.

By an act of Congress approved March 3, 1891, 26 Stat. 1093, 1103, c. 559, the President was authorized to create forest reservations, and by a subsequent act it was provided "that in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent."

The charge of the indictment is that the defendants in the case conspired to use the privilege of this act after fraudulently acquiring school sections from California and Oregon, and conspired to corrupt or use the officers of the General Land Office in Washington to make or facilitate the selection in exchange for such sections lands of the United States, and thereby defraud the United States.

Its allegations, omitting repetitions and redundancies, are as follows:

Frederick A. Hyde and John A. Benson were engaged from the 24th of October, 1901, until the 1st of February, 1904, in the city of San Francisco, State of California, in the business of obtaining from the United States and appropriating, in the manner hereinafter set forth, the possession and use of and title to public lands of the United

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States outside forest reserves established under the laws of the United States, in exchange for and in lieu of lands lying within such reserves and known as school lands, by them obtained from the States of California and Oregon in the manner hereinafter set forth. Henry P. Dimond and Joost H. Schneider were, during said periods, employés of Hyde and Benson in the matter of their business, Dimond as agent and attorney and Schneider as agent. Woodford D. Harlan and William E. Valk were, before and during such period, employés of the United States, holding official positions in the General Land Office at the city of Washington, in the District of Columbia, paid salaries as such, and, respectively, charged with duties pertaining to the disposal of the public lands lying outside of forest reserves established under the laws of the United States and open to selection under said laws, in exchange for and in lieu of lands within such reserves.

Benjamin F. Allen, was before and during such period, an employé of the United States, that is, a forest superintendent, and Grant I. Taggart a forest supervisor.

Hyde, Benson, Dimond and Schneider during such period, to-wit, on the 30th day of December, 1901, at Washington, D. C., unlawfully did conspire, combine and confederate together, and with other persons unknown, to defraud the United States out of the possession and use of and title to divers tracts of the public lands of the United States open and to be opened to selection in lieu of lands within forest reserves established and to be established in California and Oregon by means of false and fraudulent practices whereby Hyde and Benson were to obtain fraudulently from those States title to and possession of school lands within the limits of such reserves which were open to purchase from those States by residents thereof, being citizens of the United States or having declared their intention to become such, under the laws thereof, in quantities for each resident not exceeding 640

acres in California and 320 acres in Oregon, upon appropriate application supported by affidavit showing his qualifications to make such purchase, and, amongst other things (as before and during the said period was required by the laws of the said States), his intention to purchase in good faith and for his own benefit and that he had made no contract or agreement to sell the same. These applications were to be made in the names of fictitious persons and in the names of persons not really desiring or qualified to purchase said lands. The use of the last-mentioned names for such purpose Hyde and Benson were to procure by paying or causing to be paid to such persons small sums of money, and by falsely representing or causing to be represented to some of them that they were merely disposing of their rights to purchase such school lands.

The proposed use of fictitious affidavits is set out at considerable length, with the names that were used, the purpose being charged to obtain the lands according to the conspiracy detailed, obtain title from the United States with the intention of disposing of the same to the general public, and to defraud the United States "to the profit, gain and use of themselves."

Hyde and Benson were, during said period, to induce and procure and take advantage of the fact that they had induced and procured the said Woodford D. Harlan and William E. Valk, by paying them respectively divers sums of money for that purpose, corruptly to furnish information concerning the status in the General Land Office of all matters pertaining to their said business and especially to their false and fraudulent selections, and to expedite, contrary to their duty, the matters which should be pending in the Land Office pertaining to their business and the examination of such selections made and to be made by Hyde and Benson and by securing the approval thereof in advance and otherwise favoring and assisting Hyde and Benson in their fraudulent practices. This

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charge is dwelt upon at some length, and it is charged, besides, that Allen, the forest superintendent, and Taggart, the forest supervisor, had been and were to be corrupted, whereby they were to give such advice and information as to including or not including lands within a forest reserve as should be to the interest of Hyde and Benson.

Hyde, Benson, Dimond and Schneider, as a part of their conspiracy, were to secure by the means detailed and other means too numerous and diverse to be described, the establishment of forest reserves in California and Oregon in such localities in those States as would best effect the object of the conspiracy, by reason of the fact that large quantities of school lands in such localities were still undisposed of and open to purchase from said States, respectively.

Dimond, for money and other valuable considerations paid by Hyde and Benson, was, as attorney, to aid and assist Hyde and Benson in their business by appearing in their behalf before the appropriate officers of the Department of the Interior and of the General Land Office from time to time to urge speedy action by those officers upon the matters there pending pertaining to their said business and to further said business in the manner hereinafter shown, he, Dimond, knowing full well the fraudulent character of the business.

Schneider, in the capacity of employé of Hyde and Benson, was to aid and assist them by obtaining in the States of California and Oregon the fictitious affidavits and the affidavits of those persons who would permit the use of their names as stated, he knowing while so assisting the fraudulent character of the applications and the purpose for which they and the affidavits were to be used.

The indictment contains the description of the lands which it was the object of the conspiracy to secure, amounting to 6,800 acres, of which 3,400 acres were selected in

the name of C. W. Clarke; all of the lands being in forest reserves then lately before established under the laws of the United States.

On December 30, 1901, Dimond entered his appearance in the General Land Office as attorney for Clarke.

The other counts in the indictment, numbering 41, are substantially alike in their general allegations, differing as to their incidents. They charge, as in the first count, a conspiracy formed in Washington by the same parties and for the same purpose and to be executed in the same way in regard to lands in the various districts of the respective States, and that in pursuance of the conspiracy certain overt acts were done. Most of the overt acts charged consisted in the filing in the General Land Office by Dimond, as attorney for Hyde, his appearance in different selection cases, in some of which he urges and sets forth the reasons for favoring a speedy action.

In counts 35 to 40, both inclusive, the overt act charged is the payment of money by Benson to either Valk or Harlan, alleged in the indictment to be salaried officials of the General Land Office and charged with duties pertaining to the exchange of lands of private claim or ownership included in a forest reserve or other public land.

Two overt acts are charged against Hyde, one of which was committed on July 29, 1903, by causing to be transmitted by mail from the United States land office at Vancouver to the Commissioner of the General Land Office at Washington a written notification to the Commissioner, signed by Hyde for C. W. Clarke, that the latter appealed to the Secretary of the Interior from a certain decision of the Commissioner, with an assignment of errors, and the second of which was that Hyde, on March 31, 1902, caused to be presented by the hand of Dimond a paper signed by him, Hyde, notifying the Commissioner that one S. E. Kieffer was authorized and appointed as Hyde's

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agent to post notices on the ground described in a certain application and to make affidavit of posting.

Shortly after the indictment was found removal proceedings were instituted against Hyde and Dimond before a United States Commissioner in California, who, after taking testimony, ordered their removal. The United States Circuit Court denied writs of *habeas corpus* and *certiorari*, and its action was affirmed by this court. *Hyde v. Shine*, 199 U. S. 62.

There was a demurrer to the indictment, which was overruled, the ruling upon which was affirmed by the Court of Appeals of the District. *Hyde v. United States*, 27 App. D. C. 362.

Motions to require the Government to elect on which counts it would proceed were filed and also motions for a bill of particulars. The latter was granted and the bill of particulars filed; the former was overruled.

Pleas in abatement were filed, to which demurrers were sustained, and finally the defendants were arraigned and pleas of not guilty made and the case proceeded to trial. Benson and Dimond were acquitted. Hyde and Schneider were convicted on all counts except 29 and 33, which were abandoned by the Government. Hyde was sentenced to two years' imprisonment and to pay a fine of \$10,000, and Schneider was sentenced to imprisonment for one year and two months and to pay a fine of \$2,000.

Their conviction and sentence were affirmed by the Court of Appeals. *Hyde v. United States*, 35 App. D. C. 451.

The case is here on *certiorari*.

The Attorney General assented to the granting of the writ, he saying that "the determination of this case depends upon the principles of law governing conspiracy," and that in view of the decisions of the lower courts and of the numerous prosecutions under the conspiracy statute, "it was of vital importance to the United States, as

well as to its citizens, that these principles be definitely settled by this court."

The petitioners asked the court to review the case for the purpose of having it decide certain questions of law which they characterized as "important and fundamental," one of which, counsel says, granting the writ took out of the case. Of those remaining one is "as to the effect of an overt act in giving jurisdiction in an indictment for conspiracy under section 5440;" and the other is "as to the effect of overt acts by some of the accused in depriving the petitioners of the benefit of the statute of limitations."

There are other questions arising from the conduct of the trial and upon which separate briefs are filed. We postpone their consideration until after the more important questions, which induced the *certiorari*, are discussed.

First, as to the overt acts in giving jurisdiction:

It will be observed that the indictment charges that the conspiracy was formed in the District of Columbia and that certain of the overt acts were performed there and others in California. A question arose at the termination of the trial and before the case was submitted to the jury as to whether the charge of the indictment was sustained. Defendant moved to take the case from the jury because there was no evidence to support the allegation that the defendants conspired within the District of Columbia. The court denied the motion, but said in passing on it that it was "not claimed on the part of the Government that the defendants had conspired within this District in any other sense than that overt acts were committed by them here." The contention was, the court said further, "that if any overt act was committed here the defendants thereby conspired here." So understanding the contentions and the proof, the court expressed its views as follows: "If these defendants got together in California and planned to defraud the United States out of its lands by the means charged in the indictment, and

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in pursuance of that plan sent Dimond here to get the titles from the Government, they were acting within the District of Columbia as much as if they had come and done the thing themselves." And subsequently the United States Attorney assented to the proposition that the Government could not prevail except on the theory that it was sufficient to show an overt act in the District of Columbia, and the court said "that if that theory was wrong, of course they failed."

The question, therefore, is presented as to the venue in conspiracy cases, whether it must be at the place where the conspiracy is entered into or whether it may be at the place where the overt act is performed, the Sixth Amendment of the Constitution of the United States requiring all criminal prosecutions to be in the "district wherein the crime shall have been committed."

The crime of conspiracy is defined by § 5440 of the Revised Statutes as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime and that the requirement of an overt act does not give the offense criminal quality or extent, but that the provision of the statute in regard to such act merely affords an opportunity to withdraw from the design without incurring its criminality (called in the cases a *locus penitentiae*). The following, among other cases, are cited in support of this view: *United States v. Britton*, 108 U. S. 199, 204; *Pettibone v. United States*, 148 U. S. 197, 203;

Dealy v. United States, 152 U. S. 539, 547; *Bannon v. United States*, 156 U. S. 464-468-469, and the opinion of this court when this case was here before, 199 U. S. 62-76.

It must be conceded at the outset that there is language in those cases that, considered by itself, justifies the contention based upon them. In *United States v. Britton*, for instance—and the language of the case is resorted to for the genesis of the doctrine and makes strongest for the contention—Mr. Justice Woods, speaking for the court, said:

“The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg. v. King*, 7 Q. B. 782; *Commonwealth v. Shedd*, 7 Cush. 514.”

The case was followed in *Pettibone v. United States* to the effect “that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by any one or more of the conspirators in furthering the object of the conspiracy.”

In *Dealy v. United States* it is said that “the gist of the offense is the conspiracy. . . . Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.”

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Indeed, it must be said that the cases abound with statements that the conspiracy is the "gist" of the offense or the "gravamen" of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by § 5440, *supra*. It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but § 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable. Interpreting the provision, it was decided in *Hyde v. Shine*, 199 U. S. 62, 76, that an overt act is necessary to complete the offense. And so it was said in *United States v. Hirsch*, 100 U. S. 33, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete another thing and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the Solicitor General, "can be a crime of which no court can take cognizance." The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.

A question may be raised as to the extent of the agency between conspirators, but we need not enter into that broad inquiry. As far as the case at bar is concerned, it

may be admitted that the act must have the conspiracy in view and have some power to effect it. In the present case the field of operation and its consummation were to be and were in the States of California and Oregon and in the District of Columbia, where the General Land Office is situated. The action of the latter was to be induced or influenced; and this might be through deception, it might be through fraud, or it might be through innocent agents and acts of themselves having no illegality, but effectually causing and moving official action to the consummation of the end designed and contemplated. Overt acts of all these kinds are charged. The bribery and deception of the officers, the intervention of attorneys and the seemingly harmless mailing of information and directions all are charged and all had some relation to the scheme devised and were steps to its accomplishment. The powers of the Land Office were necessarily to be invoked and proceedings therein instituted and prosecuted by acts innocent indeed of themselves, taking only criminal taint from the purpose for which they were done. Indeed, is not this so of acts done in the execution of any crime? Discharging a loaded pistol at a target is an innocent pastime; discharging a loaded pistol at a human being with felonious intent takes a quality from such intent and may constitute murder.

If the unlawful combination and the overt act constitute the offense, as stated in *Hyde v. Shine*, marking its beginning and its execution or a step to its execution, § 731 of the Revised Statute must be applied. That section provides that "when any offense against the United States is begun in one judicial district and completed in another it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein." This provision takes an emphasis of signification from the fact

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that it was originally a part of the same section of the statute which defined conspiracy—that is § 30 of the act of March 2, 1867, 14 Stat. 484, c. 169. Nor has the provision lost the strength of meaning derived from such association by its subsequent separation, for it is provided in § 5600 of the Revised Statutes that “the arrangement and classification of the several sections of the revision have been made for the more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed.”

Section 731 was applied in *In re Palliser* (136 U. S. 257) to the offense of unlawfully using the mails. It was decided that an offense committed by mailing a letter was continued in the place where the letter was received, and triable in the District Court of the United States having jurisdiction in such place. The case was cited in *Benson v. Henkel*, 198 U. S. 1, 15, which was concerned with extradition proceedings against one charged with the crime of bribery, alleged to have been committed by mailing a letter in the State of California, directed to certain officers of the General Land Office in the District of Columbia. It was objected to the removal of the defendant to the District of Columbia for trial that the crime was committed, if at all, in California. The contention was held untenable under the ruling in *In re Palliser*. The strong expression of counsel for the defendants may, therefore, be turned from derision of to the support of the view, that crime, even conspiracy, may be carried from one place to another in the “mail pouches.” And we may ask in passing, may not a conspiracy be formed through the mails, constituted by letters sent by persons living in different States? And, if so formed, we may further ask, to which State would the conspiracy be assigned? In such cases must the law come forward with some presumption or fiction, if you

please, to give locality to an union of minds between men who were never at the same place at the same time? The statute cuts through such puzzles and makes the act of a conspirator, which necessarily has a definite place without the aid of presumption or fiction, the legal inception of guilt inculcating all and subjecting all to punishment.

In re Palliser was also applied in *Burton v. United States*, 202 U. S. 344, in which it was held that there was jurisdiction in Missouri of a criminal charge against Burton for agreeing in that State to receive prohibited compensation for certain services to be rendered by him while he was a United States Senator, the offer being carried to Missouri by an agent and accepted there, Burton not being personally present in the State. The court said, through Mr. Justice HARLAN (p. 387): "The constitutional requirement is that the crime shall be tried in the State and District where committed, not necessarily in the State or district where the party committing it happened to be at the time. This distinction was brought out and recognized in *Palliser's* case, 136 U. S. 257, 265."

And, after stating that the agreement between the parties was completed at the time of the acceptance of Burton's offer at St. Louis, he added: "Then the offense was committed, and it was committed at St. Louis, notwithstanding the defendant was not personally present in Missouri when his offer was accepted and the agreement was completed." And the contention was rejected "that an individual could not, either in law or within the meaning of the Constitution, commit a crime within a State in which he is not physically present at the time the crime is committed."

This court has recognized, therefore, that there may be a constructive presence in a State, distinct from a personal presence, by which a crime may be consummated. And if it may be consummated it may be punished by an exercise of jurisdiction; that is, a person committing it may

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be brought to trial and condemnation. And this must be so if we would fit the laws and their administration to the acts of men and not be led away by mere "bookish theorick." We have held that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing. If so in time, it may be in place—carrying to the whole area of its operations the guilt of its conception and that which follows guilt, trial and punishment. As we have pointed out, the statute states what in addition to the agreement is necessary to complete the measure of the offense. The guilty purpose must be put into a guilty act.

We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused, and we do not wish to put out of view such possibility. But there are counter considerations. It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him—indeed, of even detecting him. And this may result, if the rule contended for be adopted. Let him meet with his fellows in secret and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment in all. And the suppositions are not fanciful, as illustrated by a case submitted coincidentally with this. *Brown v. Elliott*, *post*, p. 392. The possibility of such a result repels the contention and demonstrates that to yield to it would carry technical rules and rigidity of reasoning too far for the practical administration of criminal justice. We see no reason why a constructive presence should not be assigned

to conspirators as well as to other criminals; and we certainly cannot assent to the proposition that it is not competent for Congress to define what shall constitute the offense of conspiracy or when it shall be considered complete and do with it as with other crimes which are commenced in one place and continued in another. Nor do we think that the size of our country has become too great for the effective administration of criminal justice. We held in *Armour Packing Company v. United States*, 209 U. S. 56, that the transportation of merchandise for less than the published rate is, under the Elkins Act, a continuing offense, and that the Sixth Amendment of the Constitution of the United States, providing that an accused shall be tried in the State and District where the crime is committed, did not preclude a trial of the offense in any of the districts through which the transportation was conducted. See also *Haas v. Henkel*, 216 U. S. 462, 473.

Cases are cited which oppose the views we have expressed and others to support them. In *Robinson v. United States*, in the Circuit Court of Appeals of the Eighth Circuit, the question was directly presented. 172 Fed. Rep. 105. The conspiracy passed on was alleged in the indictment to have been entered into in Cincinnati and Chicago, the overt acts set out were proved to have been committed in Minneapolis and the evidence showed that it was the intention of the conspirators to carry out their conspiracy at Minneapolis. The trial court was moved to direct a verdict for the defendants if the jury found that the agreement was entered into in Cincinnati and Chicago and was complete when the parties went into the district of Minnesota. The instruction was refused and, the defendants having been convicted, the refusal was assigned as error, in the Circuit Court of Appeals, based on the provisions of the Constitution of the United States giving those accused of crime the right to trial by jury of the State and district wherein the crime shall have been committed.

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The court, passing on the ruling of the trial court, said by District Judge Carland (p. 108) and we quote its language to avail ourselves not only of the citation of cases, but of the comments upon them:

"At common law the venue in conspiracy could be laid in any county in which it could be proven that an overt act was done by any one of the conspirators in furtherance of their common design. 1 Archbold's Criminal Practice and Pleading (8th ed.) p. 226. Where a conspiracy was formed at sea, and an overt act done in Middlesex county, it was held that the venue was properly laid in that county. *The King v. Bresac and Scott*, 4 East, 164. In the case of *King v. Bowes and Others*, referred to in the above case, the conspirators were tried in Middlesex, though there was no proof of an actual conspiracy in that county, and the acts and doings of some of them were wholly in other counties. In *People v. Mather*, 4 Wend. (N. Y.) 261, 21 Am. Dec. 122, Marcy, J., in delivering the opinion of the court, said:

'I admit that it is the illegal agreement that constitutes the crime. When that is concluded the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown or ever performed to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act there they renew, or perhaps, to speak more properly they continue, their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. In this respect, conspiracy resembles

treason in England, when directed against the life of the King. The crime consists in imagining the death of the King. In contemplation of law, the crime is committed wherever the traitor is and furnishes proof of his wicked intention by the exhibition of any overt act.'

"To the same effect are *Commonwealth v. Gillespie*, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; *Noyes v. State*, 41 N. J. Law, 418; *Commonwealth v. Corlies*, 3 Brewst. (Pa.) 575.

"If this was the law of venue in conspiracies at common law, where proof of an overt act was not necessary to show a completed offense, the same rule can be urged with much greater force under section 5440, Rev. St. U. S., as the offense described therein for all practical purposes is not complete until an overt act is committed. . . . It seems clear, then, that whether we place reliance on the common law or on section 731, Rev. St., the venue of the offense was correctly laid in the district of Minnesota, and the evidence sustained the allegation of the indictment."

To the cases cited by the learned court these may be added: *State v. Nugent*, 77 N. J. L. 84, 86; *Bloomer v. State*, 48 Maryland, 521; *People v. Arnold*, 46 Michigan, 268, 275; *American Insurance Co. v. State*, 75 Mississippi, 24; *State v. Hamilton*, 13 Nevada, 386; *International Harvester Co. v. Commonwealth*, 137 Kentucky, 668, 674; *Pearce v. Territory*, 11 Oklahoma, 438; *Ex parte Rogers*, 10 Tex. App. 655, and *Raleigh v. Cook*, 60 Texas, 438.

There are cases in the lower Federal courts which may be cited for and against the demarcation of the conspiracy and the overt act. To compare and comment on them would extend this opinion to too great length. We may say the same of the special citation of cases by defendants.

But it is said that the crime charged is not the crime proved, even if it be assumed that the overt act is part of the crime of conspiracy under § 5440. In support of

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the contention it is said that the averment of the indictment is that the conspiracy itself was entered into in the District of Columbia and that the overt acts were committed there. It is conceded by the Government that the conspiracy was originally formed, not in the District of Columbia, but in the State of California, and we have seen that it was the view of the trial court that the defendants had not conspired within the District of Columbia "in any other sense than that overt acts were committed by them" there.

The contention is answered by the views which we have already expressed. As the overt acts give jurisdiction for trial, it is not essential where the conspiracy is formed so far as the jurisdiction of the court in which the indictment is found and tried is concerned. This is established by the cases which have been cited, and the question will be considered further in *Brown v. Elliott* and *Moore v. Elliott*, cases submitted coincidentally with this, *post*, p. 392.

The fifth, sixth, seventh and eighth assignments of error invoke the statute of limitations in behalf of Hyde and Schneider.

The plea of the statute as affected by overt acts was considered in *United States v. Kissel*, 218 U. S. 601, where it was declared that a conspiracy may be a continuing one, and the doctrine is applicable to the case at bar unless there is something special in the facts regarding Hyde and Schneider which constitutes a defense as to them. This is asserted. It is contended that the relation of Schneider to the conspiracy was only that of one rendering service as a servant of his master (Hyde), in consideration of the salary paid to him by his master, and that he had not within three years before the finding of the indictment participated in any way in the carrying out of the master's scheme, the subject of the conspiracy. And from this it is contended the question arises whether Hyde is not also entitled to the protection of the statute of limitation

in so far as he is charged with conspiring with his employé, Schneider.

But the fact that a salary was paid by one to another would not preclude a conspiracy between them. It might, indeed, mark a more humble criminal desire, and one which preferred a certain reward rather than take chances in the success of a criminal enterprise, and it was certainly not inconsistent with a full and active participation in the scheme. Indeed, Schneider, in a confession which we shall presently refer to, stated that a salary and the certainty of employment was his inducement.

The Government contends that there was such participation originally and to a time within the statute, and that there is nothing to show a repudiation of or withdrawal from the conspiracy by him before 1902, when he made a partial disclosure of the conspiracy to the Government. But upon this the Government frankly says it cannot rely for an affirmance of the judgment, in view of the charge of the court to the jury.

The court charged the jury in substance that if Schneider had engaged in the conspiracy "back of the three year period" and the conspiracy contemplated that acts should be done from time to time through a series of years until the purposes of the conspiracy should be accomplished, although he, Schneider, did not do anything within the three year period but "remained acquiescent, expecting and understanding" that further acts should be performed, they, if performed, would be his acts "and would have the same effect against him as if he had done them himself. He would still be acting through his colleagues. He might be playing his part by keeping still as much as he did formerly by acting."

The contention of the defendants is that the statute begins to run from the last overt act within three years from the formation of the conspiracy within which there was *conscious participation*. (Italics ours.) The Govern-

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ment makes the counter contention that however true this may be as to accomplished conspiracies it is not true of one having continuity of purpose and which contemplated the performance of acts through a series of years. And that such a distinction can exist, we have seen, is decided and illustrated in *United States v. Kissel*. And necessarily so. Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time he remains an agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the *Kissel Case* stated in another way. As he has started evil forces he must withdraw his support

from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending and the principle of the cases cited by defendants is satisfied.¹

But it is contended that under the instructions of the court Schneider was involved in criminality by overt acts done not only after he had ceased to be in Hyde's employment in any capacity, but after he had disclosed that there was a conspiracy against the Government. It was testified by Woodford D. Harlan that disclosure of frauds had come through one J. A. Zabriskie, he, however, knowing nothing about the matters except as informed by Schneider. The matter was referred to an agent who reported conversations with Schneider giving detailed information of the frauds and the manner by which they were accomplished. This report was received at the General Land Office in November, 1902. It does not appear what became of the report. The recollection of the witness was that he saw the report first, and he testified that he took it to the clerk who was distributing the mail, but for what purpose it does not appear. He never saw it again until one day during the trial. He, however, wrote to Benson about it, and after having seen weekly statements of certain special agents who were investigating the Schneider charges, he notified Benson. This seems to have been in March, 1903. Later, in October and November, 1903, he also wrote Benson at the suggestion of detective Burns.

There are overt acts charged subsequent to the disclosure made by Schneider, and it is contended that by the instruction embodied in the seventh assignment of error Schneider was continued in the conspiracy by overt acts committed after his disclosure to the agent of the Land

¹ *Ex parte Black*, 147 Fed. Rep. 832, 840, and same case in 160 Fed. Rep. 431; *Ware v. United States*, 154 Fed. Rep. 577; *United States v. Eccles*, 181 Fed. Rep. 906; *United States v. Greene*, 115 Fed. Rep. 343, 350; *Ochs v. The People*, 25 Ill. App. 379, same case, 124 Illinois, 399.

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Department had been communicated to the Commissioner of the General Land Office.

The instruction to which this effect is attributed is as follows:

"Now if he [Schneider] had stood by that and had gone on and disclosed all he knew about the matter, and said: 'I will have nothing more to do with this matter,' nothing that could have been done by the others after that could affect him at all. He would have been out of it; he would have repudiated it. As bearing on the effect of what he did there if you find he did it, you are to consider what he did afterwards. If, after having made this disclosure as far as he did, he shut his mouth and said: 'I will not say anything more about this matter; the Government shall not get anything more out of me,' that is not an act by him in furtherance of the conspiracy, but it is a piece of evidence to be considered by you as bearing on the question whether he was acquiescent—what his attitude of mind toward the conspiracy was.

"If he had stood on his disclosure, you might have said: 'Well, he is out of it from now on'—but in connection with that you are to consider what he said afterwards. If you find that he closed his mouth and refused to say anything more about the matter and kept still in the interest of the others, you would have a right to say that that showed that he was still acquiescent in the matter. It would neutralize, if you choose to treat it so, the effect of his former declaration, that he did know, and was willing to disclose."

The instruction does not sustain the contention based upon it. The court submitted to the jury the effect of repudiation, and whether it was adhered to, as evidence of Schneider's further participation in the conspiracy by the overt acts done subsequent to the date of his disclosure. Acts prior to that time are within the principles we have announced, and the only question under the

instruction is whether there was an acquiescence which embraced the later acts, and this, we think, under the circumstances, was for the jury to determine.

The other questions in the case we shall now proceed to consider.

It is contended (ninth assignment of error) that the court erred in sustaining the demurrers to the pleas in abatement of Hyde and Schneider.

The defendants demurred to the indictment, which was overruled, and a special appeal was allowed to the Court of Appeals of the District and the ruling on the demurrer affirmed.

The case was remanded for further proceedings and the mandate was filed in the Supreme Court of the District April 26, 1906. Nearly two years afterwards (April 1, 1908) the defendants filed pleas in abatement, alleging irregularity in the making up of the list of jurors from which the grand jury which found the indictment was selected. The charge was that the commission to make a list of jurors appointed under § 198 of the District Code placed on the "list the names of persons many of which were selected not by themselves or by any of them, but by some other person or persons whose names are" to the defendant unknown, and that on the 16th of November, 1903, the commissioners met in the District of Columbia and then and there made an order by which they undertook to appoint one James A. Harstock secretary of said commission, and undertook by a further order to give him the right of access to the jury box provided in accordance with § 200 of the Code, and that he took the box, unaccompanied by any other person into a room in the City Hall and there opened it and took out of it all of the pieces of paper therein containing the names of the jurors, and from day to day during several successive days replaced in the box such names as he deemed fit and thereupon returned it to the custody of the clerk. The

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names of twenty-three persons were drawn from the box and constituted the grand jury which found the indictment. In consequence of this it was averred that the grand jury was not a legal body.

Demurrers were filed and sustained to the pleas, and to support the ruling of the court the Government cites *Agnew v. United States*, 165 U. S. 36. The defendants contest the application of the case on two grounds: (1) that under the District Code a plea in abatement comes properly 'after a demurrer to the indictment and before pleas to the matter of the indictment, such as not guilty or special pleas; and (2) that whether a plea is seasonably filed cannot be resisted by demurrer but only by a motion to strike out.

Both propositions may be formally correct, but do not preclude the court from itself noticing an unreasonable delay or treating the demurrer as raising that objection. And by concession of counsel that is what the court, in effect, did. Indeed, in the "points and authorities" filed with the demurrer it is urged that "the said pleas are not filed within a reasonable time." There was certainly unreasonable delay. It is said in the *Agnew Case* that pleas in abatement on account of irregularities in selecting and impaneling a grand jury which did not relate to the competency of individual jurors must be pleaded with strict exactness and that a defendant must take the first opportunity in his power to make the objection. The indictment in that case was returned December 12, 1895; the plea in abatement was filed on the 17th of that month. It was held to have been filed too late.

In the case at bar four years elapsed between the finding of the indictment and the filing of the plea, two years after the mandate of the Court of Appeals sustaining the action of the trial court upon the demurrer and after a bill of particulars had been demanded and furnished. The delay is not attempted to be explained.

It is extremely doubtful whether the pleas were not defective under the *Agnew Case*. In that case it was alleged that the irregularities complained of tended to the injury and prejudice of the defendant, no grounds, however, being assigned for the conclusion, and the record did not exhibit any. In the case at bar the plea is not even that specific. It is not shown that any juror was disqualified, nor is it shown that the grand jury was composed of jurors not selected by the commission. It is alleged, it is true, that names which had been put in the box by the commissioners had been taken out by Harstock, and that he put back those only that he deemed fit and proper. It follows, of course, from this that had all of the original names been in the box the grand jury might have been differently composed, but from this it cannot be inferred that injury or prejudice resulted to the defendants.

The tenth assignment of error is directed against the instruction of the court that the jury might convict any one of the defendants alone, including Hyde. In explanation of the instruction the court said to the jury that as to each defendant evidence was admitted which was not admitted against the others, and instanced as an example an alleged confession of Schneider which, the court said, was admitted against him only. "The same would be true," the court said, "as to Dimond, as to whom a great deal of evidence was admitted that was not received against the other defendants." And further: "So that it is true, as I stated in a proposition for the benefit of counsel, that there may be a verdict against any one of the defendants, whether one or more, as to whom the evidence submitted, and received against him or them, proves that he or they conspired as charged, provided any overt act is also proved."

If there is confusion in the instruction it is easily resolved. It is clear when read in connection with other

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instructions that the court distinguished the purpose and effect of particular testimony and did not mean to say that there could be a conspiracy by one defendant alone. So regarding it, we pass to the consideration of the objection urged against it.

It is insisted that it is not competent in any case where two or more persons are charged with conspiracy, and all are on trial, to find a verdict against one of them only, in any aspect of the evidence, and, further, that as to the defendant Hyde there is no evidence in the case which justified a verdict against him alone, even if the principle announced by the court is in the abstract correct.

The immediate answer is that there was not a verdict against one defendant, and besides the argument of counsel is somewhat minute, and its criticism is based on a partial view of the instructions and of the evidence, which, we think, preclude the inferences which are deduced from the instructions.

The court's charge was necessarily very long and comprehensive, and a reproduction of it is not convenient, but certain of its general propositions may be stated. "Each count of the indictment," it was said, "charges the same conspiracy, and, in addition thereto, one or more overt acts alleged to have been done in pursuance of it. So that, stated in one way, these counts subsequent to the first count contain nothing new except the overt acts; and when you take those up one by one, the question is, if you have found the conspiracy in the first place, whether the overt acts charged were committed. If you do not find the conspiracy, of course the overt acts cannot be found."

The court emphasized the necessity of the proof of the conspiracy and stated that by it the overt acts were to be judged, saying, "An overt act must be one in pursuance of the conspiracy and one in furtherance of it;" and whether a certain act was in pursuance of it might depend entirely upon what the conspiracy was.

"The first question is," the court charged, "Did the defendants conspire at all? The second question is whether they conspired to accomplish the end alleged. The third question is, whether they conspired to accomplish that end by the fraudulent means alleged, so far as the indictment in that respect is necessary to be proved, referring to what has been already stated in that regard. The fourth question is, under each count, whether the overt act therein mentioned has been proved.

"Two other important questions must be determined in connection with the foregoing: One relating to the place, the other to the time. The conspiracy must have existed in the District of Columbia, and it must have existed and some overt act in pursuance of it must have been committed within three years next before the filing of the indictment."

And, assuming that the conspiracy was established and overt acts in furtherance of it shown in the District of Columbia, the court explained, "the conspiracy is here [the District of Columbia] just as truly as if the defendants were all here in person, doing those things with the common mind and purpose which contemplated them. In such circumstances the defendants would be conspiring together in the doing of each act because each act would have reference to the conspiracy. It would not be necessary that they should put their heads together and go over the terms of the conspiracy every time an act was done in furtherance of it. It would be enough if the act was an expression of their common understanding."

The court instructed the jury further as follows:

"Now, it has been suggested that if these men were guilty there were others just as guilty. That does not make any difference. The indictment itself, in one clause of it which I did not read to you, charges that these defendants conspired with each other and with other persons to the grand jury unknown. But that does not make any

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difference. If there are other persons who might have been prosecuted, and would have been liable, and they are not prosecuted, that is no concern of yours. You are only to consider the question of whether these defendants conspired in the way alleged, and whether the overt act was committed."

And the court charged the jury that some of the defendants could be convicted on one count and some on another count; that there was "practically one charge, although in so many counts. It is one conspiracy with allegations of different acts done in pursuance of it. . . . But you cannot split the matter up."

We think, therefore, that the instruction excepted to was in the interest of the defendants, not to their prejudice. It excluded from consideration as to each of them testimony which might possibly have no relation to him. It is true that the jury convicted Hyde and Schneider and acquitted Benson and Dimond. But, as said by the Government, "This does not signify that the evidence against Hyde and Schneider was of a different offense than that charged, but only that the proof against them was more conclusive than that against Benson and Dimond."

It is not necessary to review the cases cited by the defendants holding that conspiracy is the crime of at least two persons and that where all but one are acquitted there can be no legal conviction as to him, the acquittal of the others being tantamount to the finding of no conspiracy. All but one were not acquitted.

The next assignment of defendants is that the court erred in allowing the District Attorney, on the direct examination of witnesses for the Government, to examine them as to previous statements made by them to certain representatives of the Government and in permitting comment upon such statements as tended to show their truth.

This assignment is directed particularly against the examination of three witnesses, William E. Valk, S. J. Holsinger and Tillie A. Fleischauer. These witnesses, not remembering certain matters, were asked about conversations with him or of written statements made by the witnesses examined, for the purpose of refreshing their memory. This was the purpose declared at the time and was the ground of the ruling of the court. Objection was made, however, and it was urged and is now urged here, that this could not be done unless upon the ground of surprise and for the purpose of discrediting the witnesses. In support of the objection § 1073a of the District Code is cited in regard to the manner and extent of contradicting witnesses by proof of former statements. The court, however, permitted the examination solely as a means of refreshing the memory of the witnesses, and they, besides, admitted the truth of what was stated. We see no error in the ruling. Indeed, it may be said that as to two of the witnesses, their statements related to Benson alone, and by his acquittal, if the ruling was error, it became unimportant.

The next contention, constituting the twelfth assignment of error, is as to the refusal of the court to permit the defendants to prove that certain letters addressed to John P. Jones never reached the Dead Letter Office. This testimony, it is insisted, became significant and important to the defendants from the fact that the District Attorney had asked Schneider if he (Schneider) had not gone under the name of John P. Jones at the post office while in Mexico at a place called Allamos. On redirect examination he explained the reason to have been that he had suspected the postmaster at Tucson, that letters which had been written to him had not reached him, and that at the time mentioned his wife, who was at Tucson, addressed him as John P. Jones, but that nobody else had. He further testified that the letters he referred to were

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"right on the desk" (the desk in the court room) "in the possession of the Government." Upon the demand of counsel the District Attorney produced the letters. Thereupon counsel questioned Schneider as to the letters which were addressed to John P. Jones at Fuerte, Mexico, postmarked Tucson, Arizona. The District Attorney then asked counsel for defendants if he desired "to offer the envelopes in evidence," to which the answer was made: "No; I don't care to offer anything further in connection with that transaction, at present." The District Attorney then offered them. Objection was made but was subsequently withdrawn, the court saying, upon the witness stating that the address upon them was in his wife's handwriting, "They [the letters] are addressed to him in the name of John P. Jones. The envelopes may be received, if it is so agreed, for the purpose of showing the postmarks, etc. This I suppose to be in corroboration of the statements of the witness as to why he changed his name."

The District Attorney was then called as a witness by counsel for the defendants and testified that he had not seen the letters "until one day in court here," and that when reference was made to them "they were produced" to him "by Mr. Pugh." The latter being called said that they came into his "possession in an envelope taken from Secretary Hitchcock's safe some time after Mr. Burns withdrew from the case, or some time after he severed his government connection with it." Burns, he testified, was in San Francisco.

Dalzell was subsequently called as a witness to testify, as has been stated, and it was said by counsel for defendants, addressing the court, that the Government had brought out that Schneider had gone under an assumed name, and that the evidence tended to show that the "reason for that, or one reason for it, was that his mail was being tampered with," "but it leaves room for the

Government to contend that those letters have been to the Dead Letter Office, and have been opened there, and might have gotten in the possession of the Secretary of the Interior or Mr. Burns honestly. We offer to call this witness [Dalzell] for the purpose of closing that gap, and showing that necessarily somebody must have been committing a greater crime than is charged against any of these defendants, in robbing the mail." The District Attorney in effect disclaimed the purpose which was attributed to him and necessarily there was no gap to be closed, nor is it shown that any purpose was subsequently attempted, which the testimony would have precluded.

The possibility suggested by the testimony is not attempted to be justified by the Government, and gives a painful surprise, but we cannot see how proof of "a greater crime . . . in robbing the mails" was relevant to a decision of the charge then under consideration.

The thirteenth assignment of error is directed against an instruction of the court which opposed the contention of defendants that "the titles obtained from the States were perfectly and absolutely valid as to all persons and at all times, except as to the particular State which had given the title and which alone could assail it." The question involved in the contention is settled by the decision of the case when it was here on the proceedings in *habeas corpus*, 199 U. S. 62, 82 and 83.

The fourteenth assignment of error is that the court erred in refusing to instruct the jury that want of personal knowledge of the character of the land applied for, or that it was not adversely occupied, did not make the application void. It is contended that if the applicant believed the statements were true, the application was neither false nor fraudulent.

We answer the contention as the Court of Appeals did, "the question is immaterial, because the applications were fraudulent by reason of the agreement for transfer"—

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that is, the applicants were not buying for themselves, but for Hyde. We need not inquire whether the statutes required the affidavits to be made on personal knowledge.

Objection is made in other assignments of error to the comments of the court "that written evidence, letters, for instance, written by parties at the time, are entitled to peculiar consideration as evidence." And to the further comment as to certain anonymous letters attributed to Dimond, the court saying to the jury that they would have to consider whether he wrote them, and added the following: "That has been treated in the argument as a very important question, and justly so. You cannot fail to see the importance of that question. There are some of the letters that were typewritten, and there is one printed with a pen."

Any evidence affecting a particular defendant is important to him when on trial. It ceases to be so in a tribunal of review if he was acquitted, as Dimond was, and may be dismissed from further consideration. And we see no error in the comments of the court on the consideration to be given to written evidence. It was but the declaration of an abstract proposition. It was not an attempt to enforce some particular part of the testimony and to take from the jury their province of considering it all or weighing the respective parts. This is shown by the charge of the court, considered in its entirety.

In the seventeenth assignment of error defendants complain that they were not allowed to show by an examination of the jurors that the "verdict was the result of a bargain and was brought about by what, under the circumstances, amounted to coercion by the court."

The record shows the following:

"Monday, June 22, 1908, at 11:30 A. M., the jury returned to the courtroom and the foreman announced that they were unable to agree. The court thereupon instructed the jury to retire for further deliberation, and

make another effort to agree upon a verdict, charging them, however, that should they render a verdict it must be one to which they all freely agreed; that the law would not recognize a coerced verdict or one which was not the free expression of the views and opinions of the jurymen, and that if after another conscientious effort the jury still fail to agree they should return to the court and so state. That it was not the purpose of the court to unduly prolong their deliberations, and that if they could not conscientiously and freely agree upon a verdict they would be discharged."

At ten minutes before three o'clock they were brought into court and again declared that they were unable to agree, and the court instructed them further, after consultation with counsel for the Government and defendants, and to which no exception was made, suggesting a consideration of the possibility of the guilt of some of the defendants and not of others. The jury, shortly after they went out, announced their agreement, finding a verdict against Hyde and Schneider of being guilty "in manner and form as charged," and Benson and Dimond not guilty.

On motion of counsel the jury was polled as to Hyde and Schneider, respectively, and they answered guilty on certain counts and not guilty on the 29th and 33d counts.

The supposed misconduct of the jury was made a ground of new trial. Certain supporting affidavits were made by counsel upon information. Counsel respectively averred that they believed the information given them to be true and that it was received partly from one of the jurors and partly from a person who had conferences with another; and that two of the jurors were requested to make affidavit, but under the advice of their counsel they declined unless required by the court.

The motion for a new trial set forth that the verdict was the result of an agreement between certain of the

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jurors who believed all of the defendants should be convicted and certain jurors who believed that all of the defendants should be acquitted, by which agreement the acquittal of Benson was exchanged for the conviction of Hyde and the conviction of Schneider for the acquittal of Dimond. And this was brought about, it is contended and argued, as the result of what "under the circumstances amounted to coercion by the court."

There is nothing in the record to justify the contention. It is true the trial was a long one and that the jury were not allowed to separate. Neither fact is unusual in criminal trials; the first is often necessary, the second often expedient, and contributes to an impartial judgment for and against defendants. It is true that the jury was in consultation for three days and nights without agreement, but the case was unusual in its issues and evidence and the detailed attention that was required.

It well might be that jurors should not see the exact bearing of the evidence as it affected particular defendants until the final instructions of the court, which we have set out and about which counsel were consulted. The court took care to say to the jury that the law would not recognize a coerced verdict, and that it was not the court's intention to unduly prolong their deliberations, and if after another effort "they could not conscientiously and freely agree upon a verdict they would be discharged." It is hard to believe that with that admonition yet in their ears they bartered their convictions, with that promise expressly made to them, they were coerced by a threat of confinement to acquit those who they were convinced were guilty or convict those who they were convinced were innocent.

But, even conceiving such possibility, we think the court rightly ruled. It was within the issues of the case to convict some of the defendants and acquit others, and we think the rule expressed in *Wright v. Illinois & Miss.*

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Tel. Co., 20 Iowa, 195, and *Gottlieb Bros. v. Jasper & Co.*, 27 Kansas, 770, should apply, that the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors and can receive no corroboration.

Judgment affirmed.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE LURTON, MR. JUSTICE HUGHES and MR. JUSTICE LAMAR, dissenting.

This is an indictment under Rev. Stat. § 5440, amended, act of May 17, 1879, c. 8, 21 Stat. 4, for a conspiracy to defraud the United States. The petitioners were tried and convicted in the District of Columbia, the conviction was affirmed by the Court of Appeals, 35 App. D. C. 451, and thereupon a writ of certiorari was granted by this court. The scheme was to obtain by fraudulent devices from the States of California and Oregon school lands lying within forest reserves, to exchange them for public lands of the United States open to selection, and then to sell the lands so obtained. Hyde and Schneider were in California and never were actually in the District in aid of the conspiracy, but overt acts are alleged to have been done there to effect the objects in view. Most of these acts are innocent, taken by themselves, consisting mainly of the entry of appearance by Hyde's lawyer in the matter of different selections, the filing of papers concerning them, and letters urging speed. Hyde is alleged to have caused some documents affecting the same to be transmitted from California to the Commissioner at Washington, and in the last six counts payments to employes in the Land Office are alleged to have been made with corrupt purpose and in aid of the plan by a person who was included in the indictment as a conspirator, but whom the jury did not convict.

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The court instructed the jury that if the defendants agreed to accomplish their purpose by having any of the alleged overt acts done in the District of Columbia, and any of those acts were done there, the conspiracy was in the District, whether the defendants were there or not. The defendants excepted to this instruction, as well as to many others.

I have said enough to show that there was more than one question in the case, but as the first and also the most important one is whether the court had jurisdiction of the alleged offence, I shall confine myself to that.

The conspiracy was continuous in its nature and is averred to have been so. *United States v. Kissel*, 218 U. S. 601. Therefore, wherever it was formed, it might have been continued in the District of Columbia, as, for instance, if the conspirators had met there for the purposes of their scheme. Moreover, in order to narrow the question, I will assume that, so far as the statute of limitations is concerned, an overt act done anywhere with the express or implied consent of conspirators would show the conspiracy to be continuing between the parties so consenting, and leave them open to prosecution for three years from that date. But it does not follow that an overt act draws the conspiracy to wherever such overt act may be done, and whether it does so or not is the question before us now.

In order to answer this question it is not enough to say that as the overt act was one that was contemplated by the conspirators it is treated as the act of them all, and that this is equivalent to saying that they were constructively present. That would be passing a *dicto secundum quid ad dictum simpliciter*. They are chargeable there for the act, but it does not follow that they were there to other intents. They are shown not to have been by the fact that they could not be treated as fugitives from justice even in respect of that very act, when and although that act was itself a crime. *Hyatt v. Corkran*, 188 U. S. 691, 712.

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To speak of constructive presence is to use the language of fiction, and so to hinder precise analysis. When a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not. For instance, if a man acting in one State sets forces in motion that kill a man in another, or produces or induces some consequence in that other that it regards as very hurtful and wishes to prevent, the latter State is very likely to say that if it can catch him it will punish him, although he was not subject to its laws when he did the act. *Strassheim v. Daily*, 221 U. S. 280, 285. But as States usually confine their threats to those within the jurisdiction at the time of the act, *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356, the symmetry of general theory is preserved by saying that the offender was constructively present in the case supposed. *Burton v. United States*, 202 U. S. 344, 389. We must not forget facts, however. He was not present in fact, and in theory of law he was present only so far as to be charged with the act.

Obviously the use of this fiction or form of words must not be pushed to such a point in the administration of the national law as to transgress the requirement of the Constitution that the trial of crimes shall be held in the State and district where the crimes shall have been committed. Art. III, § 2, Cl. 3. Amendments, Art. VI. With the country extending from ocean to ocean this requirement is even more important now than it was a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grievous wrongs. In the case of conspiracy the danger is conspicuously brought out. Every overt act done in aid of it of course is attributed to the conspirators, and if that means that the conspiracy is present as such wherever any

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overt act is done, it might be at the choice of the Government to prosecute in any one of twenty States in none of which the conspirators had been. And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even wider if success should be held not to merge the conspiracy in the crime intended and achieved. I think it unnecessary to dwell on oppressions that I believe have been practised or on the constitutional history impressively adduced by Mr. Worthington to show that this is one of the wrongs that our forefathers meant to prevent.

No distinction can be taken based on the gravity of the overt act, or the fact that it was contemplated, or that it is important for the accomplishment of the substantive evil that the conspiracy aims to bring about and the law seeks to prevent. That would be carrying over the law of attempts to where it does not belong. Although both are adjective crimes, a conspiracy is not an attempt, even under Rev. Stat. § 5440, which requires an overt act. When I first read that section I thought that it was an indefinite enlargement of the law of attempts. But reflection and the decisions both convinced me that I was wrong. The statute simply did away with a doubt as to the requirements of the common law. *Rex v. Spragg*, 2 Burr. 993, 999; Roscoe, *Crim. Ev.* 6th ed. 381, 382. An attempt, in the strictest sense, is an act expected to bring about a substantive wrong by the forces of nature. With it is classed the kindred offence where the act and the natural conditions present or supposed to be present are not enough to do the harm without a further act, but where it is so near to the result that if coupled with an intent to produce that result, the danger is very great. *Swift & Co. v. United States*, 196 U. S. 375, 396. But combination, intention and overt act may all be present without amounting to a criminal attempt—as if all that

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were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offence. On the other hand, the essence of the conspiracy is being combined for an unlawful purpose—and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it in any degree. In this case the statute treats the conspiracy as the crime and the indictment follows the statute.

The cases in this court have agreed that the statute has not made the overt act a part of the crime, which still remains the conspiracy alone. By the same reasoning the overt act gives no ground for the application of Rev. Stat. § 731, creating a double jurisdiction when an offence against the United States is begun in one district and completed in another. The act is no part of the conspiracy even if it is an element in some other crime, as is stated in so many words in *Hyde v. Shine*, 199 U. S. 62, 76, quoting the well known statement in *United States v. Britton*, 108 U. S. 199, 204, that the statutory requirement merely affords a *locus penitentiæ*. *Delay v. United States*, 152 U. S. 539, 547. See also *United States v. Hirsch*, 100 U. S. 33. *Pettibone v. United States*, 148 U. S. 197, 202. *Bannon v. United States*, 156 U. S. 464, 469. The overt act is simply evidence that the conspiracy has passed beyond words and is on foot when the act is done. As a test of actuality it is made a condition to punishment, but it is no more a part of the crime than it was at common law, where it was customary to allege such an act; or than is the fact that the statute of limitations has not run.

I can think of no other case in which it would be argued that an act constituting no part of the crime charged draws jurisdiction to the place where it is done. Even when the act is the substance of a felony the history of the

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law shows that the courts only slowly and with hesitation came to the admission that a man, although within the jurisdiction, could be a principal when he was not present at the accomplishment of the crime. Y. B. 7 Henry, VII, 18, pl. 10. The distinction between principal and accessory before the fact is a late surviving expression of the doubt. 4 Bl. Com. 36, 37. When the accessory is in a different jurisdiction it has been held that he could not be convicted as such in the place of the crime, even in modern cases. *State v. Moore*, 6 Foster, N. H. 448, Bish. Crim. Law, 8th ed., § 111. It would be an amazing extension of even the broadest form of fiction if it should be held that an otherwise innocent overt act done in one State drew to itself a conspiracy in another State to defraud people in the latter, even though the first State would punish a conspiracy to commit a fraud beyond its own boundaries. Of course in the present case the conspiracy as well as the overt act was within the United States, but the case that I have supposed of different jurisdictions is a perfect test of where the crime was committed. If a conspiracy exists wherever an overt act is done in aid of it, the act ought to give jurisdiction over conspirators in a foreign State, if later they should be caught in the place where the act was done.

The defendants were in California and never left the State, so far as this case is concerned. The fraud, assuming as I do for the purposes of decision that there was one, was to get land from the United States there and elsewhere on the Pacific Coast. If successful it would be punished there. The crime with which the defendants are charged is having been engaged in or members of a conspiracy, nothing else; no act, other than what is implied as necessary to signify their understanding to each other. It is punished only to create a further obstacle to the ultimate crime in California. The defendants never were members of a conspiracy within a thousand miles of the District

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in fact. Yet if a lawyer entered his appearance there in a case before the Land Department, and the defendants directed it and expected to profit by it in carrying out their plans, it is said that we should feign that they were here in order to warrant their being taken across the continent and tried in this place. The Constitution is not to be satisfied with a fiction. When a man causes an unlawful act, as in the case of a prohibited use of the mails, it needs no fiction to say that the crime is committed at the place of the act, wherever the man may be. *Re Palliser*, 136 U. S. 256. But when the offense consists solely in a relation to other men with a certain intent, it is pure fiction to say that the relation is maintained and present in the case supposed. If the Government, instead of prosecuting for the substantive offence, charges only conspiracy to commit it, trial ought to be where the conspiracy exists in fact.

The effect of an overt act upon the statute of limitations is consistent with what I have said. If an overt act is done with the consent of the conspirators, and to effect their end, the reason why the statute begins to run afresh is not that a new conspiracy is made or the old one renewed by the act, but that the facts supposed show conclusively that the conspiracy is continuing in life. So long as it does so it cannot be barred, although the earlier years of it may be.

To avoid misapprehension the distinction should be noted between acts done in aid of a conspiracy and acts that constitute and call it into being. If a conspiracy should be formed by letters between men living in California, Louisiana and Massachusetts, who never left their several States, nothing that I have said would disparage the right of the Government to indict them where in contemplation of law the agreement was made.

It is said that the conspiracy may be a secret one; but that cannot affect the tests of jurisdiction. The overt act may amount to evidence not only of its existence but of its place. But to treat overt acts as evidence is one

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thing; it is quite another to treat any overt act as sufficient in itself to give jurisdiction, although the conspiracy exists only in another place.

The intimations that are to be found, opposed to the view that I take, appear to have been induced by the confusion that I have tried to dispel, and to assume that an overt act creates jurisdiction over a conspiracy on the same ground that causing a death may give jurisdiction in murder; or, perhaps, in *The King v. Brisac*, 4 East, 164, 171, to proceed on the dangerous analogy of treasonable conspiracies to levy war or compass the death of the sovereign. The dictum in that case gains no new force from the repetition by text writers. It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis. On the other hand, if overt acts had been regarded as founding jurisdiction, the petitioners could not have been discharged in *Tinsley v. Treat*, 205 U. S. 20, where overt acts of other conspirators within the jurisdiction were alleged and not denied. Although the point was not mentioned in the opinion, it was argued and was not overlooked. At least in the absence of clear statutory words I am of opinion that logic and the policy and general intent of the Constitution agree in refusing to extend the fiction of constructive presence to a case like this. I think that the true view still is that of *Reg. v. Best*, 1 Salk. 174, "The *venue* must be where the conspiracy was, not where the result of the conspiracy is put in execution," quoted as correct in principle in Markby's edition of Roscoe's Criminal Evidence, 6th ed., 391; and that to decide otherwise is to overrule not only the often expressed and settled understanding but the express decisions of this court.

MR. JUSTICE LURTON, MR. JUSTICE HUGHES and MR. JUSTICE LAMAR concur in this dissent.

BROWN *v.* ELLIOTT, UNITED STATES MARSHAL IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, *et al.*

MOORE *v.* ELLIOTT, UNITED STATES MARSHAL IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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

Nos. 201, 202. Argued October 19, 1911. Reargued May 1, 1912.—Decided June 10, 1912.

If the indictment under § 5440, Rev. Stat., sufficiently charges the commission of overt acts within the district, it is sufficient even if it states that the place where the conspiracy formed is unknown.

The Sixth Amendment to the Constitution does not preclude the place of trial of conspirators indicted under § 5440, Rev. Stat., being in any State where an overt act was performed. *Hyde v. United States*, *ante*, p. 347.

A conspiracy entered into in violation of § 5440, Rev. Stat., may be a continuous crime, and, if it was designed to be, and was, continuous, every overt act was the act of all the conspirators by reason of the terms of their unlawful plot.

Where there are successive overt acts during the existence of the conspiracy, the period of limitation must be computed from the date of the last of them properly specified in the indictment, although some of them may have occurred more than three years before the indictment was found.

The Constitution of the United States is not intended as a facility for crime, but to prevent oppression; its letter and its spirit are satisfied if where a criminal purpose is executed that criminal purpose be punished. The criminal himself makes the venue of his trial.

THE facts, which involve the validity of an indictment under § 5440 Rev. Stat., are stated in the opinion.

Mr. Henry F. Woodard and *Mr. A. A. Birney* for appellants.

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The Solicitor General for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These appeals involve the action of the Circuit Court in dismissing petitions for writs of *habeas corpus* to discharge appellants from the custody of appellee, United States Marshal for the Northern District of California. Both appellants were held under a warrant of removal made by the District Court of that district upon an order of commitment made by a United States commissioner in proceedings for the removal of appellants to the District Court of Nebraska.

There was an indictment found against appellants in the District Court of the Omaha Division of the District of Nebraska for the crime of conspiracy, in which it was charged that they and others whose names, aliases and the numbers by which they were designated as part of the means of effecting the scheme, and who in the indictment are called "conspirators," "on the fifth day of April, in the year of our Lord one thousand nine hundred and seven, did then and there" conspire with Ernest Fenby and other persons to the grand jurors unknown "to commit the acts made offenses and crimes by § 5480 of the Revised Statutes of the United States, as amended by an Act of Congress enacted March 2, 1889 (25 Stat. 873, c. 393) entitled 'An Act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails.'" And it is charged that appellants and the other persons conspired in devising and intending to devise a scheme and artifice to defraud various persons out of their money and property, to be effected by means of the post-office establishment of the United States, and particularly to defraud certain persons who were named. To avoid repetition, they are called in

the indictment "victims," and they were to be defrauded of their money and property by the conspirators "agreeing to organize, institute, conduct and manage certain horse races and athletic contests . . . as wagering contests upon which money should be bet," at Council Bluffs, in Iowa, and in certain places in Missouri, Arkansas, Colorado, Louisiana and Washington, and other places to the grand jurors unknown, and "at Omaha, district aforesaid." The races and contests were to be conducted in a fraudulent, unfair and dishonest manner and to be controlled solely by the conspirators so that the outcome was known in advance, with intention thereby to defraud the victims. The charge is made with much circumstance and detail which it is not necessary to repeat except to say that the conspirators were to be represented as millionaires traveling through the United States making investments in municipal, county and city bonds, and in other projects, and having with them horses and athletes for their private amusement which they would match with those of strangers. One of the conspirators was to be represented to be the secretary to the others and as having charge of the contests which he had theretofore always managed with great financial profit and gain as well as to the amusement of his employers, but that he had become aggrieved at the treatment he had received and would so manage the contests that the horses and athletes of the millionaires would lose, and that he was desirous of betting against them and thereby win their money for himself and for such other persons as would bet for him as his secret agents. Others of the conspirators were to represent themselves to the victims to be friends and relatives of the "secretary" and had been requested by him to procure men of financial standing to act as his secret agents in betting money against his employers, the millionaires, and it was to be represented that it was necessary for him to procure such persons of financial standing and respon-

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sibility to represent him and bet his money in order to conceal his disloyalty to his employers. Such persons were not to bet their own money but the secretary's money, and be paid a percentage of the winnings. The victims were to be induced to bring letters of credit or negotiable paper for large sums of money and thereby establish credit in the bank of the town where the races and contests were to be conducted. And when they, relying on the fraudulent representations of the secretary, should bet and wager money furnished by him they were to be informed that the money was not in fact his but was his employers' money; that they, the employers, had or might become suspicious that the money was not that of the victims and the secretary not the stakeholder, and to prevent criminal prosecutions the races and contests would be called off; that therefore it would be necessary for the victims to come to his (the secretary's) rescue and bet their money for him and allay such suspicions and to insure the races and contests proceeding to a finish as arranged, the money to be returned after the races and contests. And it was to be represented that the races and contests terminated unfortunately through an unusual and deplorable accident, to wit, a serious injury to one of the jockeys or one of the athletes and in such way that it would be unfair to declare themselves winners, and additional races and contests were to be conducted in the same manner and an opportunity afforded to win back the money lost. Finally it was to be represented to the victims that they had been engaged in a criminal transaction, which had resulted in a serious injury to a person, and to avoid arrest and criminal prosecution they (the victims) were to depart from the scene, and leave the money bet with the secretary, who was to convert it to the use and gain of the conspirators. And this was alleged to be fraudulent and done with intention to deceive, etc.

The manner of carrying out the scheme was alleged

to be to rent a United States post-office box for the delivery of the mail in the United States post-office at Omaha, Nebraska, and in other cities throughout the United States where any of the conspirators should establish headquarters in furtherance of the scheme and artifice to defraud, and the conspirators were to assume and request to be addressed by the number of such boxes respectively and carry on their correspondence with each other through and by means of the post-office establishment of the United States by the use of such assumed title numbers without the use of their own proper names, and to assume other names and request their victims to address them by such assumed names through and by means of the post-office establishment of the United States. And it is charged that the conspirators, in further execution of their scheme, were to take and receive letters so addressed from and out of the United States post-office at Omaha and other places which were mentioned and that they were to write and send letters to one another by means of the post-office establishment which were to contain and set forth their fraudulent and deceitful schemes and were to be shown to the other victims for the purpose of inducing the latter to turn over to the conspirators large sums of money. The conspirators, it is charged, also used the post-office establishment to open correspondence with the victims and to procure them to open correspondence with two of the conspirators, whose names are given, in pursuance of the conspiracy.

It is alleged "that the said wicked and corrupt conspiracy, combination, confederation and agreement was originally formed and entered into by the said conspirators during the year 1905, the exact date whereof is to the grand jurors unknown, in the United States of America, the exact place and district whereof is to the grand jurors unknown, and until the twenty-third day of February, in the year nineteen hundred and nine, continuously and

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at all times during the four years next preceding the said twenty-third day of February," it, the conspiracy, "was continuously in existence and in the process of execution and operation and including all of said times, and the said conspirators did knowingly, falsely, wickedly and corruptly conspire, combine, confederate and agree together as aforesaid, and with said Ernest Fenby and said divers other persons to the grand jurors unknown, as aforesaid."

Overt acts are alleged, one of which is the renting by one of the conspirators under an assumed name of a post-office box at Omaha, Nebraska, and the receiving and sending of letters to the "victims," which set forth the scheme in detail by which the "millionaires" were to be imposed on and the ease of its accomplishment and assurance of success displayed. The indictment contains copies of the letters.

The second count of the indictment alleged the conspiracy to have been formed on the first of April, 1907, and the scheme of fraud and deception was set forth in a more general way. The use of the post-office establishment was alleged, as in the first count.

The original formation of the conspiracy was alleged, as in the first count, to have been in a place and district to the grand jurors unknown, but was continuously in existence and in process of execution for four years next preceding the twenty-third of February, 1909. The overt act alleged was the depositing of a letter by one of the conspirators in the post-office at Omaha, Nebraska, which letter concerned the scheme and artifice to defraud and to effect the object of the conspiracy.

It will be observed that it is charged that appellants and those named in the indictment as "conspirators," "on April 5," 1907 (first count), "did then and there," and "on April 1," 1907 (second count), "did then and there" conspire with Ernest Fenby and others, and that races and contests upon which money was to be bet were

to be organized "at Council Bluffs, in the State of Iowa," and that the conspirators "further then and there, and at Omaha, district aforesaid," were to execute their scheme. And it is charged that the conspiracy was to be effected in the manner described and that the conspirators, further to effect the object of the conspiracy, were "to rent a United States post office box for the delivery of mail, in the United States post office at Omaha, in the State of Nebraska, district aforesaid," and in other places.

The first overt act charged in pursuance of the conspiracy on the fifth of April, 1907, is the renting of such box. To effect the object of the conspiracy formed on April 1, 1907, the first overt act is alleged to have been done in July, 1907, at Omaha.

It is, however, also alleged that the conspiracy was originally formed and entered into during the year 1905 in the United States, the exact date and place being unknown, and was continuously in existence and in the process of execution and operation during the four years preceding the twenty-third of February, 1909.

The assignments of error present the contentions that the indictment is essentially deficient in the following particulars:

1. It does not allege that the conspiracy was formed in Nebraska, but, on the contrary, alleges that it was formed at some place unknown to the grand jury.

2. It does not allege in any of its counts that the first overt acts were done in Nebraska, but that they were done in a place and district unknown.

3. The indictment shows that the conspiracies were formed more than three years prior to the finding of the indictment.

4. It does not allege that appellants consciously participated in any overt act within three years next preceding the finding of the indictment.

The first two contentions involve the jurisdiction of the

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court under the Sixth Amendment of the Constitution of the United States requiring a crime to be tried in the State and district where it was committed. The third and fourth contentions raise the question of the statute of limitations.

First, as to what the indictment shows as to the formation of the conspiracy and the commission of overt acts. The appellants consider these propositions entirely upon the assumption that the only allegation that can be regarded is that which charges the formation of the conspiracy originally in 1905, and not the allegation of the formation of a conspiracy in 1907.

But nothing is specifically alleged as having been done to execute the conspiracy as originally formed. It is true, there is an allegation that the conspiracy was in existence and in the process of execution and operation, which is somewhat vague but is certainly not inconsistent with the fact that whatever was done, if anything, was done at Omaha.

It is charged that on April 5, 1907 (first count), and on April 1, 1907 (second count), the appellants and other persons "did then and there" conspire (we omit the adverbs). This might well be contended, so far as removal proceedings are concerned, as an allegation of the formation of the conspiracy in the district of Nebraska, or certainly a distinct and explicit renewal of it. And it would seem like giving technicality too much effect to consider that the agreement made in 1905, rather than its specific and formal renewal in 1907, should determine the jurisdiction of its trial. Besides, its continued existence and operation are alleged, and we have seen if overt acts were done prior to 1907 they may have been done at Omaha and constituted, with those done afterwards, a part of an entire scheme, to be executed by a succession of acts.

It is only by the assumption and insistence that the conspiracy was formed in 1905 that appellants give their

contentions any foundation whatever. If the conspiracy was formed at Omaha in 1907, upon the supposition that the conspiracy constitutes the offense and the State and district of its origin are the State and district of its trial, the District Court of Nebraska had jurisdiction. And again, upon the supposition that the first overt act completes the offense commenced by the conspiracy and by completing it determines the place of its trial, the District Court of Nebraska had jurisdiction. This follows, no matter where the overt act was done. We have pointed out, however, that the indictment does not show that the first overt act was done at a place and district unknown. The first overt act may have been performed at Omaha.

If either view, therefore, be accepted, the judgment of the Circuit Court dismissing the petitions for *habeas corpus* must be affirmed.

If, however, we assume with appellants that the indictment charges that the conspiracy was formed in 1905 and at a place unknown to the grand jurors, the same result must be pronounced, upon the authority of *Hyde v. The United States*, just decided, *ante*, p. 347. We there held that the place of trial could be any State and district where an overt act was performed. And we further held, following *United States v. Kissel*, 218 U. S. 601, that conspiracy might be a continuous crime. We there said, distinguishing a crime from its results: "But when the plot contemplates bringing to pass a continuing result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one." These remarks are especially pertinent to the case at bar. It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous, and, being so, every overt act

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was the act of all the conspirators, made so by the terms and force of their unlawful plot.

In *Lonabaugh v. United States*, 179 Fed. Rep. 476, the Circuit Court of Appeals for the Eighth Circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said (p. 478), by Mr. Justice Van Devanter, then Circuit Judge: "While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (*Hyde v. Shine*, 199 U. S. 62, 76); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Lorenz v. United States*, 24 App. D. C. 337, 387; *S. C.*, 196 U. S. 640; *Ware v. United States*, 84 C. C. A. 503, 154 Fed. Rep. 577, 12 L. R. A. (N. S.) 1053; *S. C.*, 207 U. S. 588; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. Rep. 417; *S. C.*, 212 U. S. 576."

If, however, the conspiracies may be regarded as distinct, then one is charged as having been formed at Omaha in April, 1907, and that overt acts were performed there to effect its object within three years of the finding of the indictment, to wit, October 7, 1909. These allegations establish the jurisdiction of the District Court of Nebraska and exclude the application of the statute of limitations.

As the place of the overt act may be the place of jurisdiction, it follows that the exact place where the conspiracy was formed need not be alleged. This case illustrates the evil which a contrary ruling would cause. The place where the conspiracy was formed was unknown

to the grand jurors (and might be so in many cases), but it was intended to be executed in a number of States of the Union, and yet, under the rigor of the contention of appellants, the conspirators could not be tried in any of them. In other words, not the place of the activities of the conspiracy and where it incurs guilt, but the place of its formation, which no one may know or can find out, is the place of the jurisdiction of its trial. And what compels this? It is answered: The Sixth Amendment of the Constitution of the United States. We have determined otherwise in *Hyde v. United States*, ante, p. 347.

The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression, and its letter and its spirit are satisfied if where a criminal purpose is executed the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them, but for the actual execution of them. The venue of his trial is thus made by the criminal himself, not determined by reasons or interests which may be adverse to him and used to his injury.

Orders dismissing petitions affirmed.

MR. JUSTICE HOLMES, dissenting.

These are appeals from orders denying writs of habeas corpus on the same state of facts, which can be set out in a few words. The petitioners were taken into custody in California for removal to Omaha, in the District of Nebraska, for trial before the District Court there, and severally petitioned for habeas corpus on the ground that the indictment showed that the Omaha court had no jurisdiction of the alleged offence. The indictment is under Rev. Stat. § 5440, amended by Act of May 17, 1879, c. 8, 21 Stat. 4, for conspiring to commit an offense

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against the United States, namely, to send and receive letters through the post-office in pursuance of a complex scheme to defraud various people, contrary to Rev. Stat. § 5480, amended by act of March 2, 1889, c. 393, 25 Stat. 873. The scheme contemplated the hiring of post-office boxes at Omaha and other places, in six different States; and the hiring of a box there and the posting and receiving of letters in that place by conspirators other than the petitioners are alleged as overt acts done in pursuance of the scheme. But it is alleged that the place where the conspiracy was formed is unknown, no place is laid for its continuance, and the petitioners are not shown to have been engaged in it in Omaha or ever to have been in the place. Therefore no jurisdiction is shown unless the averment of the above-mentioned overt acts makes up for all that is left out.

To deny the jurisdiction, however, I must go farther than was necessary in *Hyde v. United States*, just decided. For in this case the offense against the United States named as the proximate object of the conspiracy, viz. the sending of letters through the post-office in aid of the ultimately intended fraud, is alleged to have been accomplished, and indeed is laid as the overt act. But all the parties to the conspiracy could have been indicted in Omaha for the use of the post-office there in pursuance of their plan by some of their number, and it naturally may be asked how it can be possible that the petitioners should be collectively guilty of unlawfully using the mails in Omaha, but not guilty of being combined there for that purpose.

The answer has been suggested at least by what I have said in the case of *Hyde*. The parties are liable to punishment where the prohibited act is done, not on the ground of a fiction that they were present, but in spite of the fact that they were not present. And they well may be dealt with there if they can be reached, for bringing about what

is deemed a harm in that place. But when they are punished for being and not for doing, when the offence consists in no act beyond the osmose of mutual understanding, they should be punished only where they are, only where the wrongful relation exists. The United States can reach them equally, it is true, in either case, but as it can try them only where the crime has been committed, the test to be applied is the same that would be applied if the crime arose under the law of one of the States. It does not follow from the defendants' liability in Omaha for certain results of their conspiracy that they can be tried there for the conspiracy itself. I assume for purposes of decision, whatever misgivings may be felt as to the justice of indicting for a conspiracy to do what actually has been done, that an indictment will lie. *Reg. v. Button*, 11 Q. B. 929. *United States v. McDonald*, 3 Dillon, 543. *United States v. Rindskopf*, 6 Biss. 259. *United States v. De Grieff*, 16 Blatchf. 20. *R. v. Spragg*, 2 Burr. 993. But I am of opinion that Omaha is not the proper jurisdiction in which to bring it.

If the case were decided on the narrow ground that for the purposes of removal an allegation of conspiracy 'then and there' in the middle of the indictment was to be taken to refer to the caption and the place where the indictment was found, I should say nothing. But as general principles are thought to be involved, I think it proper to state my opinion about them.

MR. JUSTICE LURTON, MR. JUSTICE HUGHES and MR. JUSTICE LAMAR concur in these views.

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Syllabus.

JOHNSON v. UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.

No. 1075. Argued May 1, 2, 1912.—Decided June 7, 1912.

Whether the prisoner was properly arraigned is not a matter of form but of substance, and should be shown by the record. *Crain v. United States*, 162 U. S. 625.

There is no explicit provision in the laws of the United States describing what shall constitute an arraignment; but so far as it is expressed it has a definite meaning.

Where a word is used as comprehensively descriptive of certain acts, it can be used in the record of a case as showing the performance of those acts; and so *held* as to "arraignment" as used in § 1032, Rev. Stat.

In this case what was done, as shown by the record, did constitute an arraignment.

The record in a case imports verity and cannot be contradicted by affidavits. *Evans v. Stettinisch*, 149 U. S. 605.

As used to define the place where a crime may be committed the words, "within any fort, arsenal, dockyard, magazine, or any other place or district of country under the exclusive jurisdiction of the United States" include the District of Columbia.

The act of January 15, 1897, 29 Stat. 487, c. 29, permitting the jury in a capital case of murder or rape under § 5339 or § 5345, Rev. Stat., to qualify the verdict by adding "without capital punishment" was applicable to the District of Columbia until superseded by the special provisions on the same subject in the District Code. *Winston v. United States*, 172 U. S. 303.

In framing a new statute a change of language from that of a former statute on the same subject is some evidence of a change of legislative purpose.

Some of the provisions of the Criminal Code approved March 4, 1909, 35 Stat. 1088, c. 321, apply to the District of Columbia and other provisions do not.

Congress in enacting the District Code recognized the expediency of separate provisions for the District of Columbia.

The provisions of the Criminal Code which deal with offenses Federal in nature, wherever committed, whether in places under Federal,

state or territorial control, supersede the District Code; provisions, however, in regard to offenses under state jurisdiction if committed in a State or over which Congress has given local control to the Territories, and in regard to which it has adopted a separate code as for Alaska, do not supersede the District Code.

The provision in § 272 of the Criminal Code of 1909 permitting the jury to qualify the verdict of guilty in certain cases punishable by death by adding "without capital punishment" does not supersede the provisions in the District Code in regard to punishment for murder.

Provisions in earlier statutes in regard to matters which are embraced in and superseded by a later statute are repealed by the later statute; but where the two statutes have definite territorial operation, they can exist together and the earlier one is not repealed or affected by the later.

An objection that the jury was not lawfully drawn must be availed of at the trial; it cannot, under § 919 of the District Code, be made the basis for setting aside the verdict on appeal.

38 App. D. C. 347, affirmed.

THE facts, which involve the validity of a conviction and sentence for murder in the District of Columbia, are stated in the opinion.

Mr. Paca Oberlin and *Mr. Thomas M. Baker* (by special leave of the court), with whom *Mr. Joseph Salomon* was on the brief, for petitioner:

A defendant in a capital case cannot waive anything essential. *Crain v. United States*, 162 U. S. 625. See, also, *Hill v. People*, 16 Michigan, 351; *Cancemi v. People*, 18 N. Y. 128.

Reading of an indictment is necessary in all criminal cases unless waived and in a capital case it cannot be waived, and the record in such a case which is silent on that point is the same in legal effect as if it recited that reading was waived, or indictment not read, and if either be true the record is fatally defective. *Crain v. United States*, *supra*.

In capital and other infamous crimes both the arraign-

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ment and plea have always been regarded as a matter of substance and must be affirmatively shown in the record. *Crain v. United States*, *supra*. This is so well established that the condition should not be disturbed. Informed of the nature of the offense means reading the indictment.

Section 330 of the Criminal Code, authorizing the jury, in capital cases, to add to their verdict "without capital punishment," applies to the District of Columbia.

Prior to January 1, 1902, the date the District Code became effective, § 5339, Rev. Stat. was the statute under which the offense of murder was prosecuted. *Winston v. United States*, 172 U. S. 303; *United States v. Guiteau*, 1 Mack. 498.

An act entitled "An act to reduce the cases in which the death penalty may be inflicted," approved January 15, 1897, 29 Stat. 487, was held to be in force in the District of Columbia. *Winston v. United States*, *supra*.

The District Code, in §§ 798, 799, 800, prescribes what constitutes murder in the first and second degrees. Section 801 prescribes that punishment of murder in the first degree shall be death by hanging, and that of murder in the second degree, imprisonment for life or for not less than twenty years.

Section 272 of the Criminal Code is, in part, substantially a reenactment of that portion of § 5339, Rev. Stat., as to the commission of murder in any "place or district of country under the exclusive jurisdiction of the United States"; two degrees of murder are provided for in both the District Code and Criminal Code; and the language of § 330 of the Criminal Code is almost identical with that of the act of January 15, 1897, which was held to be in force in the District of Columbia.

Inconsistency between § 330 of the Criminal Code and previous statutes, for the purpose of preventing that section from being in force in the District, must be such as clearly exhibits an intent on the part of Congress not to

give the people of the National Capital the benefits of the law.

From early times it has been true that whenever there was a statute in favor of life or liberty that construction has been adopted by the courts which would cause it to operate in all places where it could so operate. A general act, prescribing the punishment of a specific offense throughout the State, operates as a repeal of a public local act prescribing a different punishment for a particular locality. *Nusser v. Commonwealth*, 25 Pa. St. 126; *People v. Jaehne*, 103 N. Y. 182.

An act changing the punishment only is not inconsistent with a failure to modify the elements of the crime also, especially when the punishment is made less. *Commonwealth v. Wyman*, 12 Cush. 237.

The rule of construction by which general acts of Congress are held to be applicable to the District of Columbia has been followed from the beginning. The Criminal Code contains nothing to indicate that this rule should be departed from.

Section 209 of the District Code, which expressly excepts capital cases, is the only provision in that code for the drawing of juries in criminal cases. The former acts of Congress regulating the selection of petit juries were repealed by the Code and § 209 is therefore the only statutory authority for completing juries; and as it expressly excepts capital cases the completing of the jury according to its provisions was reversible error.

The Solicitor General for the United States.

MR. JUSTICE McKENNA delivered the opinion of the court.

Johnson was indicted, tried and convicted in the Supreme Court of the District of Columbia for the crime of murder for killing one Ofenstein, and sentenced to death.

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He moved for arrest of judgment and for new trial on certain grounds which, among others, present three questions—(1) whether he had been properly arraigned; (2) the action of the court in giving and refusing instructions in regard to the power of the jury to add to their verdict, if they found him guilty of murder, the words “without capital punishment”; (3) the legality of the manner of selecting the jury.

(1) The record recites the presence of the attorney for the United States, the defendant in proper person and by his attorney, and adds that “thereupon the defendant being arraigned upon the indictment pleads thereto not guilty and for trial puts himself upon the country, and the attorney of the United States doth the like.”

The contention is that there is a fatal defect in that the record does not show that the indictment was read to the defendant, and to establish that such reading was necessary counsel invoke the Sixth Amendment of the Constitution of the United States, which provides, among other things, that in all criminal prosecutions the accused shall be informed of the nature and cause of the action against him. But to this it may be urged, as it is urged, that information of the charge may be given without reading the indictment. But we may pass that, and grant also that in capital and otherwise infamous crimes both the arraignment and plea are a matter of substance, and must be affirmatively shown by the record. We think that they are shown if such be the fair intendment of the words of the record. And this is demonstrated by the case that is relied on against it, that is, *Crain v. United States*, 162 U. S. 625. In that case the record did not show (and we quote from the opinion, p. 636) “that the accused was ever formally arraigned, or that he pleaded to the indictment,” except as an inference from a statement in the bill of exceptions that the jury were “sworn and charged to try the issues joined.” It was held, after elaborate dis-

cussion, three members of the court dissenting, that a plea to the indictment was not a matter of form, but of substance, and should be shown by the record. In the discussion and in the cases cited the arraignment was considered as distinct from the plea and consisted of formally calling the accused to the bar for the purpose of a trial. We may quote as illustrative the following paragraph from pages 637, 638:

"According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is, the 'demanding of him whether he be guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him *cul. prist*, and enters the prisoner's plea; then he demands how he will be tried, the common answer is, *by God and the country*, and thereupon the clerk enters *po. se*, and prays to God to send him a good deliverance.' 2 Hale's Pl. Cr. 219. So, in Blackstone: 'To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment.' 'After which [after the indictment is read to the accused] it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty.' 4 Bl. Com. 322, 323 to 341. Chitty says: 'The proper mode of stating the arraignment on the record is in this form, "and being brought to the bar here in his own proper person, he is committed to the marshal, etc. And being asked how he will acquit himself of the premises (in case of felony, and of 'the high treasons' in case of treason) above laid to his charge, saith," etc. If this statement be omitted, it seems the record will be erroneous.' 1 Chitty's Cr. Law,* 419."

There is no explicit provision in the laws of the United States describing what shall constitute an arraignment. But so far as it is expressed it has a definite meaning. By § 1032 of the Revised Statutes it is provided that

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“when any person indicted for any offense against the United States, whether capital or otherwise, upon his *arraignment* stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.”

It will be observed that the word “arraignment” is used as comprehensively descriptive of what shall precede the plea. If it be so used in the law, it certainly can be used in the record as showing the performance of that which the law prescribes by it. We realize that both the Constitution and the law are careful to direct that information be given to the accused of the charge against him. By § 1033 it is provided that when any person is indicted for any capital offense, if it be treason, three days before the trial, and if it be any other capital offense, two days before the trial, a copy of the indictment and list of jurors and witnesses shall be delivered to him. And this can be insisted on. *Logan v. United States*, 144 U. S. 263; *Hickory v. United States*, 151 U. S. 303. We may presume that the law was complied with in the present case and that Johnson was given a copy of the indictment as well as having had it read to him, which we think the record sufficiently shows; and as the record imports verity it cannot be contradicted by an affidavit which counsel filed in the case, even if it had been filed for such purpose, which, according to counsel, it was not, but “to call the attention of the court to the defect on the face of the record.” *Evans v. Stettinisch*, 149 U. S. 605, 607.

(2) Prior to January 15, 1897, homicide, as a crime against the United States was divided into murder and manslaughter “when committed within any fort, arsenal, dock-yard, magazine, or in any other place or district of

country under the exclusive jurisdiction of the United States," and upon the high seas and certain waters out of the jurisdiction of any particular State. The punishment for murder was death; for manslaughter, a certain term of imprisonment. Sections 5339, 5340, 5343. The crime of rape, when committed in any of the specified places, was also punished by death. Section 5345.

By the act passed January 15, 1897, it was provided "that in all cases where the accused is found guilty of the crime of murder or of rape under section fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487, c. 29. It will be observed that § 5339 of the Revised Statutes is made part of the act. By that section, reenacting earlier acts of Congress, "every person who commits murder" "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, shall suffer death." The act was held applicable to the District of Columbia, and under its provisions and § 5339 until January 1, 1902, the date when the District Code became effective, murder was prosecuted. *Winston v. United States*, 172 U. S. 303.

By the District Code murder was divided into two degrees, and it was provided that the punishment for murder in the first degree should be "death by hanging." Punishment for manslaughter was fixed at imprisonment for life, or for not less than twenty years. Sections 798, 799 (this section made it murder in the first degree to put obstructions on a railroad or street railroad), 800 and 801.

The District Code also changed the law as to rape and fixed its punishment at not less than five nor more than thirty years, the jury having the power to add to their

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verdict, if it be guilty, the words "with the death penalty." Section 808.

It necessarily followed that the provision for the qualified verdict ceased to apply in the District. Thereafter the definitions and requirements of the District Code prevailed and the death penalty was imposed for conviction of murder in the first degree for eight years.

In the meanwhile a commission was at work revising and codifying the criminal and penal laws of the United States, with the result that a Criminal Code was approved March 4, 1909, 35 Stat. 1088, c. 321. It is the asserted clash between its provisions giving power to the jury to qualify their verdict and those of the District Code under which, we have seen, the jury has not such power, that constitutes the question in this case.

That some provisions of the Criminal Code are applicable to the District, is conceded. It is conceded by the Government that the first ten chapters are applicable just as they are to the States, Territories and other districts, and that the same is true of chapter 12. The concession is put upon the ground that those chapters deal with offenses Federal in their nature. Chapter 13, it is said, relates to territorial jurisdiction and deals with certain offenses "when committed within any Territory or district, or within or upon any place within the exclusive jurisdiction of the United States." So far as the District Code deals with the offenses described in chapter 13, it is superseded by the Criminal Code.

The Government says: "There seems to be no room for doubt of this. The offenses defined are to be punished as prescribed 'when committed within any Territory or district, or within or upon any place within the exclusive jurisdiction of the United States.' Sec. 311. The District of Columbia comes within this description. Then we find in § 319 that 'the provisions of this section shall apply only within the Territories of the United States,' and in

§ 320 that 'the provisions of this section shall apply only within the Territories of the United States and the District of Columbia.'"

The final concession of the Government, therefore, is that "it cannot be said broadly that in the enactment of the Criminal Code there was no purpose to deal with or modify the District Code in any respect." But the Government turns from these concessions and insists that chapter 11, in which murder is defined, was not intended to apply to the District. This is deduced from the report of the commission and § 272 of the chapter which defines the territorial extent and the application of the chapter. The commission in their report said: "In the revision of this chapter we have deemed it important to define with the greatest attainable precision the places within which the jurisdiction of the United States over crimes shall be exercised."

They adopted a definition by an enumeration of places. Among others, the following: "Any fort, arsenal, dockyard, magazine, other needful building, structure, reservation, or other place under the exclusive jurisdiction of the United States."

But the suggested definition was amended by the joint committee of Congress and became § 272 of the Criminal Code, which is less broad than the provision recommended by the commission. That section provides: "The crimes and offenses defined in this chapter [11] shall be punished as herein prescribed. . . . Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." The difference to be observed between this provision and that recommended by the commission is the

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difference between "any fort . . . or other place under the exclusive jurisdiction of the United States," and "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof." The word "lands" in the latter is limited, as the word "place" was in the former, by its association. It is further limited and, indeed, specialized by the qualification "reserved or acquired for the exclusive use of the United States." In other words, it has a proprietary and not a governmental sense, and is very inapt, indeed, to describe the District of Columbia.

This view is reinforced by a comparison of § 272 with §§ 5339 and 5570 of the Revised Statutes, which preceded it, and of which it was intended to take the place. Section 5570 was the predecessor of the fourth subdivision of § 272, and we have no concern with it. The other three subdivisions were preceded by § 5339, which provided as follows: "Every person who commits murder—First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. . . .

"Third. . . . shall suffer death."

It will be observed, therefore, how general and comprehensive the first clause of § 5339 is, and in comparison how restricted and special is subdivision three of § 272. In other words, there is omitted from the latter the words by which, we have seen, it was decided in *Winston v. United States, supra*, that the act of January 15, 1897, *supra*, which was the first legislation giving the power to a jury to qualify their verdict, was applicable to the District of Columbia.

A change of language is some evidence of a change of purpose, and certainly it could not have been supposed that the words "any lands reserved or acquired for the exclusive use of the United States," used in § 272, would

be regarded as the equivalent in meaning of the words "district of country under the exclusive jurisdiction of the United States," used in § 5339. And yet it is mainly on those words in § 272 that appellant relies. The District of Columbia can hardly be said, as we have pointed out, to be in any proper or adequate sense "lands reserved for the exclusive use of the United States," while the words "district of country under the exclusive jurisdiction of the United States" can be, as they had been, properly and adequately held to include the District of Columbia.

Very little comment is necessary to show the purpose of the restricted language of § 272. Chapter 11 deals, as said by the Government, with offenses of the kind subject to the jurisdiction of the States severally where there are States—offenses not distinctively Federal in character, but subjects of local or domestic police. The Territories provided their own laws in such cases, just as the States did, and there were distinct congressional enactments for Alaska and the District of Columbia which were not intended, we think, to be disturbed. This conclusion gets strength from § 289, which provides that if any act be done or omitted in any of the places mentioned in § 272 which is not made penal by a law of Congress but is penal "within the territorial limits of any State, recognized Territory or District," shall remain penal notwithstanding a "subsequent repeal or amendment thereof by any such State or Territory or District."

It follows, therefore, we think, that chapter 11 of the Criminal Code, and necessarily § 272, which is a part of it, are not applicable to the District of Columbia. And it is an immediate inference that if the chapter defining the crime of murder is not applicable, chapter 14, which deals with its trial and incidents, may not be applicable. There are circumstances which confirm the inference.

In chapter 11 the definition of murder is essentially the same as in the District Code, though there are some

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differences in the manner of expression. It is divided into murder in the first degree and murder in the second degree, and in both the punishment is death, the District Code providing the manner of death to be by hanging, as does the Criminal Code, in § 323 of chapter 14.

The punishment for murder in the second degree is different in the different codes. In the District Code it is imprisonment for life or for not less than twenty years; in the Criminal Code, for life or for not less than ten years. The punishments for manslaughter are also different, being for not more than ten years in the Criminal Code and not exceeding fifteen years in the District Code, or such imprisonment and a fine not exceeding one thousand dollars.

This brings us to the consideration of chapter 14, of which it may be said that most of its sections are continuations of the sections of the Revised Statutes or of former acts of Congress. For instance, § 330, which provides for the qualified verdict, is the same as the act of January 15, 1897, c. 29, § 1, 29 Stat. 487, except that the words "murder in the first degree" are added.

Further comparisons of the sections and provisions of the codes will not help us to clarify the situation, which, it must be admitted, lends itself to controversy.

We think, however, that there are certain general considerations which control. The codes are separate instruments, and no certain test can be deduced from pointing out particular likenesses or differences. But the effect of separation is important and necessarily had its purpose. The codes had in the main special spheres of operation and provisions accommodated to such spheres. There is certainly nothing anomalous in punishing the crime of murder differently in different jurisdictions. It is but the application of legislation to conditions. But if it be anomalous, very little argument can be drawn from it to solve the questions in controversy. The difference

existed for a number of years between the District and other places under national jurisdiction, for, as we have seen, the qualified verdict has not existed in the District since the enactment of the District Code, and did not exist when the Criminal Code was enacted. There is certainly nothing in the mere act of enacting that code which declares an intention to give to the provision conferring power on a jury to qualify their verdict greater efficacy against the code of the District than the same provision in the act of January 15, 1897, possessed. And the difference between that act and the District Code we cannot assume was overlooked and all that it meant in the administration of criminal justice when Congress came to review the laws of the country for the purpose of their codification and necessarily the territorial extent of their operation.

Congress certainly in enacting the District Code, recognized the expediency of separate provisions for the District of Columbia. It was said at the bar and not denied that the District Code was not only the work of the lawyers of the District, having in mind the needs of the District, but of its citizens as well, expressed through various organizations and bodies of them. In yielding to the recommendations Congress made no new precedent. It had given local control to the Territories, and it enacted a separate code for Alaska.

But it is said that Congress recognized the incompleteness of the District Code, and provided that all inconsistent acts of Congress passed thereafter should be held to modify its provisions, and to support this § 1639 is cited. That section provides as follows:

"The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment

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of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith."

In connection with this section, § 341 of the Criminal Code is referred to, which is as follows:

"Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

This section adds no force or explanation to § 1639. Of course, what was "embraced within and superseded by" the Criminal Code is repealed by it. But we have to consider, as we have considered, whether the provision of the District Code in regard to the punishment of murder were embraced within the Criminal Code, and the discussion answers as well the contention based on § 1639. There is no inconsistency of superseding or repealing effect between the Code of the District and the Criminal Code, regarding the latter as an act of Congress passed after the District Code. Having definite territorial operation, they can exist together. And, as said by the Court of Appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provisions of the Criminal Code, which, in chapter 15, enumerates in detail the provisions repealed, and no reference is made to the District Code.

(3) The last contention of petitioner is that the jury was not lawfully drawn. This contention is made as a make-weight at the last minute. It was not made as a ground for new trial or arrest of judgment, nor was it assigned as error in the Court of Appeals. The contention has the broad basis, according to the argument of petitioner, that there is no way of impaneling jurors in a

capital case in the District of Columbia without assenting to or dissenting from the proposition. We think it constituted a ground of objection to the competency of the jurors when they were called, and should have been availed of at the trial. It is provided by § 919 of the District Code that no verdict shall be set aside for any cause which might be alleged as ground of challenge before a juror is sworn, except for disqualifying bias not discovered or suspected by the defendant or his counsel before the juror was sworn.

Judgment affirmed.

GLASGOW *v.* MOYER, WARDEN OF THE
UNITED STATES PENITENTIARY AT AT-
LANTA, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 1123. Argued May 13, 1912.—Decided June 7, 1912.

The writ of *habeas corpus* cannot be made to perform the office of writ of error.

The rule that on *habeas corpus* the court examines only into the power and authority of the court restraining the petitioner to act, and not the correctness of its conclusions, *Matter of Gregory*, 219 U. S. 210, applies where the petitioner attacks as unconstitutional, or as too uncertain, the law which is the foundation of the indictment and trial.

Where the court below has remitted the petitioner to his remedy on writ of error, it would be a contradiction to permit him to prosecute *habeas corpus*.

A defendant in a criminal case cannot reserve defenses which he might make on the trial and use them as a basis for *habeas* proceedings to attack the judgment after trial and verdict of guilty. It would introduce confusion in the administration of justice.

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Argument for Appellant.

THE facts are stated in the opinion.

Mr. John C. Fay, with whom *Mr. Chas. Colden Miller* was on the brief, for appellant:

Section 211 of the Penal Code is unconstitutional

Congress exceeded its constitutional power in not confining the depositing matter in some authorized receptacle of the United States, or for delivery through the United States mail.

There is no authority for this kind of legislation under the grant in § 8 of Art. I, "to establish Post Offices and Post Roads."

This statute, by its broad terms, certainly exceeds the powers of Congress to enact, and is, therefore, unconstitutional and void. *United States v. Steffens*, 100 U. S. 82; *United States v. Reese*, 92 U. S. 214; *Baldwin v. Franks*, 120 U. S. 678; *United States v. Harris*, 177 U. S. 305; *United States v. Gooding*, 12 Wheat. 460; *United States v. Sheldon*, 2 Wheat. 119; *James v. Bowman*, 190 U. S. 127.

Section 211 is obnoxious to the guarantees contained in the Sixth Amendment to the Constitution, in that it fails by its lack of certainty and the absence of any standard contained in it to inform the accused of the nature and cause of the accusation. *Cook v. State*, 26 Ind. App. 278; *Matthew v. Murphy*, 23 Ky. L. Rep. 750; *Johnston v. State*, 100 Alabama, 32; *Louis. & N. R. Co. v. State*, 99 Kentucky, 132; *Czarra v. Board of Medical Supervisors*, 25 App. D. C. 443; *McConville v. Jersey City*, 39 N. J. L. 38; *United States v. Balt. & Ohio S. W. R. R. Co.*, 222 U. S. 8.

The uncertainty of the statute in the use of the word "obscene" cannot be better illustrated than by referring to the variety of meaning that has been attached to it in the various prosecutions had under it in the various District Courts of the United States. Not less than 26

cases ¹ have been before the District Courts of the United States for the definition of the words of this statute, and the various definitions have been almost as numerous as the cases before them. *Tot homines quot sententiae*.

The uncertainty of the law is as obnoxious to "due process of law" as it is to the requirement of informing the accused of the nature of the accusation against him. Until the legislature has defined a crime in definite words it has not made a valid law; there can be no due process of law to enforce it.

That such uncertainty in a statute creating a punishment for an act which is *malum prohibitum* only, which in its practical operation and enforcement unavoidably involves judicial legislation in defining the crime after the commission of the act, whether left to the court or to a jury, is an *ex post facto* law, and carries with it all the evils that the framers of the Constitution sought to avoid by forbidding such enactment. See *Rosen v. United States*, 161 U. S. 29.

The indictment is insufficient.

¹ *United States v. Bennett*, Fed. Cas. No. 14, 571; *United States v. Britton*, 17 Fed. Rep. 733; *United States v. Brazeau*, 78 Fed. Rep. 463; *United States v. Coleman*, 131 Fed. Rep. 829; *United States v. Commerford*, 25 Fed. Rep. 903; *United States v. Clark*, 37 Fed. Rep. 107; *United States v. Cheesman*, 19 Fed. Rep. 498; *United States v. Clarke*, 33 Fed. Rep. 402; *United States v. Clarke*, 38 Fed. Rep. 734; *United States v. Davis*, 38 Fed. Rep. 327; *United States v. Debout*, 28 Fed. Rep. 523; *United States v. Harman*, 45 Fed. Rep. 421; *United States v. Lamkin*, 73 Fed. Rep. 463; *United States v. Moore*, 129 Fed. Rep. 160; *United States v. Martin*, 50 Fed. Rep. 921; *United States v. Males*, 51 Fed. Rep. 42; *United States v. Redd*, 176 Fed. Rep. 944; *United States v. Smith*, 45 Fed. Rep. 418; *United States v. Smith*, 45 Fed. Rep. 477; *United States v. Shepherd*, 160 Fed. Rep. 584; *United States v. Slenker*, 32 Fed. Rep. 695; *United States v. Smith*, 11 Fed. Rep. 664; *United States v. Timmons*, 85 Fed. Rep. 205; *United States v. Wroblensky*, 118 Fed. Rep. 496; *United States v. Williams*, 4 Fed. Rep. 485; *United States v. Wrightman*, 29 Fed. Rep. 636.

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The facts and record in this case make it distinguishable from the *Rosen Case*, 161 U. S. 29.

The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor any one else, has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. The general rule requires an indictment to be specific. *Stephens v. State*, Wright (Ohio), 73; *Commonwealth v. Gillespie*, 7 Serg. & R. 469; *Commonwealth v. Stow*, 1 Massachusetts, 54; *Commonwealth v. Bailey*, 1 Massachusetts, 62; *Commonwealth v. Sweeney*, 10 Serg. & R. 173; *Commonwealth v. Wright*, 1 Cush. 46; *Commonwealth v. Tarbox*, 1 Cush. 66; *Commonwealth v. Houghton*, 8 Massachusetts, 107; *King v. Beere*, 12 Mod. 219; *State v. Parker*, 11 Am. Dec. 735. See also *Commonwealth v. Stevens*, 1 Massachusetts, 203. The Constitution forbids in a certain class of cases prosecution except by indictment; therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is entitled, under the Constitution, to know the secrets of the grand jury room.

The Solicitor General for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This appeal is prosecuted to review the order of the District Court denying petition of appellant to be discharged in proceedings for *habeas corpus* from the custody of the Warden of the United States Penitentiary at Atlanta, Georgia.

The petition alleges the following: On the 21st of July, 1911, while appellant was temporarily in Wilmington, Delaware, he was arrested and charged with peddling books without a license and was convicted in the Municipal Court of the city and fined \$5.00. The judgment was

almost immediately remitted and he was re-arrested and charged with having deposited in the United States mails a copy of an obscene book, and by one William G. Mahaffy, a United States commissioner, committed to the custody of the warden of the Newcastle County Workhouse to await the action of the grand jury. Under the direction of the United States Attorney his rooms were pillaged and all of his possessions, clothing, books, etc., were carried off and deposited in the United States court house. Before his conviction he was stripped of his clothing, dressed in prison garb, harsh prison rules were enforced against him and he was fed on unwholesome food. He was so confined and treated until a grand jury, selected by the commissioner who had committed him, found an indictment against him charging him with having deposited an obscene book in the United States mails, and, without seeing a copy of the indictment or knowing its contents, he was arraigned in his prison clothes, notwithstanding the indictment charged no offense against the laws of the United States and was couched in vague and uncertain language that did not apprise him of the offense, defects which he brought to the attention of the judge of the District Court, by pleas to the jurisdiction, demurrers and motions to quash, all of which were overruled, and he was placed on trial before a jury selected by the commissioner who had committed him. Although the array was challenged for that cause and the number of peremptory challenges prescribed by law were not allowed him, he was forced to trial, and the jury under instructions from the court was constrained to find a verdict against him, papers material to his defense having been withheld by the United States Attorney, with the acquiescence of the judge, and process for non-resident witnesses having been refused.

Motions in arrest of judgment and for a new trial were filed and the hearing thereof fixed for January 6, 1912, before Edward G. Bradford, District Judge, who, having,

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the petition alleged, exhibited during the trial a deep-seated prejudice against appellant and a violent partiality in his rulings for the United States Attorney, appellant in good faith, as in law he was entitled to do, filed an affidavit charging him, the District Judge, with prejudice, and an application to have the same certified to the senior Circuit Judge, then present in the Circuit Court of Appeals for the Third Circuit, together with the certificate of counsel as required by law.

The petition further alleged that by the filing of the same and by operation of the act of March 3, 1911, 36 Stat. 1087, c. 231, which went into operation January 1, 1912, the District Judge became and was disqualified to further proceed in said cause, and any further action taken by him was without jurisdiction and absolutely null and void; further alleged that the judge forbade the clerk to enter of record the affidavit, forbade the clerk to certify the same to the senior Circuit Judge, proceeded to overrule the motions in arrest of judgment and for a new trial, and, against the protest of appellant, sentenced him to confinement in the penitentiary at Atlanta, Georgia, for a term of fifteen months from the sixth of January, 1912, and to pay a fine of \$500.

Appellant, the petition alleged, was placed in the hands of the United States Marshal and by him imprisoned by force in his (the Marshal's) office from about 1 P. M., January 6, 1912, without being permitted to return to the court house to get his personal property there, and at midnight was spirited away by a circuitous route to Norfolk, Virginia, where he was imprisoned all night and all of the next day (Sunday). Thence he was taken, manacled, without being supplied with food or being allowed to purchase any, and delivered under the unlawful order of the District Court to the custody of the appellee, by whom he has ever since been confined in the penitentiary at Atlanta, Georgia.

Appellant, the petition alleged, is by the action recited not only unlawfully imprisoned, but, by the refusal to certify his application, affidavit and certificate of counsel to the senior Circuit Judge, "there is now no judge of the United States District Court of Delaware, and no one there authorized to pass upon his motions in arrest of judgment or motion for a new trial, or competent to sit and certify to the exceptions reserved by him to the many errors committed by said Judge Bradford during his trial, or to permit him to have the same reviewed and set aside by an appellate tribunal."

The allegations of the petition were denied by the District Judge. A writ of *habeas corpus* was prayed, to the end that appellant be discharged or cause to the contrary be shown.

The writ was issued, but upon its return and hearing appellant was remanded to custody.

The court, as grounds for its decision, said: "The real question in this case is whether or not under § 21 of the new Judicial Code, an affidavit such as provided for therein, can be filed after a case has been tried" and verdict rendered, and where the attempt is to disqualify a judge from pronouncing sentence. The court pointed out that in the case at bar there was also the circumstance that the case had been tried and the verdict rendered before the Code went into effect, and the court thought that it could not be conceived that it was the purpose of Congress to apply the act to such a situation, the section itself providing that the affidavit should be filed not less than ten days before the beginning of the term of the court or good cause shown for failure to file within that time. The court said further: "It would require some specific language in this act to satisfy me that Congress intended such an affidavit to be filed at the stage which had been reached in this case."

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The court, however, finally concluded that the action of the District Court of Delaware "was a matter for review by the Circuit Court of Appeals on writ for error" and was "clearly beyond the proper scope and use of the" writ of *habeas corpus*.

The assignments of error attack the action of the District Court for error (1) in holding that §§ 20 and 21 of the Judicial Code did not apply to the case at bar; (2) in holding that Judge Bradford had jurisdiction to impose the imprisonment complained of; and (3) in refusing the writ and dismissing the petition. But questions are raised here which were not presented in the petition in the court below or passed on by that court. Section 211 of the Criminal Code act of March 4, 1909, 35 Stat. 1088 (which makes it a crime to deposit obscene books in the mails),¹ under which appellant was indicted, is attacked as unconstitutional because (a) it is not within

¹ "SEC. 211. Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, . . . is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, . . . shall be fined not more than five thousand dollars or imprisoned not more than five years, or both."

"SEC. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. . . ."

the constitutional grant of legislative power to Congress, in that it does not confine its operation to depositing matter in the United States post-office or other authorized depositary for United States mail; (b) it does not inform appellant of the nature of the accusation against him nor describe an offense with certainty; (c) it is an *ex post facto* law; (d) appellant was deprived of his liberty and property without due process of law. It is also asserted that § 211 does not create an offense against the United States.

Appellant, however, even if, in the absence of all proof of their truth, the recitals of the petition which we have previously stated be accepted for the purpose of this proceeding only as true, encounters an obstacle to a consideration of his contentions in the limitation upon the scope of a writ of *habeas corpus*, and this limitation was the ultimate ground of the decision of the District Court.

The writ of *habeas corpus* cannot be made to perform the office of a writ of error. This has been decided many times, and, indeed, was the ground upon which a petition of appellant for *habeas corpus* to this court, before his trial, was decided. It is true, as we have said, that the case had not then been tried, but the principle is as applicable and determinative after trial as before trial. This was decided in one of the cases cited.—*In re Lincoln*, 202 U. S. 178, which cited other cases to the same effect. Subsequent cases have made the principle especially pertinent to the case at bar. *Harlan v. McGourin*, (218 U. S. 442) was an appeal from a judgment discharging a writ of *habeas corpus* petitioned for after conviction, and it was held that the writ could not be used for the purpose of proceedings in error but was confined to a determination whether the restraint of liberty was without authority of law. In other words, as it was said, "Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions."

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Matter of Gregory, 219 U. S. 210, was a writ of *habeas corpus* brought after conviction, and we said that we were not concerned with the question whether the information upon which the petitioner was prosecuted and convicted was sufficient or whether the case set forth in an agreed statement of facts constituted a crime—that is to say, whether the court properly applied the law—if it be found that the court had jurisdiction to try the issues and to render judgment. And for this many cases were cited.

The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant before his trial petitioned this court in *habeas corpus*, and that his petition was denied on the ground that his proper remedy was by writ of error after trial. In his petition he charged mistreatment by the prison authorities, the taking of his papers and property from his room and from the express office, and, that although he informed the United States Attorney, no permission was granted him to examine his papers for his defense. He also in the petition attacked the indictment against him on the ground that it described no offense against the laws of the United States nor an offense “against any valid law of the United States and afforded no justification for his imprisonment.” The petition was accompanied by a brief which presented the same contentions as those now presented, though less elaborately.

Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus*. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals. It certainly cannot be said that the District Court of Delaware did not have jurisdiction of the case, including those defenses, or that its rulings could not have been reviewed by the Circuit Court of Appeals or by this court by writ of error. It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict.

Order discharging writ affirmed.

CITY OF LOUISVILLE *v.* CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 761. Argued March 7, 8, 1912.—Decided June 7, 1912.

Quære, and not determined, whether an ordinance cutting the earnings of a telephone company down to six per cent per annum, would, under the circumstances of this case be confiscatory and unconstitutional under the Fourteenth Amendment.

This court requires clear evidence before it will declare legislation, otherwise valid, to be void as an unconstitutional taking of property by reason of establishing rates that are confiscatory.

In this case the evidence is not sufficient to justify enjoining enforcement of an ordinance fixing rates of a telephone company and the decree granting an injunction is reversed, but without prejudice.

THE facts, which involve the question of whether an ordinance of the City of Louisville fixing rates for telephone service in that city, was unconstitutional as confiscatory of the property of the companies, are stated in the opinion.

Mr. Clayton B. Blakey and Mr. Huston Quinn, with whom Mr. Joseph S. Lawton was on the brief, for appellant:

Questions referred to a master cannot in turn be referred to an accountant in such a manner that the report of the accountant will bind the parties, the master or the court. *Kimberly v. Arms*, 129 U. S. 512.

The court should assume that a telephone company will charge the same rates to all of its subscribers having the same class of service. *Knoxville v. Water Co.*, 212 U. S. 16.

A telephone company without a franchise or privilege to occupy the streets of a city is a trespasser and should not be permitted to question a rate regulating ordinance. *Rough River Tel. Co. v. Cumberland Tel. Co.*, 119 Kentucky, 470; *Rural Home Tel. Co. v. K. & I. Tel. Co.*, 32 Ky. Law Rep. 1072; *East Tenn. Tel. Co. v. Russellville*, 106 Kentucky, 669; *Bland v. Cumberland Tel. Co.*, 109 S. W. Rep. 1180; *Bridge Co. v. Prange*, 35 Michigan, 400; *Cincinnati Inclined Plane Railway Co. v. Cincinnati*, 44 N. E. Rep. 327.

A telephone company should not be granted relief against rates established by a city ordinance where such company refuses to make a frank disclosure of its books, and records and facts within its knowledge. *Knoxville v. Water Co.*, 212 U. S. 16.

A telephone company should not be permitted to earn a return on cables which it has installed and does not use

and will have no occasion to use for years to come. *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 697; *San Diego L. & T. Co. v. Jasper*, 189 U. S. 429; *Water District v. Water Co.*, 99 Maine, 376; *S. C.*, 59 Atl. Rep. 539.

In determining the value of a telephone plant when it charges that a rate ordinance confiscates its property the true method is to ascertain what it would cost to reproduce a plant, then deduct from the reproduction cost the amount the plant in question has depreciated. *Knoxville v. Water Co.*, 212 U. S. 1.

In determining the value of a telephone plant where it claims that a city rate ordinance confiscates its property the value of the franchise should not be considered. Beale and Wyman's Work on Railroad Rate Regulation, § 362; *Brunswick & T. Water District v. Maine Water Co.*, 99 Maine, 371.

Rates charged by telephone companies in other cities of substantially the same size and similarly located as the city in question are a fair criterion in determining the reasonableness of telephone rates. *Interstate Com. Comm. v. Southern Railway Co.*, 115 Fed. Rep. 741; *Interstate Com. Comm. v. East Tenn., Va. & Ga. Ry.*, 85 Fed. Rep. 107.

Mr. William L. Granbery and Mr. Alexander Pope Humphrey, with whom Mr. Alexander Pope Humphrey, Jr., was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to prevent the enforcement of an ordinance of the City of Louisville fixing telephone rates, passed in 1909, after the attempt of the city to deprive the appellee of its franchise, when that seemed likely to fail. See *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S. 649. The question raised is the usual one of con-

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fiscation. In consequence of the conclusion to which we have come we shall make a much more summary statement of the facts than in other circumstances might be necessary. The case was referred to a Master and he reported in favor of the city. He was of opinion that in the first year after the ordinance should go into effect there would be a loss of \$30,000, but that in another year or so, in view of the probable increase of subscribers, the company would get back to its former net revenue with a probable continuous increase thereafter, and would earn a sufficient return. The judge was of a different opinion, and for the purposes of the present decision only we shall adopt his figures subject to the changes that we shall state which leave us unprepared to sustain the decree without giving the ordinance a trial to show its actual effect.

The Judge's values were:

Plant, including toll lines	\$1575000.00
Real estate.	162000.00
Supplies on hand	18000.00
Working capital	33000.00

\$1788000.00

Gross earnings for 1908, including 15% of receipts from toll lines. This was undisputed. \$325838.30

The court added 10% more of the toll line receipts, making 330926.38

The Master was of opinion that the remaining 85% should be added, making the total gross earnings. 369087.00

For the purpose of such an estimate as this we think that the toll lines should be either in or out, and if they are to be counted in the property upon which the appellee is not to be prevented by

law from earning a fair return, as they are above, and the expenses charged to the appellee, the whole return from them should be added to the gross earnings of the appellee. So we take the total gross earnings as.....	\$369087.00
Expenses as found by the Master and accepted by the Judge	\$216363.07
But this includes amount charged to the Exchange for the use of real estate (less expenses for repairs), which, in view of the inclusion of real estate above, it should not	11707.52
	<hr/>
	\$204655.55
Deduct corrected expenses from gross earnings	204655.55
	<hr/>
Net earnings	\$164431.45
Even if we deduct from the net earnings a sum estimated by the Judge as necessary above actual expenditures of 1908 to make good average depreciation..	24095.02
	<hr/>
we have	\$140336.43
which is nearly eight per cent. on the estimated value. The Master prophesies a falling off for the first year of	30000.00
	<hr/>
which would leave	\$110336.43
or over six per cent. on the valuation assumed.	

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Suppose now that we leave out the toll lines.

Plant with real estate &c. as above. . . . \$1788000.00

Deduct toll lines estimated at 125000.00

\$1663000.00

Gross earnings. 325838.30

Less 15% from toll lines 7632.11

\$318206.19

Expenses \$216363.07

Less amount charged for use
of real estate as above.. 11707.52

\$204655.55

Less toll line expenses
which if estimated (in the
absence of satisfactory
proof as to their amount)
by dividing expenses in
proportion to receipts
would be approximately 30000.00

\$174655.55

Deduct corrected expenses from gross
earnings 174655.55

\$143550.64

Additional deduction for depreciation as
before 24095.02

\$119455.62

Which is nearly 7 per cent. or deducting
for loss of custom the first year. . . . 30000.00

\$89455.62

which is just above five per cent. on the Judge's valuation.

We express no opinion whether to cut this telephone company down to six per cent. by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent. on the values estimated by him. The Judge on assumptions to which we have stated our disagreement makes the present earnings $5^{10}/_{17}$ per cent. with a reduction by the ordinance to $3^6/_{17}$ per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand.

Decree reversed without prejudice.

MESSENGER v. ANDERSON.

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

No. 150. Argued January 19, 22, 1912.—Decided June 2, 1912.

Where the Circuit Court of Appeals has before it in the second trial of the same case, a will previously construed by it, and meanwhile the highest court of the State in which the real estate affected is situated has construed the will differently, the Circuit Court of Appeals is not bound to adhere to its previous decision as being the law of the case. It may follow, and in such a case it should lean toward an agreement with, the state court.

In the absence of statute, the phrase "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts gen-

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erally to refuse to open what has been decided—not a limit to their power.

In a conflict between decisions of the state and Federal courts, this court is free when the case comes here.

In this case, in which the Circuit Court of Appeals construed a will as giving testator's son a life interest only with remainder that he could not affect, and the state court construed it as giving him the estate subject to the divesting clause, *held*, that the construction given by the state court was right and that the Circuit Court of Appeals should have followed it.

Quære whether the decision of the state court did not finally adjudicate the question of title as between the parties so as to be binding upon every court before which the title might subsequently be discussed.

171 Fed. Rep. 785, reversed.

THE facts, which involve the construction of a will affecting real estate in Ohio, and the question of whether the Federal courts should follow the state court in such a case, are stated in the opinion.

Mr. Harry E. King and *Mr. Clayton M. Everett*, with whom *Mr. Oliver B. Snider* was on the brief, for petitioner:

The first and second judgments of the Circuit Court of Appeals each reversed the preceding judgment of the Circuit Court, and remanded the case generally, without other direction, and therefore, until the last judgment of the Circuit Court, no final judgment was rendered. *Aurora City v. West*, 7 Wall. 82; *Smith v. Adams*, 130 U. S. 167.

Respondent acquired no title under the will of his grandfather. Thereby testator intended to give his sons, or the survivor of them, an estate in fee simple, subject to defeasance should they or the survivor of them die without issue. *Anderson v. United Realty Co.*, 79 Ohio St. 23; § 5970, R. S. O. (10580, Gen'l Code); *Carter v. Gray*, 58 N. J. Eq. 411; *Chamberlain v. Owings*, 30 Maryland, 447; *Piatt v. Sinton*, 37 Ohio St. 353; *Lambert v. Paine*, 3 Cranch, 97.

The decision of the Circuit Court of Appeals that under the will respondent took an estate in remainder upon the decease of his father, is contrary to long settled rule of property in Ohio. *Abbot v. Essex Co.*, 18 How. 202; *Parish v. Ferris*, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 320, citing and following *Abbot v. Essex Co.*, *supra*; *Taylor v. Foster*, 17 Ohio St. 166; *Piatt v. Sinton*, 37 Ohio St. 353; *Martin v. Lapham*, 38 Ohio St. 538; *Collins v. Collins*, 40 Ohio St. 353; *Durfee v. MacNeill*, 58 Ohio St. 238; *Anderson v. United Realty Co.*, 79 Ohio St. 23; § 5970, R. S. O. (10580, Gen'l Code); *Walker v. Walker*, 20 O. C. C. 409; *Darlington v. Compton*, 20 O. C. C. 242; *Pendleton v. Bowler*, 27 Cinn. L. Bull. 313.

The Federal courts must look to the law of the State in which land is situated for the rules which govern its descent, alienation and transfer and for the effect and construction of wills and other instruments conveying title thereto, and in trials at law must regard the state law as a rule of decision. Section 721, U. S. Rev. St.; *Brine v. Ins. Co.*, 96 U. S. 627; *DeVaughn v. Hutchinson*, 165 U. S. 566; *Clarke v. Clarke*, 178 U. S. 186; *Orr v. Gilman*, 183 U. S. 278; *East &c. Co. v. Central Co.*, 204 U. S. 266; *Olmstead v. Olmstead*, 216 U. S. 386.

The Circuit Court of Appeals erred in not following the Ohio decisions and statute. *Giles v. Little*, 104 U. S. 291; *Britton v. Thornton*, 112 U. S. 526; *Roberts v. Lewis*, 153 U. S. 367; *Little v. Giles*, 25 Nebraska, 313; *Yocum v. Parker*, 134 Fed. Rep. 205; *Bilger v. Nunan*, 186 Fed. Rep. 665.

For decisions construing statutes like the Ohio statute, see: *Devecmon v. Shaw*, 70 Maryland, 210; *Snyder v. Baer*, 144 Pa. St. 278; *Kiefer v. Keepler*, 173 Pa. St. 181; *Simons v. Simons*, 168 Massachusetts, 144; *Harris v. Dyer*, 18 R. I. 540; *May v. San Antonio*, 83 Texas, 502; Page on Wills, § 562, pp. 653, 654.

Independently of statute, the will devised only a de-

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feasible fee. *Thompson v. Hoop*, 6 Ohio St. 480; *Smith v. Berry*, 8 Ohio, 365; other Ohio cases above cited; Schouler on Wills, § 262, p. 549.

The limitation over provided for in the will constituted a definite failure of issue; an estate tail, or an estate in remainder was not and could not have been created or implied. Kent's Comm., vol. 4, pp. 274, 275, star paging; 1 Tiffany on Real Prop., § 25, p. 63; 2 Jarman on Wills, 6th ed., Big star paging 1320; 2 Washburn, Real Prop., 5th ed., star paging 355; *Niles v. Gray*, 12 Ohio St. 320.

A limitation over after definite failure of issue creates a defeasible fee. *Pells v. Brown*, 3 Croke's Rep. 590; *DeWolf v. Middletown*, 18 R. I. 810; *Toman v. Dunlop*, 18 Pa. St. 72; *Jordan v. Roach*, 32 Mississippi, 481; *Daniel v. Thompson*, 14 B. Mon. (Ky.) 662; *Wardell v. Allaire*, 20 N. J. L. 6; Page on Wills, § 591.

The construction given the will by the Circuit Court of Appeals, 146 Fed. Rep. 929, rests largely upon three cases, one from Ohio, one from Georgia and the third from South Carolina, each of which has been discredited or overruled. The rule in Ohio is not as declared in *Shaw v. Hoard*, 18 Ohio St. 228, but the opposite as in *Anderson v. United Realty Co.*, 79 Ohio St. 23, and cases therein cited. In Georgia, not as in *Wetter v. United &c. Co.*, 75 Georgia, 540, but the opposite as in *Matthews v. Hudson*, 81 Georgia, 126; *Chewing v. Shumate*, 106 Georgia, 751; *Hill v. Terrell*, 123 Georgia, 49; *Kinard v. Hale*, 128 Georgia, 485. *Carr v. Green*, 2 McCord (S. C.), 75, construed a will which was given exactly the opposite construction in *Carr v. Jeanerett*, 2 McCord (S. C.), 66. See also *Carr v. Porter*, 1 McCord Ch. 60; *Shaw v. Erwin*, 41 So. Car. 209; *Bond v. Moore*, 236 Illinois, 576. Other cases overruling *Carr v. Green* are: *Durant v. Nash*, 30 So. Car. 184; *Gordon v. Gordon*, 32 So. Car. 563; *Powers v. Bullwinkle*, 33 So. Car. 293; *Thompson v. Peake*, 38 So. Car. 440; *Sheppard v. Jones*, 77 So. Car. 274.

The decision of the Circuit Court of Appeals is also opposed to the decisions of the highest court of Mississippi, where the testator resided when his will was drawn, executed and took effect. *Jordon v. Roach*, 32 Mississippi, 481; *Sims v. Conger*, 39 Mississippi, 231; *Busby v. Rhodes*, 58 Mississippi, 237; *Johnson v. DeLome*, 77 Mississippi, 15; *Halsey v. Gee*, 79 Mississippi, 193; and besides being contrary to the decision of the Supreme Court of Ohio is also opposed to the decisions of the highest courts of all the States comprising the Sixth Circuit. *Hart v. Thompson*, 42 Kentucky, 482; *Daniel v. Thompson*, 53 Kentucky, 562; *Harris v. Berry*, 70 Kentucky, 113; *Salé v. Crutchfield*, 71 Kentucky, 636; *Crozier v. Cundall*, 99 Kentucky, 202; *Smith v. Ballard*, 117 Kentucky, 179; *Harvey v. Bell*, 118 Kentucky, 512; *Rice v. Rice*, 118 S. W. Rep. 270 (Ky.); *Williamson v. Tunis*, 107 Tennessee, 83; *Mullreed v. Clark*, 110 Michigan, 229.

Mr. Rhea P. Cary and Mr. C. H. Trimble for respondent: An executory devise or bequest cannot be prevented or disturbed by any alteration in the estate out of which or subsequent to which it is limited. The executory interest is wholly exempted from the power of the first beneficiary or taker. 4 Kent's Comm. 270; *Jackson v. Bull*, 10 Johns. 19; *Burleigh v. Clough*, 52 N. H. 275.

If only a life estate is granted, a power of disposition in the life tenant does not invalidate a remainder over. *Kelly v. Meins*, 135 Massachusetts, 234; *Ramsdell v. Ramsdell*, 8 Maine, 205; *Larned v. Bridge*, 17 Pick. 339; *Burleigh v. Clough*, *supra*.

The contract of October 4, 1844, was competent evidence. Declarations by one in possession, in disparagement of his title, are admissible against those claiming under him. *Dooley v. Baines*, 86 Virginia, 648; *Dodge v. Freedmen's S. & T. Co.*, 93 U. S. 379; *Henderson v. Wanamaker*, 79 Fed. Rep. 738; *Baker v. Humphrey*, 101 U. S.

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499; 2 Wigmore on Ev., § 1080; 1 Elliott on Ev. (1904 ed.), § 261; 16 Cyc. 986.

It is the duty of courts to construe wills as they find them, and not to make them. While the doctrine of implication must be resorted to cautiously in the construction of wills, the courts should not hesitate to resort to that doctrine, when thus only can the manifest intention of the testator be carried out. *Holton v. White*, 23 N. J. L. 330, *Lytle v. Beveridge*, 58 N. Y. 592; *In re Moore's Estate*, 11 Misc. Rep. 436; *Bentley v. Kaufman*, 12 Phila. 435; *In re McAlpin's Estate* (Pa.), 60 Atl. Rep. 321; *Beilstein v. Beilstein*, 194 Pa. St. 152.

Parrish v. Ferris, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 320; *Taylor v. Foster*, 17 Ohio St. 166; *Piatt v. Sinton*, 37 Ohio St. 353; *Martin v. Lapham*, 38 Ohio St. 538; *Collins v. Collins*, 40 Ohio St. 353; *Anderson v. United Realty Co.*, 79 Ohio St. 23, can be distinguished from the case at bar.

It is essential to a complete and effectual delivery of an instrument intended to operate as a present deed, that the grantor should part with all control and dominion over it. If he retains the right to recall the deed, it cannot be considered as delivered. The same principle applies to an escrow. 1 Devlin on Deeds, § 324, p. 578, citing *Campbell v. Thomas*, 42 Wisconsin, 437; *Miller v. Sears*, 91 California, 282; *Prutsman v. Baker*, 30 Wisconsin, 644; *In re Cornelius' Estate*, 151 California, 550. And see *Shirley v. Heirs*, 14 Ohio St. 310; *Provart v. Harris* (Ill.), 39 N. E. Rep. 958.

A plaintiff cannot be forbidden to try facts upon which his right to relief is based before a court of his own choice, if otherwise competent. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of ejectment for land in Toledo, Ohio,

brought by the respondent, Anderson. The case went three times to the Circuit Court of Appeals, and ended in a judgment for the plaintiff. 146 Fed. Rep. 929; 77 C. C. A. 179. 158 Fed. Rep. 250; 85 C. C. A. 468. 171 Fed. Rep. 785; 96 C. C. A. 445. The facts that need to be stated are these: In 1841 Charles Butler assigned an overdue mortgage of the land to Henry Anderson as security for a note of his own. He made default, Anderson brought a bill to foreclose, (Butler not being served with process), got a decree, bought in, and got the sale confirmed. For the purposes of this decision it may be assumed that Anderson got the land in fee simple, subject to some question as to Butler's rights. The plaintiff below, the respondent here, claimed as remainderman under the will of Henry Anderson, who was his grandfather. The petitioner claims under a conveyance from Butler. If the plaintiff's title is bad that is an end of the case.

In 1846 Henry Anderson, then domiciled in Mississippi, made his will and died, leaving two sons William and James. These sons executed deeds declaring that their father Henry held and intended to hold the land in trust to secure the payment of Butler's note, and Butler subsequently made such payments on the same that it may be assumed that unless the plaintiff has a title that his father James could not affect by the above-mentioned deed, he has none. Whether he has such a title depends on the terms of Henry's will. That instrument, after creating a general trust of substantially all the testator's property, went on thus: "Item. It is my will that when my son William arrives at the age of twenty-one years the trustees . . . shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property reserving thereout two-fifth parts of said moiety, by valuation which my said trustees shall hold in trust and properly invest and pay over to

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him at the age of twenty-five years . . . And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William," &c.

If these clauses were all, there would be no doubt that William and James got an absolute title when they reached the age mentioned. But a following paragraph reads, "If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants then" over to brothers and sisters of the testator. Later in the paragraph the testator says: "I make the following explanation: The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons of disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills." The testator's son William died in 1850, unmarried and intestate. The other son James died in 1902, intestate and leaving the plaintiff his only child.

The Circuit Court of Appeals when this case first came up held that James took only a life estate and that the plaintiff got a remainder that his father could not affect. 146 Fed. Rep. 929. But pending the proceedings another case was tried in the state courts between these same parties concerning other parcels of land in Toledo depending on the same title, in which it was decided by the lower court and affirmed on writ of error by the Supreme Court of Ohio that James took a fee subject to be defeated

only by his leaving no lineal descendant. *Anderson v. United Realty Co.*, 79 Ohio St. 23. S. C., 222 U. S. 164. The judgment of the lower court was pleaded, but it was held by the Circuit Court of Appeals after the affirmation by the Supreme Court that its own previous decision was the law of the case and that it was not at liberty to reverse the judgment even if the matter was *res judicata* on the principle laid down in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396. See *Parrish v. Ferris*, 2 Black, 606. In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *King v. West Virginia*, 216 U. S. 92, 100. *Remington v. Central Pacific R. R. Co.*, 198 U. S. 95, 99, 100. *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343. Of course this court, at least, is free when the case comes here. *Panama R. R. Co. v. Napier Shipping Co.*, 166 U. S. 280. *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84. In our opinion even apart from the effect of the state judgment as an adjudication it should have been followed, if for no other reason, because at least as against the decision of the Circuit Court of Appeals it was right.

The later clauses that we have quoted from the will make a difference, it is true, according to whether the sons leave lineal descendants at their death or not. But the interest thus exhibited in descendants is satisfied by the probability that they would inherit the property or be provided for out of it. It is not shown to be so definite and paramount as to cut down the gifts imported by the previous words except in the single event in which the will does so in terms. On the contrary the still later provision that nothing shall be construed to 'deprive' the sons of the power to dispose of 'their portions' by will

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indicates that the testator meant the sons to be owners of his estate, subject to the divesting clause.

We should lean toward an agreement with the state courts, especially in a matter like this. In the present instance we see no sufficient reason for refusing to follow their judgment, even if, for any cause not pointed out to us, it did not finally adjudicate the question of title as between these parties in such wise as to be binding upon every court before which that title subsequently might be discussed.

Judgment reversed.

ZECKENDORF v. STEINFELD.

STEINFELD v. ZECKENDORF.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY
OF ARIZONA.

Nos. 139, 140. Argued March 15, 1912.—Decided June 7, 1912.

One of the parties interested in and having control of a mining company purchased a neighboring group of mines and agreed that the company should have the opportunity of taking them on reimbursing him for outlay; if not availed of, he to keep them for his own. Subsequently the combined groups being sold he claimed the agreement had by reason of certain resolutions been rescinded and that he was entitled to the proceeds of the purchased group. The case was twice before the Supreme Court of the Territory: on the first appeal that court held that the agreement had been rescinded. *Held* that:

The findings of fact sent up from the territorial court must alone be the basis of the judgment of this court.

In interpreting the action of stockholders in passing resolutions regarding the relative rights of the corporation and one of the stockholders and officers in property of the corporation, the surrounding facts and circumstances may be considered.

The agreement that the company could acquire the purchased group was carried out and not rescinded.

Whatever effect the decision of the Supreme Court of a Territory may have, as the law of the case, on the lower court or on the Supreme Court itself, prior to an appeal to this court, it is not the law of the case for this court.

Under the circumstances, the appointment of a receiver and his continuance for final settlement of the affairs of the company was proper.

THE facts, which involve the construction of contracts relating to sale of mining properties in Arizona, are stated in the opinion.

Mr. Frank H. Hereford and *Mr. Edwin A. Meserve* for appellant in No. 139 and appellees in No. 140.

Mr. Eugene S. Ives, with whom *Mr. Francis J. Heney* was on the brief, for appellees in No. 139 and appellants in No. 140.

MR. JUSTICE DAY delivered the opinion of the court.

Louis Zeckendorf brought this suit in the District Court of Pima County, Territory of Arizona, as a stockholder of the Silver Bell Copper Company, hereinafter called the Silver Bell Company, for and on its behalf, against Albert Steinfeld, J. N. Curtis and R. K. Shelton, as individuals and as officers and directors of the Silver Bell Company, the Silver Bell Company, and a certain company known as the Mammoth Copper Company. He sought to recover \$338,710.15 for so much money wrongfully appropriated by and to the use of the defendant Steinfeld, which rightfully belonged to the Silver Bell Company, and to recover, as belonging to the company, 300 shares of stock in the Silver Bell Company. There was also a prayer for an accounting and the return of the money and shares and

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for the appointment of a receiver. Steinfeld answered that the money, a portion of which was the proceeds of certain mining properties which had belonged to him and had been sold in conjunction with properties belonging to the Silver Bell Company, and shares of stock belonged to him and for reasons set forth were rightfully in his possession.

The District Court, upon the first trial, found in favor of Zeckendorf. This judgment was reversed by the Supreme Court of Arizona and the case sent back for further findings. (10 Arizona, 221.) The pleadings were amended, the amended complaint dividing the controversy into two causes of action, the first embracing the ownership of the proceeds of sale taken by Steinfeld and the second the title to the 300 shares of stock and dividends thereon. Upon the second trial the District Court found against Zeckendorf on the first cause of action and against Steinfeld on the second cause of action upon the facts found, made certain provisions as to attorney fees, and, in view of the situation of the Silver Bell Company, appointed a receiver and ordered that the property and the assets of the company be turned over to him for distribution according to the order and judgment of the court, and that upon final hearing the Silver Bell Company be dissolved, its debts paid and assets distributed among the stockholders according to their rights. The court further ordered that Steinfeld should hold in his hands the sum of \$25,750 to secure him against his liability as garnishee in a case by one Franklin against the Silver Bell Company, Steinfeld to account to the company for the money on the final determination of the action. An appeal was again taken to the Supreme Court of the Territory of Arizona, and that court affirmed the judgment and orders of the District Court. (12 Arizona, 245.)

Both parties appealed. No. 139 is the appeal of Zeckendorf from that part of the judgment dismissing on the

merits his first cause of action, concerning the moneys paid to Steinfeld. No. 140 is the appeal of Steinfeld from the order and judgment holding that the 300 shares of stock belong to the company and requiring him to account for the dividends thereon. The Supreme Court of the Territory made elaborate findings of fact, adopting the findings of the District Court and making certain findings of its own. So far as necessary to determine the case as we view it, the findings may be summarized as follows:

Since 1878 Albert Steinfeld and Louis Zeckendorf have been partners under the firm name of Louis Zeckendorf & Company. Zeckendorf lived in the city of New York. Steinfeld resided in the city of Tucson, Arizona, and was the active member of the firm in its mining operations. William and Julia Zeckendorf were the owners of a certain mine known as the Old Boot or Mammoth Mine, which was being operated by one Carl Nielsen, under contract with Steinfeld as trustee of the owners. Nielsen became so indebted to the partnership that, in order to secure such indebtedness, in January, 1899, a company was incorporated under the laws of Arizona known as the Nielsen Mining & Smelting Company, the name being changed on January 14, 1901, to the Silver Bell Mining Company, and all the stock of the company was originally issued to Carl Nielsen, in consideration of the transfer to the company of his rights in the Old Boot mine, and a like transfer of personal property used in working the mine. The stock was divided as follows: 499 shares to L. Zeckendorf & Company, 30 shares to Albert Steinfeld, trustee of William and Julia Zeckendorf, 170 shares to J. N. Curtis, 300 shares to Carl Nielsen and one share to R. K. Shelton, but being in fact the property of L. Zeckendorf & Company. In January, 1901, the 300 shares in Nielsen's name were transferred on the books of the company to the name of Albert Steinfeld, trustee. On the sixth of June, 1903, the 499 shares of L. Zeckendorf & Company were

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divided, 250 shares to Louis Zeckendorf and 249 shares to Albert Steinfeld, Steinfeld taking the one share standing in the name of Shelton which was in Steinfeld's possession until December 9, 1903, when it was given to Shelton. At the meetings of the stockholders Steinfeld voted the stock in his name as trustee and the stock of L. Zeckendorf & Company, and Louis Zeckendorf was never at any stockholders' meeting and did not vote therein by proxy until the stockholders' meeting of December 26, 1903, at which he was present. Subsequent to January 14, 1901, Albert Steinfeld, J. N. Curtis and R. K. Shelton were the directors of the corporation, all residing in Tucson, Arizona. Shelton was at all times the representative of Steinfeld on the board of directors of the company, and at all times involved in this action voted as ordered, directed and requested by Steinfeld. After June 6, 1903, J. N. Curtis, as director and other officer of the Silver Bell Company, was under the dominion and control of Steinfeld and did as he directed.

In the year 1900 Steinfeld purchased, in his own name and in the name of the Mammoth Copper Company, which was owned and controlled by him, certain mining properties in the neighborhood of the Old Boot Mine, known as the English Group of Mines, and in September, 1900, proceeded to Europe, and there concluded the purchase of the English title to that group.

The findings of fact sent up to us, and which must alone be the basis of our judgment (*Eagle Mining Co. v. Hamilton*, 218 U. S. 513, 515), show that Steinfeld, in purchasing the English Group of mines, did not purchase them with the intent that they should thereby become the property of the Silver Bell Company, but that at that time he proposed to give the Silver Bell Company an opportunity to take the mines upon reimbursing him for his outlays and expenditures in that connection, which he expected the Silver Bell Company would do, intending, if it did not,

to keep them for his own. In our view, the facts found show that Steinfeld and the company effectually carried out this purpose, and that the subsequent attempt to rescind the action by which the proceeds of the sale of the English Group of mines became the property of the Silver Bell Company and to give the proceeds to Steinfeld must be held for naught.

The findings show that after the acquisition of the English Group of mines Steinfeld turned them over to the possession of the Nielsen Mining and Smelting Company (the name of which was subsequently changed to the Silver Bell Copper Company), which assumed the possession and control of them; that they were operated in connection with the other mining property of the company, known as the Old Boot Mine; that maps were prepared, under the direction of Steinfeld, showing the mining properties as one entire group of mines, and that the president of the company made reports of the mines as the properties of the Silver Bell Company; that these maps and reports were sent to Zeckendorf and others, and that efforts were made by Steinfeld to sell the properties as a whole, including the English Group.

In the early part of 1901, Curtis, who was president of the Silver Bell Company, holding certain shares in his own right, contended that the English Group of mines was held in trust by Steinfeld for the Silver Bell Company. Both parties consulted one Franklin, an attorney, who advised that Steinfeld could not hold the properties as his own until he had given the company an opportunity to take them upon reimbursing him for his outlays and expenses and it had declined to do so.

Steinfeld acquiesced in this position and on July 15, 1901, made a proposition in writing to the Silver Bell Company. The substance of this proposal was that he would hold in trust for the Silver Bell Company all the mining properties controlled by him, the company to as-

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sume all obligations, counsel fees, etc., to pay for the annual assessment work and to reimburse him for his outlays on or before the fifteenth of October, 1901 (and that he would also turn over the Nielsen stock in controversy in the second cause of action upon the assumption of certain obligations). And upon compliance with the terms of the proposition the mining properties were to belong to the Silver Bell Company. Steinfeld stated in this proposal:

"I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth, by the Mammoth Mining Company and by myself, are of great value to you, and that your company should own the same, and as an inducement to you to purchase and acquire the same, I am willing to place you in my shoes, that is to say, to sell and convey to you all the interest so acquired by me, upon my being repaid the amounts of money I have expended, with interest, and upon your assuming and guaranteeing with security satisfactory to me the performance on your part, of all the matters and things and payments which under the various contracts I am liable or responsible for. To this end I herewith submit to you the following proposition."

The Silver Bell Company was given until October 15, 1901, to accept the proposition; and, in the event it failed to do so and to comply therewith by such date, the option was to be at an end. This proposition was presented to the board of directors on July 15, 1901, and it was ordered that a meeting of the stockholders should be called to decide upon it. Another meeting of the directors took place October 1, 1901, at which Steinfeld stated that he would agree, on condition that the company pay for the assessment work done and to be done in 1900, 1901 and 1902, and pay interest for the interval on the amount named in his original proposition, to extend the time for acceptance of his proposal to the fifteenth day of September, 1902. This proposition of extension was accepted by

the board, and it was further resolved that a stockholders' meeting should be called not later than September 15, 1902, and a stockholders' meeting was held later on that day, October 1, 1901, but Zeckendorf was not present and no action was taken. And the Silver Bell Company continued to possess, use and work the properties as its own with the full knowledge and consent of Steinfeld and the Mammoth Copper Company.

In this situation of affairs Steinfeld negotiated the sale of all of the properties, and on May 13, 1903, reported to the board of directors that he had, on behalf of himself, the Mammoth Copper Company and the Silver Bell Company, given an option for the sale of the properties for \$515,000, as one entire property, and requested that his action be confirmed, which was done, Steinfeld himself voting in favor of such confirmance. At the time the price of \$515,000 was fixed Steinfeld intended to renew and permit the corporation to accept the terms of his proposition of July 15, 1901, as extended, and the officers of the Silver Bell Company expected the corporation to avail itself of the offer, so that the whole of the purchase money would be paid to and become the property of the Silver Bell Company. On May 20, 1903, all the properties were conveyed to the Imperial Copper Company for the purchase price of \$515,000, \$115,000 in cash and the balance in notes payable in four equal quarterly instalments. The cash and notes were turned over to Steinfeld as the treasurer of the Silver Bell Company and were to be held by him under a certain agreement, dated May 20, 1903, which permitted Steinfeld to hold the money and notes as indemnity for the obligations and liabilities to the Imperial Copper Company which he had assumed, the latter company having required Steinfeld to guarantee the titles to the mines sold for one year. It was mutually agreed in the agreement of May 20, 1903, that the purchase price paid and to be paid upon the sale should belong to

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the Silver Bell Company. Between May 20, 1903, and January 20, 1904, the Imperial Copper Company paid to Steinfeld, as treasurer and trustee of the Silver Bell Company \$319,487.50, representing the cash payment and the proceeds of the first two notes, with interest, out of which money was paid \$118,000, including \$18,117 to Steinfeld. In October and November, 1903, Steinfeld sent all the money, except \$50,000 which had been attached in his hands at the suit of Franklin, to the Bank of California, at San Francisco, California, and deposited it there in his individual name.

On the day the contract of May 20, 1903, was executed, the board of directors held a meeting, Steinfeld, Curtis and Shelton being present, at which the president reported the various transactions attending the sale and submitted certain documents. He further reported that Steinfeld, who had conducted the negotiations with the Imperial Copper Company, had again submitted for acceptance his proposition of July 15, 1901, with the modifications that the company forthwith pay him in cash the sum of \$18,117, being the sum named in the original proposal with interest, and assume all obligations incurred in past and present negotiations and transactions with respect to such mining properties, and the president stated that it was necessary to adjust with the Mammoth Copper Company the disposition of the purchase money, and submitted the agreement of May 20, 1903. Five several resolutions were thereupon unanimously adopted: (1) Ratifying the sale; (2) accepting Steinfeld's proposition and directing the payment forthwith of the \$18,117 and providing for certain other payments; (3) authorizing the payment of certain commissions on the sale; (4) fully empowering the president and secretary of the company to indemnify Steinfeld against loss or damage for having guaranteed the titles to the properties; and (5) specifically ratifying and approving the agreement of May 20, 1903,

providing for the disposition of the proceeds of the sale and indemnifying Steinfeld. And on the day following, May 21, 1903, the \$18,117 was paid to Steinfeld. Zeckendorf was not at this meeting or any of the meetings except the stockholders' meeting on December 26, 1903.

In December, 1903, Zeckendorf brought a suit in California to enjoin the bank there from turning over to Steinfeld the moneys and notes so deposited by him, and obtained an injunction restraining Steinfeld from receiving and the bank from delivering to him the money and notes.

Thereafter, on December 26, 1903, a stockholders' meeting was held in Tucson, Arizona, all the stockholders and the respective attorneys of Zeckendorf and Steinfeld being present, and it was at this meeting, it is contended, that the action theretofore taken vesting the proceeds of sale in the Silver Bell Company was rescinded. The Supreme Court of Arizona, on the first appeal of this case to that court (10 Arizona, 221), found that such rescission was accomplished, notwithstanding the stockholders may have intended to do no more than rescind the indemnity feature of the former agreement and resolutions, and sent the case back for findings of fact as to the ownership of the English Group of mines and also of the 300 shares of stock, and as to the rights of the parties as to the distribution of the proceeds of the sale. This conclusion as to the rescission of the agreement of May 20, 1903, it is said, has become the law of the case and binding in its subsequent stages. Whatever might be the holding of the Supreme Court of Arizona as to the effect of this decision upon its own judgment and that of the District Court, the case reached this court for the first time upon the present appeal, and certainly the holding of the Supreme Court of Arizona at any of the stages of the case prior to this appeal would not be the law of the case for this court. *United States v. Denver & Rio Grande Railroad Co.*, 191 U. S. 84, 93.

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We cannot agree with the Supreme Court of Arizona that the effect of this stockholders' meeting was to rescind so much of the former action as vested the proceeds of the sale in the Silver Bell Company. Nor can we agree, as the court held, that, if the parties did intend to rescind only the former action as to the custody of the proceeds of the sale, they made a mistake only as to the legal effect of the rescinding resolution. On the other hand, we think it is apparent from a consideration of the proceedings of that meeting, which the Supreme Court of Arizona has made a finding of itself, that the objection of Zeckendorf, the principal stockholder other than Steinfeld, was to so much of the former action as pertained to the turning over of the proceeds of the sale to Steinfeld to be held by him for his indemnity. At the meeting no disposition was manifested to give Steinfeld the ownership of the proceeds of the sale of the English mines nor to treat any modification of the former action as a rescission of the entire matter.

The discussion at that meeting throughout shows that the object of Zeckendorf was to get the money and the proceeds of the notes into the hands of a treasurer of the company who would give security therefor, and to have the entire proceeds of the sale divided among the stockholders. There was no intimation that the money or notes then held by the treasurer would be taken from the Silver Bell Company and one-half thereof turned over to Steinfeld as the vendor of the English Group of mines. As the counsel of Steinfeld said:

"We are unwilling to admit that we did not have the right to this money. We still assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which we will rescind the resolution and

agreement, and *relinquish all right whatever to the personal custody of that money, and turn it over to the company.*

"Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the board) should offer." (*Italics ours.*)

Thereupon the resolution in the following language was offered:

"Resolved, that the agreement executed on May 20th by the President and Secretary of the corporation, the Mammoth Copper Company and Albert Steinfeld, be and the same is hereby rescinded and that the said agreement and resolution passed on said day be declared null and void."

After the resolution had been offered and before the vote was taken, counsel for Steinfeld said further:

"We are acquiescing in your demand. . . ."

"We will now organize as a stockholders' meeting."

"Our desire is in good faith to rescind that resolution, *but we will never admit we acted wrongfully in taking the money; you attacked the resolution, and we are willing, if you wish, to rescind it.*" (*Italics ours.*)

What resolution does this refer to? Certainly not the one (1) ratifying and approving the sale to the Imperial Copper Company; nor the one (2) accepting Steinfeld's proposition and authorizing payments to Steinfeld and those from whom he had purchased; nor (3) the payment of commissions. But manifestly all parties had in mind so much of the resolutions as referred to the right of Steinfeld to continue to hold the proceeds of the sale, cash and notes, for his indemnity.

At the stockholders' meeting, the entire 1,000 shares, representing those belonging to Zeckendorf, Steinfeld, Shelton and Curtis, were all voted in favor of the resolution.

We will not stop to recite the other parts of the long finding which includes all the proceedings of this meeting.

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At the end of the findings of fact in this connection the Supreme Court of Arizona makes this significant statement:

“In the stockholders’ meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff in voting to rescind said agreement of May 20, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, *nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.*” (Italics ours.)

It is argued that this is but a conclusion and not in any proper sense a finding of fact. If this be so, we think it is the proper conclusion from the facts stated. In our view it cannot be reasonably maintained that, in passing the resolution, when it is read in the light of the proceedings at the meeting and the known facts surrounding the parties at the time, the stockholders intended to rescind any more of the transaction than related to the indemnity agreement. On the other hand the fair inference from the proceedings at this meeting leaves no doubt in our minds that the stockholders intended to affirm the previous transactions except so far as they related to Steinfeld’s right to hold the money and notes for his indemnity, and that Steinfeld acquiesced in such modification as one of the stockholders.

In interpreting the action of the stockholders in passing the resolution, the facts and circumstances surrounding them may legitimately be looked to. *Canal Company v. Hill*, 15 Wall. 94, 100, 101. In construing written docu-

ments, "this kind of evidence," said Mr. Justice Bradley, speaking for the court, "is especially pertinent when the inquiry is as to the subject-matter of the agreement" (p. 101). To the same effect, *Reed v. Insurance Co.*, 95 U. S. 23, 30, 31.

Notwithstanding the directors did not, in good faith, understand the rescission to go beyond the indemnity feature, as above stated, on December 26, 1903, the directors, Steinfeld, Shelton and Curtis, met and undertook to rescind their former action. It is specifically found that Zeckendorf had no knowledge of this meeting, although it was held on the same day as the meeting of the stockholders to which we have referred. On January 16, 1904, Curtis and Shelton, for the directors, without notice to the other stockholders, and no one else being present but Steinfeld and his counsel, at the request of Steinfeld, adopted the resolution which divided the \$515,000, the proceeds of the sale to the Imperial Copper Company, by awarding to Steinfeld and his company, the Mammoth Copper Company, as the owners of one-half of the property sold, one-half of the cash and notes, less certain payments which are recited. Under that supposed authority, Curtis, as treasurer, turned over to Steinfeld \$145,743.75 in cash and one of the notes. In so voting and acting it is specifically found that Curtis and Shelton consulted with no person whatsoever except Steinfeld and his attorney and that they were under the complete dominion and control of Steinfeld, and voted and acted on his orders and not otherwise. For the reasons stated, we are of the opinion that the Supreme Court of Arizona erred in affirming so much of the judgment as dismissed the first cause of action. This conclusion renders it unnecessary to consider whether Steinfeld in view of his relation to the company could have held the title acquired by him except in trust for the company.

As to the second cause of action:

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On the twentieth of January, 1904, Steinfeld received \$33,300 as dividends upon the stock standing in his name as trustee and which is in controversy in the second cause of action, a dividend of \$111 per share having been declared by the board of directors. As to this phase of the case, it is unnecessary to recite the facts found by the Supreme Court of Arizona. They are clear and distinct, and there can be no doubt that Steinfeld held the 300 shares of stock purchased from Nielsen for the company, and the court was right in affirming the judgment upon the second cause of action upon the facts found.

It is contended that it was wrong to appoint a receiver in the case, but we think that, in view of the situation of the property and the final winding up of the company, the appointment of the receiver was proper, and that that officer should be continued for the final settlement of the affairs of the company.

It follows that the judgment of the Supreme Court of the Territory of Arizona should be reversed in so far as it affirms the judgment of the District Court on the first cause of action, and affirmed in so far as the Supreme Court affirms the District Court on the second cause of action; and the case remanded to the Supreme Court of the State of Arizona, as successor of the territorial Supreme Court (36 Stat. ch. 310, pp. 557, 576, 577; *Nielsen v. Steinfeld*, May 13, 1912, 224 U. S. 534), for such further proceedings as may not be inconsistent with the opinion of this court.

Judgment accordingly.

LOW WAH SUEY *v.* BACKUS, COMMISSIONER OF
IMMIGRATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 869. Argued April 30, 1912.—Decided June 7, 1912.

Congress may pass laws forbidding aliens or classes of aliens from coming within the United States and may provide for their expulsion; it may also devolve upon the executive department or subordinate officers the right and duty of carrying out the law. *Wong Wing v. United States*, 163 U. S. 228.

Hearing on proceedings for deporting aliens before executive officers may be made conclusive when fairly conducted. One attacking such proceedings in the courts must show that the officers conducting them were manifestly unfair and abused the discretion committed to them. Otherwise the order of executive officers within the authority of the statute is final.

When a case is decided upon demurrer the question is whether a case was made upon those allegations which are well pleaded and not upon those that are mere conclusions of law.

A preliminary examination of an alien without counsel is permitted by the statute; and if at subsequent stages of the proceedings the alien has counsel there is no denial of right.

The Alien Immigration Acts of 1907 and 1910 do not give authority to the Commissioner or Secretary to issue process to compel attendance of witnesses on behalf of the alien held for deportation. The alien is not denied rights if the witnesses produced on his behalf are heard.

The Act of 1907 is not unconstitutional as denying one held for deportation of his liberty without due process of law because it does not give the immigration officers power to compel his witnesses to appear.

This court cannot pass on an objection that hearsay evidence was received and not communicated to the alien where the record does not disclose the nature of the testimony.

This court is not prepared to declare the rules of the Secretary of Commerce and Labor in regard to proceedings for deportation of aliens to be so arbitrary as to deprive the alien of a fair hearing and

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beyond the power of the Secretary to make under the authority given by the statute. The statute expressly provides for a summary hearing.

As a general rule in *habeas corpus* proceedings, a copy of the record of the proceedings attacked is required, *Craemer v. Washington*, 168 U. S. 124, and if petitioner cannot comply with the rule by annexing a complete copy he should comply with it so far as it is within his power.

The Alien Immigration Act in terms applies to all aliens.

An alien is one born out of the jurisdiction of the United States and who has not been naturalized under its Constitution and laws.

The effect of the marriage of an alien woman to a male citizen of the United States is not determined by the common law. That matter is regulated by statute.

Under § 1994, Rev. Stat., a woman who could be naturalized becomes by her marriage to a citizen of the United States a citizen herself. See *Kelly v. Owen*, 7 Wall. 496.

Quære, whether a woman, incapable under the laws of the United States of being naturalized, can become a citizen of the United States by marriage to a citizen thereof.

An alien who has become a citizen of one of the States, can be excluded under the Alien Immigration Act if within a class prohibited to enter.

All statutes must be given a reasonable construction, with a view of effecting the object and purposes thereof.

The object of the provisions of the Alien Immigration Acts of 1907 and 1910, providing for deportation of prostitutes, was to prevent the introduction and keeping in this country of women of the prohibited class; and even if a woman married to a citizen might be permitted to enter if she does not belong to that class, if she is found violating the statute by being in a house of prostitution she becomes subject to the deportation provisions thereof, notwithstanding her marriage to a citizen.

Where Congress has power to pass an act and its provisions are plain, the court must apply it even in a hard case.

If a statute should be amended to prevent its operation in particular cases that result can only be accomplished by an exercise of legislative authority.

THE facts, which involve the construction of the Alien Immigration Act of February 20, 1907, and the right thereunder of the Government to deport the alien Chinese wife

of a Chinese citizen found within three years after entering this country in a house of prostitution, are stated in the opinion.

Mr. Corry M. Stadden, with whom *Mr. George A. McGowan* was on the brief, for appellants:

This court has jurisdiction. In *Yeung How v. North*, 223 U. S. 705, dismissed *per curiam* this term, there had been a trial on the main issues, and petitioner was a widow. The cases are dissimilar. The statute should receive a reasonable construction. *United States v. Kirby*, 7 Wall. 482.

In this case there is a husband and a child of the marriage. Even if the marriage left appellant an alien she was not an alien within the meaning of the Alien Immigration Acts. *Gonzales v. Williams*, 192 U. S. 1. *Re Thakla Nicola*, 184 Fed. Rep. 322.

As to the status of the Chinese wife of an American-born citizen, see *Tsoi Sim v. United States*, 113 Fed. Rep. 925.

The fact that appellant could not be naturalized does not prevent her from becoming a citizen by marrying a citizen. See T. D. Jan.-Dec., 1900, No. 22551, construing § 1994, Rev. Stat.

Naturalization is the only right withheld. Marriage and its legitimate effects are not affected.

Appellant's constitutional rights were invaded by the proceeding. *United States v. Williams*, 185 Fed. Rep. 598; *Redfern v. Halpert*, 186 Fed. Rep. 150.

The petition states why the record is not annexed thereto. It was too voluminous in the first place and it was inaccessible to the petitioner. The time was brief as the order was to deport forthwith. See *Chin Yow v. United States*, 208 U. S. 8.

As to what is abuse of discretion and arbitrary action on the part of the inspector and the Secretary, see *United*

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States v. Chin Len, 187 Fed. Rep. 544; *Lewis v. Frick*, 189 Fed. Rep. 146; *Ex parte Lee Kow*, 161 Fed. Rep. 592; *Ex parte Korner*, 176 Fed. Rep. 478; *Woey Ho v. United States*, 109 Fed. Rep. 888.

An abuse of discretion is merely a discretion exercised to an end or purpose not justified by and clearly against reason or evidence. *Sharon v. Sharon*, 75 California, 48; 1 Cyc. 219; 14 Cyc. 383; *Rothrock v. Carr*, 55 Indiana, 334.

Mr. Assistant Attorney General Harr, with whom *The Solicitor General* was on the brief, for appellee:

It does not affirmatively appear from the petition that appellant was denied a fair hearing by the immigration authorities, which is the foundation of the jurisdiction of the District Court. *United States v. Ju Toy*, 198 U. S. 253; *Chin Yow v. United States*, 208 U. S. 8; *Tang Tun v. Edsell*, 223 U. S. 673.

Under the principles announced by this court in respect to administrative hearings, an alien has no right to be represented by counsel through all stages of the proceedings leading to his deportation. *In re Can Pon*, 168 Fed. Rep. 479, 483.

The regulations of the Secretary of Commerce and Labor for the enforcement of the Immigration Act give the alien full opportunity to show cause and to be represented by counsel from a certain point in the proceedings. It is not alleged that these regulations were not complied with.

The fact that the alien was an unwilling witness does not indicate any abuse of authority, nor the fact that her answers were incorporated into the record.

The immigration officers had no power to compel the attendance of witnesses.

That certain alleged hearsay evidence was considered by the immigration officers is immaterial, administrative

proceedings not being subject to the limitations of a judicial trial; besides, the nature of such evidence is not set forth or the truth thereof denied.

The allegation that the hearings before the Secretary were not in fact hearings upon the merits is a mere conclusion of law, no facts being set forth in support of the contention.

The petition is defective in that it is not accompanied by copies of the proceedings before the immigration authorities which are attacked, or the essential parts thereof. *Craemer v. Washington*, 168 U. S. 124, 129; *Terlinden v. Ames*, 184 U. S. 270, 279; *Haw Moy v. North*, 183 Fed. Rep. 89.

The allegations in this case are fundamentally different from those in the *Chin Yow Case*, 208 U. S. 8, 11. There is no allegation here of any denial of opportunity to produce testimony or to secure the attendance of witnesses.

Under the laws of the United States, a Chinese woman does not become a citizen of the United States by virtue of her marriage to a citizen. Section 1994, Rev. Stat., only confers citizenship upon a woman married to a citizen of the United States "who might herself be lawfully naturalized." These words here and in the act of February 10, 1855, 10 Stat. 604, from which it was taken, refer to the class or race who might be lawfully naturalized. *Kelly v. Owen*, 7 Wall. 496; *Burton v. Burton*, 1 Keyes (N. Y.) 359; *Leonard v. Grant*, 5 Fed. Rep. 11; *Kane v. McCarthy*, 63 No. Car. 299; *United States v. Kellar*, 13 Fed. Rep. 82.

A native of China is not a "white person" within the meaning of the term as used in the naturalization laws, *In re Ah Yup*, 5 Sawy. 155, and such statutes have never been made applicable to persons of the Chinese race. *Fong Yue Ting v. United States*, 149 U. S. 698, 716.

Marriage to a citizen does not prevent the deportation of an alien woman for a violation of the immigration laws. *Yeung How v. North*, 223 U. S. 705. See, also, *Hoo Choy*

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v. *North*, 183 Fed. Rep. 92, in which certiorari was denied by this court.

It is of no consequence that the American-born husband of Yeung How had died before she was ordered deported. If she had become a citizen by virtue of the marriage, that citizenship status would have continued after the death of her husband. *Kelly v. Owen*, 7 Wall. 496; 15 Op. A. G. 599.

The alien wife of a citizen who becomes an inmate of a house of prostitution is within both the letter and the spirit of the immigration laws. *Gonzales v. Williams*, 192 U. S. 1, has no application, because in that case the allegiance of natives of Porto Rico had been transferred to the United States.

The marriage of Li A. Sim to Low Wah Suey did not change her political status with respect to this country. *Shanks v. Dupont*, 3 Pet. * 242, * 246, and cases cited; *White v. White*, 2 Met. (Ky.) 185, 191; *Sutliff v. Forgey*, 1 Cowen, 85; 5 Cowen, 713; *Mick v. Mick*, 10 Wend. 379; *Connolly v. Smith*, 21 Wend. 59.

If Li A. Sim had conducted herself properly, she would not, although an alien, have come within the operation of the immigration laws. Assuming that a citizen has the right to bring in a wife, although she be an alien, this does not authorize her to engage in immoral practices in violation of the restrictions placed by Congress upon all aliens.

It cannot be contended that the Immigration Act does not apply to the resident alien wife of a citizen because domiciled aliens have a quasi-citizenship according to certain authorities on international law (dissenting opinion in *Fong Yue Ting v. United States*, 149 U. S. 735), as this would exclude from its operation all domiciled aliens, and § 3 of the act is expressly directed at alien women or girls who become inmates of houses of prostitution after their entry into the United States. The only other ground of exemption is that the statute was not intended to disturb

the family relations; but this contention was overruled in *Zartarian v. Billings*, 204 U. S. 170, where the child of a naturalized citizen afflicted with trachoma was held not entitled to admission.

In re Nicola, 184 Fed. Rep. 322, has no application, because the women referred to therein belonged to a race that might be lawfully naturalized.

United States v. Mrs. Gue Lim, 176 U. S. 459, and *Tsoi Sim v. United States*, 116 Fed. Rep. 920, are also to be distinguished. The purpose of the Immigration Act in excluding alien prostitutes is to protect the public health and morals, and an alien woman who engages in such practices is as much within the purpose of the act when she is the wife of a citizen as when she is not.

MR. JUSTICE DAY delivered the opinion of the court.

Li A. Sim, a Chinese woman, wife of Low Wah Suey, was ordered to be deported by the Department of Commerce and Labor, a hearing having been had before an immigration inspector at San Francisco and appeal taken to the Secretary of Commerce and Labor under the provisions of the act of Congress approved February 20, 1907 (34 Stat. 898, c. 1134), the warrant for deportation reciting that she had landed at the port of San Francisco, California, on the fifteenth of April, 1910, and had been found in the United States in violation of the act of February 20, 1907, as amended by the act approved March 26, 1910 (36 Stat. 263, c. 128), namely, that she was an alien, found as an inmate of a house of prostitution within three years subsequent to her entry into the United States.

The statutes of the United States under which the proceedings were had and the warrant issued are principally § 3 of the act of March 26, 1910, amending § 3 of the act of February 20, 1907, and §§ 20 and 21 of the latter act. Section 3 provides: ". . . Any alien who shall be found

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an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. . . ." Section 20 provides that any alien who enters the United States in violation of law, etc., shall, upon the warrant of the Secretary of Commerce and Labor, be deported to the country whence he came within three years after his entry into the United States. Section 21 provides that the Secretary of Commerce and Labor, upon being satisfied that an alien is found in the United States in violation of the act or is subject to deportation under the act or any law of the United States, shall cause such alien to be taken into custody and returned to the country whence he came within three years after landing or entry in the United States. The act also provides for a hearing before an inspector or commissioner under rules prescribed by the Secretary of Commerce and Labor. The inspector or commissioner reports his conclusions and the testimony on which they are based to the Secretary, who, after examination, may order a release or deportation, as in his judgment the case may warrant. Under this statute the Secretary of Commerce and Labor has provided certain instructions and rules, some of which will be hereinafter noticed.

That Congress may pass laws forbidding aliens or classes of aliens from coming within the United States and may provide for the expulsion of aliens or classes of aliens from

its territory, and may devolve upon the executive department or subordinate officials the right and duty of identifying and arresting such persons, is settled by previous decisions of this court. *Wong Wing v. United States*, 163 U. S. 228, 237.

A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *United States v. Ju Toy*, 198 U. S. 253; *Chin Yow v. United States*, 208 U. S. 8; *Tang Tun v. Edsell*, 223 U. S. 673.

In the case of *Yeung How v. North*, 223 U. S. 705, decided at the present term, this court dismissed the appeal in a *per curiam* opinion. An examination of that case shows that it was in all respects like the case at bar, so far as the status of Yeung How, the person deported, is concerned, she being a Chinese woman who had married a Chinaman of American birth, except that the husband of Yeung How was dead, so that at the time of the deportation order she was the widow of an American citizen. An examination of the briefs in that case show that it was contended in behalf of the petitioner that the statute and procedure thereunder, the case being one of the deportation and not of the admission of an alien, deprived the petitioner of due process of law under the Constitution of the United States, inasmuch as there was no provision by which the petitioner could procure or compel the attendance of witnesses, and because the statute made no provision for the punishment of a witness giving false

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testimony against the detained person, and because such alien, lawfully within this country could not be deported without a hearing of a judicial character. Notwithstanding these alleged infractions of constitutional right, this court dismissed the appeal.

In the case now under consideration, the proceedings and order for deportation were attacked by a writ of *habeas corpus* filed in the District Court of the United States for the Northern District of California. The case was decided upon demurrer, and the question, therefore, arises whether, upon the allegations well pleaded, a case was made for the discharge of the prisoner. The petition abounds in conclusions of law. We will examine such of the allegations advanced as a basis for the relief sought as state facts. The petitioner, Low Wah Suey, who instituted the proceedings in behalf of his wife, Li A. Sim, alleged that he was a resident of the city and county of San Francisco, California, born in the United States of parents regularly domiciled therein; that consequently he is a citizen of the United States and of the State of California; that he was married to Li A. Sim on the tenth of March, 1910, in Hong Kong, a British province, and that they have since been and were at the date of the filing of the petition husband and wife; that they entered the United States on the fifteenth of September, 1910; that the entry was lawful, and that until the commencement of proceedings for deportation they continuously lived and cohabited together as husband and wife; that they had a son, Low Sang, born to them on February 9, 1911, at their home in the State of California; and that both Low Wah Suey and Li A. Sim are citizens of the State of California. The arrest and hearing before the Commissioner of Immigration at the port of San Francisco are recited, as is the approval of the Secretary of Commerce and Labor and the warrant for deportation. It is further alleged that Li A. Sim was refused the right to be repre-

sented by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer at the port of San Francisco, and before she had been advised of her right to counsel and before she was given an opportunity of securing bail, and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which she was questioned by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel. This objection, in substance, is that under examination before the inspection officer at first she had no counsel. Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel.

It is next averred that the Secretary of Commerce and Labor and the Commissioner of Immigration refused to take the necessary steps to enforce the attendance of witnesses to testify on behalf of the petitioner, although it is said that the immigration officers did use their power to procure witnesses to testify against her; and that had such witnesses as she wished been produced, she says, upon information and belief, that the testimony in the record would have been such as to require a different order by the Secretary of Commerce and Labor, and sufficient to prevent the issuing of the order of deportation. The statute does not give authority to issue process to compel the attendance of witnesses. It does not appear from the record that any witnesses offered on behalf of the petitioner were not heard or that anything was done to prevent the production of such witnesses, and the nature and character of the proposed testimony offered is not set forth. This

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objection was urged in the *Yeung How v. North* case, and the lack of power to compel witnesses by the immigration officer was alleged as depriving the appellant of due process of law. This court dismissed the case upon reference to other cases which indicate its view that no constitutional right was thereby taken from the petitioner. The former cases have sustained the right to provide for such hearing, and nothing was done to prevent the production of such witnesses as the petitioner might have seen fit to produce.

It is further alleged that the executive officer acted in bad faith and arbitrarily in receiving a report based on hearsay information, the name of the informer being withheld from Li A. Sim and no opportunity being given her to offset or disprove such hearsay evidence. The nature and character of this testimony is not set forth, and we have no means of knowing it was not such as might properly have been considered in such a hearing.

It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of Rule 35. From these rules, it appears, that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be represented by counsel, who shall be permitted to be present at the further conduct of the hearing, to inspect and make a copy of the record of the hearing so far as it has proceeded and to meet any evidence that theretofore has been or may thereafter be presented by the Government, and it is further provided that all the papers, including the minutes and any written argument submitted by counsel, together with the recommendations, upon the merits, of the examining officer and the officer in charge shall be forwarded to the Department as

the record on which to determine whether or not a warrant for deportation shall issue. Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary, hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute.

The petition would be much more satisfactory if the general rule had been complied with and the proceedings had before the immigration officer had been set out. As a general rule in *habeas corpus* proceedings a copy of the record of the proceedings attacked is required. *Craemer v. Washington*, 168 U. S. 124, 128, 129. The reasons given for failure to comply with this rule, as stated in the petition, are that the record is too voluminous to be made a part thereof, that to incorporate a copy of the entire proceedings would "burden the petition and cloud the issue," that the petitioner was not in the possession of the entire record and was unable to secure it in time to file it with his petition, and that the Commissioner of Immigration had a copy of the record which he could produce with the body of Li A. Sim. It does not appear that a copy of the essential part of the proceedings was not in the possession of the petitioner or could not be had, and so far as it was within his power he should have complied with the rule.

An examination of the petition, omitting such allegations as are merely conclusions or charges of bad faith, we think, justified the court below in sustaining the demurrer, provided that, at the time of the arrest and order of deportation, Li A. Sim was an alien within the meaning of the statute which provides for the deportation of any alien found as an inmate of a house of prostitution or practicing prostitution after entering the United States, when the

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proceeding shall be instituted within three years from the entry of such alien into this country.

The statute in terms applies in general to all aliens. An alien has been defined to be "one born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws." 2 Kent, 50; 1 Bouvier Law Dictionary, 129. Within this general description Li A. Sim would clearly come, unless her status was changed, as is alleged, by marriage to a Chinaman of American birth, who is consequently an American citizen. It is unnecessary to discuss the effect of such marriage at common law, as in this country the matter is regulated by statute. Section 1994 of the Revised Statutes provides:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

This section is said to originate in the act of Congress of February 10, 1855 (10 Stat. 604, c. 71), which in its second section provided "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." This section was construed in *Kelly v. Owen*, 7 Wall. 496, and was held to confer the privileges of citizenship upon women married to citizens of the United States, if they were of the class of persons for whose naturalization the acts of Congress provide. So under the present statute, when a woman who could be naturalized marries a citizen of the United States, she becomes by that act a citizen herself.

Li A. Sim was a Chinese person not born in this country, and could not become a naturalized citizen under the laws of the United States. *Fong Yue Ting v. United States*, 149 U. S. 698, 716; Act of May 6, 1882 (22 Stat. 58, 61, § 14, c. 126). Being incapable of naturalization herself, although the wife of a Chinaman of American birth, she remained an alien and subject to the terms of the act, un-

less it can be successfully maintained that she was not within the intent and purpose of the act when it is properly construed. In this behalf the argument of her counsel is that Congress did not intend, notwithstanding the terms of the act in question, to make it applicable to a Chinese woman married to an American citizen lawfully domiciled within this country.

To sustain this position *Gonzales v. Williams*, 192 U. S. 1, is cited by counsel. In that case this court held that Isabella Gonzales, an inhabitant of Porto Rico at the date of the proclamation of the treaty of 1898, could not be prevented from landing and detained by an immigration inspector as an alien immigrant in order that she might be returned to Porto Rico, it appearing likely that she might become a public charge. This court held that she had been made by act of Congress a citizen of Porto Rico; that she was within the class absolved from all previous allegiance to the Spanish Government; that the act excluding alien immigrants was intended to apply to foreigners as respects this country, to persons owing allegiance to a foreign government and citizens or subjects thereof; that citizens of Porto Rico whose permanent allegiance was due to the United States and who lived in the peace of its dominion, the organic law of whose domicile was enacted by the United States and enforced through its officials, could not be considered alien immigrants within the meaning of the exclusion act of March 3, 1891 (26 Stat. 1084, c. 551). From a reading of that case it is manifest that this court did not think that Congress intended to exclude those over whom it had acquired jurisdiction under the Treaty of Paris and the subsequent legislation of Congress, whose sole allegiance was to this country and who were not aliens to it in any just sense of the term.

The case of *United States v. Mrs. Gue Lim*, 176 U. S. 459, is also relied upon. We think that case is readily distinguished from the one at bar. It was there held, that

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the wife of a Chinese merchant entitled by treaty to come into this country and dwell here could not be required to furnish the certificate required by the statute from Chinese persons other than laborers, as such construction of the statute would lead to absurd results in requiring a certificate from the wife of a merchant in regard to whom it would be impossible to give the particulars which the statute required should be stated in the certificate; that the real purpose of the statute was not to prevent the persons named, who under the second article of the treaty had the right to come into this country, from entering, but was to prevent Chinese laborers from entering under the guise of being one of the classes permitted to enter. "To hold that a certificate is required in this case," the court said, at p. 468, "is to decide that the woman [the wife of a Chinese merchant] cannot come into the country at all, for it is not possible for her to comply with the act, because she cannot in any event procure the certificate even by returning to China. She must come in as the wife of her domiciled husband or not at all," and it was held that the act was never intended to exclude the wife and minor children of a merchant lawfully entitled to enter.

It is argued that, being a citizen of California, the petitioner and her husband are to be protected from the operation of the act. Assuming that they are citizens of California, there is nothing in that fact to prevent the officers of the United States from exercising the authority conferred upon them to exclude or deport aliens or others who are such within the terms of the Federal law.

We find nothing in the previous decisions of this court which exempts Li A. Sim from the operations of the statute as an alien person. True it is, as contended, that all statutes must be given a reasonable construction, with a view to effecting the object and purposes thereof. It was the manifest purpose of Congress in passing this law to prevent the introduction and keeping in the United States

of women of the prohibited class. The object of the act was to exclude alien prostitutes, or, if they entered and were found violating the statute within the period prescribed, to return them to the country whence they came. A married woman may be as objectionable as a single one in the respects denounced in the law. There is nothing in the terms of the act showing the congressional purpose to exclude from its provisions an alien who had previously married or who might marry an American citizen. Indeed, if this construction were adopted, the marriage of such alien to a countryman of American citizenship who might be ignorant of the conduct of the alien or willing to condone it, would afford an easy means of evading the statute. In the present case, in view of the finding of the immigration officer, approved by the Secretary of Commerce and Labor, it must be taken as true that Li A. Sim, notwithstanding her marriage relation, was found in a house of prostitution in violation of the statute. This situation was one of her own making, and, conceding her right to come into the United States and dwell with her husband because of his American citizenship, it is obvious that such right could have been retained by proper conduct on her part and was only lost upon her violation of the statute, she, being an alien, thereby forfeiting her right to longer remain in this country. If it be admitted that the present is a hard application of the rule of the statute, with the effect of such law this court has nothing to do. The provisions of the statute are plain, and it was passed by Congress with full power over the subject. In our view the present case is brought within the terms of the law, when given a reasonable construction with a view to effecting its purposes. If it ought to be amended so as to except from its operation alien wives of American citizens, that result can only be legitimately obtained in the exercise of legislative authority.

Judgment affirmed.

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Syllabus.

SEABOARD AIR LINE RAILWAY v. DUVALL.

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

No. 304. Argued April 30, 1912.—Decided June 10, 1912.

To give this court jurisdiction under § 709, Rev. Stat., it must appear upon the record, and not by certificate of the judge, that a right under the Constitution or laws of the United States was set up and denied. While such a certificate may make more certain the fact that the Federal right was asserted and denied, it is insufficient to confer jurisdiction if the record itself does not show the fact. *Louisville & Nashville R. R. v. Smith*, 204 U. S. 551.

The fact that a case in the state court asserts a claim based on a Federal statute, does not give this court jurisdiction to review the judgment under § 709, Rev. Stat., if none of the exceptions are based on the refusal of the court to make a definite construction of the act as requested by the plaintiff in error.

Where the case comes up under § 709, Rev. Stat., this court is not one of general review. It can reëxamine only those rulings which denied Federal rights specially set up.

It is the duty of counsel asking in the state court for a particular construction of a Federal statute involved in the case to put the request in such definite terms that the record will show that it was a claim of Federal right specially set up as required by § 709 in order to give this court jurisdiction.

The trial court is not under obligation to give special charges based on only a part of the evidence.

Where the only defense to an action for personal injuries by an employé of an interstate railway carrier is contributory negligence on the part of the plaintiff in going into a car in violation of a rule requiring him to remain in another car, no construction of the provision of the Employers' Liability Act that the employé can only recover if injured while employed by the carrier is involved which is reviewable by this court, unless the request is definitely set up as a Federal right specially asserted and denied.

Excepting to a part of the charge by saying that an employé's going from the baggage car into the express car of a train is such an act that a reasonably prudent man would not have done under the cir-

cumstances does not raise specific questions as to the construction of the Employers' Liability Act under which the action was brought and give this court jurisdiction to review under § 709, Rev. Stat. Writ of error to review 152 No. Car. 524, dismissed.

THE facts, which involve the jurisdiction of this court under § 709, Rev. Stat., to review the judgment of a state court in a case brought under the Federal Employers' Liability Act, are stated in the opinion.

Mr. Walter H. Neal and Mr. Benjamin Micou, with whom Mr. Hilary A. Herbert, Mr. Richard P. Whiteley and Mr. E. T. Cansler were on the brief, for plaintiff in error:

This court has jurisdiction.

The case was a civil action instituted by defendant in error against plaintiff in error under the Federal Employers' Liability Act of 1908.

The record itself is the best evidence that the suit was instituted under the act.

No specific reference is made in the complaint to the Federal act by name, but under the rules of pleading this was neither necessary nor proper. *Emerson v. St. Louis & H. Ry. Co.*, 111 Missouri, 161; *Kansas City, M. & B. R. Co. v. Flippo*, 35 So. Rep. 457; 138 Alabama, 487.

If the allegations of the complaint show that the action is based on a public statute not penal, it is sufficient, without counting on or reciting the statute. *Peru v. Barrett*, 100 Maine, 213; *Voelker v. Chicago Ry. Co.*, 116 Fed. Rep. 867; Thorton's Employers' Act, § 175; *Missouri Pacific Ry. Co. v. Brinkmeier* (Kansas), 93 Pac. Rep. 622; *Kan. City M. & D. R. R. Co. v. Flippo*, 35 So. Rep. 460; *Lemons v. L. & N. R. R. Co.* (Ky.), 125 S. W. Rep. 702.

Whether the complaint sufficiently charges a cause of action under the Federal statute is one of pleading and

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is necessarily governed by the state practice. *Hancock v. Railroad*, 124 Nor. Car. 222; see also 20 Ency. of Pleading & Practice, p. 594 and notes.

The case was tried by the trial court of North Carolina under this Federal statute.

Evidence was offered and admitted to establish the contention of plaintiff in error on the issues joined in the complaint and answer.

The charge, as given by the court, would find no place in an action under the North Carolina statute, or at common law.

The highest court of the State, the Supreme Court, reviewed the case under this Federal statute.

The opinion of that court may be examined to ascertain whether the Federal question was presented and passed upon. *San Jose Land Co. v. San Jose Ranch Co.*, 189 U. S. 180; *Grosse v. Mortgage Co.*, 108 U. S. 477; *Fire Association v. New York*, 119 U. S. 110.

Even where the Federal question was first raised in a petition for a rehearing, after the case had been decided adversely by the Supreme Court of the State, this court has taken jurisdiction. *Mallett v. St. North Carolina*, 181 U. S. 592; *Leigh v. Green*, 193 U. S. 85.

The writ of error was granted by the Chief Justice of the Supreme Court of North Carolina, upon a petition that declared that the case was brought under the Federal statute, and that Federal questions were presented, and the construction placed thereon was adverse to the construction asked by the plaintiff. *Illinois v. McKendree*, 203 U. S. 525; *Rector v. City Bank*, 200 U. S. 405, 412; *Marvin v. Trout*, 199 U. S. 21.

The case must have been tried under the Federal act and not under the state law.

The act supersedes both the common and statutory law of the several States bearing on the subject covered by said act. *Fulgham v. Middling Valley R. R. Co.*, 167

Fed. Rep. 662; *Dewberry v. So. Ry. Co.*, 175 Fed. Rep. 307; *Clark v. So. Pac. Co.*, 175 Fed. Rep. 122; *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 Fed. Rep. 527; *Lemon's Admr. v. L. & N. Ry. Co.*, 125 S. W. Rep. 103; *State v. Tex. & No. R. R. Co.*, 124 S. W. Rep. 984; *Calhoun v. Cent. of Ga. Ry. Co.*, 67 S. E. Rep. 274.

The suit was brought and the case tried in the state courts under the Federal act. If so, then presumably the proceedings had at the trial are properly referable to that act, and the rights and liabilities of the respective parties arise under the act. The plaintiff below alleged in his complaint, and offers evidence in support of the allegation, that he was injured while actually employed by the receivers of the plaintiff in error in interstate commerce. That is, while actually engaged in discharging the duties of a baggage master. This having been his allegation, it follows that if he recovers it must be upon proof conforming to said allegation. He could not sue under the Federal statute and recover at common law.

Plaintiff in error does not ask the court either to go into any controverted questions of fact, or to pass on the admissibility of any evidence excluded from the jury, but contends that it was entitled to instructions construing the law as applicable to admitted evidence in its aspect most favorable to the plaintiff in error.

Where a party relies upon an act of Congress, and the questions construed by the court, and upon which the case turned, were whether the party had brought himself within the scope of that act, a Federal question is presented. *San Jose Land Co. v. Ranch Co.*, 189 U. S. 177; *St. L. I. M. & S. R. Co. v. Taylor*, 210 U. S. 281.

The Federal question was properly and seasonably presented in the court below.

Where a servant departs from the sphere of his assigned duties, the relation of master and servant is considered as temporarily suspended, and his position then becomes

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that of a trespasser or a bare licensee. Thornton, Employers' Liability, § 24; 2 Labatt, Master & Servant, § 629; White on Personal Injuries, § 227; 3 Elliott on Railroads, § 1303.

Mr. William C. Douglass for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action by an employé of the plaintiff in error to recover damages for severe and permanent personal injuries alleged to have been received while in its service. The plaintiff alleged that he was baggage-master and flagman on one of the defendant's passenger trains, running from Portsmouth, Virginia, to Monroe, North Carolina. That a head-on collision occurred with another of defendant's trains, whereby plaintiff and others were injured, and that the collision was due to the negligence of defendant's officers and agents. The answer was, in substance, a general denial for want of knowledge. There was a jury, verdict and judgment for the defendant in error, which was later affirmed by the Supreme Court of the State. This writ of error was allowed by the Chief Justice of that court upon the ground that "there was drawn into question a right, privilege or immunity claimed by the railroad company under a statute of the United States, and the decision was against such right, privilege or immunity so claimed and specially set up by said defendant," etc. Such a certificate is, however, not sufficient to confer jurisdiction to review the judgment of a state court under § 709, Revised Statutes. That there was set up and denied some claim or right under the Constitution or a statute of the United States must appear upon the record, and such a certificate is only of value to make more definite or certain that the Federal right was definitely asserted and decided. *Sayward v. Denny*, 158

U. S. 180, 183; *Louisville & Nashville R. R. Co. v. Smith*, 204 U. S. 551.

The Federal question relied upon to sustain the writ of error to this court concerns the construction and application of the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149. Neither the complaint nor the answer makes any direct reference to that act; but the complaint did allege that the railroad company was operating a line of railroad between Portsmouth, Virginia, and Monroe, North Carolina, and that the plaintiff while in its employment as baggage-master and flagman upon a passenger train running between said points was negligently injured by a head-on collision. This states a ground of action under that act and it was so assumed by the trial court, as appears from that part of the charge relating to the effect of contributory negligence, as well as from some of the questions made in the Supreme Court of the State.

That the collision was due to negligence was conceded. The only defense which seems to have been made was that under the rules of the company, the plaintiff was required to remain in the baggage car; but that he was hurt while in the express car, a place where, it is claimed, his duty did not call him, and therefore, he was not injured while employed in the service of the company, or engaged in any duty his employment devolved upon him.

The case was submitted upon these issues, and the finding of the jury upon each was as follows:

"1. Was the plaintiff injured by the negligence of the defendant? Answer. Yes.

"2. Was the plaintiff's injury caused by his contributory negligence? Answer. No.

"3. What damage is the plaintiff entitled to recover? Answer. \$30,000."

Four requests for special charges, which bear upon this defense and which were denied, have been assigned here

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as error reviewable by this court. They were as follows:

"1. That where an employé undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will find the first issue 'No.'

"3. That as the plaintiff admits that he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had that notice) required him to remain in the baggage car, when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence, that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury, you will answer the first issue 'No.'

"4. That unless the jury shall find by the greater weight of the evidence that when the plaintiff went into the express car, he understood that he was going there to discharge some of the duties of his employment, the defendant's negligence in causing the derailment of said car would not be the proximate cause of the plaintiff's injuries, and the jury will answer the first issue 'No.'

"6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to

go to discharge his duties as an employé of the defendant, the jury will answer the first issue 'No.'"

The plaintiff in error also excepted to a part of the court's charge which was in these words:

"If you find from the evidence that the plaintiff had no right to go into the express car; that he was not where he should have been; and you further find that he would not have been injured but for his going into the express car, *and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation*, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.' If you do not so find, it would be your duty to answer the second issue 'No.'"

Not one of the requests asks any definite construction of any part of the Employers' Liability Act, or, indeed, contains any reference whatever to the act.

They are based alone upon the admitted facts that at the time of the collision the plaintiff was in the express car, and that there was a rule of the company requiring him to be in the baggage car. They assume that in being in the express car he was where he had no right to be, and that if injured while there the jury must acquit the company of negligence and upon that issue find for the railroad company. The requests take no account of the legal effect of other evidence in the case. Thus, there was evidence tending to show that the express car was used for through baggage, and that baggage was often received from the platform into the express car, and carried to the adjacent baggage car. There was also evidence tending to show that the rule referred to was not enforced, and that the baggage-master and express messenger frequently exchanged work, and that this was known to the conductor, who made no objection. There was also evidence tending to show that both the conductor and the

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plaintiff had gone to the express car, either upon the call of the messenger or for a social purpose, the plaintiff in either event going by direction or on invitation of his immediate superior, the conductor of the train. Any question as to whether his being in the express car at the moment of the collision either contributed to the collision or to the injury he sustained, as well as any consideration of the question whether he was in any way negligent in being there, as being in a place of greater danger than if in the baggage car, was ignored.

The trial court was under no obligation to give special charges based upon but a part of the evidence—charges which, in effect, took from the jury every question save the single fact that plaintiff was, when hurt, in the express car, and that there was a rule which required him to remain in the baggage car.

But the plaintiff in error now urges that it was entitled to have construed that provision of the Employers' Liability Act which requires that a plaintiff to recover under it must have been injured "while he was employed by such carrier in such commerce," and that the requests denied were applicable to the evidence which tended to show that he had ceased to be such an employé, because he was not, at the moment of the injury, engaged in the conduct of interstate commerce, or at the place where his duty required him to be. That the plaintiff was in the general employment of an interstate railroad, and at the time was the baggage-master of one of its trains running from one State to another, was shown by all the evidence. If his employment had been terminated, it was solely because he had momentarily gone into the adjacent express car. If he was injured while employed about something which it was not his duty to do, it was solely due to the fact that he had gone into that car either under direction or with the consent of his conductor.

This case does not come here from a Federal court and

we are, therefore, not a court of general review. It comes under § 709, Rev. Stat., and the power to review a judgment of a state court is limited and defined by that provision. The sole ground upon which our jurisdiction is invoked is found in the third clause of the section, which provides that, "when any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute . . . and the decision is against the title, right, privilege or immunity specially set up or claimed, . . . may be reëxamined or reviewed. . . ."

This action was brought under an act of Congress. If the act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled, was denied, a right has been denied under the statute, and the question may be reviewed by this court. In *St. Louis, I. M. & S. Ry. v. Taylor*, 210 U. S. 281, 293, it was said:

"Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

That case came from a state court from a judgment against the plaintiff in error in an action under the Safety

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Appliance Act. But in that case the Federal question was specially set up and definite rulings had upon definite questions requiring a construction of the act. Thus the court concludes the paragraph above set out by saying (p. 293):

"The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here."

It was the obvious duty of counsel, if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right "specially set up" and denied by the court. "It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and then a decision against the right claimed under it." Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error. *Maxwell v. Newbold*, 18 How. 511, 515; *Sayward v. Denny*, 158 U. S. 180; *Gillis v. Stinchfield*, 159 U. S. 658; *Speed v. McCarthy*, 181 U. S. 269, 275, 276; *Gaar, Scott Co. v. Shannon*, 223 U. S. 468, decided at present term. In *Appleby v. Buffalo*, 221 U. S. 524, 529, this court said:

"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. Denny*, 158 U. S. 180, 183; *Harding v. Illinois*, 196 U. S. 78; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97."

Passing now to the error assigned to a paragraph in the general charge, the part objected to and assigned as error is the clause italicized. It was a part of the general charge in respect of contributory negligence. It was limited to the separate issue submitted to the jury as to such negligence.

It is not easy to see why the mere going into the express car would be negligent unless the conditions were such as to be an act of imprudence which a reasonable man would not have done. But this we pass by as pertaining to the merits. In any event the exception did not raise any specific question as to the proper construction of the act under which this action had been brought.

The jury was in explicit terms told that if they found the plaintiff guilty of contributory negligence it would not bar a recovery, but that the damages assessed must be diminished in proportion to the amount of negligence attributable to the plaintiff. This was in pursuance of the statute. The jury specially found that the plaintiff had not been guilty of contributory negligence.

In conclusion, we are of opinion that neither the instructions denied nor that objected to are sufficient to raise any Federal question which this court may review.

The motion to dismiss the writ for want of jurisdiction is therefore granted.

DAVID LUPTON'S SONS COMPANY *v.* AUTOMOBILE CLUB OF AMERICA.

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

No. 137. Argued December 20, 1911.—Decided June 7, 1912.

Where the trial in the Circuit Court is before a referee by stipulation, the only question here is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee. These findings are conclusive in this court. Nor can this court pass upon exceptions to the refusal of the referee to find facts as requested.

In determining whether, under a state statute, failure to comply with its terms renders a contract void or merely acts as a bar to maintaining an action thereon, the Federal court must follow the interpretation given the statute by the highest court of the State.

As construed by the Court of Appeals of that State, § 15 of the General Corporation Law of New York does not make contracts of a foreign corporation which has not complied with its provisions absolutely void, but merely disables the corporation from suing thereon in the courts of the State.

Where the contract of a corporation of one State not complying with the statutes of another State where the contract is made, is not void, the corporation can maintain its action, if jurisdiction otherwise exists, in the Federal courts.

A State cannot prescribe the qualifications of suitors in the Federal courts; nor can it deprive of their privileges those who are entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of valid contracts.

Judgment ordered for plaintiff for amount fixed by referee's findings of fact.

THE facts, which involve the construction of § 15 of the General Corporation Law of New York, and the right of foreign corporations which had not complied therewith, to sue in the Federal courts, are stated in the opinion.

Mr. William Ford Upson, with whom Mr. William Forse Scott was on the brief, for plaintiff in error:

The judgment entered on the report of the referee is reviewable. *Roberts v. Benjamin*, 124 U. S. 64, 67; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 364; *Bagley v. Gen. Fire Ext. Co.*, 150 Fed. Rep. 284.

Plaintiff's claim that the statute of the State of New York was in contravention of the Constitution of the United States sufficiently appears by the record. *Loeb v. Columbia*, 179 U. S. 472, 476; *Holder v. Aultman*, 169 U. S. 81, 88.

A bill of exceptions is not required or appropriate for raising the points here sought to be reviewed. Rev. Stat., § 700; *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 124; *Walnut v. Wade*, 103 U. S. 683, 688.

The transaction in suit, consisting essentially of the sale of articles manufactured in Pennsylvania, to be thence transported to New York and there delivered to defendant, was interstate commerce and as such under the protection of the Federal Constitution. *Brown v. Maryland*, 12 Wheat. 419, 447; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 734; *Norf. & West. R. Co. v. Pennsylvania*, 136 U. S. 114.

If plaintiff has also done some local business, that does not affect its rights. *Crutcher v. Kentucky*, 141 U. S. 47, 59.

The fact that plaintiff did some work in putting the frames in place and hanging the sash in the frames does not deprive it of protection. *Caldwell v. North Carolina*, 187 U. S. 622; *Milan Milling Co. v. Gorten*, 93 Tennessee, 590; *Black-Clawson Co. v. Carlyle Paper Co.*, 133 Ill. App. 61; *Chuse Engine Co. v. Vromania Co.*, 133 S. W. Rep. 624; *Wolf Co. v. Kutch*, 132 N. W. Rep. 981.

It is not necessary that the contract to be protected should itself specify or require goods from another State; the substantial character of the transaction is controlling.

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Argument for Defendant in Error.

Rearick v. Pennsylvania, 203 U. S. 507, 511; *Swift & Co. v. United States*, 196 U. S. 375, 398.

The New York statute is in contravention of the Federal Constitution, and the provision that the corporation may not maintain any action in any court in the State is inseparable from the rest of the statute and falls with it. *International Text Book Co. v. Pigg*, 217 U. S. 91, 108.

The interference of defendant excused performance of the contract to the extent of the work which defendant caused to be done by others. *United States v. Peck*, 102 U. S. 46; *Kingsley v. Brooklyn*, 78 N. Y. 200, 216.

Defendant waived any default of strict performance on the part of plaintiff.

In substance and effect the referee's report was in favor of the plaintiff, for his legal conclusions are overborne by his specific findings from which opposite conclusions should have been drawn.

Mr. William W. Niles for defendant in error:

The judgment entered herein on the report of the referee is not reviewable. *York &c. R. R. v. Myers*, 18 How. 252; *Campbell v. Boyreau*, 21 How. 223; *Kearney v. Case*, 12 Wall. 275.

The alleged errors assigned herein do not raise any issue which would give this court jurisdiction to review the judgment herein entered.

The Supreme Court will not review alleged errors in the refusal of the court to find facts requested. *Shipman v. Straitville Mining Co.*, 158 U. S. 361; *Insurance Co. v. Folsom*, 18 Wall. 237, 250.

The transcript of record contains no bill of exceptions, and thus fails to show what questions were raised on the trial of the action before the referee, and fails to show that any question which would give this court jurisdiction was in issue in the court below. Rev. Stat., § 700; *Insurance Co. v. Folsom*, 18 Wall. 237; see pp. 249, 250.

Even in the state practice of New York, the questions presented on appeal must have been raised in the court below in order to be reviewable. None of the so-called exceptions filed by the plaintiff in error raise any question which could give this court jurisdiction to review, particularly so as this court will not review errors alleged to have been made by the refusal of this court to make requested findings. *Shipman v. Straitville Mining Co.*, 158 U. S. 361; *Insurance Co. v. Folsom*, 18 Wall. 237, 250.

The alleged errors assigned cannot be reviewed without a bill of exceptions, and no such bill was ever prepared, allowed, settled or filed.

Practically all alleged errors assigned relate to the findings of fact, which the court will not review.

All the alleged errors on rulings of law that the court might possibly review are immaterial in view of the finding by the referee of all material facts affecting the merits in favor of the defendant, and in view of said referee's finding that the plaintiff had substantially failed to carry out its contract and had broken its contract. *Holder v. Aultman*, 169 U. S. 81; *Burton v. United States*, 196 U. S. 283, 295.

Plaintiff having failed to perform, and there being no pretense that it had any excuse for non-performance, or that performance had been waived, could not recover and the complaint was properly dismissed. *Smith v. Brady*, 17 N. Y. 173; *Spence v. Ham*, 163 N. Y. 220; *Fuchs v. Saladino*, 133 A. D. 710; *Schultze v. Goldstein*, 180 N. Y. 249.

Impossibility of performance without fault of contractor does not excuse him from performing contract. *Jacksonville Ry. v. Hooper*, 160 U. S. 514, 527.

The referee having found that the plaintiff, so far as the transaction in suit was concerned, was doing business in the State of New York, and was not engaged in interstate commerce, that finding is conclusive upon this court

on the record presented to it, and cannot be called in question. The referee's decision was amply justified under the decision of this court in *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611.

The referee was right in holding that an action could not be maintained by the plaintiff against the defendant under the circumstances of this case. *Wood v. Ball*, 190 N. Y. 217; *Colonial Trust Co. v. Montello Brick Co.*, 172 Fed. Rep. 310.

No Federal question is involved which would give this court jurisdiction.

The question of the construction of the New York statute is not a Federal question. It does not raise constitutionality of statute, but construction merely. *Swing v. Weston Lumber Co.*, 205 U. S. 275, 278.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error, David Lupton's Sons Company, a Pennsylvania corporation, was engaged in the business of manufacturing and installing metal window frames and sash. Its factory was in Pennsylvania. In 1905 it entered into a contract in New York with the defendant, The Automobile Club of America, by which it agreed to manufacture and to place in position frames and sash for the defendant's building, to be erected in the city of New York, for the sum of \$10,344. While the Lupton Company was putting in the frames a strike occurred, and all the other persons employed by the defendant in the construction of the building stopped work on account, as it is found, "of the character and condition of labor" employed by the Lupton Company, and the material it furnished, of which complaint had been made by a New York labor union. After various negotiations, the defendant—under an adjustment by the architect and in order to get its building constructed—employed another

concern to complete the work embraced in the contract with the Lupton Company. The latter received, for what it did, \$5,837.72; the defendant paid for the completion \$3,796.76, and if this were credited against the contract price there would remain a balance of \$709.52.

The Lupton Company, insisting that it was wrongfully prevented from performance, brought this suit in the Circuit Court of the United States to recover the sum of \$5,000 as the damages sustained by the alleged breach. The defendant pleaded several defenses, as well as a counterclaim for damages for breach by the plaintiff. Among the defenses was one that the Lupton Company could not maintain this action because it was a foreign corporation doing business in the State of New York without a certificate of authority in violation of § 15 of the General Corporation Law of that State. Laws of 1890, p. 1063, c. 563, § 15; Laws of 1892, p. 1805, c. 687, § 15, as amended.

Upon written stipulation the action was referred to a referee to hear and determine the issues. The referee reported his findings of fact and conclusions of law, holding that the contract was void under the statute and that the complaint should be dismissed. Upon the plaintiff's application, the report was recommitted in order that further findings might be proposed. The referee then passed on numerous requests submitted by the plaintiff, and on the filing of his supplemental report, which left unchanged the original conclusions of law, judgment was entered for the defendant. The Lupton Company brings the case here on writ of error to the Circuit Court upon the ground that the New York statute, as applied to the transaction in question, was in contravention of the Constitution of the United States as an unwarrantable interference with interstate commerce.

As the trial was had before the referee pursuant to the stipulation, the only question presented here is whether

there is any error of law in the judgment rendered by the court upon the facts found by the referee. The findings of fact are conclusive in this court. We cannot review any of the exceptions to these findings or to the refusal of the referee to find facts as requested. *Roberts v. Benjamin*, 124 U. S. 64, 71, 74; *Shipman v. Straitsville Mining Co.*, 158 U. S. 356, 361; *Chicago, M. & St. P. Rwy. Co. v. Clark*, 178 U. S. 353, 364; *Hecker v. Fowler*, 2 Wall. 123; *Bond v. Dustin*, 112 U. S. 604; *Paine v. Central Vermont R. R. Co.*, 118 U. S. 152, 158.

Under § 15 of the General Corporation Law of the State of New York a foreign stock corporation, other than a moneyed corporation, is prohibited from doing business in the State without having first procured from the Secretary of State a certificate that it has complied with certain prescribed conditions. The corporation is required (§ 16) to file with the Secretary of State a sworn copy of its charter and a statement setting forth the business which it proposes to carry on in the State; to designate its principal place of business within the State and to appoint a person upon whom legal process may be served. *Wood & Selick v. Ball*, 190 N. Y. 217, 224. Section 15 provides: "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate." In his original report, the referee found that the Lupton Company was doing business in the State of New York, within the meaning of the statute, without a certificate of authority; and after the report was recommitted he made additional findings with respect to the nature of its business, upon which the plaintiff in error bases its contention that the statute has been held to apply to transactions in interstate commerce which were not subject to the State's interdiction. It is not necessary, however, to review these findings, for the statute has received a construction by the

highest court of the State of New York which precludes it, in any aspect of the case, from being regarded as a bar to the maintenance of this action.

The referee's ruling that the contract was void was based upon the statement in the opinion in *Wood & Selick v. Ball*, *supra*, that "the procuring of a license must precede the transaction of business or the contracts of the corporation are not lawful." But in *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, the Court of Appeals of New York has declared that a contract made by a foreign corporation doing business within the State without certificate of authority is not absolutely void; that the only penalty prescribed by the General Corporation Law for a disregard of the provisions of § 15 is a disability to sue upon such a contract in the courts of New York; and that the contract remains valid and effective in all other respects.

In the *Mahar Case*, the action was brought to recover a sum deposited under a contract made in New York with the defendant, a foreign corporation, which it was alleged was transacting business in the State without authority at the time the contract was made. It was asserted, in support of the action, that the contract was void and hence that there was a failure of consideration. The Court of Appeals held that the complaint did not state a cause of action. In the opinion delivered by Willard Bartlett, J., in which the majority of the court concurred, it is said (p. 234):

"It is assumed in the prevailing opinion" (that is, the opinion below, 146 App. Div. 756), "that this court held in the case of *Wood & Selick v. Ball* (190 N. Y. 217) that non-compliance with the requirements of that section has the effect of rendering any contracts made by such a corporation in this state absolutely void. Such is not my understanding of the purport of that decision. The only proposition decided in that case was 'that compliance with

section 15 of the General Corporation Law should be alleged and proved by a foreign corporation such as the plaintiff, in order to establish a cause of action in the courts of this state.' . . . The only penalty which the General Corporation Law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the courts of New York. 'No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate.' (Cons. Laws, ch. 23, section 15.) This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint; but in my opinion it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York without the certificate of authority required by section 15 of the General Corporation Law is limited to that thus prescribed in the section itself. No doubt the legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this state without having obtained the certificate; but it has not done so. This was the view taken in *Alsing Co. v. New England Quartz & Spar Co.* (66 App. Div. 473; *affd.*, 174 N. Y. 536) where it was held that section 15 did not prevent a foreign stock corporation doing business here without having procured the necessary certificate from recovering upon a counterclaim growing out of the transaction upon which the plaintiff sued. 'The defendant, having been brought into court and thus made to defend,' said Mr. Justice O'Brien in that case, 'should be allowed, unless there is a distinct provision to the contrary, not only to defend but also to litigate any question arising out of the transaction that has been made the basis of the plaintiff's complaint. There is no such prohibitive provi-

sion in this statute, and, therefore, the obtaining of the certificate would not be a prerequisite to a recovery upon the counterclaim in question.' (p. 476.) The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state imposing conditions upon it as a prerequisite to the lawful transaction of business therein. In *Fritts v. Palmer* (132 U. S. 282) a tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from purchasing or holding land in that state until it should acquire the right to do business therein by fulfilling certain prescribed conditions. Here the Missouri corporation had unquestionably violated the laws of Colorado when it purchased the property without having previously designated its place of business and an agent, as required by the Colorado statute. The only penalty which that statute provided, however, for non-compliance with these provisions was that the officers, agents and stockholders should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held the fair implication to be that, in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute prescribing the terms upon which foreign corporations might do business in that state; and hence the judiciary ought not to inflict the additional and harsh penalty of forfeiting the estate which had been conveyed to the Missouri corporation. In other words, the court refused to treat the conveyance as void, notwithstanding that it was made to a corporation which was forbidden to receive it.

"If I am right in assuming that the only infirmity in the contract mentioned in the complaint is the disability of one of the parties to it, namely, the foreign corporation,

to sue upon it in the courts of this state, it remains a valid and effective instrument in all other respects."

In this view, despite its transaction of business without authority, the foreign corporation could sue upon its contracts in any court of competent jurisdiction other than a court of the State of New York. Accordingly, it was held by the Court of Errors and Appeals of New Jersey that a suit might be brought by the corporation in that State upon a contract made in New York, where it was doing business without the prescribed certificate. *Alleghany Co. v. Allen*, 69 N. J. Law, 270. The court conceded the general rule both in New Jersey and New York to be that a contract void by the law of the State where made would not be enforced in the State of the forum. But it was held that the New York statute did not in terms declare the contract void; it provided that no such action should be maintained in that State.

In dismissing the writ of error to review that judgment (*Allen v. Alleghany Co.*, 196 U. S. 458, 465) this court commented upon the decision of the New York court in the case of the *Neuchatel Asphalte Co. v. The Mayor*, 155 N. Y. 373, which arose under the statute in an earlier form, the section (15) of the General Corporation Law then providing that the foreign corporation should not maintain "any action in this State upon any contract made by it in this State until it shall have procured such certificate." This court said: "The Court of Appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that no penalty for non-compliance was provided, except the suspension of civil remedies in that State, and none others would be implied. This corresponds with our rulings upon similar questions. *Fritts v. Palmer*, 132 U. S. 282."

It must follow, upon the similar construction of § 15 as it read at the time of the transaction in question, that

the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal court. The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. *Union Bank v. Jolly's Adm'rs*, 18 How. 503, 507; *Hyde v. Stone*, 20 How. 170, 175; *Cowles v. Mercer County*, 7 Wall. 118, 122; *Insurance Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 186; *Lawrence v. Nelson*, 143 U. S. 215; *In re Tyler*, 149 U. S. 164, 189; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111. The State in the statute before us made no such attempt. The only penalty it imposed, to quote again from the *Mahar Case*, was a disability to sue "in the courts of New York." Before this decision of the state court, the Circuit Court of Appeals for the Second Circuit reached the same conclusion as to the meaning of the statute and upheld the right of the foreign corporation to sue in the Federal court. *Johnson v. New York Breweries Co.*, 178 Fed. Rep. 513, 101 C. C. A. 639. The court below erred in dismissing the complaint.

With respect to the facts going to the merits of the claim of the Lupton Company, the referee made numerous findings which it is not necessary to set forth or to review at length. The contract provided that "in the event of any strike or cessation of work, caused by character or condition of labor employed or material furnished," the owner should have full authority "to arbitrate or adjust the matter" and the contractor should make good the loss, to be fixed by the architect or by arbitration. This clause was evidently inserted to meet the sort of difficulty which actually arose. The referee found, as has been stated, that it was "on account of the character and condition of labor employed by the plaintiff and the material furnished

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by it" that the strike took place and all the other persons employed on the building stopped work. It was also found that to complete the contract the defendant necessarily expended the sum of \$3,796.76. This was done under an adjustment by the architect, and upon the findings the defendant was properly allowed a credit for the amount thus paid. There remained due to the plaintiff the sum of \$709.52, for which it was entitled to judgment with interest.

Judgment reversed and the cause remanded to the District Court with instructions to enter judgment in favor of the plaintiff for \$709.52, with interest from the date of the commencement of the action.

SAVAGE v. JONES, STATE CHEMIST OF THE
STATE OF INDIANA.

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

No. 68. Argued January 18, 1912.—Decided June 7, 1912.

Where appellant, as complainant below, attacked as unconstitutional a state statute under which the sale of his product was interfered with by the state officer enforcing the statute, and a general demurrer for want of equity is sustained, this court has jurisdiction of the appeal; nor will the appeal be dismissed because the bill in one of its allegations asserted that complainant's product was not one of those specified in the act, if, as in this case, the bill also alleged that the proper state officer had construed the statute as applicable thereto.

Sales made in one State to be delivered free on board at a point therein, to be delivered to consumers in another State in the original unbroken packages, freight to be paid by purchaser, constitutes interstate commerce.

Commerce among the States is not a technical legal conception, but a practical one drawn from the course of business. Protection accorded to interstate commerce by the Federal Constitution extends to the sale by the receiver of the goods in the original packages.

An attack by state authorities upon purchasers of goods manufactured in and shipped from another State, inflicts injury upon the manufacturer by reducing the interstate sales, and if this result can only be prevented by complying with illegal demands, under an unconstitutional state statute, equity will grant relief.

Regulating the sale of food for domestic animals is properly within the scope of the state police power, and the vendors of such food are not deprived of their property without due process of law by a regulation requiring disclosure of ingredients and minimum percentage of fat and proteins, disclosure of the formula for combination not being required; and so *held* as to the statute of Indiana of 1907.

Quære whether a State can require disclosure of formulas for trade secret for mixture of a harmless article whose value depends upon the mixture.

While the State cannot, under cover of exerting its police power, directly regulate or burden interstate commerce, a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce.

Where a state police statute involving inspection of goods is enforced by the affixing of stamps, it will not be held unconstitutional as a revenue measure in disguise if the bill does not allege any facts to show that the charge for stamps is unreasonable and the total sale is so much in excess of the cost of inspection as to impute bad faith.

One whose sales are so large as to require stamps far in excess of the minimum amount to be issued is not prejudiced by the requirement to purchase such minimum amount of stamps.

No state statute which even affects incidentally interstate commerce is valid if it is repugnant to the Federal Food and Drugs Act of June 30, 1906, the object of which is to prevent adulteration and misbranding and keep adulterated and misbranded articles out of interstate commerce.

Where an act of Congress relating to a subject on which the State may act also, limits its prohibitions, it leaves the subject open to state regulation as to the prohibitions which are unenumerated.

In determining whether a Federal act overrides a state law, the

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entire scheme must be considered and that which needs must be implied has no less force than that which is expressed.

The intent of Congress to supersede the exercise by the States of their police power will not be inferred unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State.

The statute of Indiana regulating the sale, and requiring formula of ingredients of, concentrated commercial food for stock is a proper and reasonable exercise of legislative police authority for the protection of the people of the State. The act is not unconstitutional as depriving a vendor of such food who lives in another State and ships it therefrom to Indiana either as a regulation of, or burden upon, interstate commerce, as depriving any vendor thereof of his property without due process of law, or as a revenue measure beyond the power of the State, nor does the requirement for publishing the ingredients conflict in any manner with the Food and Drugs Act of 1906.

Although the Food and Drugs Act prohibits misbranding it does not require publication of ingredients, and in that respect the field is left open for state legislation.

THIS is an appeal from a decree of the Circuit Court sustaining a demurrer to the bill for want of equity. The suit was brought by Marion W. Savage, a citizen of Minnesota, to restrain the defendant, the State Chemist of Indiana, from taking proceedings to enforce an act of the General Assembly of that State (Acts 1907, chapter 206) as applied to the sales of the complainant's product, a preparation for domestic animals known as "International Stock Food." The act is set forth in the margin.¹

¹ Acts 1907, Chapter 206, Page 354, Indiana.

An Act to provide for the inspection and analysis of, and to regulate the sale of concentrated commercial feeding stuff in the State of Indiana; to prohibit the sale of fraudulent or adulterated concentrated commercial feeding stuffs; to define the term concentrated commercial feeding stuffs; to provide for guarantees of the ingredients of concentrated commercial feeding stuffs; for the affixing of labels and stamps to the packages thereof, as evidence of the guarantee and inspection thereof; to provide for the collection of an inspection fee from the

The bill alleges that the complainant has for many years been engaged in Minnesota in the manufacture of medic-

manufacturers of, or dealers in concentrated commercial feeding stuffs; to fix penalties for the violation of the provisions of this act, and to authorize the expenditure of the funds derived from the inspection fees.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That before any concentrated commercial feeding stuff is sold, offered or exposed for sale in Indiana, the manufacturer, importer, dealer, agent or person who causes it to be sold, or offered for sale, by sample, or otherwise, within this state, shall file with the state chemist of Indiana at the Indiana agricultural experiment station, Purdue university, a statement that he desires to offer such concentrated commercial feeding stuff for sale in this state, and also a certificate, the execution of which shall be sworn to before a notary public, or other proper official, for registration, stating the name of the manufacturer, the location of the principal office of the manufacturer, the name, brand or trade-mark under which the concentrated commercial feeding stuff will be sold, the ingredients from which the concentrated commercial feeding stuff is compounded, and the minimum percentage of crude fat or crude protein allowing one per cent. of nitrogen to equal six and twenty-five hundredths per cent. of protein, and the maximum percentage of crude fibre which the manufacturer, or person offering the concentrated commercial feeding stuff for sale guarantees it to contain; these constituents to be determined by the methods recommended by the association of official agricultural chemists of the United States.

SEC. 2. Any person, company, corporation or agent that shall sell or offer, or expose for sale, any concentrated commercial feeding stuff in this state, shall affix, or cause to be affixed to every package or sample of such concentrated commercial feeding stuff in a conspicuous place on the outside thereof, a tag or label which shall be accepted as a guarantee of the manufacturer, importer, dealer or agent and which shall have plainly printed thereon in the English language, the number of net pounds of concentrated commercial feeding stuff in the package, the name, brand, or trade-mark under which the concentrated commercial feeding stuff is sold, the name of the manufacturer, the location of the principal office of the manufacturer, and the guaranteed analysis stating the minimum percentage of crude fat and crude protein, determined as described in section 1, and the ingredients from which the concentrated commercial feeding stuff is compounded. For each one hundred pounds, or fraction thereof, the person, company, corporation or agent, shall also affix the stamp purchased from the state chemist, showing

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inal preparations, one of which is called "International Stock Food" and is sold in every State in the Union as

that the concentrated commercial feeding stuff has been registered as required by section one of this act, and that the inspection tax has been paid. When concentrated commercial feeding stuff is sold in bulk a tag as hereinbefore described, and a state chemist stamp shall be delivered to the consumer with each one hundred pounds, or fraction thereof: *Provided*, That for wheat bran a special stamp covering fifty pounds shall be issued on request, and one such stamp, attached to the tag hereinbefore mentioned, shall be delivered to the purchaser with each fifty pounds or fraction thereof.

SEC. 3. The state chemist shall register the facts set forth in the certificate required by section one of this act in a permanent record, and shall furnish stamps or labels showing the registration of such certificate to manufacturers or agents desiring to sell the concentrated commercial feeding stuff so registered at such times and in such numbers as the manufacturers or agents may desire: *Provided*, That the state chemist shall not be required to sell stamps or labels in less amount than to the value of five dollars (\$5.00) or multiples of five dollars for any one concentrated commercial feeding stuff: *Provided, further*, That the state chemist shall not be required to register any certificate unless accompanied by an order and fees for stamps or labels to the value of five dollars (\$5.00) or some multiple of five dollars: *Provided, further*, That such stamps or labels shall be printed in such form as the state chemist may prescribe: *Provided, further*, That such stamps or labels shall be good until used.

SEC. 4. On or before January 31st of each year, each and every manufacturer, importer, dealer, agent or person, who causes any concentrated commercial feeding stuff to be sold or offered or exposed for sale in the State of Indiana shall file with the state chemist of Indiana a sworn statement, giving the number of net pounds of each brand of concentrated commercial feeding stuff he has sold or caused to be offered for sale in the state for the previous year ending with December 31st: *Provided*, That when the manufacturer, jobber or importer of any concentrated commercial feeding stuff shall have filed the statement aforesaid, any person acting as agent for said manufacturer, importer or jobber, shall not be required to file such statement.

SEC. 5. For the expense incurred in registering, inspecting and analyzing concentrated commercial feeding stuffs, the state chemist shall receive for stamps or labels furnished, one dollar per hundred: *Provided*, That for wheat bran a special stamp as required by section 2 of

well as in many foreign countries; that he has invested large amounts of money in building up a lucrative trade

this act shall be furnished at fifty cents per hundred. The money for said stamps, or labels, shall be forwarded to the said state chemist, who shall pay all such fees received by him to the director of the Indiana agricultural experiment station, Purdue university, by whom they shall be paid into the treasury of said Indiana agricultural experiment station, the board of control of which shall expend the same, on proper vouchers to be filed with the auditor of state in meeting all necessary expenses in carrying out the provisions of this act, including the employment of inspectors, chemists, expenses in procuring samples, printing bulletins giving the results of the work of feeding stuff inspection, as provided for by this act, and for any other expenses of said Indiana agricultural experiment station as authorized by law. The director of said experiment station shall make to the governor, on or before February 15th of each year, a classified report showing the total receipts and expenditures of all fees received under the provisions of this act.

SEC. 6. Any person, company, corporation or agent that shall offer for sale, sell or expose for sale any package or sample or any quantity of any concentrated commercial feeding stuff which has not been registered with the state chemist as required by section 1 of this act, or which does not have affixed to it the tag and stamp required by section 2 of this act, or which is found by an analysis made by or under the direction of the state chemist to contain a smaller percentage of crude fat or crude protein than the minimum guarantee, or which shall be labeled with a false or inaccurate guarantee, or who shall adulterate any concentrated commercial feeding stuff with foreign mineral matter or other foreign substance, such as rice hulls, chaff, mill sweepings, peanut shells, corn bran, corncob meal, oat hulls, oat clippings, or other materials of less or of little or no feeding value without plainly stating on the label hereinbefore described, the kind and amount of such mixture, or who shall adulterate with any substance injurious to the health of domestic animals, or who shall alter the stamp, tag or label of the state chemist, or shall use the name and title of the state chemist on a stamp, tag or label not furnished by the state chemist, or shall use the stamp, tag or label of the state chemist the second time, or shall refuse or fail to make the sworn statement required by section 4 of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in the sum of fifty dollars for the first offense, and in the sum of one hundred dollars for each subsequent offense. In all litigation arising from the purchase or sale of any concentrated commercial

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in Indiana among the retail druggists, many hundreds of whom were "buying, carrying in stock and retailing to

feeding stuff in which the composition of the same may be involved a certified copy of the official analysis signed by the state chemist shall be accepted as prima facie evidence of the composition of such concentrated commercial feeding stuff: *Provided*, That nothing in this act shall be construed to restrict or prohibit the sale of concentrated commercial feeding stuff in bulk to each other by importers, manufacturers or manipulators who mix concentrated commercial feeding stuff for sale, or as preventing the free, unrestricted shipment of these articles in bulk to manufacturers or manipulators who mix concentrated commercial feeding stuff for sale, or to prevent the state chemist, or the Indiana agricultural experiment station, or any person or persons deputized by said state chemist, making experiments with concentrated commercial feeding stuffs for the advancement of the science of agriculture.

SEC. 7. The state chemist or any person by him deputized is hereby empowered to procure from any lot, parcel or package of any concentrated commercial feeding stuff offered for sale or found in Indiana a quantity of concentrated commercial feeding stuff not to exceed two pounds: *Provided*, That such sample shall be drawn during reasonable business hours, or in the presence of the owner of the concentrated commercial feeding stuff or of some person claiming to represent the owner.

SEC. 8. Any person who shall prevent or strive to prevent the state chemist, or any person deputized by the state chemist, from inspecting and obtaining samples of concentrated commercial feeding stuff, as provided for in this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of fifty dollars for the first offense, and in the sum of one hundred dollars for each subsequent offense.

SEC. 9. The state chemist is hereby empowered to prescribe and enforce such rules and regulations relating to concentrated commercial feeding stuff as he may deem necessary to carry into effect the full intent and meaning of this act, and to refuse the registration of any feeding stuff under a name which would be misleading as to the materials of which it is made, or when the percentage of crude fiber is above or the percentage of crude fat or crude protein below the standards adopted for concentrated commercial feeding stuffs. The state chemist is further empowered to refuse to issue stamps or labels to any manufacturer, importer, dealer, agent or person who shall sell or offer or expose for sale any concentrated commercial feeding stuff in this state

the public" the complainant's preparations; that the complainant's gross annual sales in Indiana amount to many thousands of dollars; that the "International Stock Food" possesses effective curative properties for various diseases of domestic animals and is composed of medicinal roots, herbs, seeds, and barks, combined by a secret formula of great value; and that the disclosure to his competitors of the proportion of the ingredients and the manner of combination would seriously injure his business; that the commercial designation "International Stock Food" is not used by the complainant as descriptive of feed of any kind, and is not so understood by retail druggists and purchasers, but is well known to the public as a trade name of a medicine for domestic animals protected under trade-

and refuse to submit the sworn statement required by section 4 of this act.

SEC. 10. It shall be the duty of every prosecuting attorney to whom the state chemist shall report any violation of this act to cause proceedings to be commenced against the person or persons so violating the act, and the same prosecuted in the manner required by law.

SEC. 11. The term "concentrated commercial feeding stuff" as used in this act, shall include linseed meals, cocoanut meals, gluten feeds, gluten meals, germ feeds, corn feeds, maize feeds, dairy feeds, starch feeds, sugar feeds, dried brewers' grains, malt sprouts, dried distillers' grains, dried beet refuse, hominy feeds, cerealine feeds, rice meals, rice bran, rice polish, peanut meals, oat feeds, corn and oat feeds, corn bran, wheat bran, wheat middlings, wheat shorts and other mill by-products not excluded in this section, ground beef or fish scraps, dried blood, blood meals, bone meals, tankage, meat meals, slaughter house waste products, mixed feeds, clover meals, alfalfa meals and feeds, peavine meal, cotton seed meal, velvet bean meal, sucrine, mixed feeds, and mixed meals made from seeds or grains, and all materials of similar nature used for food for domestic animals, condimental feeds, poultry feeds, stock feeds, patented proprietary or trade and market stock and poultry feeds; but it shall not include straw, whole seeds, unmixed meals made directly from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat and broom corn, nor wheat flours or other flours.

SEC. 12. All laws and parts of laws in conflict with this act are hereby repealed.

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marks in the United States; that on investigations made by the United States internal revenue department it was determined that the preparation was not feeding stuff nor a condimental stock food, but was a proprietary or patent medicine within the meaning of the revenue laws of 1863 and 1898; and that subsequent to the enactment by Congress of the Food and Drugs Act of 1906 (June 30, 1906, 34 Stat. 768, c. 3915), the administrative officers of the United States Government duly determined that it was a medicine and not a food within the meaning of that act.

The bill then avers the passage of the act above mentioned by the legislature of Indiana and sets forth the provisions of §§ 1, 2, 8, 9 and 11. It is alleged that the defendant, the State Chemist of Indiana, is asserting that the complainant's manufacture is one of the concentrated commercial feeding stuffs covered by the act, and that it is the duty of the complainant to comply with its provisions with reference to its sale in Indiana, "and has stated and declared to your orator, and now threatens that unless your orator has attached in a conspicuous place on the outside of each package of your orator's said medicinal preparation offered for sale within the State of Indiana, a printed statement, clear and truthful, certifying among other things the name of the manufacturer and shipper, the place of manufacture, the place of business and chemical analysis stating the percentage of crude protein, crude fat and crude fiber contained in said preparation and have all its constituents determined by the methods adopted by the session of official agricultural chemists, and shall also state upon said package the names of each ingredient of which said preparation is composed, he will cause the arrest and prosecution of every person dealing or trading in the medicinal preparation of your orator within the State of Indiana." That the defendant has sent, or caused to be sent, broadcast

throughout the State of Indiana to dealers and others who are customers, directly or indirectly, of complainant many thousand circular letters warning them against the sale of said preparation and threatening that prosecution will be instituted against all persons engaged in the sale thereof, unless and until the complainant shall have complied with the provisions of said act.

It is also alleged that the sales made by the complainant "in the State of Indiana are made at the city of Minneapolis, State of Minnesota, to be delivered free on board of cars at Minneapolis, Minnesota, and delivered to purchasers and consumers within the State of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." That unless restrained the defendant will continue to annoy and intimidate the numerous persons engaged in selling the preparation in Indiana, by threats of criminal prosecution, and will report to the various prosecuting attorneys of the State the sales that may come to his notice and instigate prosecutions of the sellers as violators of the statute, thereby obstructing the complainant in the conduct of his business in the State of Indiana and interfering with his property rights to his irreparable injury, for which there is no adequate legal remedy. That many hundreds of persons engaged in selling the preparation have already discontinued their purchases and sales because of the fear of criminal prosecution induced by the defendant's threats, and that large numbers of those who are still handling it will be induced by such threats to discontinue its sale.

The bill further avers that the complainant's preparation is not in any sense either concentrated commercial feeding stuff, or condimental stock feed, or a patent proprietary stock feed within the proper construction of the act of Indiana, and is not advertised as possessing nutritive properties or used except as medicine; that the complainant does not "claim that said medicinal preparation con-

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tains any crude protein or crude fat;" that it does not contain, nor is it claimed on behalf of the defendant that it contains, any ingredient that is deleterious or injurious to animal life or health; that it is prescribed and administered in small doses as medicine and "that the only nutritive substance or ingredients . . . are employed as diluents in so small an amount as to produce no feeding effect whatever, but for the sole purpose of rendering medicinal bitter roots, herbs, barks and seeds more acceptable to the animal stomach;" that directions for use accompany each package and in every case there is a statement plainly showing that the preparation is to be used to cure disease and not in place of or as a substitute for any grain or feed. That nevertheless, the defendant, who in his official capacity is charged by law with the enforcement of the statute, has construed it to apply to complainant's product.

That under § 3 of the statute of Indiana the State Chemist is to register the facts set forth in the certificate required by § 1 as a permanent record and to furnish stamps or labels, showing such registration, to manufacturers or agents desiring to sell the concentrated commercial feeding stuff so registered in amounts not less than the value of five dollars or multiples of five dollars for any one such product; that by § 5 the State Chemist is to receive one dollar for each one hundred stamps, and that the proceeds thus derived are to be paid into the treasury of the Indiana Agricultural Experiment Station to be expended in carrying out the provisions of the statute and for any other expenses of such station as authorized by law.

That the statute, and particularly §§ 1, 2, 7, 8 and 9, are repugnant to the Fourteenth Amendment of the Constitution of the United States in that they require manufacturers of proprietary stock feed and condimental feeds, arbitrarily, without compensation and without due proc-

ess of law, whether such preparation contain any poisonous or deleterious element or ingredient, to disclose the formulæ by which they are compounded, and the ingredients and proportions thereof, which embody valuable trade secrets; and that if the act is enforced against the complainant he will be deprived of his property contrary to the said Amendment.

That the statute also violates § 8 of Art. I of the Constitution of the United States as an unreasonable interference with interstate commerce in which the complainant is engaged.

That further, the statute is invalid under § 19 of Art. IV of the constitution of the State of Indiana in that the title does not express the requirement that manufacturers or dealers shall disclose the formulæ by which their products are manufactured or the ingredients or proportions.

That for many years the complainant's preparation has been offered for sale in packages of different sizes, holding respectively 24 ounces, 3 pounds, 6 pounds and 25 pounds; that under the terms of the statute the complainant would be required to pay the same amount of tax for a package of 24 ounces that other commodities and manufacturers thereof pay for a package of one hundred pounds; and that this discrimination is unreasonable and unconstitutional.

That the enforcement of the requirement as to the affixing of stamps and payment therefor is a tax upon the complainant's property and business, and is not a license fee determined by any reasonable requirement, or for the purpose of carrying out the inspection required, but, on the contrary, under the guise of a police regulation constitutes a measure for raising revenue for the general work and expense of the Indiana Agricultural Experiment Station. That the act is contrary to § 10 of Art. I of the Constitution of the United States, that no State shall without the consent of Congress lay any imposts or duties on imports,

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except what may be absolutely necessary for executing its inspection law.

The bill prays that the defendant may be enjoined from taking any action against the complainant, interfering with his right to vend and convey his preparations in the State of Indiana, from instituting any proceedings to punish him for failure to comply with the defendant's demands, from giving out orally or in writing to the various prosecuting officers of the State, or to any other agents thereof charged with the enforcement of its law, or to the public, any threats of prosecution or information upon which prosecutions are requested, or may be based, and from otherwise seeking to prevent the conduct of the complainant's business in the State or to discredit the reputation of his remedy.

The defendant demurred to the bill upon the ground that it was wholly without equity, and that the court was without jurisdiction. Upon the former ground the bill was dismissed.

Mr. M. H. Boutelle for appellant:

Appellant is entitled to equitable relief. *Scully v. Bird*, 209 U. S. 481.

The constitutional question presented establishes the right of direct appeal from the decree of the Circuit Court to this court. *Scott v. Donald*, 165 U. S. 58; *Penn Ins. Co. v. Austin*, 168 U. S. 694; *Holder v. Aultman*, 169 U. S. 88; *Loeb v. Columbia Twp.*, 179 U. S. 472; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397; *Mississippi R. R. Comm. v. Ill. Cent. Ry.*, 203 U. S. 335.

Every question arising upon the record is open for consideration on the present appeal. *Carey v. Hudson Ry. Co.*, 150 U. S. 181; *Horner v. United States*, 143 U. S. 576.

The Indiana statute constitutes an unlawful interference with and attempted regulation of interstate commerce. In so far as applicable to the subjects or commodities

of interstate commerce it is both regulatory and restrictive of that commerce. Its action and effect in this behalf is direct, as contradistinguished from indirect, in that by its terms it undertakes to impose as conditions precedent to the free and unrestricted enjoyment of the privileges of interstate commerce, the fulfillment of certain requirements. No State can impose conditions of this character. *Vance v. Vandercook*, 170 U. S. 438.

The power of the State is limited and measured by the constitutional inhibition against direct restriction or regulation of commerce amongst the several States. *Robbins v. Shelby District*, 120 U. S. 489; *West v. Kansas Gas Co.*, 221 U. S. 229.

It is no answer to say that the attempted exercise of such powers is referable to considerations appertaining to local police regulation and that their validity is attested by this circumstance. As applied to interstate commerce, the question still remains, whether, in the attempted exercise of otherwise concededly valid powers, that commerce has been directly regulated or restricted. *Asbell v. Kansas*, 209 U. S. 251, 254, 255; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 334; *Walling v. Michigan*, 116 U. S. 446; *Adams Express Co. v. Kentucky*, 214 U. S. 218; *Leisy v. Hardin*, 135 U. S. 100; *Crossman v. Lurman*, 192 U. S. 189; *Schollenberger v. Pennsylvania*, 171 U. S. 1.

While the act does not contain an express prohibition against importation and sale, prohibition is implied and its equivalent effected, by making compliance a condition to the right of importation and sale and visiting failure of compliance with criminal responsibility. If, under the guise of restricting the importation and sale of adulterated commodities, legislation may be adopted restricting and limiting the right of importation and sale of all commodities and conditioning the exercise of that right upon such formalities as each State may see fit to impose, the results would be to bring within the police power any article of

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consumption that a State might wish to exclude. *In re Rahrer*, 140 U. S. 545; *Bowman v. Chicago Ry.*, 125 U. S. 465; *Collins v. New Hampshire*, 171 U. S. 30.

The law in question is not an inspection act. The inspection features are evasions and the law itself primarily a revenue measure. The general powers of the States, with respect to the adoption of inspection laws, is referable to Art. I, § 10 of the Constitution. As originally interpreted, the power thus indicated was confined to foreign, as contradistinguished from interstate, commerce. *Turner v. Maryland*, 107 U. S. 38; *Woodruff v. Parham*, 8 Wall. 123, and cases cited.

Inspection laws act upon the subject before it becomes an article of foreign commerce or commerce among the States and prepare it for that commerce. *Gibbons v. Ogden*, 9 Wheat. 1; *Bowman v. Chicago Ry.*, *supra*.

As to the right of the States to adopt inspection laws with respect to personal property imported from abroad or from another State, see *Voight v. Wright*, 141 U. S. 62; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345; *Pabst Brew. Co. v. Crenshaw*, 198 U. S. 17.

Inspection which is virtually delegated to the foreign manufacturer who is required to file a verified analysis of his product, is not inspection at all. *Scott v. Donald*, 165 U. S. 58, 93, 99; *Vance v. Vandercook*, *supra*; and see dissenting opinion in *Pabst Brew. Co. v. Crenshaw*, *supra*.

In the ascertainment of the natural effect and intentment of the act this court is neither concluded by its self-styled objects nor its local interpretation. *Mugler v. Kansas*, 123 U. S. 623; *Railroad v. Husen*, 95 U. S. 465; *Reid v. Colorado*, 187 U. S. 137; *Asbell v. Kansas*, 209 U. S. 251.

The imposition of the tax must be rested upon the assumption that the act is a valid inspection act and the charge imposed with the bona fide purpose of defraying the cost of such inspection. Otherwise any such imposition

falls under the inhibition against taxation of interstate commerce. *Robbins v. Shelby District*, *supra*; *Postal Tel. Co. v. Taylor*, 192 U. S. 64; *Postal Tel. Co. v. New Hope*, 192 U. S. 55; *Atl. & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160; *McLain v. Denver Ry.*, 203 U. S. 38.

The act in question as applied to interstate commerce is superseded and annulled by the act of Congress of June 30, 1906, known as the Pure Food and Drug Act.

Where jurisdiction with respect to a subject-matter is vested in Congress by the Constitution, the laws of Congress, enacted in the exercise of the power thus delegated, constitute the supreme law of the land, and, of necessity, supersede and annul local legislation in the same field. *Chicago Ry. v. United States*, 219 U. S. 486; *Asbell v. Kansas*, 209 U. S. 251, 255.

The exclusive power as respects the regulation of interstate commerce is vested in Congress and the delegation of this authority to the Federal Government excludes its exercise by the States. This result obtains even in the absence of direct or affirmative legislation by Congress. *Bowman v. Chicago Ry.*, *supra*, and cases cited; *Sturgis v. Crowninshield*, 4 Wheat. 122; *Reid v. Colorado*, 187 U. S. 137.

Legislation of the character of that presented by the Indiana law, contravening as it does the provisions of the Federal enactment, must be held null and void.

Mr. Edwin Corr, with whom *Mr. Thomas M. Honan*, Attorney General of the State of Indiana, was on the brief, for appellee:

Appellant shows by his bill that he cannot be injured, except incidentally, by the operation of this law. It must appear that the law operates upon him or his property directly and not incidentally. *Southern Ry. v. King*, 217 U. S. 534; *Hatch v. Reardon*, 204 U. S. 160; *Hooker v. Burr*, 194 U. S. 419.

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The class to whom protection is guaranteed by that provision of the Constitution giving Congress the right to regulate commerce among the several States, is necessarily the class who engage in interstate commerce. Unless a person belongs to that class he would have no interest in a law regulating such commerce and would have no right to attack a state law undertaking to regulate interstate commerce on the ground of its unconstitutionality. Appellant has not engaged in and does not engage in interstate commerce.

In determining the validity of this law, it should be considered in its entire scope, and not in detached paragraphs. It should be considered as a whole. Thus considered it will be seen to be a valid exercise of the police power, which is reserved to the States. The act is simply an inspection law designed to protect the public against the sale of adulterated concentrated commercial feeding stuff. It does not directly undertake to regulate interstate commerce. It does not undertake the regulation of importation of commodities into the State. It is only where the police power of a state law undertakes directly to regulate interstate commerce that it is invalid. *McLean v. Denver & R. G. R. Co.*, 203 U. S. 50.

The grant to Congress of authority to regulate foreign and interstate commerce did not involve a surrender by the States of their police powers. *Plumley v. Massachusetts*, 155 U. S. 471; *In re Rahrer*, 140 U. S. 545, 546.

In exercising its right to protect persons and property within its borders, a State has a right to require that any article of commerce, whether harmful or not, be sold for just what it is, and may require it to be labeled showing of what it is composed. In its regulations to prevent fraud and deceit and adulteration in the sale of articles, it may require an inspection not only of adulterated articles but of those which may not be adulterated. Inspection laws are not founded on the theory that the things on which

they act are dangerous or noxious in themselves. *Bowman v. Chicago Ry. Co.*, 125 U. S. 488; *Heath & Milligan v. Worst*, 207 U. S. 338; *Stilz v. Thompson*, 44 Minnesota, 271; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345.

The Indiana law does not require the manufacturer or vendor of concentrated commercial feeding stuff to disclose any of his secret formulas. It only requires him to state the ingredients that enter into its composition. See *Arbuckle v. Blackburn*, 113 Fed. Rep. 616-627, aff'd 191 U. S. 405.

Unless the inspection fee is so unreasonably large as to show on its face the lack of good faith in the enactment of the law, the question of the amount of such inspection fee is a legislative and not a judicial question. *McLean v. Denver & R. G. R. Co.*, 203 U. S. 55; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 355; *Neilson v. Garza*, 2 Woods, 287.

The Indiana law is supplemental or complementary to the Federal Pure Food and Drug Act and does not in any way conflict therewith. *Crossman v. Lurman*, 192 U. S. 190.

Appellant is not entitled to equitable relief upon the allegations of his bill. *Francis v. Flinn*, 118 U. S. 388; *Arbuckle v. Blackburn*, *supra*.

The contention that the standard by which the constituents of commercial feeding stuffs is to be determined is indefinite and might vary, even if conceded, would not affect the validity of this law, for it only goes to the defect or incompleteness of the legislation, not to its legality. *Heath & Milligan v. Worst*, 207 U. S. 358. Inaccuracies in a law may be removed in the administration of the same or by legislative modification.

Appellant does not come into court with clean hands. He gives his product a false name. He calls that a food which he says is a medicine. His product is misbranded and he is not entitled to the aid of a court of equity.

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MR. JUSTICE HUGHES, after making the above statement, delivered the opinion of the court.

The principal contention in support of this appeal is that the statute of Indiana (Acts 1907, chapter 206), the provisions of which have been set forth, is an unconstitutional interference with the complainant's right to engage in interstate commerce.

A preliminary question arises with respect to the jurisdiction of this court, by reason of the allegation of the bill that the complainant's product is not a "concentrated commercial feeding stuff" within the true meaning of the act, and that so interpreted the statute would not apply. But it was also alleged that the State Chemist, who was authorized to enforce the statute, had construed it to be applicable to the commodity, which is commercially known as "International Stock Food;" and thus charged by the officer with the duty of obedience, the complainant in his bill challenged the constitutionality of the legislation. The grounds for the attack were not found in the conclusions reached by the officer, as to the nature of the article, in administering an act otherwise conceded to be valid (*Arbuckle v. Blackburn*, 191 U. S. 405, 414), but in the provisions of the statute itself as applied to the articles within its purview while in the course of interstate commerce. A general demurrer, for want of equity, was sustained, and in view of the substantial character of the contention the case must be regarded as one in which the law of a State is claimed to be in contravention of the Constitution of the United States. Act of March 3, 1891, 26 Stat. 826, c. 517, § 5; *Penn Mutual Life Insurance Co. v. Austin*, 168 U. S. 685, 694; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 478; *Lampasas v. Bell*, 180 U. S. 276, 282.

It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show in-

jury. *Southern Railway Co. v. King*, 217 U. S. 524, 534. The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods "to be delivered free on board of cars" at that point, "and delivered to purchasers and consumers within the State of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." In answer, it must again be said that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398; *Rearick v. Pennsylvania*, 203 U. S. 507, 512. It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another State. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 559, 560; *Plumley v. Massachusetts*, 155 U. S. 461, 473; *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438, 444, 445; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 22-25; *Heyman v. Southern Railway Co.*, 203 U. S. 270, 276. An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State Chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the

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article within the State and had distributed broadcast throughout the State warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands. *Scott v. Donald*, 165 U. S. 107, 112; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146; *Hopkins v. Clemson College*, 221 U. S. 636, 643-645; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 621.

We are thus brought to the examination of the statute. The question of its constitutional validity may be considered in two aspects, (1) independently of the operation and effect of the act of Congress of June 30, 1906, c. 3915 (34 Stat. 768), known as "The Food and Drugs Act," and (2) in the light of this Federal enactment.

First. The statute relates to the sale of various sorts of food, for domestic animals, embraced in the term "concentrated commercial feeding stuff" as defined in the act. It requires the filing of a statement and a sworn certificate, the affixing of a label bearing certain information, and a stamp.

By § 1 it is provided, in substance, that before any such feeding stuff is sold, or offered for sale, in Indiana, "the manufacturer, importer, dealer, agent or person," selling or offering it, shall file with the State Chemist a statement that he desires to sell the feeding stuff, and also a sworn certificate, for registration, stating (a) the name of the manufacturer, (b) the location of the principal office of the manufacturer, (c) the name, brand or trade-mark under which the article will be sold, (d) the ingredients from which it is compounded, and (e) the minimum percentage of crude fat and crude protein, allowing one per cent. of nitrogen to equal six and twenty-five hundredths

per cent. of protein, and the maximum percentage of crude fiber which the manufacturer or person offering the article for sale guarantees it to contain; these constituents to be determined by the methods recommended by the association of official agricultural chemists of the United States. The State Chemist is to register the facts set forth in the certificate in a permanent record (§ 3).

Section 2 provides that there shall be affixed to every package or sample of the article a tag or label which shall be accepted as a guarantee of the manufacturer, importer, dealer or agent and shall have plainly printed thereon (a) the number of net pounds of feeding stuff in the package, (b) the name, brand or trade-mark under which it is sold, (c) the name of the manufacturer, (d) the location of the principal office of the manufacturer, and (e) the guaranteed analysis stating the minimum percentage of crude fat and crude protein determined as described in § 1, and the ingredients from which the article is compounded.

A stamp purchased from the State Chemist, showing that the article has been registered and that the inspection tax has been paid, is to be affixed for each one hundred pounds or fraction thereof, special provision being made for the delivery of an equivalent number of stamps on sale in bulk. By an amendment of 1909, stamps are to be issued by the State Chemist to cover twenty-five, fifty and one hundred pounds (Acts 1909, chapter 46, p. 106). He is not required to sell stamps in less amount than to the value of five dollars, or multiples thereof, for any one feeding stuff, or to register any certificate unless accompanied by an order and fees for stamps to the amount of five dollars, or some multiple of that sum (§ 3). Sworn statements are to be filed annually of the number of net pounds of each brand of feeding stuff sold or offered for sale in the State (§ 4).

The price of the stamps under the original act was one

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dollar per hundred; but by the amendment of 1909 (*supra*) the charge was made eighty cents per hundred, for stamps to cover one hundred pounds, and forty cents and twenty cents respectively for stamps to cover fifty and twenty-five pounds. The fees received are to be paid into the treasury of the Indiana Agricultural Experiment Station and expended "in meeting all necessary expenses in carrying out the provisions of this act, including the employment of inspectors, chemists, expenses in procuring samples, printing bulletins giving the results of the work of feeding stuff inspection, as provided for by this act, and for any other expenses of said Indiana agricultural experiment station, as authorized by law." A classified report of the receipts and expenditures is to be made to the Governor of the State annually (§ 5).

Any one selling, or offering for sale, any feeding stuff which has not been registered, and labeled and stamped as required by the act, or which is found by an analysis made by the State Chemist or under his direction to contain "a smaller percentage of crude fat or crude protein than the minimum guarantee," or is "labelled with a false or inaccurate guarantee," and any one who adulterates any feeding stuff "with foreign mineral matter or other foreign substance, such as rice hulls, chaff, mill sweepings," etc., "or other materials of less or of little or no feeding value without plainly stating on the label hereinbefore described, the kind and amount of such mixture," or who adulterates with any substance injurious to the health of domestic animals, or alters the State Chemist's stamp, or uses it a second time, or fails to make the sworn statement as to annual sales as required, is guilty of a misdemeanor and is subject to fine (§ 6).

The State Chemist and his deputies are empowered to procure from any lot or package of the described feeding stuffs offered for sale or found in Indiana a quantity not exceeding two pounds, to be drawn during reasonable

business hours, or in the presence of the owner or his representatives (§ 7), and it is made a misdemeanor to interfere with such inspection and sampling (§ 8). He is also authorized to prescribe and enforce regulations as he may deem necessary to carry the act into effect; and he may refuse "the registration of any feeding stuff under a name which would be misleading as to the materials of which it is made, or when the percentage of crude fiber is above or the percentage of crude fat or crude protein below the standards adopted for concentrated commercial feeding stuffs."

The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food. The practice of selling feeding stuffs under general descriptions gave opportunity for abuses which the legislature of Indiana determined to correct, and to safeguard against deception it required a disclosure of the ingredients contained in the composition. The bill complains of the injury to manufacturers if they are forced to reveal their secret formulas and processes. We need not here express an opinion upon this question, in the breadth suggested, as the statute does not compel a disclosure of formulas or manner of combination. It does demand a statement of the ingredients, and also of the minimum percentage of crude fat and crude protein and of the maximum percentage of crude fiber, a requirement of obvious propriety in connection with substances purveyed as feeding stuffs.

The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. *Railroad Co. v. Husen*, 95 U. S.

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465, 475; *Walling v. Michigan*, 116 U. S. 446; *Bowman v. Chicago &c. Ry. Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Scott v. Donald*, 165 U. S. 58; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 13; *Houston & Texas Central R. R. Co. v. Mayes*, 201 U. S. 321; *Atlantic Coast Line v. Wharton*, 207 U. S. 328; *Adams Express Co. v. Kentucky*, 214 U. S. 218. But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. *Plumley v. Massachusetts*, 155 U. S. 461; *Hennington v. Georgia*, 163 U. S. 299, 317; *N. Y., N. H. & H. Ry. Co. v. New York*, 165 U. S. 628; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345; *Reid v. Colorado*, 187 U. S. 137; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; *Crossman v. Lurman*, 192 U. S. 189; *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 50; *Asbell v. Kansas*, 209 U. S. 251, 254-256; *Chicago, R. I. & P. Ry. Co. v. Arkansas*, 219 U. S. 453.

In *Plumley v. Massachusetts*, a law of that Commonwealth was sustained which had been passed "to prevent deception in the manufacture and sale of imitation butter." The article, for the sale of which the plaintiff in error was convicted in the state court, had been received by him from the manufacturers in Illinois, as their agent, and had been sold in Massachusetts in the original package. The court said (*supra*, pp. 468, 472), referring to the purpose and effect of the statute: "He is only forbidden to practise, in such matters, a fraud upon the general public. The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It

compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? . . . Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States."

In *Patapsco Guano Co. v. North Carolina*, *supra*, the court had before it a statute of North Carolina relating to fertilizing materials. It provided: "Every bag, barrel or other package of such fertilizers or fertilizing materials as above designated offered for sale in this State shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the Commissioner of Agriculture, together with a true and faithful sample of the fertilizer or fertilizing material which it is proposed to sell, . . . and the said label or stamp shall truly set forth the name, location and trade-mark of the manufacturer; also the chemical composition of the contents of such package, and the real percentage of any of the following ingredients asserted to be present, to wit, soluble and precipitated phosphoric acid, which shall not be less than eight per cent; soluble potassa, which shall not be less than one per cent; ammonia, which shall not be less than two per cent, or its equivalent in nitrogen; together with the date of its analyzation, and that the requirements of the law have

been complied with; and any such fertilizer as shall be ascertained by analysis not to contain the ingredients and percentage set forth as above provided shall be liable to seizure and condemnation." A charge of twenty-five cents per ton on such materials was laid for the purpose of defraying the expenses connected with the inspection; and the department of agriculture was authorized to establish an experiment station and to employ an analyst, whose duty it was to analyze such fertilizers and products as might be required by the department and to aid so far as practicable in suppressing fraud in their sale.

The court upheld the statute, saying (*supra*, p. 357): "Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power." After referring to the decision in *Plumley v. Massachusetts*, *supra*, the court continued (pp. 358, 361): "Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope. . . . The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton as intended merely to defray the cost of such inspection. It being competent for the State to pass laws of this character, does the re-

quirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce. In any view, the effect on that commerce is indirect and incidental, and 'the Constitution of the United States does not secure to any one the privilege of defrauding the public.'"

It cannot be doubted that, within the principle of these decisions, and of the others above cited, the State of Indiana—assuming for the present that there was no conflict with Federal legislation—was entitled, in the exercise of its police power, to require the disclosure of the ingredients contained in the feeding stuffs offered for sale in the State, and to provide for their inspection and analysis. The provisions for the filing of a certificate, for registration and for labels, were merely incidental to these requirements and were appropriate means for accomplishing the legitimate purpose of the act. It is said that the statute permits the State, through its officials, to set up arbitrary standards governing conditions of manufacture. But it does not appear that any arbitrary standard has been set up, or that there has been any attempt to enforce one against the complainant. (See *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 168.) The complainant has declined to file the statement and to affix the labels containing the disclosure of ingredients for which the statute provides, and instead he resorts to this suit.

The contention is made that the statute is a disguised revenue measure, but on a review of its provisions we find no warrant for such a characterization of it. The bill sets forth no facts whatever to show that the charge for stamps is unreasonable in its relation to the cost of inspec-

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tion, and certainly it cannot be said that aught appears "to justify the imputation of bad faith and change the character of the act." *Patapsco Guano Co. v. North Carolina*, *supra*; *McLean v. Denver & Rio Grande R. R. Co.*, *supra*; *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 393. With respect to the requirement of an advance payment for stamps, to the value of five dollars, to accompany the certificate, we need not say more than that the complainant is plainly not prejudiced, in view of the alleged extent of his sales.

Second. The question remains whether the statute of Indiana is in conflict with the act of Congress known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915). For the former, so far as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation. *Reid v. Colorado*, 187 U. S. 137, 146, 147; *Asbell v. Kansas*, 209 U. S. 251, 256, 257; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 378; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 436.

The object of the Food and Drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State "of any article of food or drugs which is adulterated or misbranded, within the meaning of this act." The purpose is to keep such articles "out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold or in original unbroken packages." *Hipolite Egg Co. v. United States*, 220 U. S. 45, 54. To determine the scope of the act with respect to feeding stuffs we must examine its definitions of the adulteration and misbranding of food, the term "food" including "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or com-

pound" (§ 6). These definitions are found in §§ 7 and 8, which are set forth in the margin.¹

¹ SEC. 7. That for the purposes of this Act an article shall be deemed to be adulterated: . . .

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of such preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

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.

That for the purposes of this Act an article shall also be deemed to be misbranded: . . .

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in

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It will be observed that in its enumeration of the acts, which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article "for the purposes of this Act" shall be deemed to be misbranded if the package or label bear any state-

whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucane, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.

ment, design or device regarding it or the ingredients or substances it contains, which shall be false or misleading (§ 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain "any added poisonous or deleterious ingredients" shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (§ 8).

Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act that "nothing in this Act shall be construed" as requiring manufacturers of

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proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas "except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding" (§ 8). We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Northern Pacific Ry. Co. v. Washington*, *supra*; *Southern Ry. Co. v. Reid*, *supra*.

But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration. *Chicago &c. Ry. Co. v. Solan*, 169 U. S. 133; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613; *Reid v. Colorado*, 187 U. S. 137; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; *Crossman v. Lurman*, 192 U. S. 189; *Asbell v. Kansas*, 209 U. S. 251; *Northern Pacific Ry. Co. v. Washington*, 222

U. S. 370, 379; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 442.

In *Missouri, Kansas & Texas Ry. Co. v. Haber*, *supra*, the Supreme Court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the State certain cattle alleged to have been affected with Texas fever which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the State of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, c. 60 (23 Stat. 31), known as the Animal Industry Act, together with the act of March 3, 1891, c. 544 (26 Stat. 1044), appropriating money to carry out its provisions, and § 5258 of the Revised Statutes, covered substantially the whole subject of the transportation from one State to another State of live stock capable of imparting contagious disease, and therefore that the State of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for the appointment of a staff to investigate the condition of domestic animals and for report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the commissioner of agriculture and certified to the executive authority of each State and Territory. Special investigation was to be made for the protection of foreign commerce and the Secretary of the Treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States, nor the owners or masters of any vessel should receive for transportation, or transport, from one State to another any live stock affected with any communicable disease, nor should any one deliver for such transportation, or drive on foot or transport in private conveyance from

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one State to another any live stock knowing them to be so affected. It was made the duty of the commissioner of agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroads, or the owners or custodians of live stock within such infected district, who should knowingly violate the provisions of the act were to be guilty of a misdemeanor punishable by fine or imprisonment.

The court held that this Federal legislation did not override the statute of the State; that the latter created a civil liability as to which the Animal Industry Act of Congress had not made provision. The court said (*supra*, pp. 623, 624):

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot v. Davenport*, 22 How. 227, 243. . . . Whether a corporation transporting, or the person causing to be transported from one State to another cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the Animal Industry Act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment for damages arising

out of the introduction into that State of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability."

In *Reid v. Colorado*, *supra*, the question arose under a statute of Colorado which had been passed to prevent the introduction into the State of diseased animals. The statute made it a misdemeanor for any one to bring into the State between April 1 and November 1 any cattle or horses from a State, Territory or county south of the 36th parallel of north latitude, unless they had been held at some place north of that parallel at least ninety days prior to importation, or unless the owner or person in charge should procure from the State Veterinary Sanitary Board a certificate, or bill of health, to the effect that the cattle or horses were free from all infectious or contagious diseases and had not been exposed thereto at any time within the preceding ninety days. The expense of any inspection in connection therewith was to be paid by the owner.

The plaintiff in error had been convicted of bringing cattle into the State in violation of the statute. There was no proof in the case that the particular cattle had any infectious or contagious disease, but it did appear that they were brought from Texas, south of the 36th parallel, without being held or inspected as the statute required. Its provisions were ignored altogether as invalid legislation. When the plaintiff in error refused assent to the state inspection he showed to the authorities a certificate signed by an assistant inspector of the Federal bureau of animal industry who certified that he had carefully inspected the cattle in Texas and found them free from communicable disease. It was insisted that the statute of Colorado was in conflict with the Animal Industry Act of Congress, but the court sustained the state law for the

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reason that, although the two statutes related to the same general subject, they did not cover the same ground and were not inconsistent with each other.

The court thus emphasized the general principle involved (*supra*, p. 148): "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'" And in the course of its review of the subjects embraced in the Federal legislation the court said (pp. 149, 150):

"Still another subject covered by the act is the driving on foot or transporting from one State or Territory into another State or Territory, or from any State into the District of Columbia, or from the District into any State, of any live stock *known* to be affected with any contagious, infectious or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased live stock from one State to another. The owner of such stock, when bringing them into another State, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to authorize the State into which they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious or communicable diseases. The act of Congress left the State free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an

offence against the United States for any one *knowingly* to take or send from one State or Territory to another State or Territory, or into the District of Columbia, or from the District into any State, live stock affected with infectious or communicable disease. The Animal Industry Act did not make it an offence against the United States to send from one State into another live stock which the shipper did not know were diseased. The offence charged upon the defendant in the state court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the 36th parallel of north latitude, without said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the State Veterinary Sanitary Board a certificate or bill of health to the effect that his cattle—in fact—were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the state enactment or under the charge made.

“Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the Constitution of the United States, independently of any legislation by Congress.”

In *Asbell v. Kansas*, *supra*, the plaintiff in error had been convicted under a statute of the State of Kansas which made it a misdemeanor to transport cattle into the State from any point south of the south line of the State, except for immediate slaughter, without having first

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caused them to be inspected and passed as healthy by the proper state officials or by the bureau of animal industry of the Interior Department of the United States. The court held that the statute was a valid exercise of the power of the State unless it were in conflict with the act of Congress. It appeared that since the decision in *Reid v. Colorado*, *supra*, Congress had provided that where an inspector of the bureau of animal industry had issued a certificate that he had inspected live stock and found them free from communicable disease they should be transported into any State or Territory without further inspection or the exaction of fees of any kind, except such as might be required by the Secretary of Agriculture. But as the law of Kansas recognized the Federal certificate, a conflict with the act of Congress was avoided, and hence the conviction under the state law was sustained.

Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That State has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to Federal authority. It follows that the complainant's bill in this aspect of the case was without equity.

Other objections urged by the bill to the validity of the statute, save so far as they may be deemed to involve the questions that have already been considered, have not been pressed in argument and need not be discussed.

Recurring to the contention that the product of the complainant is not within the statute, it is evident that, assuming the validity of the enactment, the complainant showed no ground for resorting to equity, as the nature of the composition must be determined according to the fact in the course of due proceedings for that purpose.

The demurrer was properly sustained.

Affirmed.

STANDARD STOCK FOOD COMPANY *v.* WRIGHT,
STATE FOOD AND DAIRY COMMISSIONER
OF IOWA.

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

No. 222. Argued April 24, 1912.—Decided June 10, 1912.

Savage v. Jones, ante, p. 501, followed to effect that it is within the police power of a State to prevent imposition upon the public and to that end to require the disclosure of ingredients of food for stock.

Where the fair import of the provisions of a state police statute is that the fees exacted are for necessary expenses of inspecting an article properly the subject of inspection, and the bill alleges no facts warranting a conclusion that the charges are unreasonable as compared with the cost, this court will not condemn the statute as an unconstitutional revenue measure.

One attacking a state statute as unconstitutional must show that he is within the class whose constitutional rights are invaded, and one admittedly doing a large business cannot be heard on the plea that the act discriminates against those doing a small business.

The Iowa statute of 1907 regulating the sale of concentrated commercial feeding stuff is not unconstitutional as depriving vendors of such stuff of their property without due process of law, or because it is a revenue measure in disguise.

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Argument for Appellant.

THE facts, which involve the construction and constitutionality of the provisions in the statutes of Iowa relative to sale of feed for stock, are stated in the opinion.

Mr. F. H. Gaines, with whom Mr. E. G. McGilton, Mr. Sidney W. Smith and Mr. A. L. Hager were on the brief, for appellant:

The tax imposed is a license fee and therefore void as a violation of the commerce clause of the Federal Constitution. *Brown v. Maryland*, 12 Wheat. 419; *Robbins v. Shelby County*, 120 U. S. 489; *American Fertilizer Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *Lee Co. v. Webster*, 190 Fed. Rep. 353.

To require a manufacturer or one importing goods into a State to pay a tax before he has the right to sell his products within the State, is a tax on interstate commerce, and such legislative enactment of a State is void. *Lyng v. Michigan*, 135 U. S. 161. See, also, *Leisy v. Hardin*, 135 U. S. 100; *McCull v. California*, 136 U. S. 104; *Crutcher v. Kentucky*, 141 U. S. 47; *Dooley v. United States*, 183 U. S. 151.

The Iowa statute specifically requires manufacturers, dealers, importers, etc., without the borders of the State, to pay into the state treasury \$100 each year before he is permitted to sell or offer for sale his products within the State. This is so clearly an attempt to levy a tax upon interstate commerce for the privilege of doing such business within the State, that no attempt will be made to sustain it, except on the assumption that such tax is an inspection fee, and therefore valid as an exercise of the police power of the State.

The statute nowhere contemplates an inspection of complainant's products before sale, and hence the license fee cannot be sustained upon the ground that it is to cover the cost of inspection. *Gibbons v. Ogden*, 9 Wheat. 1; *Turner v. Maryland*, 107 U. S. 38.

The license fee imposed by the State is not an inspection fee and cannot be sustained upon that ground. It is not made so by statute, and the requirement that the manufacturer, etc., shall pay a fixed sum before he sells his goods in the State, is a charge for the privilege of selling them, and hence a license fee.

An inspection fee cannot be determined in advance by a lump sum.

Conditions of sale which a State may prescribe do not include a right to exact a fee or license for the privilege of vending articles of commerce within the State, and herein lies the difference between an inspection fee which the State has the right to exact, and a license fee which is prohibited by the Constitution. An inspection fee is exacted to cover the cost of the performance of a certain duty of state officials preceding the sale of the proposed article to the public and in order to ascertain whether or not it is meeting the requirements of the State in its sale. A license fee is imposed as a condition precedent to the sale of a product and for the privilege of permitting it.

The prohibition of the commerce clause of the Constitution is direct and positive. The State cannot tax an article of commerce except only to cover a proper inspection of such article before it becomes an article of commerce within the State. *Pabst Brew. Co. v. Crenshaw*, 198 U. S. 17; *Vance v. Vandercook*, 170 U. S. 438.

To permit a State to tax commerce to provide a fund to enforce its police laws or to punish those who disobey them would destroy in substance the prohibition of the Constitution.

A State has not the power to require the maker of any wholesome product, that contains nothing injurious whatever and is not and cannot be from its very nature an imitation of something else, to disclose not only the ingredients but the percentages of such wholesome ingredients.

Such a formula where no fraud is perpetrated, is as much

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Argument for Appellee.

entitled to the protection of the law as the good will of a business or an ownership in land. *Mugler v. Kansas*, 123 U. S. 206.

The act of Congress of June 30, 1906, specifically exempts proprietors or manufacturers of proprietary food stuffs which contain no unwholesome added ingredients from disclosing their trade formula. To require such disclosure by the State is in effect to supersede and annul the act of Congress.

The act of the Iowa legislature in so far as it sought to compel complainant to pay a tax of one hundred dollars for the privilege of doing business in the State, and to set forth upon the outside of the package or container of its product the percentage or percentages of the diluent or base, is void.

Mr. George Cosson, Attorney General of the State of Iowa, with whom *Mr. Henry E. Sampson* was on the brief, for appellee:

The validity of the act must be determined not by the casual use of any word or phrase, but by its necessary and obvious result, and the purpose for which it was framed. *Henderson v. New York*, 92 U. S. 259; *Minnesota v. Barber*, 136 U. S. 319.

The requirements of the act are not for the mere purpose of raising revenue or placing a burden upon the business of dealers in commercial feeding stuffs. There is hardly a section in the entire act which does not contain some provision looking to the protection of the public against fraud and deception.

One of the objects of inspection, so far as it applies to domestic sales, is to protect the community from fraud and imposition. *Clintzman v. Northrup*, 8 Cow. 46.

Elements of inspection include quality of the article, form, capacity, dimensions, weight of package, the mode of putting up, marking and branding of various kinds; but

it is not necessary for all these elements to coexist to make a valid inspection law. *Turner v. Maryland*, 107 U. S. 38. And see *McLean v. Denver*, 203 U. S. 38.

Inspection need not be made before the goods become articles of commerce. *Neilson v. Garza*, 2 Woods, 287; *Clintsmen v. Northrup*, 8 Cow. 46, do not apply.

The words "imports" and "exports" as used in Art. I, § 10 of the Constitution, have been held to apply only to articles imported from or exported to foreign countries. *Woodruff v. Parham*, 8 Wall. 123; *Pittsburg &c. Coal Co. v. Louisiana*, 156 U. S. 590, 600; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 350.

The scope of inspection laws is very large and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported and to those intended for domestic use as well. *Neilson v. Garza*, *supra*.

Inspection laws may operate as well on importations as exportations. *Patapsco Guano Co. v. North Carolina*, *supra*.

Where the receipts from inspection fees are found to average largely more than enough to pay the expenses, the presumption is that the legislature will moderate the charge. *Patapsco Guano Co. v. North Carolina*, *supra*; *McLean v. Denver & R. G. R. R. Co.*, 203 U. S. 55.

Even though the act may discriminate against the manufacturer doing a small amount of business in the State who is required to pay a fee equal to that done by the large manufacturer doing a large business, as complainant herein, this objection to the statute cannot be raised by the appellant for the reason that it is to his advantage and not disadvantage. *Turpin v. Lemon*, 187 U. S. 51; *Hooker v. Burr*, 194 U. S. 415, 419; *Southern Ry. Co. v. King*, 217 U. S. 524, 534; *Collins v. Texas*, 223 U. S. 281, 295; *Quong Wing v. Kirkendall*, 223 U. S. 59; *People v. Olson*, 215 Illinois, 620, 623.

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The fact that each and every package is not inspected will not invalidate the act. *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, and *Vance v. Vandercook*, 170 U. S. 438, distinguished; and see *Frazier v. Warfield*, 13 Maryland, 279; *State v. Bixman*, 162 Missouri, 34.

The law is not invalid because the fee is prescribed in a lump sum. *Tennessee v. Bank of Commerce*, 53 Fed. Rep. 735.

It is the ultimate result which is to govern, that in the final analysis the fee must be paid by some person or corporation, and necessarily by either the seller or the purchaser, and therefore the form of the imposition of the fee should not in and of itself invalidate an act. *Cinn. Gas Light Co. v. State*, 18 Oh. St. 245; 22 Cyc. 1366.

The law was framed to meet a condition which existed and not a theory. It was so worded as to meet the exigencies of a particular situation, and is not void because thereof. *McClain v. Denver & R. G. R. R. Co.*, 203 U. S. 38; *Missouri Pac. Ry. v. Mackey*, 127 U. S. 205.

If the act bears a real relation to the object to be accomplished, the method of its accomplishment is for the legislature. *Jacobson v. Massachusetts*, 197 U. S. 11; *St. Louis & I. M. Ry. v. Taylor*, 210 U. S. 295.

The act is not invalid because it requires, among other things, a labeling so as not to deceive the purchaser, and a setting forth of the percentage of the diluent or base of the product.

The constitutionality of an act cannot be determined upon the particular practice during a particular time of a particular company engaged in the manufacture and sale of stock food. The legislature in the passage of the act under its police power determined that there was an evil to correct; that stock food companies manufactured and sold false, fraudulent and adulterated stock foods and labeled the same so as to mislead and deceive the purchasers, and that if this practice was so common among

other stock food companies as to require the passage of an act in question, there must be some information contained upon the package to the end that the purchaser may know what he is buying, and unless the percentage of the diluent or diluents or bases is stated upon the package, there will be great opportunity for fraud and deception. *Heath & Milligan v. Worst*, 207 U. S. 338; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 12; *Stilz v. Thompson*, 44 Minnesota, 271. And see also: *Patterson v. Kentucky*, 97 U. S. 501; *Arbuckle v. Blackburn*, 113 Fed. Rep. 616, 627, affirmed, 191 U. S. 405.

The act is not void by reason of its conflict with the law of the United States enacted by Congress June 30, 1906. It is merely supplementary to the Federal law and covers a field which is not covered by the act of Congress and concerning which Congress would not have the power to legislate. *United States v. New Bedford Bridge*, 27 Fed. Cas. 97, No. 15,867; *Plumley v. Massachusetts*, 155 U. S. 461, 472; *Crossman v. Lurman*, 192 U. S. 189, 198; *Bowman v. Chicago &c. Ry. Co.*, 125 U. S. 465, 501.

The Constitution of the United States does not declare that an inspection fee to be valid must be prescribed in one form alone. It permits the States to levy a sufficient amount to execute its inspection laws, but does not define the method in which the amount may be collected. *Brown v. Maryland*, 12 Wheat. 419.

This court is not clothed with authority and jurisdiction to declare unconstitutional an act of a state legislature because it is not couched in stereotyped language, or because the court might consider that it was illogical in its arrangement. 5 Elliott's Debates, 428; *Hylton v. United States*, 3 Dall. 171; *Sinking Fund Cases*, 99 U. S. 717; *Holden v. Hardy*, 169 U. S. 366; *Commonwealth v. Alger*, 7 Cush. 53.

The whole act discloses the fact that its relation to interstate commerce is incidental.

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If there is any doubt as to the constitutionality of the act, that doubt should be resolved in the interests of the people of the State. *Atkins v. Kansas*, 191 U. S. 223.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Standard Stock Food Company, a Nebraska corporation, brought this suit against the State Food and Dairy Commissioner of Iowa to restrain the enforcement of a statute of Iowa effective July 4, 1907 (Code of Iowa, Supplement 1907, §§ 5077-a6-5077-a24), relating to the sale within the State of "concentrated commercial feeding stuffs," upon the ground that it was repugnant to the interstate commerce clause (§ 8, Art. I), and to the Fourteenth Amendment, of the Constitution of the United States. Demurrer to the bill was sustained by the Circuit Court and the complainant appeals.

It was alleged in the bill that the appellant's product was a "condimental stock food," sold in Iowa and other States under the trade-name of "Standard Stock Food;" that it was prepared pursuant to a secret formula of great value, contained nothing deleterious or poisonous, and had "condimental and tonic properties and powers which aid animals in the digestion of food." It was further alleged that it was made in Nebraska and shipped into Iowa, where it was sold in the original packages either by agents of the appellant or by dealers.

The act required that each package of the described articles should have affixed thereto in a conspicuous place on the outside, a printed statement giving certain information. The substance of this requirement, with respect to its products, is thus stated in the appellant's argument:

"The package or container of such products shall have printed on the outside thereof:

"First. The number of net pounds of feeding stuffs in the package.

"Second. The name, brand or trade-mark under which the article is sold.

"Third. The name and address of the manufacturer, importer, dealer or agent.

"Fourth. The place of manufacture.

"Fifth. The name and percentage of any deleterious or poisonous ingredient or ingredients.

"Sixth. The name and percentage of the diluent or diluents or bases" (§§ 1, 2).

The statute also contains the following provision (G. A., c. 189, § 5):

"Before any manufacturer, importer, dealer or agent shall offer or expose for sale in this state any of the concentrated commercial feeding-stuffs defined in section three (3) of this act, he shall pay to the state food and dairy commissioner an inspection fee of ten cents per ton for each ton of such concentrated commercial feeding-stuffs sold or offered for sale in the state of Iowa for use within this state; except that every manufacturer, importer, dealer or agent for any condimental, patented, proprietary or trademarked stock or poultry foods, or both, shall pay to the state food and dairy commissioner, on or before the fifteenth day of July of each year, a license fee of one hundred dollars (\$100.00) in lieu of such inspection fee. Whenever the manufacturer or importer of such foods shall have paid the fee herein required, no other person or agent of such manufacturer or importer shall be required to pay such license fee."

The appellant challenges the constitutional validity of the statute in these two particulars: (1) The requirement that the name and percentage of the diluent or diluents or bases shall be stated, and (2) the exaction of the fee of one hundred dollars.

1. With respect to the first question the case in its essential features is not to be distinguished from that of *Savage v. Jones*, decided June 7, 1912, *ante*, p. 501, and

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nothing need be added to what was there said. It was competent for the State, in the exercise of its power to prevent imposition upon the public, to require the disclosure to which objection is made. The provision was not an unreasonable one and the effect upon interstate commerce was incidental only. *Plumley v. Massachusetts*, 155 U. S. 461; *Hennington v. Georgia*, 163 U. S. 299, 317; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 361; *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 50; *Heath & Milligan Manufacturing Co. v. Worst*, 207 U. S. 338; *Asbell v. Kansas*, 209 U. S. 251, 254, 256. Nor is there any conflict with the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768; *Savage v. Jones*, *supra*.

2. The statute provides for inspection and analysis. Under § 6, it is the duty of the State Food and Dairy Commissioner to "cause to be made analyses of all concentrated commercial feeding-stuffs and agricultural seeds sold or offered for sale in this State." For this purpose, that officer is authorized "in person or by deputy, to take for analysis a sample from any lot or package of concentrated commercial feeding-stuffs in this State," and further provision is made to assure the representative character of the sample. The results of the analyses are to be published from time to time in official bulletins. The State Food and Dairy Commissioner is required to enforce the statute and to this end is authorized to appoint, with the approval of the executive council, such analysts and chemists as may be necessary to carry it into effect. Violation of any of the provisions of the act is made a misdemeanor.

We are of opinion that the statute must be considered as an inspection law which it was within the power of the State to enact, and that its fair import is that the fees exacted by § 5 above quoted are for the purpose of meeting the expense of inspection. The bill alleges no facts

warranting the conclusion that the charge is unreasonable as compared with this expense. *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 347, 354, 361; *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 50; *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 393; *Savage v. Jones*, *supra*.

The payment of the sum of one hundred dollars in the case of "condimental, patented, proprietary or trade-marked stock or poultry foods" was required in lieu of the inspection charge of ten cents a ton, and was in effect a commutation of that charge. The essential character of the exaction was not altered. If it be said that this provision discriminates against one doing a small business, still the appellant wholly fails to show that it is thereby injured and thus entitled to complain. On the contrary, the bill alleges that the appellant "sells to more than eight hundred dealers in the State of Iowa, besides a very large number of customers who buy direct from your orator or through its agents," and that it "has been enabled to sell in the State of Iowa during the past year and for a number of years preceding a quantity of its goods in an amount exceeding \$40,000 per annum."

The case in this aspect falls within the established rule that "one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution." *Southern Ry. Co. v. King*, 217 U. S. 524, 534. See also *Tyler v. The Judges*, 179 U. S. 405; *Turpin v. Lemon*, 187 U. S. 51, 60; *Hooker v. Burr*, 194 U. S. 415; *Hatch v. Reardon*, 204 U. S. 152, 160; *Collins v. Texas*, 223 U. S. 288, 295.

The Circuit Court was right in sustaining the demurrer.

Affirmed.

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Syllabus.

CLAIRMONT *v.* UNITED STATES.ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA.

No. 239. Submitted May 1, 1912.—Decided June 10, 1912.

The act of January 30, 1897, 29 Stat. 506, c. 109, in regard to sale of liquor to the Indians and introduction of liquor into Indian country, repealed, as far as inconsistent therewith, the Act of July 23, 1892, 27 Stat. 260, c. 234.

An indictment under the act of January 30, 1897 for introducing liquor into Indian country cannot be sustained if the offense alleged was committed on land within a State and which had been completely withdrawn from the reservation, and the Indian title thereto surrendered so as not then to be Indian country. Under such circumstances the District Court of the United States has no jurisdiction.

Although that portion of the act of 1834 which defined Indian country was repealed by § 5596 Rev. Stat., it may still be referred to in connection with the portion of the act remaining in force in order to determine what must be regarded as Indian country when spoken of in the statutes.

A cession by Indians may be qualified by a stipulation in the treaty that the ceded territory, although within the boundaries of a State, shall retain its original status of Indian country so far as the introduction therein of liquor is concerned.

The title to that part of the Flathead Reservation in Montana included within the right of way of the Northern Pacific Railway Company, has been completely withdrawn from the Reservation and the Indian title thereto extinguished and therefore is no longer Indian country within the meaning of the act of January 30, 1897.

THE facts, which involve the construction of Federal statutes relative to introduction of liquor to allottee Indians and on allotments to Indians, are stated in the opinion.

Mr. N. W. McConnell and Mr. O. W. McConnell for plaintiff in error.

Mr. Assistant Attorney General Denison, with whom Mr. Louis G. Bissell, Attorney, was on the brief, for the United States:

Beyond question the Indian land title in this strip had been entirely extinguished. 13 Stat. 365; *Northern Pacific R. R. Co. v. Townsend*, 190 U. S. 267; *Buttz v. Northern Pacific Railroad Co.*, 119 U. S. 355.

There is nowhere any express provision for the retention of any Federal police power over this strip, excepting that statements were made by the representative of the United States in the council with the Indians which preceded their deed to the effect that no liquor would be sold "on the reservation at the depots;" that after the road was built there would be "no white men to sell liquor," and that "the white people will not be allowed to go on the reservation."

This informal and parol agreement, and the fact that the grant was made for the limited purpose, and the physical situation of the strip in reference to the reservation and in its contact with the Indians brings this case under *Dick v. United States*, 208 U. S. 340.

In the Montana enabling act, 25 Stat. 677, the United States reserved its jurisdiction with reference to "unappropriated public lands."

In view of these conditions, the decisions of this court in *Maricopa Railroad Co. v. Arizona*, 156 U. S. 347, and *Bates v. Clark*, 95 U. S. 204, 208, 209, may perhaps finally dispose of the case; and see *Utah & Northern Ry. v. Fisher*, 116 U. S. 28, which seems to imply that the grant of a railroad right of way takes the land out of the reservation only in so far as may be necessary for the particular purposes of the grant.

The territorial power to tax the railroad line is not nec-

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essarily inconsistent with the continuation of the Federal police power for purposes of the discharge of the duty toward the Indians. *United States v. 43 Gallons of Whiskey*, 93 U. S. 188; 108 U. S. 491; *United States v. McBratney*, 104 U. S. 621; *Thomas v. Gay*, 169 U. S. 264, 277; *Draper v. United States*, 164 U. S. 240; *Truscott v. Hurlburt Land & Cattle Co.*, 73 Fed. Rep. 60.

The *locus in quo* was a part of a tract definitely set apart as a reservation for exclusive occupancy by the Indians, 12 Stat. 940. It, therefore, possessed its character as Indian country more because of the specific action by Congress than by reason of the original general definition of Indian country. 4 Stat. 729.

As to *United States v. 4 Bottles Sour Mash Whiskey*, 90 Fed. Rep. 720, see 22 Ops. Atty. Genl. 232.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error was indicted by the grand jury of the United States for the District of Montana for introducing intoxicating liquor into the Flathead Indian Reservation. It appeared upon the trial in the District Court that he lived on the reservation and at the time of the alleged offense was returning to his home from Missoula on a train of the Northern Pacific Railway Company, intending to leave the train at Ravalli. A special officer of the Interior Department boarded the train at Arlee, and, finding a pint of whisky on the person of the plaintiff in error, at once arrested him and took him back to Missoula. Both Arlee and Ravalli are points within the exterior limits of the reservation, which is crossed by the right of way of the railway company.

The jury rendered a verdict of guilty, whereupon it was urged by motion in arrest of judgment that the court was without jurisdiction. The motion was denied and the defendant was sentenced to imprisonment for sixty

days and to the payment of a fine of \$100. The case comes here on writ of error, the District Judge certifying the question of jurisdiction. The conviction was had under the act of January 30, 1897, c. 109,¹ 29 Stat. 506, which provides:

“That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever . . . to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and 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 a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided however*, That the person convicted shall be committed until fine and costs are paid.”

We are not here concerned with that portion of the statute which penalizes selling or giving intoxicating liquors to the Indians described or with the authority of Congress to protect the Indian wards of the Nation.

¹ This repealed, so far as it was inconsistent, the act of July 23, 1892, c. 234, 27 Stat. 260, which amended § 2139 of the Revised Statutes.

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The indictment charged that the plaintiff in error "did, then and there, wrongfully and unlawfully introduce" a quantity of intoxicating liquor "into the Flathead Indian Reservation, in the State and District of Montana," the said reservation "being an Indian country." The offense alleged was the introduction of the liquor into the reservation, and not "attempting to introduce."

The Flathead Indian Reservation was established by the treaty of July 16, 1855, between the United States and the confederated tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians. 12 Stat. 975. It comprised a district now included within the boundaries of the State of Montana. The Enabling Act of 1889, under which the State was formed, required the adoption of an ordinance, irrevocable in the absence of the consent of the United States, providing: "That the people inhabiting" the proposed State "do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Act of February 22, 1889, c. 180, 25 Stat. 676, 677.

By the act of July 2, 1864, c. 217, § 2, 13 Stat. 365, 367, Congress granted a right of way through the public lands to the Northern Pacific Railroad Company for the construction of a railroad and telegraph as proposed, "to the extent of two hundred feet in width on each side of said railroad," including all necessary ground for station buildings, workshops, etc. It was provided that the United States should "extinguish, as rapidly as may be consistent with public policy and the welfare of the said

Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill." On July 5, 1882, the railroad company filed a map of definite location showing its line of railroad across the southwestern part of the Flathead reservation. Thereupon on September 2, 1882, the confederated tribes above mentioned entered into an agreement with the United States by which, after reciting the grant by Congress of the right of way, the treaties with the Indians, and the filing of the map of definite location, the Indians surrendered and relinquished to the United States "all the right, title and interest which they now have under and by virtue of the aforesaid treaty of July sixteenth, eighteen hundred and fifty-five, in and to all that part of the Jocko (or Flathead) Reservation situate in the Territory of Montana and described as follows, namely: A strip of land not exceeding two hundred feet in width, that is to say, one hundred feet on each side of the line laid down on the map of definite location hereinbefore mentioned wherever said line runs through said reservation." In consideration of the "surrender and relinquishment of lands as aforesaid," amounting in the aggregate to 1430 acres, the United States agreed to pay to the Indians the sum of \$16,000. (Ex. Doc. No. 15, 48th Cong. 1st sess.)

Thus, by the grant of Congress the railroad company obtained the fee in the land constituting the "right of way" (*Buttz v. Northern Pacific R. R. Co.*, 119 U. S. 55, 56, 66; *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 271), and by virtue of the agreement between the United States and the Indians this land was freed from the Indian right of occupancy. As the Government states in its brief: "Beyond question the Indian land title in this strip had been entirely extinguished."

The question then is whether a person having intoxicating liquor in his possession on a railroad train running

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on this strip can be deemed to have introduced the liquor "into the Indian country" within the meaning of the act of 1897. Was the strip "Indian country" so that the District Court of the United States can be said to have had jurisdiction of the alleged offense?

The act of June 30, 1834, c. 161, 4 Stat. 729, thus defined "the Indian country" :

"That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

This portion of the act of 1834 was not reenacted in the Revised Statutes, though other parts of the statute were, and hence was repealed by § 5596 of the revision. But, as has frequently been stated by this court, the definition may still "be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." *Ex parte Crow Dog*, 109 U. S. 556, 561; *United States v. LeBris*, 121 U. S. 278, 280.

The proper criterion to be applied was considered in *Bates v. Clark*, 95 U. S. 204, where Mr. Justice Miller, delivering the opinion of the court, said (*id.*, pp. 207, 208): "Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence,

whose operation was confined to the Indian country, whatever that may be. . . .

"The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

It must be assumed that, in the act of 1897, Congress used the words "Indian country" in the accepted sense. And this is confirmed by the provision bearing witness to the policy which had been adopted looking to the dissolution of tribal relations and the distribution of tribal property in separate allotments. Thus, the act provides that the term Indian country "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." *United States v. Sutton*, 215 U. S. 291; *Hallowell v. United States*, 221 U. S. 317, 323, 324.

That the effect of a cession by the Indians might be qualified by a stipulation in the treaty that the ceded territory, although within the boundaries of a State, should retain its original status of Indian country so far as the introduction into it of intoxicating liquors was concerned was decided in *United States v. Forty-three Gallons of Whiskey, &c.*, 93 U. S. 188; 108 U. S. 491. But, as was pointed out in *Bates v. Clark, supra*, that decision proceeded upon the hypothesis that "when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule." The same principle of decision was recognized in *Dick v.*

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United States, 208 U. S. 340. There, the plaintiff in error had been convicted of introducing intoxicating liquor into the Nez Perce Indian Reservation within the State of Idaho. The offense was committed, if at all, in the village of Culdesac, which, although within the boundaries of the reservation as established before Idaho was admitted into the Union, was at the time specified in the indictment an organized village of that State. The lands upon which the village was located were part of those ceded to the United States by an agreement with the Indians in which it was stipulated that the ceded lands, as well as those retained, should be subject for the period of twenty-five years to all Federal laws prohibiting the introduction of intoxicants into the Indian country. It was held that this was a valid stipulation based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with the Indians, and was "not inconsistent, in any substantial sense, with the constitutional principle that a new State comes into the Union upon entire equality with the original States" (p. 359). Upon this ground the judgment of conviction was affirmed.

While the *Dick Case* was thus found, owing to the stipulation in the agreement, to be within the exception, the court explicitly recognized the rule which governs in the absence of a different provision by treaty or by act of Congress. The court said (p. 352): "If this case depended *alone* upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction

of the State, for all purposes of government, was full and complete. *Bates v. Clark*, 95 U. S. 204; *Ex parte Crow Dog*, 109 U. S. 556, 561."

In the present case there was no provision, either in the treaty with the Indians, or by act of Congress, which limited the effect of the surrender of the Indian title. We have been referred to certain statements made by the representative of the United States in the course of the negotiations with the Indians which preceded their agreement, but these were of an informal character and cannot be regarded as qualifying the agreement that was actually made. The Indian title or right of occupation was extinguished, without reservation; and the relinquished strip came under the jurisdiction of the then Territory and later under that of the State of Montana. It was not "unappropriated public land," or land "owned or held by any Indian or Indian tribe." (Enabling Act, *supra*.)

To repeat, the plaintiff in error was not charged with "attempting to introduce" the liquor into Indian country, but with the actual introduction. If having the liquor in his possession on the train on this right of way did not constitute such introduction, it is immaterial so far as the charge is concerned whether or not he intended to take it elsewhere. Nor is it important that the plaintiff in error was an Indian. The statute makes it an offense for "any person" to introduce liquor into Indian country.

Our conclusion must be that the right of way had been completely withdrawn from the reservation by the surrender of the Indian title and that in accordance with the repeated rulings of this court it was not Indian country. The District Court therefore had no jurisdiction of the offense charged and the judgment must be reversed.

The judgment is reversed and the cause remanded with directions to quash the indictment and discharge the defendant.

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Syllabus.

SHULTHIS v. McDOUGAL.

BERRYHILL v. SHULTHIS.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

Nos. 156, 157. Argued January 23, 24, 1912.—Decided June 7, 1912.

Where a petition of intervention is entertained and disposed of in virtue of jurisdiction already invoked, if the decree of the Circuit Court of Appeals is final in respect of the original suit, it is equally so in respect of the intervention.

Whether jurisdiction depends alone on diverse citizenship or on other grounds as well, must be determined from complainant's own statement in the bill of his cause of action, regardless of what may be brought into the suit by answer or in subsequent proceedings.

Jurisdiction of the Federal court can only rest on grounds distinctly and affirmatively set forth; grounds of jurisdiction, other than those of diverse citizenship alleged, cannot be inferred argumentatively from statements in the bill.

A case is not one arising under the laws of the United States unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law upon the determination whereof the result depends. This rule applies peculiarly to suits respecting rights to land acquired under laws of the United States; otherwise all suits to establish title to land which had been part of the public domain would be cognizable in the Federal courts.

The fact that the controversy might have arisen under the laws of the United States does not give the Federal court jurisdiction, if the bill does not allege the facts in that particular, and the controversy might have arisen in another way independent of those laws.

A corporation which was organized in the Indian Territory while the statutes of Arkansas were, under authority of Congress, in force in that Territory is not for that reason a Federal corporation, but is to be regarded for jurisdictional purposes as one of Oklahoma. *Kansas Pacific R. R. Co. v. Atchison, Topeka & Santa Fé R. R. Co.*, 112 U. S. 414.

The action of Congress in putting the laws of Arkansas in force in the Indian Territory by the act of February 18, 1901, 31 Stat. 794,

c. 379, was to provide a body of law for that Territory until it became a State, and the effect was the same as though those laws had been adopted by a Territorial legislature.

In this case *held*, that as the jurisdiction of the Circuit Court depended solely upon diverse citizenship, the judgment of the Circuit Court of Appeals was final; and, notwithstanding the case involved conflicting claims to allotted lands in the Creek Nation, it was not one arising under the laws of the United States.

Appeals from 170 Fed. Rep. 529, dismissed.

THE facts, which involve the determination of the question of finality of judgments of the Circuit Court of Appeals under the act of 1891, in a suit brought to determine conflicting rights to a tract of land in the Creek Nation, are stated in the opinion.

Mr. C. L. Thomas, with whom *Mr. Edgar A. de Meules* was on the brief for appellant in No. 156, and appellee in No. 157:

This court has jurisdiction.

The effect of the patent issued to the lessor of appellant, by the United States and the Creek Nation, requires an interpretation of § 7 of the act of June 30, 1902, 32 St. L. 500, and necessarily presents a Federal question. *McGilvra v. Ross*, 215 U. S. 70; *Shively v. Bowlby*, 152 U. S. 1.

The defendant, Kiefer Oil & Gas Company, being, as alleged in the bill, "a corporation duly organized . . . under and by virtue of the laws of the United States in force in the Indian Territory," this suit is one arising under the laws of the United States, and, therefore, the jurisdiction of this court exists in this case. *Osborn v. Bank of United States*, 9 Wh. 739; *Pacific Removal Cases*, 115 U. S. 1; *Nor. Pac. Ry. Co. v. Amato*, 144 U. S. 465; *Butler v. National Home*, 145 U. S. 64; *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593; *Union Pac. v. Harris*, 158 U. S. 326; *Wash.-Idaho Ry. Co. v. Cœur d'Alene Ry. Co.*, 160

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Argument for Appellee in No. 156.

U. S. 77; *Texas & Pac. Ry. v. Gentry*, 163 U. S. 353; *Sup. Lodge v. Kalinski*, 163 U. S. 289; *Texas & Pac. Ry. Co. v. Cody*, 166 U. S. 606; *Smith v. Rieves*, 178 U. S. 436; *Mo. Pac. Ry. Co. v. Soderberg*, 188 U. S. 526; *Tex. & Pac. Ry. Co. v. Eastin*, 214 U. S. 153; *In re Dunn*, 212 U. S. 374; *Wolf v. C. O. & G. Ry. Co.*, 133 Fed. Rep. 601; *Sup. Lodge v. England*, 94 Fed. Rep. 369; *Sup. Lodge v. Hill*, 76 Fed. Rep. 468; *Freehold Land Co. v. Gallegos*, 89 Fed. Rep. 769; *Canary Oil Co. v. Standard Co.*, 182 Fed. Rep. 663.

As it appears from the bill that the original jurisdiction of the Circuit Court was not dependent entirely upon diverse citizenship, the judgment of the Circuit Court of Appeals was not final, and the right of appeal to this court exists. *Nor. Pac. Ry. Co. v. Soderberg*, 188 U. S. 526; *Howard v. United States*, 184 U. S. 676; *Sonnentheil v. Christian Brew. Co.*, 172 U. S. 401; *Bankers' Casualty Co. v. Minneapolis*, 192 U. S. 380; *Florida Central Ry. Co. v. Bell*, 176 U. S. 325; *Colorado Min. Co. v. Turck*, 150 U. S. 142; *Third St. Ry. Co. v. Lewis*, 173 U. S. 460.

Mr. James P. Harrold for appellant in No. 157.

Mr. Geo. S. Ramsay and *Mr. Preston C. West* for appellee in No. 156:

This court has no jurisdiction on appeal from the Circuit Court of Appeals, because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties to the suit being citizens of different States. And whether or not the jurisdiction of the Circuit Court depended solely upon the diversity of citizenship must be determined from an examination of the plaintiff's bill to the exclusion of all other parts of the record. *Colorado Min. Co. v. Turck*, 150 U. S. 141; *Florida Central R. Co. v. Bell*, 176 U. S. 325; *West. Un. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 232; *Bonin v. Gulf Co.*, 198 U. S.

116; *Empire State M. & D. Co. v. Hanley*, 198 U. S. 293; *Bankers' Casualty Co. v. Minneapolis &c. R. Co.*, 192 U. S. 378; *Arbuckle v. Blackburn*, 191 U. S. 406.

Jurisdiction cannot be conferred upon the Circuit Court by the defendants setting up a Federal question, or making a claim to the title under some Federal law. The answer cannot be examined to aid the court in deciding this question. Cases *supra* and *Metcalf v. Watertown*, 128 U. S. 586; *Ayres v. Polsdorfer*, 187 U. S. 586; *Mountain View Min. Co. v. McFadden*, 180 U. S. 534; *Chappell v. Waterworth*, 155 U. S. 102; *Tex. & Pac. R. Co. v. Cody*, 166 U. S. 606; *Powell v. Brunswick Co.*, 150 U. S. 433; *Arkansas v. Kansas Coal Co.*, 183 U. S. 187; *Devine v. Los Angeles*, 202 U. S. 315; *Press Publishing Co. v. Monroe*, 164 U. S. 107; *Tennessee v. Union Bank*, 152 U. S. 454; *Eastlake Land Co. v. Brown*, 155 U. S. 488; *Oregon Short Line v. Skottowe*, 162 U. S. 491; *Spencer v. Duplan Silk Co.*, 191 U. S. 527; *Boston Copper Co. v. Montana Ore Co.*, 188 U. S. 633; *Third Street R. Co. v. Lewis*, 173 U. S. 458; *Shields v. Boardman*, 98 Fed. Rep. 455; *California Oil Co. v. Miller*, 96 Fed. Rep. 19.

Where jurisdiction is claimed on the ground that there is a Federal question involved, it is not sufficient that jurisdiction may be inferred argumentatively under averments, and the allegations showing the Federal question must be positive, and the Federal question must clearly appear. *Handford v. Davies*, 163 U. S. 274; *Iowa v. Chicago, M. & St. P. R. Co.*, 33 Fed. Rep. 391; *Manhattan R. Co. v. New York*, 18 Fed. Rep. 195.

Plaintiff's allegation that he bases title to the oil and gas in the land, and the right to operate the same and have the defendants enjoined from operating for oil and gas, is not sufficient to show a Federal question, although the plaintiff alleges that his rights exist under an oil and gas lease executed by a Creek Indian and approved by the Secretary of the Interior, as required by act of Con-

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gress. *Shoshone Min. Co. v. Rutter*, 177 U. S. 508; *Florida Central Co. v. Bell*, 176 U. S. 328; *Blackburn v. Portland Mining Co.*, 175 U. S. 571; *Romie v. Casanova*, 91 U. S. 379; *Blue Bird Mining Co. v. Largey*, 49 Fed. Rep. 289; *Starin v. New York*, 115 U. S. 248; *Bonin v. Gulf Company*, 198 U. S. 115.

The fact that the corporation was organized under the provisions of the corporation laws of Arkansas put in force in the Indian Territory by act of Congress, does not show a Federal question. *Union Pacific R. Co. v. Harris*, 158 U. S. 327; *Boyd v. Great Western Coal Co.*, 189 Fed. Rep. 115; *Binns v. United States*, 194 U. S. 491.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

These are appeals from decrees of the Circuit Court of Appeals for the Eighth Circuit affirming a decree of the Circuit Court for the Eastern District of Oklahoma dismissing on the merits a bill in equity, as also a petition in intervention, brought to determine conflicting claims to a tract of allotted land in the Creek Nation. The allegations of the bill may be summarized as follows:

The complainant, Shulthis, is a citizen of Kansas. One of the defendants, the Kiefer Oil and Gas Company, is a corporation organized in the Indian Territory under the Arkansas statutes which were put in force therein by an act of Congress, and since the admission of Oklahoma as a State "has been and now is a citizen and resident of said State" and of the Eastern District thereof. The other defendants are citizens of that State, resident in that district. The intervenor, George Franklin Berryhill, is a member by blood of the Creek Nation, duly enrolled as such, and his wife is not a member.

A son, named Andrew J. Berryhill, was born to the

intervenor and his wife in May, 1901, and died in November following, leaving no brother or sister surviving. In October, 1902, the deceased son's name was placed on the roll of the Creek Nation by the Commission to the Five Civilized Tribes, and thereafter an allotment, including the tract in controversy, was made to his "heirs" from the lands of the Nation, and a deed or patent was issued to such heirs with the approval of the Secretary of the Interior. Subsequently, and in March, 1906, George Franklin Berryhill and his wife, claiming to be the sole heirs of Andrew J. and the owners in fee of this tract, executed to the complainant a lease thereof, granting to him the right to explore for and extract oil and gas from the land for the term of fifteen years. The lease was made conformably to regulations prescribed by the Secretary of the Interior, was filed with the United States Indian Agent at Muskogee, in the Indian Territory, March 21, 1906, and was approved by the Secretary of the Interior April 19, 1907. The complainant complied with the regulations, duly paid the advance royalty provided for in the lease, and claims the sole and exclusive right to prospect for and extract the deposits of oil and gas existing in and under the land, which are said to be extensive and to have a value many times in excess of \$2,000. Respecting the claims and acts of the defendants the bill alleges:

"Your orator further shows that the defendants and each of them claim and assert some right, title and interests in and to said lands and particularly to the said oil and natural gas deposits adverse to your orator, but the nature of said claims of said defendants is to your orator unknown; but your orator states that they have no such right, title or interest in the said deposits of oil and natural gas or any part thereof; that whatever claimed rights the said defendants or any of them have therein, were acquired long subsequent to the right of

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your orator hereinbefore set forth; and further were acquired with notice and knowledge of the lease to your orator so executed, filed and approved as aforesaid; and also of facts and circumstances sufficient to put them and each of them upon inquiry with reference thereto.

"Your orator further states that the said defendant Kiefer Oil and Gas Company, combining and confederating with the other defendants named herein, have disregarded and still disregard the rights of your orator, and in violation thereof, and without right, unlawfully and wilfully on or about the first day of April, 1907, entered upon the said above described lands, and have stationed thereon divers agents, servants and employés, whose names are to your orator unknown, and with force and arms exclude and have excluded your orator and his agents, servants and employés therefrom; and further that said defendants have bored and drilled oil and gas wells on said premises, and have and still are allowing large quantities of oil and natural gas to escape therefrom and be wasted. That by reason thereof your orator has been damaged in the sum of \$25,000. And further, said defendants threaten to, and will unless restrained by this court, drill other and further wells on said land for oil and natural gas, and have and are threatening to, and will unless restrained, by means of such wells, extract said oil and gas deposits from said land and convert the same to their own use and benefit against the manifest right of your orator."

The prayer of the bill is that the defendants be decreed to have no interest or estate in the deposits of oil and gas, save as any defendant may have an interest in the land and be thereby entitled to the royalties secured by the lease; that the cloud cast upon the complainant's title and rights under the lease by the claims of the defendants be removed and his title and rights thereunder be quieted, and that a receiver be appointed to take possession and

proceed with the extraction and disposal of the oil and gas for the benefit of whomsoever may prove to be entitled to it. After the filing of the bill, a receiver was appointed, who took possession and proceeded as suggested. Thereafter George Franklin Berryhill, who had not been made a party to the bill, was permitted to file in the suit a petition in intervention, wherein he asserted full title in himself to the land, subject only to the lease to the complainant, specifically set forth the claims of the defendants, assailed those claims as invalid and clouds upon his title, and sought a decree establishing the latter as against the former. Answers and replications were filed, proofs were taken, and on the final hearing a decree was entered for the defendants. 162 Fed. Rep. 331. The complainant and the intervenor separately appealed to the Circuit Court of Appeals, where the decree was affirmed, 170 Fed. Rep. 529, and then the case was brought here.

Our jurisdiction is challenged by a motion to dismiss the appeals. Section 6 of the act of March 3, 1891, 26 Stat. 826, c. 517, declares that "the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different States," and this refers to the jurisdiction of the Federal court of first instance. Thus, it becomes necessary to consider whether the jurisdiction of the Circuit Court depended entirely upon diversity of citizenship. If it did, the appeals must be dismissed.

The question is not affected by the petition in intervention, for it was entertained and disposed of in virtue of the jurisdiction already invoked; and if the decree is final in respect of the original suit, it is equally so in respect of the intervention. *Rouse v. Letcher*, 156 U. S. 47; *Gregory v. Van Ee*, 160 U. S. 643; *Pope v. Louisville &c. Co.*, 173 U. S. 573; *St. Louis, K. C. & C. R. R. Co. v. Wabash Railroad Co.*, 217 U. S. 247, 250.

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In opposing the motion the appellants contend that the case arose under certain laws of the United States, presently to be mentioned, and therefore was not one in which the jurisdiction depended entirely on diversity of citizenship. The consideration of the contention will be simplified if, before taking up the specific grounds on which it is advanced, the rules by which it must be tested are stated. They are:

1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. *Colorado Central Mining Co. v. Turck*, 150 U. S. 138; *Tennessee v. Union and Planters' Bank*, 152 U. S. 454; *Spencer v. Duplan Silk Co.*, 191 U. S. 526; *Devine v. Los Angeles*, 202 U. S. 313, 333.

2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth. *Hanford v. Davies*, 163 U. S. 273, 279; *Mountain View Mining Co. v. McFadden*, 180 U. S. 533; *Bankers' Casualty Co. v. Minneapolis &c. Co.*, 192 U. S. 371, 383, 385.

3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise,

as all titles in those States are traceable back to those laws. *Little York Gold-Washing and Water Co. v. Keyes*, 96 U. S. 199; *Colorado Central Mining Co. v. Turck*, *supra*; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571; *Florida Central & P. Railroad Co. v. Bell*, 176 U. S. 321; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505; *De Lamar's Nevada Co. v. Nesbitt*, *Id.* 523.

To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes (Acts March 1, 1901, 31 Stat. 861, c. 676; June 30, 1902, 32 Stat. 500, c. 1323; April 26, 1906, 34 Stat. 137, c. 1876, § 22) relating to the allotment in severalty of the lands of the Creek Nation, the leasing and alienation thereof after allotment, the making of allotments to the heirs of deceased children, and the rights of the heirs, collectively and severally, under such allotments; but the bill makes no mention of those statutes or of any controversy respecting their validity, construction or effect. Neither does it by necessary implication point to such a controversy. True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain. Of course, it could have arisen in different ways wholly independent of the source from which his title or right was derived. So, looking only to the bill, as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned. As was said in *Blackburn v. Portland Gold Mining Co.*, *supra*, a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress.

It next is insisted that the bill shows that the Kiefer Oil

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and Gas Company, one of the defendants, is a Federal corporation, and therefore that under the decisions of this court in *Osborn v. Bank*, 9 Wheat. 738; *Pacific Railroad Removal Cases*, 115 U. S. 1, and *Matter of Dunn*, 212 U. S. 374, the case was one arising under the laws of the United States. The bill states that this company was incorporated in the Indian Territory under the Arkansas statutes, which were put in force therein by an act of Congress, and then adds that since the admission of Oklahoma as a State the company "has been and now is a citizen and resident of said State." Evidently, the pleader did not anticipate the present insistence, but proceeded on the theory that the company became an Oklahoma corporation when that State was admitted into the Union.

The corporation laws of Arkansas were put in force in the Indian Territory by the act of February 18, 1901, 31 Stat. 794, c. 379, which was but one of a series of acts of that character. Congress was then contemplating the early inclusion of that Territory in a new State, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local legislature, Congress alone could act. Plainly, its action was intended to be merely provisional and not to encroach upon the powers which rightfully would belong to the prospective State. The situation, therefore, is practically the same as it would be had the corporation laws of Arkansas been adopted and put in force by a local or territorial legislature. *United States v. Pridgeon*, 153 U. S. 48, 52-54.

In *Kansas Pacific Railroad Co. v. Atchison, Topeka & Santa Fe Railroad Co.*, 112 U. S. 414, this court had occasion to consider the effect of the admission of a Territory as a State on corporations existing at the time under the territorial laws, and it was there said (p. 415):

"The admission of Kansas as a State into the Union,

and the consequent change of its form of government, in no respect affected the essential character of the corporations or their powers or rights. They must after that change be considered as corporations of the State, as much so as if they had derived their existence from its legislation. As its corporations they are to be treated, so far as may be necessary to enforce contracts or rights of property by or against them, as citizens within the clause of the Constitution declaring the extent of the judicial power of the United States."

Adhering to the principle of that ruling, we hold that the corporate defendant here is an Oklahoma, and not a Federal, corporation, and therefore must be regarded as a citizen of that State for jurisdictional purposes.

It follows from what has been said that the case is one in which the jurisdiction of the Circuit Court depended entirely on diverse citizenship, and so the decrees of the Circuit Court of Appeals are final.

Appeals dismissed.

EASTERN CHEROKEES *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 234. Argued April 30, May 1, 1912.—Decided June 7, 1912.

In rendering a judgment for the Cherokee Nation in its suit against the United States, on the item claimed by, and over the objection of, the Eastern Cherokees, the Court of Claims recognized the Nation as the titular claimant authorized to prosecute the item to recovery, although for the ultimate benefit of the Eastern Cherokees, and this court having affirmed the judgment, 202 U. S. 1, the question has been adjudicated.

Under the decree of the Court of Claims as affirmed by this court the attorneys for the Cherokee Nation are entitled to be paid their fees

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on the amount of the recovery including the items recovered in the name of the Nation for the Eastern Cherokees.

After this court has reviewed the judgment of the Court of Claims and affirmed it, the Court of Claims, like any other court whose judgment has been reviewed by this court, must give effect to it and carry it into effect according to the mandate without variation or other further relief. *In re Sanford Fork & Tool Co.*, 160 U. S. 247. 45 Ct. Cl. 104, affirmed.

THE facts, which involve certain phases of the claims of the Cherokee Indians against the United States and the relative interests therein of the Cherokee Nation and the Eastern Cherokees, are stated in the opinion.

Mr. Charles Poe and Mr. Samuel A. Putman for appellants.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The controversy here to be considered arises in this way: In recent years there was litigated in the Court of Claims and this court a claim against the United States arising under treaties with the Cherokee Indians and consisting of four items, one of which, designated as item 2, was for \$1,111,284.70, with interest at 5 per cent from June 12, 1838, to the date of payment. The litigation was conducted under § 68 of the act of July 1, 1902, 32 Stat. 725, 726, c. 1375, as construed and amplified by the act of March 3, 1903, 32 Stat. 982, 996, c. 994, and the parties were the Cherokee Nation, the Eastern Cherokees, and the United States. Most of the Eastern Cherokees were members of the Cherokee Nation, but some were not, as was the case with those who remained in North Caro-

lina and other adjacent States; and most of the members of the Nation were Eastern Cherokees, but some were not, as was the case with those who were known as Old Settlers. The principal questions in controversy in the litigation, so far as they are now material, were (a) whether there could be a recovery against the United States on item 2, (b) whether the recovery should be in the name of the Cherokee Nation or in that of the Eastern Cherokees, and (c) whether, if the recovery were in the name of the Cherokee Nation, it should be for the benefit of the members of the Nation, whether Eastern Cherokees or otherwise, or for the benefit of the Eastern Cherokees, whether members of the Nation or otherwise. These questions were all stoutly contested in both courts. As to the first the Cherokee Nation and Eastern Cherokees made common cause against the United States, and as to the other two they advanced opposing contentions. The jurisdictional acts, before mentioned, required that "both the Cherokee Nation and said Eastern Cherokees" be made parties to the suit, and provided that if the claim were sustained the judgment should be "in favor of the rightful claimant" and should determine, "as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part." The acts also provided that the Cherokee Nation should be represented by attorneys to be employed and compensated in the manner prescribed in Rev. Stat., §§ 2103-2106, and that the Eastern Cherokees should be represented by attorneys employed by them, whose compensation should be fixed by the Court of Claims upon the termination of the suit.

The litigation was started by the Cherokee Nation, which, on January 16, 1903, had entered into a contract, conformably to Rev. Stat., §§ 2103-2106, with the late Gustavus A. Finkelnburg and others, whereby the latter were to represent the Nation as its attorneys in the prose-

cution of the claim and were to receive, as compensation for their services, 5 per cent of the first \$1,000,000, or part thereof, collected, and $2\frac{1}{2}$ per cent of the amount collected over and above the first \$1,000,000, such compensation to be, by the proper officers of the United States, deducted from the amount recovered and paid directly to such attorneys.

The Court of Claims held, and its decree was to the effect, that there should be a recovery against the United States on all the items of the claim; that the recovery on all should be in the name of the Cherokee Nation; and that the recovery on items 1, 3 and 4 should be for the benefit of the Nation, and on item 2 for the benefit of the Eastern Cherokees, whether members of the Nation or otherwise; that the proceeds of items 1, 3 and 4 should be paid or credited to the Nation, less the percentage thereof contracted by the Nation to be paid as counsel fees, and that the proceeds of item 2, "less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903," should be paid to the Secretary of the Interior, to be by him distributed directly to the Eastern Cherokees, inclusive of a class spoken of as Western Cherokees. The concluding portion of the decree declared: "So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of §§ 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to re-

ceive the same upon the making of an appropriation by Congress to pay this judgment. The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States." 40 Ct. Cl. 252, 363.

From that decree the parties severally appealed to this court, the United States complaining of the recovery against it on item 2, the Cherokee Nation claiming that the recovery on that item ought not to have been declared to be for the benefit of the Eastern Cherokees, and the latter insisting (a) that the recovery on that item should have been in their name, and not in that of the Nation, (b) that the Western Cherokees, so called, ought not to have been included among those who were to participate in the per capita distribution, and (c) that "the court erred in charging the said fund of \$1,111,284.70 and interest, to be realized from its said judgment or decree, with the fees of the attorneys for the Cherokee Nation." This court overruled all objections to the decree, save the one relating to the inclusion of the Western Cherokees, and, after directing that the provision for the per capita distribution be so modified as to confine it to the Eastern Cherokees, whether east or west of the Mississippi, exclusive of the Old Settlers, affirmed the decree, with that modification. 202 U. S. 101.

In passing upon the question, whether the recovery on item 2 was in the name of the rightful claimant, this court said (p. 130): "The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees." And again (p. 130): "We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it."

In disposing of the insistence that the proceeds arising

from that item ought not to have been charged with any fee for the attorneys for the Cherokee Nation, this court said (p. 131): "In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with the Court of Claims in the allowance of fees and costs." And then, after noticing the arguments advanced by counsel for the Eastern Cherokees in support of a contrary conclusion, which were based upon the fact, among others, that the Nation had asserted a right to collect that item, not for the benefit of the Eastern Cherokees, but for the benefit of its members, whether Eastern Cherokees or otherwise, the court concluded the consideration of that insistence by saying (p. 131): "Nevertheless, taking the entire record together, the various treaties, and acts of Congress, and of the Cherokee Council, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs."

On receipt of the mandate the Court of Claims modified its original decree so as to conform to the direction in respect of the persons who should participate in the per capita distribution, and, in pursuance of the reservation made before, entered a supplemental decree fixing the compensation of the attorneys for the Eastern Cherokees at 15 per cent of the amount of item 2, including interest. Thereafter Congress made an appropriation to pay the original decree as modified, 34 Stat. 634, 664, c. 3912, and the accounting officers of the Treasury computed the interest due on each item, thereby ascertaining that item 2 amounted to almost \$5,000,000. Finkelnburg and his associates, the attorneys for the Cherokee Nation, then presented to the Acting Commissioner of Indian Affairs a sworn statement of their services under the contract of January 16, 1903, conformably to the requirements of Rev. Stat. § 2104, upon which statement that officer and the Acting Secretary of the Interior determined and certi-

fied that such attorneys had fully complied with the contract and were entitled to the compensation therein provided, including the stipulated percentage of the amount recovered on item 2; and, upon the presentation of that certificate, the officers of the Treasury Department paid to such attorneys, out of the moneys applicable to the several items, the percentage named in the contract and deducted the same from the proceeds of the several items, the amount so deducted from item 2 being \$147,527.01. The certification and payment, in so far as they affected that item, were made over the objection and protest of the Eastern Cherokees, who insisted at the time that no fees or compensation for the attorneys for the Cherokee Nation lawfully could be paid out of, or charged against, the moneys arising therefrom.

Shortly thereafter the Eastern Cherokees filed in the Court of Claims, in the original cause, a supplemental petition wherein they challenged (a) the right of the attorneys for the Cherokee Nation to receive any fees or compensation out of the moneys recovered on item 2, and (b) the authority of the officers of the Treasury Department to make any payment or deduction therefrom by reason of the contract between the Nation and its attorneys, and alleged, in substance, that the decree furnished no warrant for any such payment or deduction; that the jurisdictional acts had not conferred upon the court of claims any power to hear or determine any question pertaining to the fees of the attorneys for the Nation; and that throughout the litigation the Nation's attorneys had contended that the amount due on item 2 should be awarded and paid to the Nation for its own benefit, to the exclusion of the Eastern Cherokees, save as most of them might as members of it be benefited indirectly. The prayer of the petition was that the court would pass a further decree "construing and enforcing its former decrees" in such manner that the entire proceeds of item 2,

less the fees and expenses theretofore or thereafter allowed by the court to the attorneys for the Eastern Cherokees, would be distributed as before directed, but without any payment therefrom to the attorneys for the Cherokee Nation or any deduction by reason of any such payment. After a hearing on the petition, the Court of Claims entered a decree dismissing it for the reasons assigned in the following excerpts from the opinion of that court, delivered by Chief Justice Peelle (45 Ct. Cl. 104, 130, 131):

"The litigation was over a fund arising from treaty stipulations supposed to be in the Treasury in trust for the parties entitled thereto. Surely the fund which was the stake in controversy should bear the expense, and such was the conclusion of this court. . . . The decree clearly recognized the distinction between the fees authorized by the separate acts. That is to say, the fees to be paid to the attorneys for the Cherokee Nation under the first act were to be governed by the contract made in accordance therewith, while under the second act the court was authorized to fix the fees of the attorneys for the Eastern Cherokees. . . . It was not until after the payment of the money under said contract that the Eastern Cherokees filed their supplemental petition herein praying the court to so construe its decree as to provide that the sum of \$1,111,284.70 [with interest] should not be chargeable with the fees of the attorneys of the Cherokee Nation. But independently of their delay, such construction would not only be contrary to the language of the decree, but would, in effect, be changing the decree after its affirmance by the Supreme Court, and, too, after the contention here was presented there and denied. . . . The Cherokee Nation was the proper party to the suit under both jurisdictional acts, and it had contracted to pay its attorneys, with the approval of the Secretary of the Interior, in strict accordance with the law, all of which was recognized by the court and sanctioned and provided

for in its decree; and the decree, in respect to the payment of said fees, having been affirmed and executed, the court is not at liberty to modify the decree or to construe it contrary to the clear import of the language used."

It was from this last decree that the present appeal was taken.

We pass other questions discussed in the opinion of the Court of Claims and elaborately argued by counsel, and come directly to consider whether further controversy over the matter presented by the supplemental petition was foreclosed by the original decree and the proceedings had in this court on the prior appeal, because, if it was, that alone requires that the action of the Court of Claims in dismissing the petition be affirmed.

By rendering a decree on item 2 in favor of the Cherokee Nation, over the objection of the Eastern Cherokees, the Court of Claims necessarily recognized the Nation as the titular claimant and as authorized to prosecute the item to a recovery, even although the recovery was for the ultimate benefit of the Eastern Cherokees. The latter so understood the decree and accordingly repeated their objection on the prior appeal, but this court sustained the action of the Court of Claims, saying, as we have seen: "The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees." Of course, that was an adjudication of the controverted question whether, in view of the treaties and congressional enactments bearing on the subject and of the attitude of the Cherokee Nation, the recovery should be in its name or in that of the Eastern Cherokees.

When the Court of Claims determined that question in favor of the Cherokee Nation, and also that the recovery should be for the benefit of the Eastern Cherokees, the question naturally arose, whether the attorneys for the Nation should be paid out of the proceeds. That matter was dealt with in two paragraphs of the decree. In one

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it was directed, in respect of the moneys recovered on item 2, "that such counsel fees as may be chargeable against the same under the provisions of the contract" between the Cherokee Nation and its attorneys should be deducted in advance of the distribution among the Eastern Cherokees, and in the other that "so much of any" item on which recovery was had "as the Cherokee Nation shall have contracted to pay as counsel fees" under Rev. Stat. §§ 2103-2106 should be paid by the Secretary of the Treasury to the attorneys entitled thereto, upon the making of an appropriation by Congress to pay the decree. In this there was a plain recognition of the services rendered by the Nation's attorneys in prosecuting item 2 and of their right to be compensated out of the moneys recovered, the amount of the compensation to be as provided in their contract. The Eastern Cherokees so understood the decree at the time, and on the prior appeal challenged it as unwarrantably charging a fund recovered for their benefit with fees for the Nation's attorneys. This court, as is manifest from its opinion, construed the decree as did the Eastern Cherokees, and affirmed it with that construction. And, while nothing was said about the power of the Court of Claims to provide for the payment of the Nation's attorneys out of the moneys recovered, the implication of the opinion was that the power existed; and, of course, the affirmance of the decree wherein the power was exercised was an affirmance of the power.

Thus it is apparent that the decree of the Court of Claims as affirmed by this court, determined every question bearing upon the right of the attorneys for the Cherokee Nation to have their fees for the prosecution of item 2 paid out of the proceeds thereof, save the single question of the amount of the fees. That was left to be determined by the terms of the contract and the certification contemplated by Rev. Stat. § 2104. It is not charged that the amount actually paid was not the true amount under

the terms of the contract or that it was not duly certified under § 2104, and so it does not appear that the payment was not in accordance with the decree as construed on the prior appeal.

What really was sought by the supplemental petition was a modification of the decree in a particular wherein it had been affirmed by this court. But the Court of Claims was without power to grant any such relief, for it, like any other court whose judgment or decree has been reviewed by this court, was bound to give effect to the rule stated in *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 255:

“When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.”

Decree affirmed.

KINDRED *v.* UNION PACIFIC RAILROAD
COMPANY.

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

No. 51. Argued November 9, 1911.—Decided June 10, 1912.

Under § 2 of the act of July 1, 1862, 12 Stat. 489, c. 120, and other provisions of that act, the predecessor in title of the Union Pacific Railroad Company acquired a right of way four hundred feet in

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width across the lands in Kansas, within the Delaware Diminished Indian Reservation, those lands having been assigned in severalty to individual Delawares under the treaty of May 30, 1860, 12 Stat. 1129, providing for such right of way.

Quære. Whether the individual Delaware Indians, to whom the lands were assigned under the treaty of 1860, obtained a better or different right in them than the tribe had in the lands in common.

Quære. Whether under § 2 of the act of July, 1862, the United States, in extinguishing the Indian title to lands through which the railroads were given rights of way, is to bear the burden by compensating the Indians, or only by assisting in the negotiations.

While the phrase "public lands" is a term ordinarily used to designate lands subject to sale under general laws, it is sometimes used in a larger sense, and as used in § 2 of the act of July, 1862, it includes lands within Indian reservations. Congress so intended and such has been the construction placed on the words by the Interior Department.

Where an Executive Department has constantly given the same construction to a statute affecting title to real estate, rights acquired thereunder will not be lightly disturbed after a lapse of many years. Purchasers of land, over which a railroad has been constructed and operated, cannot claim that they purchased without notice of the claim of the railroad to own the right of way.

Where a railroad company enters upon the land of another and constructs a railroad thereover, under a statute entitling it to do so on condition that compensation be made to the owner, and the latter permits the construction and operation of the railroad without compliance with that condition, a subsequent vendee of the owner takes the land subject to the burden of the right of way, and the right to exact payment therefor from the railroad company belongs to the owner at the time of entry and construction.

168 Fed. Rep. 648, affirmed.

THE facts, which involve the right of the Union Pacific Railroad Company to certain portions of its right of way within the Delaware Diminished Reservation, are stated in the opinion.

Mr. Edward D. Osborn, with whom *Mr. A. M. Harvey* and *Mr. Frank Doster* were on the brief, for appellants:

Congress had no power to grant a right of way through

the lands in question. See treaty proclaimed March 24, 1831, 7 Stat. 357; treaty of 1854, 10 Stat. 1048; treaty of 1860, 12 Stat. 1129.

The design of the treaty of 1854, as accomplished by the treaty of 1860, was to vest the individual Delawares with a property right in the lands allotted to them in severalty. The quality of descendibility to successors was imparted to the land. There was, as in all land treaties with Indians, an understood, even if unexpressed, intent to educate the Indians into the habits of civilized life by individual ownership instead of communal occupancy. A full equitable title to the allotted lands became vested in the individual Delawares. *Jones v. Meehan*, 175 U. S. 1; *Francis v. Francis*, 203 U. S. 233.

Where a grant is made to one "and his heirs" a restriction on alienation either partial or entire does not debase the grant to a mere right of occupancy, but a vested interest passes thereby under the cover and protection of the constitutional guaranties of property right. *Libby v. Clark*, 118 U. S. 250; *United States v. Paine Lumber Co.*, 206 U. S. 467; *S. C.*, 154 Fed. Rep. 263; *United States v. Cook*, 19 Wall. 591; *Shiver v. United States*, 159 U. S. 491.

As an Indian allottee's interest in the land is a vested property right, Congress is lacking the power to make a grant through it of a railroad right-of-way without making provision for compensation therefor. *Jones v. Meehan*, 175 U. S. 1; *Cherokee Nation v. Southern Kansas R. R. Co.*, 135 U. S. 641.

The act does not purport or intend to grant a right-of-way through the lands in question, but only "through the public lands." At the time of its enactment the lands involved were not public lands nor were they merely lands conceded and guaranteed to the Indians as a perpetual home by express treaty; they had but a few months before been allotted in severalty to the individual members of the tribe. The question is not, "Could Congress grant

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the right-of-way over these lands?", but "Did Congress do so?"

Congressional grants of land are not to be regarded as including lands which have been reserved or appropriated by the United States for any purpose whatever, even though they be not expressly excepted by the language of the grant. *L. L. & G. R. Co. v. United States*, 92 U. S. 733; *M., K. & T. Ry. Co. v. United States*, 92 U. S. 760; *Beecher v. Wetherly*, 95 U. S. 717; *Spokane Falls & N. Ry. Co. v. Ziegler*, 61 Fed. Rep. 392; *United States v. Sioux City Ry. Co.*, 46 Fed. Rep. 502; *Scott v. Carew*, 196 U. S. 100.

Grants of lands or rights out of the "public lands" are to be construed as excluding lands otherwise reserved or appropriated, unless a contrary intent is clearly and positively expressed. *Wilcox v. Jackson*, 13 Pet. 498; *Bardon v. Nor. Pac. R. Co.*, 145 U. S. 535; *Northern Lumber Co. v. O'Brien*, 71 C. C. A. 598; 139 Fed. Rep. 614, affirmed, 204 U. S. 190.

To give the act of July 1, 1862, the effect contended for by the appellee is to abrogate the treaty of 1860 with the Delaware Nation. A treaty of the United States, whether made with a foreign nation or with an Indian tribe, has the force of law equally with an act of Congress. Congress may abrogate such treaties, as it may repeal statutes, but in neither case is repeal or abrogation by implication favored. Unless the intent of Congress to abrogate the treaty is clear and undoubted from the language of the act, unless it admits of no other reasonable construction, it will not be construed as abrogating the treaty. *Chew Heong v. United States*, 112 U. S. 536; *United States v. Gue Sim*, 176 U. S. 459; *Ward v. Race Horse*, 163 U. S. 459; *Cope v. Cope*, 137 U. S. 682; *Turner v. American Missionary Union*, 5 McLean, 349.

The courts of the United States have uniformly held that grants of public lands to railways do not apply to Indian reservations, even though such reservations be not

expressly excepted from the grant. *L. L. & G. R. Co. v. United States*, 92 U. S. 733; *Bardon v. Nor. Pac. R. Co.*, 145 U. S. 535; *Northern Lumber Co. v. O'Brien*, 204 U. S. 190; *Minnesota v. Hitchcock*, 185 U. S. 373; *A. & P. R. Co. v. Mingus*, 165 U. S. 413; *King v. McAndrews*, 111 Fed. Rep. 860; *United States v. Oregon Military Road Co.*, 103 Fed. Rep. 549, 554; *Nor. Pac. R. Co. v. Maclay*, 61 Fed. Rep. 554. *M., K. & T. Ry. Co. v. Roberts*, 152 U. S. 114, is not in conflict with this doctrine.

This rule of construction applies to right-of-way grants. *Washington & I. R. Co. v. Osborn*, 160 U. S. 103; *Union Pac. R. Co. v. Harris*, 215 U. S. 386.

Appellee's authorities do not support its contention that a different rule of construction is applicable to right-of-way grants. See *Railroad Co. v. Jones*, 177 U. S. 125; *Bybee v. Oregon Ry. Co.*, 26 Fed. Rep. 586.

The extinguishment clause is not an adequate expression of the intent of Congress to deprive the Indians of a part of the land that had been set apart and granted for their separate perpetual use, and to give it to the railroad company. *Atl. & Pac. R. Co. v. Mingus*, 165 U. S. 413.

The generally accepted construction put upon such extinguishment clauses is that its effect is to extend the grant to wild, unceded Indian lands occupied by the Indians under their original right of occupancy, but not to lands expressly reserved for their occupation or use by treaty. *Buttz v. Nor. Pac. R. Co.*, 119 U. S. 55; *Caldwell v. Robinson*, 59 Fed. Rep. 653; *L. L. & G. R. Co. v. United States*, 92 U. S. 733; *Nor. Pac. R. Co. v. Hinchman*, 53 Fed. Rep. 523.

This is the settled ruling of the Department of the Interior as to the similar extinguishment clause in the Northern Pacific grant. *Dillone v. Nor. Pac. R. R. Co.*, 16 Land Dec. 229; *Nor. Pac. R. Co. v. Warren*, 28 *Id.* 494; *Warren v. Nor. Pac. R. Co.*, 22 *Id.* 568; *Nor. Pac. R. Co. v. Eberhard*, 19 *Id.* 532; *Nor. Pac. R. Co. v. Haynes*,

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20 *Id.* 90; *Nor. Pac. R. Co. v. Maclay*, 26 *Id.* 43; *Nor. Pac. R. Co. v. Clark*, 5 *Id.* 138; *Whitney v. Nor. Pac. R. Co.*, 1 *Id.* 343; *Phelps v. Nor. Pac. R. Co.*, 1 *Id.* 368; *William P. Maclay*, 2 *Id.* 675; *Atl. & Pac. R. Co.*, 13 *Id.* 373; *Atl. & Pac. R. Co. v. Tiernan*, 17 *Id.* 587.

The construction given to a statute by those charged with its execution has much weight and ought not to be overruled without cogent reasons. The decisions of the Department of the Interior in regard to the construction and effect of statutes relating to congressional grants of the public domain, especially when followed consistently for many years, will be accepted by the courts as correct, unless obviously wrong. *United States v. Hammers*, 221 U. S. 220; *United States v. Moore*, 95 U. S. 760; *Edwards v. Darby*, 12 Wheat. 206; *United States v. Burlington R. R. Co.*, 98 U. S. 334; *Brown v. United States*, 113 U. S. 568; *Hewitt v. Schultz*, 180 U. S. 139; *St. Paul, &c. R. Co. v. Phelps*, 137 U. S. 528; *Hastings, &c. R. Co. v. Whitney*, 132 U. S. 357; *McFadden v. Mountain View Min. Co.*, 97 Fed. Rep. 670.

The predecessors in title of the appellee accepted the benefits of the act of July 1, 1862, and thereby became subject to its limitations, as well those upon the original grant of July 1, 1862, as those upon the grants contained in the amendatory act itself. See *Humbird v. Avery*, 195 U. S. 480; *Heydenfeldt v. Davey G. & S. Mining Co.*, 93 U. S. 634.

By accepting an additional grant of powers or franchises, a corporation becomes subject to new restrictions imposed by the granting act. *St. Paul Ry. Co. v. Chadwick*, 6 Land Dec. 128; *St. Paul R. Co. v. Moling*, 7 *Id.* 184; *St. Paul R. Co. v. Thompson*, 10 *Id.* 507.

By "Government reservation" is obviously meant any public land reserved by the Government for any special use. Indian reservations are undoubtedly included within the meaning of the term. *Leavenworth, L. & G. R. Co. v.*

United States, 92 U. S. 733; *Hot Springs Cases (Rector v. United States)*, 92 U. S. 698; *A. & P. R. Co. v. Mingus*, 165 U. S. 413; *Cohn v. Barnes*, 5 Fed. Rep. 326, 331; *Rio Verde Canal Co.*, 27 Land Dec. 421.

Mr. Maxwell Evarts for appellee:

At the time of the Pacific Railroad Act of July 1, 1862, the Delaware Indians were the wards of the Nation and had only a right of occupancy to the lands in the Delaware Reservation, and such lands were at the time public lands of the United States within the meaning of the second and ninth sections of said act of 1862.

Moreover, the policy of the General Government has always been that the United States, and the United States alone, should have dealings with the Indians—its wards. Neither the railroads nor individuals were permitted to extinguish, by purchase or in any other way, any right of occupancy which the Indians might have in the lands of the United States. For this reason, therefore, such lands must be deemed to be public lands, so far as the people of the United States are concerned, with the right in the Government alone to extinguish the Indian title whenever such lands were necessary for purposes other than the occupancy thereof by the Indians. *Johnson v. M'Intosh*, 8 Wheat. 543, 585; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17; *Jones v. Meehan*, 175 U. S. 1, 8.

The expression "Indian title" is perhaps misleading, and was not intended to convey the idea that the Indians had title to their lands in the usual meaning of the term, but only a right to live on them, subject to whatever disposition the United States might see fit to make of them. *Veale v. Maynes*, 23 Kansas, 1, 23; *Cherokee Nation v. Georgia*, 5 Pet. 1.

To understand the peculiar relations of the United States and of the Indians to the wild lands of the country, the treaties with the Delawares must be considered. See

treaties of January 21, 1785, 7 Stat. 16, 17; of January 9, 1789, 7 Stat. 28, 29; of 1795, 7 Stat. 49; of September 29, 1817, 7 Stat. 160; of September 17, 1818, 7 Stat. 178; of October 3, 1818, 7 Stat. 188; of September 24, 1829, 7 Stat. 327; May 6, 1854, 10 Stat. 1048; May 30, 1860, 12 Stat. 1129.

The treaties in *Veale v. Maynes*, (23 Kansas) with the Pottawatomie Indians were substantially the same as the treaties with the Delaware Indians, and the question then before Mr. Justice Brewer was precisely the question which is now presented to this court.

The Pottawatomie Treaty of 1867, 15 Stat. 531, is practically similar to the Delaware Treaty of 1866, 14 Stat. 793.

Mr. Justice Brewer held that the allotment of the land to the Pottawatomie Indians under the Treaty of 1861 made no change in the relation of the Indians of that Tribe to the land in controversy, except that the land instead of being held in tribal occupancy was to be held in personal or individual occupancy, and that no enlargement of the right of the Indians to occupy the land was to be found until the right to a patent in fee simple was given to them under the treaty of 1867.

The argument of Mr. Justice Brewer in the *Veale Case* is precisely the argument of appellees, that the Delaware Indians had no other, further or greater right to their lands by reason of the Treaty of 1860 than they had before.

The treaties with the Delaware Tribe show that up to the time of the Pacific Railroad Act of 1862 the Delawares had no claim whatever to the land in question except a right of occupancy at the will of the United States. See Ninth Article, Treaty of July 4, 1866, 14 Stat. 793, 796.

The question, however, of the right of the Leavenworth Company and its successors to the right of way across the lands of the Delawares is no longer open for determination

under the language of the treaties, but has long since become an established rule of property in the State of Kansas, under the decisions of its highest court. *Grinter v. Kan. Pac. Ry. Co.*, 23 Kansas, 642; *State v. Horn*, 34 Kansas, 556; *S. C.*, 35 Kansas, 717; *Union Pacific Ry. Co. v. Kindred*, 43 Kansas, 134, 135.

The Indians to whom the allotments were made under the treaty of 1860, 12 Stat. 1129, have already been paid for the right of way granted to the Leavenworth Company and they and their successors in title have no claim of any kind to the lands in question. See Art. 3 of Delaware Treaty of 1860; act of July 1, 1862, *supra*; act of July 13, 1892, 27 Stat. 120, 126; *United States v. Un. Pac. Ry. Co.*, 84 Fed. Rep. 1022; *United States v. Un. Pac. Ry. Co.*, 168 U. S. 505.

No right of way by adverse possession has been acquired by the appellants or any of them to any portion of the right of way granted to the Leavenworth Company under the act of July 1, 1862.

Congress alone was the judge of the width of the right of way required by the grantee corporation. *Nor. Pac. R. R. Co. v. Smith*, 171 U. S. 260, 275; *Nor. Pac. Ry. Co. v. Townsend*, 190 U. S. 267, 272.

Equity has jurisdiction to protect a railroad company in the use and enjoyment of its right of way. *Louis. & Nash. R. Co. v. Smith*, 128 Fed. Rep. 1; *Cairo, V. & C. Ry. Co. v. Brevoort*, 62 Fed. Rep. 129; *Pennsylvania R. R. Co. v. Freeport Borough*, 138 Pa. St. 91.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The ultimate question to be decided on this appeal is, whether the appellee, the Union Pacific Railroad Company, has a right of way 400 feet in width across certain lands in the State of Kansas, formerly within the Delaware

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Diminished Indian Reservation. The facts out of which the question arises are these:

By the treaty of 1829, 7 Stat. 327, with the Delaware Indians it was provided that certain lands in the fork of the Kansas and Missouri rivers should be "conveyed and forever secured" to those Indians "as their permanent residence." By the treaty of May 6, 1854, 10 Stat. 1048, parts of the reservation so established were relinquished and the remainder retained for a "permanent home." Article 11 of this treaty declared that at the request of the Delawares the diminished reservation should be surveyed and each person or family assigned such portion as the principal men of the tribe should designate, the assignments to be uniform; and Art. 12 provided that railroad companies, when their lines of railroad necessarily passed through the diminished reservation, should have a right of way on payment of a just compensation. The treaty of May 30, 1860, 12 Stat. 1129, after reciting such a request as was contemplated by the preceding treaty, provided that 80 acres of the diminished reservation should be assigned and set apart for the exclusive use and benefit of each Delaware and his heirs; that the tracts assigned should not be alienable in fee, leased or otherwise disposed of, except to the United States or to other members of the tribe, and should be exempt from levy, taxation, sale or forfeiture until otherwise provided by Congress; and that if any Delaware should abandon the tract assigned to him the Secretary of the Interior should take such action in respect of its disposition as in his judgment might seem proper. Article 3 of this treaty gave to the Leavenworth, Pawnee & Western Railroad Company, a Kansas corporation, a preferred right to purchase the unassigned lands in the reservation, and declared: "It is also agreed that the said railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compen-

sation therefor, in money, to the respective parties whose lands are crossed by the line of railroad.”

The act of July 1, 1862, 12 Stat. 489, c. 120, relating to the location, construction and maintenance of the Union Pacific and other railroads, authorized the Leavenworth, Pawnee & Western Railroad Company, before mentioned, to locate, construct and maintain a railroad from the Missouri river, at the mouth of the Kansas river in Kansas, to a connection with the Union Pacific Railroad on the 100th meridian of longitude in Nebraska, and granted to it, as also to other companies named in the act, a right of way in the following terms:

“SEC. 2. That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.”

Other portions of the act required the Leavenworth, Pawnee & Western Railroad Company to file with the Secretary of the Interior within six months after the date of the act an acceptance of its conditions and within two years after such date a map of the general route of its road, and to complete 100 miles, commencing at the mouth of the Kansas river, within two years after such acceptance, and 100 miles per year thereafter until completion; and made provision for an official examination and approval

of the completed road in sections of 40 consecutive miles. The company seasonably filed an acceptance of the conditions of the act and a map of the general route of its road showing that the route extended from the mouth of the Kansas river to and across the Delaware Diminished Reservation. That part of the road was constructed on that route and put into operation within two years from the date of the act, and was duly examined and approved by the proper officers of the United States. Under congressional authority the route for the remaining part of the road was subsequently changed so that the connection with the Union Pacific Railroad would be made at a point farther west than was originally intended, and the later construction conformed to this change, but this has no bearing here. The appellee, the Union Pacific Railroad Company, became in 1898, and now is, the successor in interest and title of the Leavenworth, Pawnee & Western Railroad Company.

By the treaty of July 4, 1866, 14 Stat. 793, provision was made for the removal of the Delawares from their home on the diminished reservation to lands secured for them in the Indian Territory, and for the sale by the United States of the lands in the reservation, whether held in common or assigned in severalty, with the qualification that assignees electing to dissolve their tribal relations and become citizens of the United States might retain the tracts assigned to them and ultimately receive patents in fee simple with power of alienation. On receiving payment for the lands sold the United States was to issue patents therefor to the purchaser or his assigns, and apply the proceeds to the benefit of the tribe or the assignees, depending upon whether the particular lands were held in common or had been assigned in severalty. The intended removal was effected, the reservation was extinguished, and the lands therein, including most of those assigned in severalty, were sold as intended.

The lands through which the asserted right of way here in controversy extends were within the diminished reservation at the date of the act of 1862, had then been assigned in severalty to individual Delawares under the treaty of 1860, were sold by the United States under the treaty of 1866, and are now claimed by the appellants through mesne conveyances under the patents issued to the purchaser at that sale. The railroad was located and constructed across these lands without the payment of any compensation for the right of way. But, so far as appears, no attempt was made by the tribe, the individual assignees, or the United States to prevent the location and construction, and no controversy arose between them and the railroad company, save as there was a dispute as to whether the assignees were entitled to compensation, and, if so, as to who should pay it. See *Grintner v. Kansas Pacific Railway Co.*, 23 Kansas, 642; *Id.* 659; *United States v. Union Pacific Railway Co.*, 168 U. S. 505. In 1892 Congress recognized the right of the assignees to be compensated for the right of way, and made an appropriation to pay them, accompanying it with a direction to the Attorney General to institute proceedings against the railroad company to compel it to reimburse the Government. See 27 Stat. 120, 126, c. 164; *United States v. Union Pacific Railway Co.*, *supra*.

The Circuit Court and the Circuit Court of Appeals sustained the railroad company's claim to a right of way 400 feet in width, 168 Fed. Rep. 648, and the present owners of the tracts affected prosecute this appeal.

It was contended in the courts below, and the contention is repeated here, that the individual Indians to whom the lands were assigned in severalty obtained no better or different right in them than the tribe had in the lands held in common; in other words, that the right was one of possession or occupancy only, the United States remaining the real proprietor and having full power to terminate the

Indian right at will. But, without passing upon that contention, we think it may well be assumed for the purposes of this case that the assignees, although not possessing the legal title and not promised a conveyance of it, had something more than the ordinary right of possession or occupancy of tribal Indians in lands set apart for tribal use. We say this, because the right of the assignees, whatever it may have been, was acquired and held under the treaty of 1860, wherein it was agreed that the Leavenworth, Pawnee & Western Railroad Company should have a perpetual right of way over any of the lands assigned in severalty, on the payment of a just compensation to those whose lands were crossed by its railroad. It therefore is not as if Congress had undertaken to grant a right of way through these lands without either the assent of the assignees or any provision for compensating them. As respects these lands, the right-of-way section in the act of 1862 did not stand alone, but was to be taken in connection with the treaty provision. The two, together, meant that the right of way was granted, not merely by the United States, but with the assent of the Indian assignees, and that the latter were to be justly compensated. The only uncertainty, if any, introduced into the situation arose from the presence in the right-of-way section of the promise on the part of the United States that it would as rapidly as might be extinguish the Indian title to all lands required for the right of way. This seems to have given rise to a question, whether the United States was to bear the burden of extinguishing the title, as by compensating the Indians therefor, or only to assist in obtaining it, as by conducting negotiations with the Indians in respect of the compensation to be paid to them. But we are not here concerned with that question, because the right under the treaty to have the compensation seasonably ascertained and paid by whomsoever was liable therefor was not insisted upon. No steps to that end

were taken, but, on the contrary, the construction of the railroad was permitted to proceed and the road was completed and put into operation as a public highway at least three years before the lands were sold under the treaty of 1866.

But it is said that the right-of-way section was inapplicable because it was confined to "public lands," a term used to designate such lands as are subject to sale or other disposal under general laws. No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense. We think that is the case here, first, because the provision in the same section, that the United States should extinguish as rapidly as might be the Indian title to all lands required for the right of way, implies that Indian lands as to which Congress properly could grant a right of way were intended to be included, and, second, because the section was so interpreted by the Executive Department charged with the administration of the act, as also of affairs pertaining to the Indians and public lands, and rights acquired thereunder ought not lightly to be disturbed after the lapse of so many years.

It results that the sole irregularity in respect of the acquisition of the right of way contemplated by the treaty provision and the statute, taken together, was the failure to make compensation therefor to the Indian assignees when the railroad was constructed or until after the lands had been sold for their benefit to the remote grantor of the appellants. The railroad was in existence and being operated across the land at the time of the sale, as ever since, and therefore there can be no claim that that or any subsequent purchase was made without notice of the right of way.

So, if the appellants be regarded as claiming under the Indian assignees, which is the most favorable view for the appellants, the case still falls within the general rule, that where a railroad company enters upon the land of another

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and constructs a railroad thereover under a statute entitling it so to do on condition that compensation be made to the owner, and the latter permits the road to be constructed and put into operation without a compliance with that condition, a subsequent vendee of the owner takes the land subject to the burden of the right of way, and the right to exact payment therefor from the railroad company belongs to the owner at the time the company entered and constructed the road. *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1, and cases cited.

At an early stage of the case it appears to have been contended that the appellants acquired title to parts of the right of way by adverse possession, but as the contention is expressly abandoned in the brief, evidently in view of the ruling in *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260; *Northern Pacific Railway Co. v. Townsend*, 190 U. S. 267, and *Northern Pacific Railway Co. v. Ely*, 197 U. S. 1, it need not be considered.

We conclude that the decree of the Circuit Court of Appeals was right.

Decree affirmed.

FLANNELLY *v.* DELAWARE AND HUDSON CO.

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

No. 132. Argued December 19, 20, 1911.—Decided June 10, 1912.

The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing.

Whether such care has been exercised is generally a question of fact for the jury, especially if the evidence be conflicting or such that different inferences may reasonably be drawn from it.

In this case, *held* that the evidence on the question of contributory negligence of a woman crossing a dangerous railroad crossing was properly submitted to the jury, and that there was evidence from which the jury could well have found, as they did, that she was not negligent.

172 Fed. Rep. 328, reversed.

THE facts, which involve the question of negligence of a railroad company and degree of care required by one crossing a track, are stated in the opinion.

Mr. Frank W. Hackett and *Mr. Paul J. Sherwood* for petitioners:

No question of law was before the Circuit Court of Appeals; no bill of exceptions had been signed. The case went up on exceptions to the court's overruling defendant's motion for judgment for defendant notwithstanding the verdict for plaintiff and such a motion is unknown to the common law. *Freeman on Judgment*, § 7; *Smith v. Power*, 15 N. H. 546; *German Insurance Company v. Frederick*, 7 U. S. App. 122.

The Circuit Court of Appeals reexamined the fact of alleged contributory negligence on the part of plaintiff. This procedure in a court of the United States is forbidden by the Seventh Amendment to the Constitution. *Parsons v. Bedford*, 3 Pet. 433; *Capital Traction Co. v. Hof*, 174 U. S. 1. Consult remarks of Matthews, J., in *Metropolitan R. R. Co. v. Moore*, 121 U. S. 537.

The presiding judge carefully instructed the jury to the effect that plaintiff could not recover if she had been negligent, the question of whether she was negligent was submitted to the jury, upon conflicting testimony; the jury found a verdict for plaintiffs and the presiding judge refused to set that verdict aside, on motion for a new trial. The Circuit Court of Appeals erred in treating the question of negligence as a question of law. That court had no jurisdiction to enter upon a review of the entire testi-

mony. Such action was not in accordance with the rules of the common law, as understood at the time when the Seventh Amendment to the Constitution was adopted.

Mr. James H. Torrey, with whom *Mr. W. S. Opdyke* and *Mr. Lewis E. Carr* were on the brief, for respondent:

The Pennsylvania act of 1905 is a valid act applicable by the Conformity Act of Congress to courts of the United States within the State of Pennsylvania. *Delmas v. Kemble*, 215 Pa. St. 410; *Joyce v. Balto. & Ohio R. R.*, 230 Pa. St. 1; *Rocap v. Bell Telephone Co.*, 230 Pa. St. 597; *Fries-Breslin Co. v. Bergen*, 168 Fed. Rep. 360; *Smith v. Jones*, 181 Fed. Rep. 819; *S. C.*, 104 C. C. A. 329.

The practice of entering judgments *non obstante veredicto* has long existed in Pennsylvania. *Casey v. Pennsylvania Asphalt Co.* 109 Fed. Rep. 746, adopted in 114 Fed. Rep. 189, *S. C.*, 52 C. C. A. 145; *Fisher v. Sharadin*, 186 Pa. St. 568, *S. C.*, 40 Atl. Rep. 1091; *Boyle v. Mahanoy City*, 187 Pa. St. 1, *S. C.*, 40 Atl. Rep. 1093; *Carstairs v. American Bonding & Trust Co.*, 116 Fed. Rep. 449, *S. C.*, 54 C. C. A. 85.

The provisions of the act of 1905 have been adopted and followed in the practice in the United States courts in Pennsylvania. The statute is of the kind to which the Conformity Act applies. *Fries-Breslin Co. v. Bergen*, *supra*; *Townsend v. Jemison*, 7 How. 706; *Sawin v. Kenny*, 93 U. S. 289; *Bond v. Dustin*, 112 U. S. 607; *Ft. Scott v. Eads*, 117 Fed. Rep. 51; *S. C.*, 54 C. C. A. 437. See also, *MacCord v. Balto. & Ohio R. R. Co.*, 187 Fed. Rep. 443; *Delaware, L. & W. R. R. Co. v. Troxell*, 183 Fed. Rep. 373.

Under the act of Congress of 1872, the United States courts sitting in Pennsylvania are bound by the practice as to non-suits regulated by the state statute. *Central Transp. Co. v. Pullman*, 139 U. S. 40; *Coughran v. Bigelow*, 164 U. S. 308. By analogy the United States courts sitting in Pennsylvania are equally required to follow the

practice with reference to judgments *non obstante veredicto* prescribed by the act of 1905.

The action of the Court of Appeals in this case does not constitute a reëxamination of the facts found by the jury, prohibited by the Seventh Amendment to the Constitution of the United States. *Delmas v. Kemble*, 215 Pa. St. 410; *Southern Pacific Co. v. Pool*, 160 U. S. 438.

There can be no doubt that where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt where the facts are undisputed or clearly preponderant that the question of negligence is one of law. *Union P. R. Co. v. McDonald*, 152 U. S. 262; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, and authorities cited; *Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S. 245; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 241.

The trial court in this case had power to, and under the defendant's requests for charge, if in accordance with the facts, was bound to, direct a verdict for the defendant at the close of the trial. *Schofield v. Railroad*, 114 U. S. 615, 616; *Elliott v. Railroad*, 150 U. S. 245, 246.

Even though the words "common law" in the Seventh Amendment referred to the common law of England and not that of the several States, it is not clear that the former does not permit the entry of judgment for defendant *non obstante veredicto*. *Rand v. Vaughan*, 1 Bing. N. C. 767, 27 Eng. C. L. R. 568; *Regina v. Governor of Darlington School*, 6 Q. B. 704, 57 Eng. C. L. R. 703; *Benson v. Duncan*, 3 Exch. 652.

Independently of the act of 1905, the Circuit Court of Appeals had power to reverse the judgment upon the defendant's fourth specification of error in the cause as it came before that court.

The Circuit Court of Appeals having found vital error in the submission of the case to the jury, it could at least

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have reversed with *venire facias de novo*, and should still be given the opportunity to enter such judgment if this court should find that the judgment afterward entered in favor of the defendant was erroneous. *Parsons v. Bedford*, 3 Pet. 443-448; *Capital Traction Co. v. Hof*, 174 U. S. 1-3.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages for injuries and loss occasioned, as was alleged, by negligence of a railroad company resulting in the collision of one of its trains with a vehicle passing over a grade crossing in Pennsylvania. The negligence charged against the defendant was the failure to give due and timely warning of the approach of the train, and the defense interposed was the freedom of the defendant from the negligence charged, and the failure of one of the plaintiffs, who was driving the vehicle, to take reasonable precautions, before attempting to drive over the crossing, to ascertain whether she could do so in safety. In the Circuit Court there was a verdict and judgment for the plaintiffs, and the defendant took the case on a writ of error to the Circuit Court of Appeals. That court treated the record as presenting, in substance, two questions: First, whether there was any substantial evidence of actionable negligence on the part of the defendant, and, second, whether the evidence conclusively established the defense of contributory negligence. Upon examining the evidence purporting to be set out in the record, the Circuit Court of Appeals answered the first question favorably to the plaintiffs and the second favorably to the defendant, and accordingly reversed the judgment. 172 Fed. Rep. 328. The case was then brought here on a writ of certiorari granted on the petition of the plaintiffs.

Assuming, but without so deciding, that the state of the record was such as to justify the Circuit Court of Appeals in examining the evidence and determining whether it conclusively established the defense of contributory negligence, we come to consider whether that question was rightly decided.

As is often true in such cases, some matters were not disputed at the trial, while others were the subjects of conflicting testimony or of testimony from which different inferences reasonably could be drawn. The matters not disputed were these: The injury occurred in the daytime, at a grade crossing in a small country village. The defendant's tracks, which were three in number, ran in a northerly and southerly direction and crossed the highway at right angles. About 700 feet south of the crossing the tracks curved to the west, and when cars were occupying the east track south of the crossing a traveler on the highway east of the crossing could not see a train approaching from the south on either of the other tracks. Mrs. Flannelly, one of the plaintiffs and wife of the other, had occasion to drive along the highway from her home, a few miles east of the railroad, to a point on the other side of it. Seated in the vehicle with her were two small boys. As she neared the crossing a freight train was approaching on the east track from the north. She stopped about 40 feet from that track and waited for the train to pass, which took some time, as it was long and moving slowly. Before this train obscured the view she looked along the tracks to the south and observed that no train was in sight coming from that direction. After the rear of the freight train passed about 150 feet beyond the crossing she drove to the first track, or near it, and, on looking in both directions and seeing no train approaching, started to drive over the tracks. Her view at that time extended 300 feet or more to the south along the second track. As she was passing over that

track a passenger train approaching thereon from the south sounded a sharp danger signal, and soon struck a rear wheel of her vehicle, thereby wrecking the latter, inflicting bodily injuries on her, and killing one of the boys. The train was moving at a rate of from 50 to 60 miles an hour, or from 73 to 88 feet per second. There was also testimony, more or less disputed, from which the jury reasonably could have found that no whistle was sounded by the passenger train at the place where such a warning of its approach was usually and properly given; that the freight train came to a stop before Mrs. Flannelly drove on the tracks; that she listened attentively for signals given by approaching trains, but heard none, other than the danger signal which came too late to be of avail; that her horse became restive and nervous before she advanced to the crossing; that when the danger signal was sounded by the passenger train the horse halted, reared and delayed their progress between five and ten seconds; and that as that signal was sounded she saw the passenger train emerge from a volume of smoke or steam which was hanging over the tracks to the south.

The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And, generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences reasonably may be drawn from it.

We think the evidence in this case, when tested by these standards, required that the defense of contributory negligence be submitted to the jury as a question of fact, as was done by the Circuit Court. The conclusion to the contrary in the Circuit Court of Appeals was rested upon

the theory that the freight train did not stop after clearing the crossing but continued in a southerly direction, thereby giving promise that the obstruction to the view along the tracks on that side of the crossing would quickly disappear. But a careful examination of the record satisfies us that there was evidence from which the jury could well have found that the train came to a full stop about 150 feet south of the crossing before Mrs. Flannelly started to cross over. If it did, she hardly could be declared negligent for failing to await its further movements, of which she knew nothing. Besides, if the action of her horse was as described, she ought not to be charged with negligence in not anticipating it.

Other questions were discussed at bar and in the briefs, but as, in the view which we take of the evidence examined by the Circuit Court of Appeals, the judgment of the Circuit Court should have been affirmed, the other questions need not be considered.

Judgment reversed.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY *v.* WAGNER ELECTRIC AND MANUFACTURING COMPANY.

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

No. 179. Argued March 1, 1912.—Decided June 7, 1912.

Where the infringer has sold or used a patented article, the patentee is entitled to recover all of the profits.

Where a patent, though using old elements, gives the entire value to the combination, the patentee is entitled to recover from an infringer all the profits.

Where profits are made by using an article patented as an entirety, the infringer is liable for all the profits, unless he can show, and the

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burden is on him, that the profits are partly the result of some other things used by him. *Elizabeth v. Pavement Co.*, 97 U. S. 126.

Where the patent admittedly creates only a part of the profits, the patentee is only entitled to that part and he must apportion the infringer's profits and show by reliable and satisfactory evidence either what part of the profits are attributable to his patent or that the entire value of the infringing article is attributable to his patent. *Garretson v. Clark*, 111 U. S. 120.

Congress has legislated, Rev. Stat., § 4921, with a view to affording the patentee ample redress against the infringer, but the general rule of law that the burden is on the one suing for profits to show that they had been made applies.

The patent itself is evidence of the utility of the claim and an infringer is estopped from denying that it is of value.

Where the plaintiff patentee shows that profits have been made by the use of his patent, but defendant proves that there were other elements contributing to the profits, it then devolves upon the plaintiff to apportion the amount of profits attributable to the use of his patent.

Where the infringer, however, by commingling the elements renders it impossible for the patentee to meet the requirement of apportionment, the entire inseparable profit must be given to the patentee. In such a case, as in that of a trustee *ex maleficio* confusing gains, the loss should fall on the guilty and not on the innocent.

This rule applies even if the patented device infringed did not preponderate the creation of profits. The owner of a small part of a fund is equally entitled to protection as the owner of a larger share.

While the rule applied may ultimately shift the burden so as to cast it on the defendant, it is justly cast upon one who should bear it, as he wrought the confusion.

Where on reversal, a decree for appellant would deprive appellee of the right to ruling on exceptions taken by him to the master's report which were not passed on by the court, and it appears that other questions of law were not passed on below, and also that material evidence was omitted, the case will be remanded with power to hear and determine on new testimony and for further proceedings not inconsistent with the opinion.

173 Fed. Rep. 361, reversed.

THE current produced by an electric generator is of relatively low pressure, and for that reason it is impracticable to utilize it, for power purposes, more than five or

six miles from the central station. It was found, however, that this pressure, or voltage, could be increased by the use of a transformer or converter, consisting of a metal core, through and around which are wound primary insulated wires leading from the generator. Secondary wires, also insulated, are wound through and around the same core, and carried thence to the point of application. The voltage is increased or decreased according as the secondary wires are wrapped around the core more or less frequently than the primary wires.

One of the consequences of thus transforming the current is the generation of heat. In small machines this is corrected by radiation, but in large ones the heat "ages" the iron, lessens the efficiency of the transformer and, in time, deteriorates the insulation around the wires. This latter result causes short circuits, makes it impracticable to take advantage of the increased voltage, and thus again restricts the area in which currents of more than 10 K. W. can be used for producing light and power. 112 Fed. Rep. 417.

Many efforts were made to overcome this difficulty, but without success until July 12, 1887, when George Westinghouse, Jr., secured patent 366,362 for an "Electrical Converter," which, his application stated, was intended to prevent the converter becoming "overheated when employed for a long time in transforming currents of high electro motive force." Extracts from the specifications and claims are copied in the margin.¹

¹ "The core is preferably composed of thin plates of soft iron . . . separated individually or in pairs from each other by thin sheets of paper or other insulating material. . . . The plates are preferably constructed with two rectangular openings through which the wires pass. . . . Each group of—say five or six plates—is preferably separated from the succeeding group by air spaces. These may be produced by passing tubes, which may be of soft iron or other metal, or of vulcanized fibre, along the lengths of the plates. It may be sufficient in other cases to block the group of plates apart at intervals instead of

Referring specially to the specifications and Claim 4, which is here involved, and speaking generally rather than technically, it will be seen that the transformer consisted of a core, composed of groups of thin metal plates, so plugged apart as to leave (a) open spaces in the core. The primary and secondary wires were wound through rectangular openings near the ends of these plates. The entire apparatus was then placed in a case filled with non-conducting oil, which, when heated, circulated in and around the transformer, being cooled by contact with the exterior surface of the enclosing box or receptacle. This invention proved to be of immense value and made it possible (112 Fed. Rep. 417, 422; 117 Fed. Rep. 495, 498) to transmit and apply powerful currents so as to produce power and light at a great distance from the generating plant. The patent was utilized by the Union Carbide Co., and on May 10, 1900, the Westinghouse Electric & Manufacturing Company as assignee of George Westinghouse sued that Company for infringing Claim 4. The transformers which the Carbide Company was using had been sold by the Wagner Company. As vendor and

extending the tubes the entire length. Preferably also the primary and secondary coils are separated from each other in a similar manner."

Where the converter is to be used in the open air, the tube will permit a free circulation of air and thus aid in keeping the converter cool.

It may be preferred in some instances to surround the converter with some oil, or paraffine or other suitable material, which will assist in preserving insulating and will not be injured by heating. This material when in a liquid form circulates through the tubes and intervening spaces of the coils and plates, and preserves the insulation, excludes the moisture, and cools the converter.

The entire converter may be sealed into an inclosing case . . . which may or may not contain a non-conducting fluid or gas.

"I claim as my invention . . . 1 . . . ; 2 . . . ; 3 . . .

4. The combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing case, and a non-conducting fluid or gas in said case adapted to circulate through said spaces and about the converter."

warrantor the latter therefore defended and admits that the decree (112 Fed. Rep. 417) of November 11, 1901, sustaining the validity of Claim 4, is, as to it, *res adjudicata*. That decree was affirmed April 29, 1902 (117 Fed. Rep. 495), and on June 24, 1902, the Westinghouse Company brought this suit (129 Fed. Rep. 604) against the Wagner Company, praying for damages and profits, and also for an injunction against further infringement.

It appeared that after the decree in the *Carbide Case* the Wagner Company had instructed its experts to build a transformer that would not infringe the Westinghouse patent. They thereupon devised one, referred to herein as Type M, which omitted the (a) open spaces *in the core*, but substituted (b) spaces *between the coil*, and (c) spaces *between the coil and the core*.

The court held that these Type M Transformers eliminating spaces in the core were not an infringement of Claim 4 and thereupon refused the injunction. 129 Fed. Rep. 604. But the defendant in its answer admitted that it had infringed Claim 4 by the manufacture of transformers, which, as it subsequently developed, contained openings (a) in the core, and also (b) openings between the coils, and (c) between the coil and core. The case was therefore referred to a Master to state an account of damages and profits arising from the infringement of Claim 4 prior to June 24, 1902.

On the hearing it appeared that the Wagner Company manufactured various electrical appliances that had been made in the same shop, by the same workmen and under the same general superintendence as that employed in making the transformers. No account had been kept which would show the cost of labor and shop expenses attributable to these transformers. Nor was there anything on the books indicating what, if any, profit had been realized from their sales.

The gross receipts of \$2,314,744.75 were mingled. The

books only showed a gross profit of about eight per cent., but it appeared that the plant had grown and the business had extended during the period covered by the accounting. There was testimony that the company had the general policy of fixing prices at a figure which would net twenty-five per cent. The Master made an elaborate analysis of the data as to flat cost of labor and material, shop expenses and commissions applicable to the transformers. From this data and the policy of the company he ultimately reached the conclusion that the company had made a profit of \$132,433 on the \$955,271.76 which the books showed had been received from the sale of several thousand infringing transformers. But at the close of the plaintiff's testimony the defendant demurred to the evidence on the ground that it failed to show that any profit had been made in the sale of the infringing transformers. The demurrer was overruled. The defendant then claimed that the infringing transformers contained elements of the patent which were not embraced in Claim 4, for which alone this suit was proceeding, and that no profit due to those elements could be recovered in this case, unless the plaintiff apportioned the gains due solely to Claim 4. It also offered evidence, including a heat test, tending to support its contention that a transformer, containing only the elements covered by Claim 4, was of little utility; that it operated mainly to reduce the heat in the core, when it was much more important to keep the coils cool; that the infringing transformers contained spaces (b) between the coils and (c) between coil and core which, it contended, were additions and non-infringing improvements, contributing to the profits, if any had been made.

In reply and to disprove the defendant's contention, the plaintiff relied among other things on the fact that upon the hearing of the application to enjoin the defendant from manufacturing transformers containing only (b)

spaces between the coil and (c) between coil and core, the Wagner Company had contended that these grooves or channels had been used to avoid infringement, although they "crippled the coils" and actually "lessened the electrical efficiency of the transformers."

At the conclusion of the lengthy testimony, the substance of which is barely outlined above, the Master found from the evidence and under the decision in 117 Fed. Rep. 498 binding on defendant, that Claim 4 was an entirety, covering not only open spaces in the core, but the use of the oil in a closed receptacle for cooling the transformer; that all of the commercial value of those sold by the defendant was due to the use of Claim 4 of plaintiff's patent and not to additions made by the defendant. He recommended that a decree should be entered against the defendant for \$132,433.35, "being approximately 25 per cent on the net amount of the sales of infringing transformers after deducting commissions and fixing the factory cost at 40 per cent."

The defendant filed many exceptions, among others:

"That the complainant has not shown what was the profit made by defendant on its transformers due to the patented invention of Claim 4, as distinguished and segregated from the other features contained in said transformers."

There were also numerous exceptions as to the Master's method of stating the account. These and others were not specifically passed on because the Circuit Court and the Circuit Court of Appeals (one judge dissenting) held, 173 Fed. Rep. 361, that Claim 4 was a limited detailed claim; that the additions made by the defendant were non-infringing and valuable improvements which contributed to the profits; that the burden of apportionment was upon plaintiff, and, having failed to separate the profits, it was only entitled to a decree for nominal damages. The court (one judge dissenting) also affirmed

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Argument for Respondent.

the decree that Type M was not an infringement of Claim 4.

Mr. Thomas B. Kerr and Mr. Paul Bakewell for petitioner.

Mr. Melville Church for respondent:

Complainant's conduct in delaying its assertion of a construction of the claim broad enough to include defendant's modified device presents a case of equitable estoppel. *Lane & Bodley Co. v. Locke*, 150 U. S. 193-200; *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 519; *Richards v. Mackall*, 124 U. S. 183; *Godden v. Kimmel*, 99 U. S. 201; *Galliher v. Cadwell*, 145 U. S. 368-372; *Gildersleeve v. New Mexico Mining Co.*, 161 U. S. 573-578; *McLaughlin v. People's Ry. Co.*, 21 Fed. Rep. 574; *York v. Passaic &c. Co.*, 30 Fed. Rep. 471; *Westinghouse Air Brake Co. v. N. Y. Air Brake Co.*, 111 Fed. Rep. 741.

Claim 4 of the Westinghouse patent in suit is limited to a transformer having open spaces between the groups of core plates. The defendant's transformers in the Carbide case had such open spaces between the groups of core plates. Properly construed, the opinion of the court in the Carbide case limits the claim to such an arrangement of core spaces. The exigency required no broader interpretation. This limited interpretation was found and followed by Judges Bradford, Kirkpatrick, Amidon and Adams, on the Circuit, and by Judges Van Devanter and Riner in the Court of Appeals for the Eighth Circuit.

No injunction can now issue, the patent having expired and an accounting should be refused. *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514; *Woodmense & Hewitt Mfg. Co. v. Williams*, 15 C. C. A. 520; *Price v. Steel Co.*, 46 Fed. Rep. 107; *Low v. Fels*, 35 Fed. Rep. 361; *Cohn v. Gottschalk*, 2 N. Y. Supp. 13.

Defendant does not contend that the Westinghouse improvement was of no value, but of very slight value: and does contend that the burden was upon complainant in the accounting to show that value in dollars and cents.

To justify an award to complainant it must appear that defendant realized a profit from using the invention of Claim 4 over and above what it would have realized by using that which was open to it and which it had a right to use. *Calkins v. Bertand*, 8 Fed. Rep. 755-760; *Maier v. Brown*, 17 Fed. Rep. 736; *Reed v. Lawrence*, 29 Fed. Rep. 915; *Mowry v. Whitney*, 14 Wall. 620; *Littlefield v. Perry*, 21 Wall. 205.

The general rule is that the burden of proof is on complainant to show profit due to a patented improvement. *Garretson v. Clark*, 111 U. S. 120; *Tomkinson v. Willets Mfg. Co.*, 34 Fed. Rep. 536; *Mosher v. Joyce*, 51 Fed. Rep. 441; *Robbins v. Illinois Watch Co.*, 81 Fed. Rep. 957; *Wales v. Waterbury Mfg. Co.*, 101 Fed. Rep. 182; *Brickill v. Mayor of N. Y.*, 112 Fed. Rep. 65; *Lattimore v. Hardsogg Mfg. Co.*, 121 Fed. Rep. 986; *Cary Mfg. Co. v. De Haven*, 139 Fed. Rep. 262; *Westinghouse Air Brake Co. v. N. Y. Air Brake Co.*, 140 Fed. Rep. 545; *Force v. Sawyer-Boss Mfg. Co.*, 143 Fed. Rep. 894.

The defendant showed affirmatively no substantial difference between the infringing and non-infringing transformers and the complainant did not prove the value of the slight difference, though the burden of proof was upon complainant. *Garretson v. Clark*, 111 U. S. 120; *Keystone Mfg. Co. v. Adams*, 151 U. S. 145; *Canda Bros. v. Mich &c.*, 81 C. C. A. 420-423.

Complainant offered no evidence to rebut or contradict defendant's evidence as to the value of things defendant was free to use.

From no point of view is defendant estopped to show the degree of utility of the improvement covered by Claim 4. *Gibbs v. Hoefner*, 19 Fed. Rep. 332; *Lamb Knit*

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Goods Co. v. Lamb Glove & M. Co. (C. C. A.), 120 Fed. Rep. 272; *International Tooth Crown Co. v. Hanks &c.* (C. C. A.), 111 Fed. Rep. 920; *Lee v. Pillsbury*, 49 Fed. Rep. 750.

The decree in the *Carbide Case* was interlocutory and not final and the matters therein covered are not, therefore, *res judicata*. *Perkins v. Fourniquet*, 6 How. 206; *Keystone Iron Co. v. Martin*, 132 U. S. 91-94; *McGourkey v. Toledo &c.*, 146 U. S. 536; *Rumford Chemical Works v. Hecker*, Fed. Cases, No. 12133; *Harmon v. Struthers*, 48 Fed. Rep. 260; *Morss v. Knapp*, 37 Fed. Rep. 351; *Roemer v. Neumann*, 26 Fed. Rep. 332; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 58 Fed. Rep. 721.

Estoppel must be certain to every intent. *Russell v. Place*, 94 U. S. 606.

It is doubtful if complainant can urge *res judicata* in this court. Defendant could not bring the *Carbide Case* to this court for review. If complainant brings the judgment in that case before this court and invokes it, it may be reviewed by this court.

The prior act shown by the record may be examined as an aid in the interpretation of Claim 4, despite all the judgments that have been rendered under the patent in suit by the courts below. *Vance v. Campbell*, 1 Black, 427; *Brown v. Piper*, 91 U. S. 37; *Dunbar v. Meyers*, 94 U. S. 187; *Eachus v. Broomall*, 115 U. S. 429.

Complainant does not here contend that defendant's modified device is within Claim 4, which is an admission of the limited character of the claim.

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

The statute makes the decision of the Circuit Court of Appeals final in patent cases, and the plaintiff's petition for the writ of certiorari herein was not granted for the

purpose of reëxamining the court's ruling that defendant's Type M Transformer was not an infringement of Claim 4 of the Westinghouse patent. The writ was issued in view of the holding that, though the Master found that the defendant had made a profit of \$132,000 from the sale of infringing transformers, the plaintiff could yet only recover \$1 because it failed to separate the profits made by its patent from those made by the defendant's addition.

1. The question as to who has the burden of proof, in cases like this, is one of great practical importance and constantly arises in patent cases. There has been much controversy on the subject and a conflict in the decisions. The authorities cited in the briefs of the two litigants, and others bearing on the subject, have been examined, but we shall not undertake to separately review them, for they disagree not so much as to the rule as to its application. It will be sufficient for the present purposes to say that—

(a) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits.

(b) Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. *Hurlbut v. Schillinger*, 130 U. S. 456, 472.

(c) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits "unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him." *Elizabeth v. Pavement Co.*, 97 U. S. 126.

(d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have

jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must, therefore, "give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature." *Garretson v. Clark*, 111 U. S. 120.

The real controversy arises in applying this principle to those cases where it is impossible to separate the single profit into its component parts.

2. In considering the question presented by the record here, it is to be borne in mind that Congress has legislated (Rev. Stat., § 4921) with a view of affording the patentee ample redress against the infringer. It not only makes the latter liable for damages—sometimes three-fold damages—but for all profits derived from the use or sale of plaintiff's invention. The rule as to the burden of proof has, however, been so applied that this statutory right has been often nullified by those infringers who had ingenuity enough to smother the patent with improvements belonging to themselves or to third persons. In such cases the greater the wrong the greater the immunity; the greater the number of improvements the greater the difficulty of separating the profits. And if that difficulty could only be converted into an impossibility the defendant retained all of the gains, because the injured patentee could not separate what the guilty infringer had made impossible of separation.

Manifestly such consequences demonstrate that either

the rule or its application is wrong. The rule is sound, for it but announces the general proposition that the plaintiff must prove its case and carry the burden imposed by law upon every person seeking to recover money or property from another. But the principle must not be pressed so far as to override others equally important in the administration of justice. It may serve to illustrate the rule and its limitations, if, at the risk of stating the obvious, we apply it to the various steps of this case.

The plaintiff proved its patent and that it had been infringed by the defendant in the manufacture of several thousand transformers which sold for \$955,000. The patent was itself evidence of the utility of Claim 4, and the defendant was estopped from denying that it was of value. *Lehnbeuter v. Holthaus*, 105 U. S. 94. But no matter how great its presumptive or actual value it did not follow that the defendant had made a profit by the sale of the infringing transformers. And so, having sued for profits, the Westinghouse Company was under the burden of showing they had been made. This it did to the satisfaction of the Master, who found that the defendant had netted \$132,000 from their sale.

The defendant then had the right either to disprove the plaintiff's case or to offer evidence in mitigation, or both. Accordingly it submitted evidence tending to show that the spaces added by the defendants were non-infringing and valuable improvements which had contributed to the making of the profits. In reply the Westinghouse Company insisted that Claim 4 was an entirety, covering a circulatory system in and around a transformer placed in an oil-filled receptacle; that it embraced the "intervening spaces in the coil" because at least a part of the coil was in the core; that if these spaces were held not to be infringements they had in fact, as employed by the defendant, added nothing to the profits, but on the contrary had crippled the coil and lessened the electrical

efficiency of the transformer. 129 Fed. Rep. 607. For that reason the plaintiff contended that it had shown that all the gains were "legally attributable to the patented feature." *Garretson v. Clark*, 111 U. S. 120; *Elizabeth v. Pavement Co.*, 97 U. S. 127 (6); *Crosby Valve Co. v. Safety Valve Co.*, 141 U. S. 441, 454; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 144-145. This view was sustained by the Master. But if it be assumed, as was found to be the fact by the court, that the spaces were non-infringing and valuable improvements, it may then have *prima facie* appeared that these changes had contributed to the profits. If so, the burden of apportionment was then logically on the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention.

3. Lindley, L. J., said in *Siddell v. Vickers*, 9 Rep. Pat. Cases, 162, that there "was no form of account more difficult to work out than an account of profits." But that is no reason why the plaintiff should be denied its rights. The problem here, though different, was in many respects analogous to that presented in those cases in which it is necessary to separate the interstate from the intrastate earnings made by a railroad where the same track, rolling stock, depots and labor are employed at the same time in making gross receipts. These commingled expenses must be apportioned between the two classes of earnings in order to determine whether the intrastate rate is confiscatory. The courts, "while recognizing the impossibility of reaching a conclusion that is mathematically exact," have, in addition to all the other evidence bearing on the question, received "the testimony of experts as to the relative cost of doing a local and through business." *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 178. The converse is true. What is permissible in an effort to separate costs may also be done in a patent case where it is necessary to separate profits. *Root v. Lake*

Shore & M. S. Railway Co., 105 U. S. 189, 198. See also *Rubber Co. v. Goodyear*, 9 Wall. 802. In effect, this was attempted in the present case. Witnesses who had been in the employment of the defendant and who had kept the books, purchased the material, superintended the construction and fixed the price of the transformers, were not able to show that profits had been made, and consequently were not able to show what part of the profits was attributable to the patent and what to the additions, if found to be non-infringing and valuable improvements.

4. Having, by books and other data, proved to the satisfaction of the Master the existence of profits, the plaintiff had carried the burden imposed by law, and established every element necessary to entitle it to a decree, except one. As to that, the act of the defendant had made it not merely difficult but impossible to carry the burden of apportionment. But plaintiff offered evidence tending to establish a legal equivalent. It had proved the existence of a fact which, whether treated as a rule of evidence or as a matter of substantive law, would entitle it to a decree for all the profits. The method was different from that mentioned in the second branch of the rule in the *Garretson Case*, 111 U. S. 120, but the plaintiff had now presented proof to demonstrate its right to the whole of the fund because of the fact that the defendant had inextricably commingled and confused the parts composing it. This result would not be in conflict with the principle which in the first instance imposed the burden of proof on the plaintiff, but merely gave legal effect to a new fact which as a matter of law entitles the patentee to a particular judgment. It presented a case where the court was called on to determine the liability of a trustee *ex maleficio*, who had confused his own gains with those which belonged to the plaintiff. One party or the other must suffer. The inseparable profit must be given to the patentee or in-

fringer. The loss had to fall on the innocent or the guilty. In such an alternative the law places the loss on the wrong-doer.

5. It is said, however, that the rule does not apply to patent cases. Why it should be limited does not appear. It is admitted that an injunction may be granted against selling infringing devices, even though the result will be to prevent the defendant from using valuable appliances confused with the patented device. And Lord Eldon treated this conceded right to enjoin as an application of the rule relating to the confusion of goods. He therefore restrained the publication of a book, a large portion of which was original, because copyright matter was incorporated therein, saying in *Mawman v. Tegg*, 2 Russ. 385, 390:

“As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say, that, if the parts, which have been copied, cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing.”

This case was cited and approved in *Callaghan v. Myers*, 128 U. S. 617, 658, where the infringer who had blended his own with copyright matter, in a volume which sold for a profit, was made to “abide the consequences on the same principle that he who has wrongfully produced a confusion of goods must alone suffer.” In one of these cases the original matter was less, and in the other more, than that unlawfully appropriated. In both, as in patent cases, the infringer was a “trustee for the plaintiff in respect of profits.” *Root v. Lake Shore & M. S. Railway*, 105 U. S. 189, 214. And the liability is not lessened because the confusion is due to a wrongful appropriation by a trustee *de son tort* instead of carelessness of a trustee lawfully appointed. Nor is it limited to those cases where

the patented device is shown to have preponderated in the creation of the profits. The owner of a small part of the fund is as much entitled to the protection of the law as the owner of a larger share. The rule, however, is not intended to penalize the infringer, nor to give the patentee profits to which he is clearly not entitled. So that where, by general evidence, expert testimony or otherwise, it is shown that his patent is of relatively small value, it will often be possible to prove that, at the utmost, it could not have contributed to more than a given amount of the profits. *Lupton v. White*, 15 Vesey Jr. 432-440. In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits.

6. But when a case of confusion does appear—when it is impossible to make a mathematical or approximate apportionment—then from the very necessity of the case one party or the other must secure the entire fund. It must be kept by the infringer, or it must be awarded, by law, to the patentee. On established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong. The fact that he may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability. He cannot appeal to a court of conscience to cast the loss upon an innocent patentee and by judicial decree repeal the provision of Rev. Stat., § 4921, which declares that in case of infringement the complainant shall be entitled to recover the “profits to be accounted for by the defendant.”

This conclusion is said to be in conflict with the *Garret-*

son and other decisions which, it is claimed, justify the conclusion that the defendant is entitled to retain all of the profits even where the patentee is unable to make an apportionment. *Warren v. Keep*, 155 U. S. 265. An analysis of the facts of those cases will show that they do not sustain so extreme a doctrine. For they deal with instances where the plaintiff apparently relied on the theory that the burden was on the defendant, and for that, or other reasons, made no attempt whatever to separate the profits. None of the cases cited discuss the rights of the patentee who has exhausted all available means of apportionment, who has resorted to the books and employes of the defendant, and by them, or expert testimony proved, that it was impossible to make a separation of the profits. This distinction, between difficulty and impossibility, is involved in the ruling by the Circuit Court of Appeals for the Sixth Circuit in *Brennan & Co. v. Dowagiac Mfg. Co.*, 162 Fed. Rep. 472, 476, where the *Garretson Case* was distinguished, and the court said:

"In the present case the infringer's conduct has been such as to preclude the belief that it has derived no advantage from the use of plaintiff's invention. . . . In these circumstances, upon whom is the burden of loss to fall? We think the law answers this question by declaring that it shall rest upon the wrongdoer, who has so confused his own with that of another that neither can be distinguished. It is a bitter response for the court to say to the innocent party, 'You have failed to make the necessary proof to enable us to decide how much of these profits are your own;' for the party knows, and the court must see, that such a requirement is impossible to be complied with. The proper remedy to be applied in such cases is that stated by Chancellor Kent in *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 108, where he said: 'The rule of law and equity is strict and severe on such occasion. . . . All the inconvenience of the confusion is thrown upon the

party who produces it, and it is for him to distinguish his own property or lose it.'"

It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment. If then the burden of separation is cast on the defendant it is one which justly should be borne by him, as he wrought the confusion.

7. This conclusion would apparently result in a decree in favor of the appellant. But such an order, under the peculiar facts of this case, would operate to deprive the defendant of the right to a ruling on the exceptions filed to the report. The Master held that the entire commercial value of the transformer was due to the invention covered by Claim 4, and that therefore all the profits belonged to the Westinghouse Company. The court, on the other hand, found that the defendant's additions were not infringements and had contributed to the profits, and that because of the failure to make a separation the plaintiff was entitled only to nominal damages. For this reason it did not specifically pass on defendant's exceptions. Other questions of law and fact involved in the accounting were not considered. Neither the court nor the Master discussed the question. Apportionment and the record does not afford satisfactory data for entering a final decree. This no doubt arises from the fact that both parties relied so entirely upon their theory that the burden was on the other, that facts were not proved which might otherwise have been established. The decree is therefore reversed and the case remanded, with power to hear and determine motions to amend the pleadings and with directions that the case be recommitted to a Master for a new hearing on

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Syllabus.

all the questions involved in the original reference, and, on evidence already submitted and such additional testimony as may be offered, for further proceedings not inconsistent with this opinion.

Reversed.

MURPHY v. PEOPLE OF THE STATE OF
CALIFORNIA.

ERROR TO THE SUPERIOR COURT OF LOS ANGELES COUNTY,
STATE OF CALIFORNIA.

No. 204. Argued March 11, 1912.—Decided June 7, 1912.

While the Fourteenth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent legislation intended to regulate useful occupations, which because of their nature and location, may prove injurious or offensive to the public.

The Fourteenth Amendment does not prevent a municipality from prohibiting any business which is inherently vicious and harmful.

The Fourteenth Amendment does not prevent a State from regulating or prohibiting a non-useful occupation which may become harmful to the public, and the regulation or prohibition need not be postponed until the evil is flagrant.

An ordinance prohibiting the keeping of billiard halls is not unconstitutional under the Fourteenth Amendment, either as depriving the owner of the hall of his property without due process of law or as denying him the equal protection of the laws.

Where, in the exercise of the police power, the municipal authorities by ordinance determine that a certain class of resorts should be prohibited as harmful to the public, the courts cannot except from the operation of the statute one of the class affected on the ground that his particular place does not produce the evil aimed at by the ordinance.

One cannot be heard to complain of his money loss by reason of the legislating out of existence of a business in which he had invested and which is not protected by the Federal or state constitution and which he knew was subject to police regulation or prohibition.

A classification in a statute regulating billiard halls based on hotels having twenty-five rooms is reasonable; and the owner of a billiard hall, not connected with a hotel, is not denied equal protection of the laws by an ordinance prohibiting keeping billiard halls for hire because hotels having twenty-five rooms can maintain a billiard hall for their regular guests.

One who does not keep a hotel with less than the specified number of rooms, cannot be heard to complain that a statute denies the owners of the smaller hotels the equal protection of the laws, it not appearing that the provision was inserted for purposes of evasion or that the ordinance was unequally enforced.

The fact that one of a class excepted from the operation of a police ordinance on complying with a condition, does not comply therewith, does not render the statute unconstitutional as against the classes upon which it operates, but renders the person violating the condition subject to the penalties of the ordinance.

The ordinance of South Pasadena, California, passed in pursuance of police power conferred by the general law of the State, prohibiting the keeping of billiard halls for hire, except in the case of hotels having twenty-five rooms or more for use of regular guests, is not unconstitutional under the Fourteenth Amendment either as depriving the owners of billiard halls not connected with hotels of their property without due process of law, or as denying them equal protection of the laws.

155 California, 322, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a police law of California regulating billiard halls, are stated in the opinion.

Mr. Alfred S. Austrian, with whom *Mr. Levy Mayer* was on the brief, for plaintiff in error:

The police power may be exercised to protect the public health, morals, safety and the general welfare, but it is at all times subject to the constitutional limitations that it may not arbitrarily take away the lawful rights of a citizen. *Lawton v. Steele*, 152 U. S. 133, 137; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Dobbins v. Los Angeles*, 195 U. S. 223; *Yick Wo v. Hopkins*,

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Argument for Plaintiff in Error.

118 U. S. 356; *C., B. & Q. R. R. v. Illinois*, 200 U. S. 561, 592, 593.

Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative, question. *Dobbins v. Los Angeles*, 195 U. S. 223, 235; *Mugler v. Kansas*, 123 U. S. 622, 661; *G., C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 154; *Lochner v. New York*, 198 U. S. 45, 60.

If a business may be so conducted as to be harmful to the public welfare, but is not necessarily so, the legislature, under its police power, may regulate, but cannot prohibit, such business. Cases *supra*; *State v. Hall*, 32 N. J. L. 158, 159; *Pfingst v. Senn*, 94 Kentucky, 556; *S. C.*, 23 S. W. Rep. 358; *State v. McMonies*, 75 Nebraska, 443; *S. C.*, 106 N. W. Rep. 454; *Zanone v. Mound City*, 103 Illinois, 552, 558.

If a thing is not in fact a nuisance *per se* it cannot be made so by a mere declaration of the legislative will expressed in an ordinance. *Yates v. Milwaukee*, 10 Wall. 497, 505; *Boyd v. Board*, 117 Kentucky, 199; *S. C.*, 77 S. W. Rep. 669; *Board v. Norman*, 51 La. Ann. 736; *S. C.*, 25 So. Rep. 401; *Hume v. Cemetery*, 142 Fed. Rep. 552, 565.

A billiard and pool room is not a nuisance *per se*; it is not necessarily harmful to the public welfare. *State v. McMonies*, 75 Nebraska, 443; *Ex parte Murphy*, 8 Cal. App. 440; *Ex parte Meyers*, 7 Cal. App. 528; *Pfingst v. Senn*, 94 Kentucky, 556; *State v. Hall*, 32 N. J. L. 158, 159; *Breninger v. Belvidere*, 44 N. J. L. 350; *Morgan v. State*, 64 Nebraska, 369.

Even if an ordinance prohibiting all billiard and pool rooms were valid, this ordinance is unconstitutional in that it confers privileges and immunities on some citizens which it denies to others and the distinctions and classification sought to be drawn are arbitrary, are not based on natural grounds of reasonableness or public policy

and do not tend to promote the public welfare. *L. S. & M. S. R. R. v. Smith*, 173 U. S. 684; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 563; *Cotting v. Godard*, 183 U. S. 79, 112; *Re Yot Yot Sang*, 75 Fed. Rep. 983; *Nichols v. Watter*, 37 Minnesota, 264, 271; *McCue v. Sheriff*, 48 Minnesota, 236; *Lappin v. District of Columbia*, 22 App. D. C. 68, 78; *Fiscal Court v. Cox Co.*, 132 Kentucky, 738; *Bailey v. People*, 190 Illinois, 28, 37; *Yick Wo v. Hopkins*, 118 U. S. 356; *G., C. & S. F. Ry. v. Ellis*, 165 U. S. 150, 155, 159, 165; *People v. Warden*, 157 N. Y. 116; *Boyd v. Board*, 117 Kentucky, 199.

Mr. John E. Carson, with whom Mr. Lynn Helm was on the brief, for defendant in error:

Municipalities in the State of California, in the exercise of the police power conferred upon them by § 11, Art. XI of the state constitution, may either regulate or prohibit, and under such power they may prohibit a thing which is not a nuisance *per se*. *Cemetery Ass'n v. San Francisco*, 140 California, 226; *Ex parte Murphy*, 8 Cal. App. 440; *S. C.*, 97 Pac. Rep. 199; *Ex parte Lacey*, 108 California, 326.

The conducting and keep of billiard and pool rooms for hire or public use is a constant menace to the public peace and morals and they may be regulated by control and regulation or entirely prohibited. *Goytino v. McAleer*, 88 Pac. Rep. 991; *Ex parte Myers*, 6 Cal. App. 273; *Ex parte Murphy, supra*; *City of Tarkio v. Cook*, 120 Missouri, 1; *Ex parte Shrader*, 33 California, 279; *Ex parte Tuttle*, 91 California, 589; *Cemetery Ass'n v. San Francisco*, 140 California, 226; *Clearwater v. Bowman*, 72 Kansas, 92; *State v. Thompson*, 160 Missouri, 333; *Tanner v. Albion*, 5 Hill (N. Y.), 121; *Cooley's Const. Lim.* (7th ed.) 884; *Hall v. State*, 34 S. W. Rep. 22; *Webb v. State*, 17 Tex. App. 205; *State v. Jackson*, 39 Missouri, 420; *Rex v. Hall*, 2 Keb. 846; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Mugler v. Kansas*, 123 U. S. 669; *Crowley v. Christensen*,

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137 U. S. 87; *Booth v. Illinois*, 184 U. S. 425; *Corinth v. Crittenden*, 94 Mississippi, 41.

A broad distinction is recognized between useful and non-useful businesses in the exercise of the police power by municipalities, and the billiard and pool room business is not a useful one. Freund on Police Power, § 59; *Crowley v. Christensen*, 137 U. S. 86; *Ex parte Murphy*, 8 Cal. App. 440; *Goytino v. McAleer*, 88 Pac. Rep. 991; *Tarkio v. Cook*, 120 Missouri, 1; *Ex parte Shrader*, 33 California, 279; *Ex parte Tuttle*, 91 California, 589; *Cemetery Ass'n v. San Francisco*, 140 California, 226; *Munn v. Illinois*, 94 U. S. 113; *In re Smith*, 143 California, 368.

The ordinance prohibits the public pool and billiard business, making no exceptions, and it is therefore not discriminative nor class legislation. Cases *supra*, and *Ex parte Christensen*, 85 California, 208; *In re Murphy*, 155 California, 322; *Ex parte Koser*, 60 California, 177; *Schwab v. Grant*, 126 N. Y. 473; *Sonora v. Curtain*, 137 California, 587; *California Reduction Co. v. Sanitary Works*, 126 Fed. Rep. 29; *Otis v. Parker*, 187 U. S. 606; *In re Kelso*, 147 California, 609; *Ex parte Haskell*, 112 California, 412.

MR. JUSTICE LAMAR delivered the opinion of the court.

In 1908 the city of South Pasadena, California, in pursuance of police power conferred by general law, passed an ordinance which prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public use, provided it should not be construed to prevent the proprietor of a hotel using a general register for guests, and having twenty-five bedrooms and upwards, from maintaining billiard tables for the use of regular guests only of such hotel, in a room provided for that purpose.

The plaintiff in error was arrested on the charge of

violating this ordinance. His application for a writ of *habeas corpus* was denied by the Court of Appeals and Supreme Court of the State. *In re Murphy*, 8 Cal. App. 440; 155 California, 322. Thereafter the case came on for trial in the Recorder's Court, where the defendant testified that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipments; that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted, and "that there was nothing in the conduct of the business which had any tendency to immorality or could in the least affect the health, comfort, safety or morality of the community or those who frequented said place of business." This evidence was, on motion, excluded and testimony of other witnesses to the same effect was rejected.

The defendant was found guilty and sentenced to pay a fine, or in default thereof to be imprisoned in the county jail. The conviction was affirmed by the Superior Court of the County, the highest court to which he could appeal. The case was then brought here by writ of error, the plaintiff contending that the ordinance violated the provisions of the Fourteenth Amendment, claiming, in the first place, that in preventing him from maintaining a billiard hall it deprived him of the right to follow an occupation that is not a nuisance *per se*, and which therefore could not be absolutely prohibited.

The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the

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useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiff's application for *habeas corpus*, a nuisance *per se*. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game but at the place; and where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go behind their finding and inquire into local conditions; or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance. As said in *Booth v. Illinois*, 184 U. S. 425, 429:

"A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily at-

tend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. *Tanner v. Albion*, 5 Hill. 121; *City of Tarkio v. Cook*, 120 Missouri, 1; *City of Clearwater v. Bowman*, 72 Kansas, 92; *City of Corinth v. Crittenden*, 94 Mississippi, 41; *Cole v. Village of Culbertson*, 86 Nebraska, 160; *Ex parte Jones*, 97 Pac. Rep. 570.

Indeed, such regulations furnish early instances of the exercise of the police power by cities. For Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places.

Under the laws of the State, South Pasadena was authorized to pass this ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain of the money loss resulting from having invested his property in an occupation which was neither protected by the state nor the Federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

There is no merit in the contention that he was denied the equal protection of the law because, while he was prevented from so doing, the owners of a certain class of hotels were permitted to keep a room in which guests might play at the game. If, as argued, there is no reasonable basis for making a distinction between hotels with 25 rooms and those with 24 rooms or less, the plaintiff

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in error is not in position to complain, because not being the owner of one of the smaller sort, he does not suffer from the alleged discrimination.

There is no contention that these provisions, permitting hotels to maintain a room in which their regular and registered guests might play were evasively inserted, as a means of permitting the proprietors to keep tables for hire. Neither is it claimed that the ordinance is being unequally enforced. On the contrary, the city trustees are bound to revoke the permit granted to hotels in case it should be made to appear that the proprietor suffered his rooms to be used for playing billiards by other than regular guests. If he allowed the tables to be used for hire he would be guilty of a violation of the ordinance and, of course, be subject to prosecution and punishment in the same way, and to the same extent, as the defendant.

Affirmed.

HENDERSON, TRUSTEE IN BANKRUPTCY
OF BURNS, v. MAYER.

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

No. 219. Argued April 19, 1912.—Decided June 7, 1912.

The provisions of the Bankruptcy Act of 1898 preventing preferences, apply not only to mortgages and voluntary transfers but also to preferences obtained through legal proceedings; but the act was not intended to lessen rights already existing nor to defeat inchoate liens given by statute of which all creditors were bound to take notice. The general lien given by the laws of Georgia to the landlord on the property of the tenant is the equivalent, as to goods levied on by distress warrant, to the common law distress; while it does not ripen into a specific lien until the distress warrant is issued, it exists from

the time of the lease, and the lien of the distress warrant is not one obtained through legal proceedings within the meaning of the anti-preference provisions of the Bankruptcy Act.

Under the Bankruptcy Act of 1867 a statutory attachment for rent in the nature of a landlord's distress warrant levied within the preference period was not nullified or discharged by the bankruptcy proceedings and there is nothing in the act of 1898 opposed to this conclusion.

The general provisions of the Bankruptcy Act of 1898 indicate a purpose and intent, as against general creditors, to preserve rights such as those given by the Georgia statute to landlords even though not enforced until within four months of the bankruptcy.

175 Fed. Rep. 633, affirmed.

SAMUEL MAYER owned a plantation in Dooley County, Georgia, which he rented to Joseph Burns for one year. The rent not having been paid at maturity, Mayer, on Nov. 13, 1908, made an affidavit in conformity with the statute, and a justice of the peace thereupon issued a distress warrant, which, on the same day, was levied upon the cotton, corn and other products of the place. The crops found on the premises being, apparently, insufficient to pay what was due, the sheriff, at the same time, levied upon other property by virtue of § 2795 of the Code of Georgia, which declares that "Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes . . . and shall also have a general lien on the property of the debtor, liable to levy and sale, and such general lien shall date from the time of the levy of a distress warrant to enforce the same."

Three days after the levy a petition in bankruptcy was filed against Burns, the tenant, who was subsequently adjudged a bankrupt. The trustee, when elected, obtained possession of all the property seized by the sheriff, and subsequently sold it in the due administration of the estate. The proceeds of the cotton and corn were paid over to Mayer, it being conceded that the Landlord's

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Special Lien on the crops had not been affected by the bankruptcy proceedings.

Mayer also claimed that, by virtue of his general lien, he was entitled to have the balance of the rent paid out of the proceeds arising from the sale of the other property levied on, and filed his intervention to secure such an order. The trustee's objection was sustained by the referee on the ground that the Landlord's General Lien was discharged because it had been "obtained by legal proceedings" or levy made three days before the filing of the petition in bankruptcy. His ruling was reversed by the District Court (175 Fed. Rep. 633). That judgment was affirmed by the Circuit Court of Appeals without opinion. The case was then brought here by writ of certiorari, granted at the instance of the trustee, who claims that under the Georgia Code the landlord had no lien on the property prior to the levy of the distress warrant, and that whatever right had been acquired by that seizure was discharged by § 67f, which declares that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be null and void in case he is adjudged a bankrupt."

Mr. Orville A. Park, with whom *Mr. George S. Jones* and *Mr. Merrel P. Callaway* were on the brief, for petitioner:

The Georgia law must govern the bankruptcy court sitting in that State as to what liens are recognized in Georgia and how and when they arise or are obtained. *Collier on Bkcy.* (8th ed.), 741.

The construction placed upon a state statute by the highest court in the State will be adopted by the Federal court when called upon to construe such statute.

A landlord's general lien dates from the time of the levy of a distress warrant to enforce the same. Ga. Code

1895, § 2795; Ga. Code 1910, § 3340; *Hobbs v. Davis*, 50 Georgia, 214; *Johnson v. Emanuel*, 50 Georgia, 590; *Elam v. Hamilton*, 69 Georgia, 736; *Thornton v. Wilson*, 55 Georgia, 608; *Jones v. Howard*, 99 Georgia, 451. *Loudon v. Blandford*, 56 Georgia, 150, can be distinguished.

The Federal court administers the law of the State in conformity with the decisions of the state court. *Re Dougherty Co.*, 109 Fed. Rep. 480. *Re Burns*, 175 Fed. Rep. 633; *Re V. D. L. Co.*, 175 Fed. Rep. 635, are directly opposed to both the letter and the spirit of the Georgia statute and to the decisions of the Georgia court of final resort.

If the lien was created or obtained more than four months prior to the adjudication in bankruptcy, although completed and enforced by a judgment within the four months' period, it is entitled to priority. If created or obtained within the four months, it is invalidated. *Metcalf v. Barker*, 187 U. S. 165; *Morgan v. Campbell*, 22 Wall. 381. *Re Robinson & Smith*, 154 Fed. Rep. 343, distinguished.

The question presented is one belonging to the local law of Georgia. *Longstreth v. Pennock*, 20 Wall. 575.

Mr. Arthur H. Codington for respondent:

Except in their rank in relation to other statutory liens, the special and general lien given by the Georgia law in every material respect are alike, and in each there is a legal proceeding for its enforcement, namely, a distress warrant. Ga. Code, 1895, §§ 2795-2797.

The general right of the landlord is not vacated by bankruptcy, but is entitled to be paid as a priority. 2 *Tiffany on Landlord & Tenant*, 1925; *Austin v. O'Reilly*, 2 Woods, 670; 18 Am. & Eng. Ency. Law (2d ed.), 426-432.

The right of the landlord against the goods and chattels of his tenant inheres in the relationship of the parties and the statutes themselves. This lien or right is not founded

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upon the legal proceedings, which are merely the machinery for its enforcement. 24 Cyc. of Law & Proc. 1249, 1250, and cases cited; *Sims v. Price*, 123 Georgia, 97; *Cohen v. Broughton*, 54 Georgia, 296; *Tyner v. Slappey*, 74 Georgia, 364.

The Bankruptcy Act preserves and gives effect to all priorities and liens which are not preferential or in fraud of the act and which are recognized by the several States.

The trustee stands in the shoes of the bankrupt as to the property of the bankrupt, which is charged with all legitimate priorities and liens. Collier on Bkcy. (7th ed.), 741, 742, 761; *Humphrey v. Tatman*, 198 U. S. 90, 92-95; *Hauselt v. Harrison*, 105 U. S. 401-408; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 351-353; *Bacon v. Int. Bank*, 131 U. S. cexvi; *Longstreth v. Pennock*, 20 Wall. 576.

A lien is not restricted to a right reduced to possession or upon specific property. It may be a simple right or charge against property. 2 Story, Eq. Jur., § 1215; *The Menominee*, 36 Fed. Rep. 199; 2 Tiffany, L. & T. 1898.

The landlord's rights enforced by distress warrant are not divested by the bankruptcy of the tenant within four months thereafter, the lien of the landlord being based on the relationship of landlord and tenant and not being one "obtained by legal proceedings" within the meaning of § 67f of the Bankruptcy Act. *In re Robinson & Smith*, 154 Fed. Rep. 343; *In re West Side Paper Co.*, 162 Fed. Rep. 110. See *In re Hoover*, 113 Fed. Rep. 136; *Wilson v. Penn. Trust Co.*, 114 Fed. Rep. 742; *In re Duble*, 117 Fed. Rep. 794; *In re Pittsburg Drug Co.*, 164 Fed. Rep. 482; *In re Belknap*, 129 Fed. Rep. 646; *In re Mitchell*, 116 Fed. Rep. 87; *In re Bishop*, 153 Fed. Rep. 304; *Malcomson v. Wappoo Mills*, 85 Fed. Rep. 907, 910. And see, also, *In re Hersey*, 171 Fed. Rep. 100; *In re Bayley*, 177 Fed. Rep. 522; *In re Bourlier C. & R. Co.*, 133 Fed. Rep. 958; *In re Morris*, 159 Fed. Rep. 591; *In re Seebold*, 105 Fed. Rep. 910; *Longstreth v. Pennock*, 20 Wall. 575-577; *Marshall v.*

Knox, 16 Wall. 551; *Schall v. Kinsella*, 117 Louisiana, 687; *In re Wynne*, Fed. Cas. No. 18117; *In re Trim*, Fed. Cas. No. 14174; *In re Appold*, Fed. Cas. No. 499; *In re Bowne*, Fed. Cas. No. 1741; *In re Dunham*, Fed. Cas. No. 4145; *In re Hoagland*, Fed. Cas. No. 6545; *In re Rose*, Fed. Cas. No. 12043; *Lambert v. De Saussure*, 4 Rich. L. 248; *Austin v. O'Reilly*, 2 Woods, 670; Fed. Cas. No. 665.

The courts likewise have sustained similar priorities or liens, such as those of laborers, materialmen and mechanics. *In re Bennett*, 153 Fed. Rep. 673; *Central Trust Co. v. Richmond &c. R. Co.*, 68 Fed. Rep. 90; *In re Laird*, 109 Fed. Rep. 550; *In re Falls City Mfg. Co.*, 98 Fed. Rep. 592; *In re Emslie*, 102 Fed. Rep. 291; *Duplan Silk Co. v. Spencer*, 115 Fed. Rep. 689; *In re Kerby Dennis Co.*, 95 Fed. Rep. 116; *In re Lewis*, 99 Fed. Rep. 935; *In re Grissler*, 136 Fed. Rep. 754; *In re Dey*, Fed. Cas. No. 3871; *In re Georgia Handle Co.*, 109 Fed. Rep. 632; *Kane Co. v. Kinney*, 174 N. Y. 69.

The Georgia decisions also support respondent's contentions. *Loudon v. Blandford*, 56 Georgia, 153; *Hight v. Fleming*, 74 Georgia, 592; *Davis v. Meyers*, 41 Georgia, 95; *Boehm v. Nelson*, 61 Georgia, 441; *Talliaferro v. Pry*, 41 Georgia, 622; *Crine v. Davis*, 68 Georgia, 138. *Hobbs v. Davis*, 50 Georgia, 214; *Johnson v. Emanuel*, 50 Georgia, 590; *Elam v. Hamilton*, 69 Georgia, 736; *Thornton v. Carver*, 80 Georgia, 397; *Lancaster v. Whiteside*, 108 Georgia, 801, can be distinguished.

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

The provisions of the Bankruptcy Act, preventing an insolvent from giving or the creditor from securing preferences for preëxisting debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal pro-

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ceedings, whether the lien dates from the entry of the judgment, from the attachment before judgment, or, as in some States, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice and subject to which they are presumed to have contracted when they dealt with the insolvent.

Liens in favor of laborers, mechanics and contractors are of this character; and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been "obtained through legal proceedings," even when it is necessary to enforce them by some form of legal proceeding. The statutes of the various States differ as to the time when such liens attach, and also as to the property they cover. They may bind only what the plaintiff has improved or constructed; or they may extend to all the chattels of the debtor, or "all the property involved in the business." *In re Bennett*, 153 Fed. Rep. 673.

In some cases the lien dates from commencement of the work, or from the completion of the contract. In others, prior to levy they are referred to as being dormant or inchoate liens, or as "a right to a lien." *In re Bennett*, 153 Fed. Rep. 677; *In re Laird*, 109 Fed. Rep. 550. But the courts, dealing specially with bankruptcy matters, have almost uniformly held that these statutory preferences are not obtained through legal proceedings, and, therefore, are not defeated by § 67f, even where the registration, foreclosure or levy necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy.

Similar rulings have been made where the landlord has only a common law right of distress. *In re West Side Paper Co.*, 162 Fed. Rep. 110. This is often referred to as a lien,

but it is "only in the nature of security." 3 Black. Com. 18. The pledge, or quasi-pledge, which the landlord is said to have is, at most, only a power to seize chattels found on the rented premises. These he could take into possession and hold until the rent was paid. *Doe ex dem Gladney v. Deavors*, 11 Georgia, 79, 84. But before the distraint the landlord at common law has "no lien on any particular portion of the goods and is only an ordinary creditor except that he has the right of distress by reason of which he may place himself in a better position." *Sutton v. Reese*, 9 Jur. (N. S.) 456. A right fully as great is created by the Georgia statute here in question. For while giving the owners of agricultural lands a special lien on the crops, there was no intention to deprive the proprietor of urban and other real estate of the lien for rent which there, as in other States, is treated as an incident growing out of the relation of landlord and tenant.

The Code (§ 2787) expressly "establishes liens in favor of landlords." It (§ 3124) gives them "power to distrain for rent as soon as the same is due." It declares (§ 2795) that landlords "shall have a general lien on the property of the tenant liable to levy and sale . . . which dates from the levy of the distress warrant to enforce the same." It is true that prior to levy it covers no specific property, and attaches only to what is seized under the distress warrant issued to *enforce* the lien given by statute. But in this respect it is the full equivalent of a common law distress—the lien of which is held not to be discharged by § 67f. *In re West Side Paper Co.*, 162 Fed. Rep. 110; *Austin v. O'Reilly*, 2 Wood, 670.

The fact that the warrant could be levied upon property which had never been on the rented premises does not change the nature of the landlord's right, though it may increase the extent of his security. The statutory restrictions as to date, rank and priority may be important in a controversy with other lienholders, but was wholly

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immaterial in this contest between the landlord and trustee, where the latter was only representing general creditors. As against them the landlord had from the beginning of the tenancy the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the levy of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the nature of the claim and the relation between himself as landlord and Burns as tenant. In issuing the distress warrant the justice acted ministerially. *Savage v. Oliver*, 110 Georgia, 636. The sheriff was not required to return it to any court, and no judicial hearing or action was necessary to authorize him to sell for the purpose of realizing funds with which to pay the rent. Such a lien was not created by a judgment nor "obtained through legal proceedings."

Decisions to the same effect were made under the Bankruptcy Act of 1867 (14 Stat. 517, 522, § 14), which dissolved attachments or mesne process within four months prior to the filing of the petition. In *Austin v. O'Reilly*, 2 Wood, 670, decided in 1875, it appeared that in Mississippi the landlord had no lien, but as in Georgia was authorized to seize (but by attachment) the tenant's goods wherever found. Justice Bradley, presiding at Circuit, said that the landlords' right to a distress at common law was not a strict lien, "but being commonly called a lien, and being a peculiar right in the nature of a lien, . . . the Supreme Court of the United States, and most of the District and Circuit Courts have regarded it as fairly to be classed as a lien, within the true intent and meaning of the Bankrupt Act," and that the statutory attachment being in the nature of a common law distress was not nullified or discharged by the bankruptcy proceedings.

There is nothing in the act of 1898 opposed to this conclusion. On the contrary, its general provisions indicate a

purpose to continue the same policy and an intent, as against general creditors, to preserve rights like those given by the Georgia statute to landlords, even though the lien was enforced and attached by levy of a distress warrant within four months of the filing of the petition in bankruptcy.

Affirmed.

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

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

No. 716. Argued April 30, 1912.—Decided June 7, 1912.

Public policy requires that the mail be carried subject to postal regulations, and that the Department and not the railroad shall, in the absence of contract, determine what service is needed and the conditions under which it shall be performed.

A railroad company, not required so to do by its charter, is not bound to furnish postal cars of the kind demanded or to accept terms named by the Postmaster General, but if it does carry the mail, it does so as an agency of the Government and subject to the laws and the regulations of the Department.

A railroad company cannot, by using a larger railway postal car than that authorized by the Department, recover the greater value of the car.

The Postmaster General can establish full railway postal lines, and as the greater includes the less, he can also establish half lines; he can abolish between two points a full line in one direction and a half line in the other.

THE facts, which involve claims made by a railroad company for furnishing railway post-office cars to the Government, are stated in the opinion.

Mr. Robert Dunlap, with whom Mr. Wm. R. Smith, Mr. Lee F. English, Mr. James L. Coleman and Mr. Gardiner Lathrop were on the brief, for plaintiff in error:

The parties were agreed upon the value of 60-foot postal car lines as the maximum rate prescribed by Congress, and as such car lines were in fact used by the Government it must be held as having agreed to pay that value. *Minneapolis &c. Ry. Co. v. Columbus Mill Co.*, 119 U. S. 149, is in no sense analogous.

The Government in fact accepted and used 60-foot cars during the entire period in question. There was no controversy between the parties as to the amount of pay which was proper for the use of a 60-foot car.

The railway company very plainly offered to the Government the use of 60-foot railway post-office cars. The use was for both directions, going and returning, upon the same route. The Government sought to force the railway company to furnish to it a 60-foot postal car in one direction and a 50-foot postal car on the return. The railway company, declining to divide the car line defined in the act of Congress, upon which it was entitled to base its pay, the attempt to reduce the compensation, not upon the ground that \$40.00 per mile per annum was not the proper charge for a 60-foot car, but solely upon the ground that the Government only wished to use on the return trip of such car fifty feet of space therein, will not avail.

The Government having in fact accepted and used the car is bound to pay for such use what throughout this case it admits such car is worth. *Thompson v. Sanborn*, 52 Michigan, 141; *Griffin v. Knisely*, 75 Illinois, 412, 417, 418; *Conway v. Starkweather*, 1 Denio, 113.

The half lines R. P. O. cars order made by the Postmaster General, effective July 23, 1907, was made without authority, is evidently contrary to the act of Congress, is oppressive and unreasonable, and therefore, invalid.

Congress provided a system for computing the pay and

indicated the manner in which the railway company was to receive pay for the rent of its cars. The order of the Assistant Postmaster General in attempting to change such basis was not only in excess of the postal regulations, but sought to impose conditions not embraced in the law nor covered by any contract with the railway company, either express or implied. The order of the Postmaster General is a plain attempt to amend or add to the act of Congress. That is not permissible. *Morrill v. Jones*, 106 U. S. 466, 467; *Bruhl Bros. v. Wilson*, 123 Fed. Rep. 957, 958; *Hoover v. Salling*, 110 Fed. Rep. 43.

The Postmaster General had no authority to impose new and unjust or unduly burdensome conditions. *United States v. Stage Co.*, 199 U. S. 422; *United States v. Bostwick*, 94 U. S. 66.

The order is an attempt to change the express provisions of the law and thus change the basis of compensation without the consent of the railway company, the other party interested therein. It would be invalid. *United States v. Symonds*, 120 U. S. 46, 48, 49; *United States v. Barnette*, 165 U. S. 174, 178, 179; 2 Willoughby on the Constitution, 1326.

If there was no express agreement fixing the price for each car line, yet inasmuch as the Government in fact accepted and used 60-foot cars for the round trips, it was bound to pay the reasonable value thereof and the record shows the Government to have admitted such value of such car line to be the maximum fixed by Congress and the railway company was entitled to demand and receive that maximum unless and until it agreed to lease its cars for a less sum, which was not either claimed or shown.

A statutory maximum is the measure of the reasonable value of a carrier's service, the full extent of which it may lawfully demand. *Manchester &c. Ry. Co. v. Brown*, L. R. 8 App. Cas. 715; *Great Western Ry. Co. v. McCarthy*,

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L. R. 12 App. Cas. 218, 235; *Wolcott v. Yeager*, 11 Indiana, 84.

There is the presumption, in the absence of a showing to the contrary, that the maximum rate fixed by the legislature is the measure of a reasonable charge, where less has not been specially agreed upon. *Beals v. Amador County*, 35 California, 624; *Archibald v. Thomas*, 3 Cowen, 284, 289.

The Government must pay for the kind of car which is in fact furnished and used. *Horton v. Cooley*, 135 Massachusetts, 589.

There was no evidence nor any fact admitted which tended to show that the maximum charge fixed by Congress was not the measure of the reasonable value of the use of such cars in the absence of an express agreement to the contrary. *Vail v. Jersey Little Falls Mfg. Co.*, 32 Barb. 564; *Sidener v. Fetter*, 19 Indiana, 310; *Smithmeyer v. United States*, 147 U. S. 343, 359, 360; *The Albert Dumois*, 177 U. S. 255.

Eastern Railroad Company v. United States, 20 Ct. Cl. 23, 43, distinguished. See *Texas & Pacific Ry. Co. v. United States*, 28 Ct. Cl. 379.

On *quantum meruit*, where the contract has been varied or departed from by the parties during performance, such contract is admissible as containing admission of the standard of value, etc. *Reynolds v. Jourdan*, 6 California, 109; *Castagnino v. Balletta*, 82 California, 250; *Shirk v. Brookfield*, 79 N. Y. Supp. 225; *Boyd v. Vale*, 82 N. Y. Supp. 932; *Schulze v. Farrell*, 126 N. Y. Supp. 678.

Mr. Joseph Stewart, with whom Mr. Assistant Attorney General John Q. Thompson, Mr. S. S. Ashbaugh and Mr. P. M. Cox were on the brief, for the United States:

The issues presented here are wholly issues of law arising upon the facts as found by the court below and admitted, if at all, in the pleadings, and no question can be

raised here, nor was such raised by assignment of error, as to the existence of this alleged fact which the court did not include in its findings and which is not admitted in the pleadings.

All argument submitted by plaintiff in error to show that the maximum rate fixed by the statute for pay for a full line of railway post-office cars is the value of the service rendered by plaintiff in error is irrelevant. The cases cited in support of plaintiff's contention may therefore be dismissed from consideration in this court.

The second main proposition of the plaintiff in error is that the half-line railway post-office cars order complained of was made without authority, was evidently contrary to the law, and was oppressive and unreasonable. *Morrill v. Jones*, 106 U. S. 466; *Bruhl v. Wilson*, 123 Fed. Rep. 957, and *Hoover v. Salling*, 110 Fed. Rep. 43, are all cases where some department of the Government attempted by an order or direction to limit or curtail some right guaranteed by a law of Congress to the whole people, and are not in point.

The case at bar is clearly distinguished from this class of cases. Congress had provided that additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars at a rate not exceeding certain rates named in such statute for cars of certain lengths. This statute does not guarantee to railroad companies an absolute allowance for such cars nor an allowance of the maximum rates fixed by law in case such cars are authorized. As will be shown hereinafter, the law is merely permissive and fixes maximum rates, allowing the Postmaster General full power and discretion to fix minimum rates for such space as he may authorize, in accordance with the actual needs of the service.

In the conduct of the postal service the Post-Office Department is performing a governmental function. It has complete control of the conduct of the postal service

in the exercise of one of the sovereign powers of the people. A railroad company carrying the mails is not a common carrier with reference to such mails, but sustains a specific relation toward the United States. *Bankers' Mut. Cas. Co. v. Minneapolis &c., Ry. Co.* 117 Fed. Rep. 434; *Texas & Pacific Ry. Co. v. United States*, 28 Ct. Cl. 379; *Minneapolis &c. Co. v. United States*, 24 Ct. Cl. 350.

If the company did not choose to accept the terms of the Postmaster General it had the privilege to decline to perform the service, but it could not, by continuing to perform the service, force its own terms upon the United States. Rev. Stat., §§ 3997, 3999, were practically superseded by the act of March 3, 1873 (Rev. Stat., § 4002), and the amending statutes authorizing the readjustment of railroad mail pay on the basis of the average daily weights and upon an entirely new scale of prices.

The making of the order by the Postmaster General was not a violation of the contractual relations. *Minneapolis &c. Ry. Co. v. United States*, 24 Ct. Cl. 350.

The Distance Circular and proceedings thereon, including the railway company's reply, show that it was understood, and that it would be subject as in the past to all the postal laws and regulations which were then or might become applicable during the term of the service.

It will be entirely clear from the above that no contract rights of the plaintiff were violated by the order made by the Postmaster General.

The road in question was not a land grant aided railway, and was under no obligation to the Government to carry the mails or furnish the space in cars for railway post-office service, but was free to carry the mails or to decline to carry them or to contract with the Government for the performance of such services or to decline to contract. *Eastern Railroad Co. v. United States*, 129 U. S. 391; *Minneapolis, &c. Ry. Co. v. United States*, 24 Ct. Cl. 350.

The Postmaster General had power to make the order

complained of authorizing "half car lines" and to subsequently fix the pay for the railway post-office car service at a rate below the maximum provided by law for full lines of railway post-office cars. See statutes and regulations governing allowance of railway post-office car pay. Section 4004, Rev. Stat., as amended by act of March 2, 1907, 24 Stat. 1212; act of March 3, 1879, § 4, 20 Stat. 358; § 1179, par. 3, Postal Laws and Regulations.

The Postmaster General has power to fix minimum rates. Rev. Stat., §§ 4002, 4004; *Eastern Ry. Co. v. United States*, 20 Ct. Cl. 23, affirmed, 129 U. S. 391; *Minneapolis & St. Louis Railroad Co. v. United States*, 24 Ct. Cl. 350; *Texas & Pacific Ry. Co. v. United States*, 28 Ct. Cl. 379.

The orders complained of were an offer which the company could have accepted or rejected. The failure to reject such offer and to refuse to perform the service, and the actual performance of service thereafter, although under objection but with notice that the Department would not pay for any greater space than that authorized, was in effect an acceptance.

The orders were offers of business, which were in effect accepted by furnishing the cars and performing the service. *Chicago & Northwestern Ry. Co. v. United States*, 15 Ct. Cl. 232; *Eastern Railroad Co. v. United States*, 20 Ct. Cl. 23; S. C., 129 U. S. 391; *Minneapolis & St. Louis Ry. Co. v. United States*, 24 Ct. Cl. 350; *Texas & Pacific Ry. Co. v. United States*, 28 Ct. Cl. 379.

The Department cannot force a contract upon a railroad company situated as this company was. *Chicago, Milwaukee & St. Paul Railway Co. v. United States*, 198 U. S. 389. With more reason it must be said that a railroad company cannot force a contract upon the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Atchison, Topeka & Santa Fé Railroad had a four-year contract with the Post-Office Department to carry

the mail between Chicago and Kansas City. Payment was made on the basis of weight hauled and the speed with which the service was performed. The company also furnished sufficient "railway post office cars," sixty feet in length, to make three round trips each twenty-four hours. This constituted three "car lines," for which the plaintiff received the maximum additional compensation then allowed by Rev. Stat., § 4004, under which the pay varied in proportion to the length of the car.

This contract was to expire June 30, 1907, by limitation; and, with a view of obtaining data, and proposing terms for a new arrangement to begin July 1st, 1907, the postal authorities, in February, mailed to the company a "Distance Circular," which, among other things, stated that the company was "to accept and perform mail service under the conditions prescribed by law and the regulations of the Department." The form was filled out and signed by an agent of the company. He, however, noted exceptions to certain postal orders previously promulgated, and "future regulations which, in the company's opinion, might be unjust or unfairly reduce its compensation for services." The circular, with these objections, was not received by the Department until July 24th, but the company, in the meantime, and without any express contract, continued to carry the mails and to furnish the three car lines. Payment therefor was made at the maximum rate allowed by the act of March 2, 1907 (34 Stat. 1205, 1212, c. 2513), which declared:

"Additional pay allowed for every line comprising a daily trip each way of railway post-office cars shall be at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length . . . thirty-two dollars and fifty cents per mile per annum for fifty foot cars and forty dollars per mile per annum for cars fifty-five feet or more in length."

The Reports and Returns, as to the amount of mail car-

ried over plaintiff's road during the spring of 1907, indicated that the quantity of east bound matter was less than that going west from Chicago to Kansas City. Accordingly the Department, on July 18, 1907, "authorized 'three half lines' R. P. O. cars fifty feet in length . . . to supersede three 'half lines' of such cars sixty feet in length over route 135,098, Chicago to Kansas City." As the distance between the two cities was about 450 miles this change would largely reduce the rate of pay, and the company at once objected, claiming in the lengthy correspondence, and subsequent suit which followed, that the statute did not authorize "half car lines"; that the order would require the company to furnish 60-foot cars in one direction and 50-foot cars on the return, thus involving an empty haul one way or forcing the company to furnish 60-foot cars both ways, without corresponding or adequate compensation.

The Department, on the other hand, insisted that under the statute, regulations and long continued practice it had the right to establish "half lines"; that "no contract would be made with any railroad by which it could be excepted from the postal laws and regulations," and that compensation would only be made in accordance with the orders of the Department establishing the three half lines.

The warrant in settlement of the September Quarter was made out on this basis. It was accepted by the company, but under protest. In answer the Department again repeated the statement that any service performed by the company must be with the distinct understanding that payment was to be made in accordance with the orders for space, facilities and car service, required by the postal authorities. The plaintiff continued to protest and to furnish the three full lines. They were daily used by the Department for postal purposes, but payment was made only for half lines.

The plaintiff thereupon brought suit, under the Tucker

Act, claiming that even though there was no express agreement, it was entitled, as under an implied contract, to recover the reasonable value of the three car lines authorized by law, furnished by the company and actually used by the Post-Office Department. This contention should have been sustained but for the fact that neither party was bound to continue the indefinite relation begun July 1, 1907, and under which the rights and liabilities of each arose, from day to day, as the facilities were furnished by the one and used by the other. Whatever may be the rule between private parties where both are demanding performance, and each is insisting on different terms (*Thompson v. Sanborn*, 52 Michigan, 141; *Jenkins v. National Association*, 111 Georgia, 732, 734), no such question arises in a controversy like this between the railroad on the one hand and the post-office on the other. For, public policy requires that the mail should be carried subject to postal regulations, and that the Department and not the railroad should, in the absence of a contract, determine what service was needed and under what conditions it should be performed. The company in carrying the mails was not hauling freight, nor was it acting as a common carrier, with corresponding rights and liabilities but in this respect it was serving as an agency of government, and as much subject to the laws and regulations as every other branch of the Post-Office.

The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate, not to exceed the statutory maximum. By virtue of that authority he could have made the same price for 60-foot cars as for 50-foot cars, and, as the greater includes the less, he could abolish full lines, or establish "half lines," and adjust the rates accordingly. Such had been the practice before the passage of the act of 1907, and there is nothing in its language indicating any intent

to change the construction previously given, Rev. Stat., § 4004.

The railroad, however, was not bound to furnish "half lines" nor to accept the terms named by the Postmaster General. For Congress had not legislated so as to require compulsory service, at adequate compensation to be judicially determined or in a method provided by statute. And as the plaintiff's road between Chicago and Kansas City had not been aided by a land grant, it was, under existing law, not obliged to carry the mails when tendered, nor to supply R. P. O. cars when demanded. *Eastern Railroad v. United States*, 129 U. S. 391, 395-396; *United States v. Alabama G. S. Railroad*, 142 U. S. 615. It may have been impracticable to furnish long cars one way and short ones the other. But there was in that fact no hardship imposed by law. The company could have protected itself against onerous terms, or inadequate compensation, by refusing to supply the facilities on the conditions named by the Department. But if, instead of availing itself of that right, it preferred to furnish 60-foot cars after having been informed that the Department only needed and would only pay for those 50 feet in length, the company cannot recover for more than the Department ordered; nor under the statute can it demand compensation for full lines, when the Postmaster General had established "half lines" consisting of cars of one length going and of another returning on the route between Chicago and Kansas City.

There was no error in dismissing the complaint, and the judgment is

Affirmed.

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PICKFORD v. TALBOTT.

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

No. 512. Argued April 29, 1912.—Decided June 7, 1912.

In order to warrant a court of equity in restraining the enforcement of a judgment at law, the defeated party must show that it is manifestly unconscionable for the judgment creditor to enforce it; it is not sufficient for him merely to show that because of newly discovered facts or evidence he would have a better prospect of success on a retrial.

It is incumbent on one seeking to have the enforcement of a judgment against him enjoined by a court of equity on the ground of newly discovered evidence to show that his failure to discover the evidence relied upon as defense was not attributable to his own want of diligence.

For the purpose of equity restraining the enforcement of a judgment at law, a defense is not deemed to be newly discovered or to have been lost by accident or mistake, if it was, or ought to have been, within the knowledge of the party when he made his defense to the action at law.

A defendant in a libel suit who deliberately abstained from defending by justification of the charges, cannot, after verdict and judgment against him, come into equity and seek to restrain the enforcement of the judgment on the ground of newly discovered evidence tending to prove the truth of the charges.

Quære whether a defendant in a libel suit who made a public charge of malfeasance in office without having evidence of truth sufficient to warrant prudent counsel in making an issue of it, is not barred from relief in equity under the doctrine of clean hands.

36 App. D. C. 289, affirmed.

THE facts, which involve an attempt to restrain in an action in equity the enforcement of a judgment obtained on the law side of the court against complainant in an action for libel, are stated in the opinion.

Mr. Henry E. Davis, with whom *Mr. Samuel Maddox* and *Mr. H. Prescott Gatley* were on the brief, for appellants.

Mr. John Ridout for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an equity action, brought by the appellants against the appellee and others, in the Supreme Court of the District of Columbia, to obtain an injunction restraining the enforcement of a judgment theretofore recovered by the appellee against the appellants in an action for libel. That action was on the law side of the Supreme Court of the District, and resulted in a verdict and judgment for \$8,500 damages, which on review was affirmed by the Court of Appeals (28 App. D. C. 498) and by this court (211 U. S. 199).

The present action was commenced after the final affirmance of the judgment at law. Upon the filing of the bill of complaint herein, with accompanying exhibits, the court made a temporary restraining order. This was continued until the final hearing, and that hearing resulted in a decree granting a perpetual injunction against the enforcement of the judgment. The defendants in the equity action, other than the present appellee, were joined for reasons not now material. He alone appealed from the final decree to the Court of Appeals of the District, which reversed the decree and ordered the cause to be remanded to the court below, with direction to dismiss the bill of complaint (36 App. D. C. 289). From the decree of reversal Pickford and Walter have appealed to this court, thus presenting for our decision the question whether, upon the pleadings and proofs, they are entitled to an injunction restraining the enforcement of Talbott's judgment against them.

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The equitable jurisdiction is invoked upon the ground that after the conclusion of the litigation at law the appellants discovered certain evidence which, if known at the time, might and would have enabled them to make a different defense in the court of law, and which it is alleged would assuredly have led to a different result there; it being insisted that the appellants were not at fault in failing to discover the evidence referred to.

A brief history of the controversy between the parties is essential to an understanding of the questions presented.

In the month of March, 1901, while the appellee, Talbott, was State's attorney for Montgomery County, Maryland, an indictment was returned by the grand jury of that county charging Pickford and Walter, the appellants, and two others named in the indictment, with having unlawfully, wilfully and maliciously set fire to and burned a certain untenanted dwelling house, the property of said Pickford and Walter. A dwelling house owned by them, situate in Montgomery County, had in fact been destroyed by fire in the latter part of the year 1897, and the fire insurance companies, after some demur, had paid to the owners sums aggregating \$22,500. It is said to have been the purpose of the indictment to attribute to the defendants named therein an attempt to defraud the insurance companies. Three of those defendants (including Walter, but not Pickford), being arrested in the District of Columbia, where they resided, sued out writs of *habeas corpus* in the District, and were released on the ground that the indictment did not set forth any crime. Pickford surrendered himself in Montgomery County and gave bail to answer the indictment, and his trial was set down for a day in the following November before the Circuit Court. He duly appeared, but Talbott, as State's attorney, asked for a postponement on the ground that he was not ready for trial. The court strongly intimated that there ought to be no postponement, and upon this intimation (and

perhaps partly because of the question that had been raised about the sufficiency of the indictment) Talbott entered a *nolle prosequi* as to Pickford. Later, he did the same with respect to Walter.

Thereafter, and in the month of December, 1901, Pickford and Walter procured to be published in the columns of a newspaper in Washington an article concerning Talbott which was the ground of his action against them for libel. A copy of the article was included in the declaration in that suit and was attached to and made a part of the bill of complaint herein. Through some inadvertence it was omitted in the printing of the record, but upon the argument we were, by consent of counsel, referred for information as to its contents to the record that was here on the former occasion (211 U. S. 199). The article purported to show "the true inwardness of the criminal scheme that culminated in this nefarious indictment," and declared that "we shall state the facts as we have learned them after a thorough investigation." It charged Talbott, as State's attorney, with participation in an alleged conspiracy to force Pickford and Walter, by means of an unfounded indictment, to repay to the insurance companies the moneys that had been paid by them to Pickford and Walter for the fire loss.

The libel suit was commenced in the year 1902. The final affirmance of the judgment therein was on November 30, 1908. The present action was begun in the following month of January.

The bill of complaint avers that at the time of the filing of the declaration in the libel suit the complainants believed it to be true (the ground of that belief is not distinctly averred) that Talbott had caused the indictment to be procured for the purpose of obtaining from the insurance companies certain large sums of money, and had thus used his public office for his personal gain; that they so informed their counsel before the filing of their pleas,

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but were advised by counsel that should they attempt to justify the publication of the article by pleading the truth thereof, and fail to make good such plea by evidence to the satisfaction of the court and jury, the attempt at justification would be held to be a repetition and republication of the libel, and would aggravate the damages to be recovered in the action; that they were, on the other hand, advised by their counsel that if they should plead "not guilty" to the declaration they would probably be excluded from endeavoring to prove the truth of the alleged libel; and that the complainants, being unable, after due diligence, to procure and submit to their counsel evidence which in the opinion of counsel might properly and safely be offered on the trial of the action in justification of the alleged libel and in proof of the truth thereof, were compelled to confine, and did confine, their defense to the general issue, and were thereby deprived of the opportunity to offer evidence tending to prove its truth; but that upon the trial they were permitted to introduce, and did introduce (not in justification of the alleged libel nor to prove the truth thereof, but to show absence of malice on their part and thus to mitigate the damages), sundry matters and things which are set forth at great length in the bill, all of which, it is averred, were known to the complainants at and before the composition and publication of the libel.

So far as appears, the matters thus recited furnished the sole basis for their alleged belief that Talbott had prostituted his office in the manner alleged in the newspaper article. Without repeating them here, it is enough to say that if those matters did in fact constitute their whole case against Talbott, their counsel was probably correct in his judgment that a plea of justification, supported by such evidence alone, would be deemed a republication of the libel and a ground for allowing increased damages against them.

The bill of complaint further avers that before pleading

to the declaration the appellants and their counsel diligently inquired of every person believed to have any possible knowledge in the premises, with the view to obtaining and producing testimony tending to support a plea of justification and to prove the truth of the matter alleged as libelous, but without avail.

It also alleges that the like diligent inquiries were continued after the trial of the cause down to the filing of the bill, but wholly without result until the twenty-ninth day of December, 1908, when, in an accidental meeting between one of the counsel for the appellants and Hon. James B. Henderson, one of the judges of the Circuit Court for Montgomery County, who held that office at the time of the indictment referred to, Judge Henderson informed counsel of a conversation said to have taken place between him and Talbott while the indictment was pending, in which conversation Talbott stated to the judge in substance that he was keeping the indictment alive in order to assist the insurance companies in an effort to recover from Pickford and Walter the moneys that had been paid to them for the fire loss; and that he, Talbott, or his firm, would get a large fee out of the business.

The bill rests the prayer for relief against the judgment at law solely upon the ground that the evidence of Judge Henderson, taken in connection with the other matters and things that were given in evidence on the trial of the libel suit as mentioned, would have caused the jury to render a verdict in favor of the defendants, Pickford and Walter.

Talbott answered the bill, fully and specifically denying all allegations thereof that attributed improper conduct to him, and expressly denying the alleged conversation between him and Judge Henderson, and denying that he had kept the indictment alive for personal gain, and every other improper inference deducible from the alleged conversation. The answer called upon complainants to make

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strict proof of the averments of the bill respecting the conferences between complainants and their counsel and respecting what was done by them about the preparation of their defense in the action at law, and denied that if the truth of the libelous matter had been pleaded and the evidence of Judge Henderson introduced the result of the trial would have been different; averring that if the pleadings had been such as to admit his testimony the door would have been opened for the admission of other evidence unfavorable to the complainants.

After the filing of this answer the complainants, by leave of the court, amended and supplemented their original bill of complaint by the addition of a considerable amount of new matter. Included in it is an averment that the indictment of Pickford and Walter, as above mentioned, was in fact caused by and through a conspiracy between Talbott and others, with the object of extorting money from the complainants, and that everything done by Talbott in reference to the indictment was done in pursuance of that conspiracy. To this, by a further answer, Talbott entered an unequivocal denial.

Upon these pleadings, and upon proofs submitted by the respective parties in support thereof, the cause was brought to final hearing, with the result already mentioned.

The principles upon which the decision of the case must turn are entirely familiar. In order to warrant the interposition of a court of equity to restrain the enforcement of a judgment at law, it is, of course, not sufficient for the defeated party to show that because of some newly discovered evidence pertaining to an issue in the case, or because of some newly discovered fact that might have been put in issue, he would probably have a better prospect of success on a retrial of the action. He must show something to render it manifestly unconscionable for his successful adversary to enforce the judgment.

As Chief Justice Marshall said: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336. Or, as Mr. Justice Curtis expressed it, in *Hendrickson v. Hinckley*, 17 How. 443, 445: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

One who seeks relief in equity against a judgment at law on the ground that through accident or mistake alone, unmixed with fraud, he has lost the benefit of a defense that would have been available in the court of law, must show entire freedom from fault or neglect on the part of himself and his agents, and must also make it manifest that the judgment against him is wrong on the merits, that he ought in justice to prevail, and that upon a retrial, with the aid of the newly discovered matter of fact or of evidence, it is reasonably certain that he will prevail. Pom. Eq. Jur. (3d ed.) §§ 1364, 1365, and notes.

The trial court rested its decision adverse to Talbott upon the theory that if it were true that he had misused his office as State's attorney, and, because of spite or for any other selfish or personal reason, had wrongfully procured an unjust indictment against Pickford and Walter,

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he ought not, in equity and good conscience, to be permitted to collect damages against them for publishing his misconduct, because he would thereby be taking advantage of his own wrong. The court recognized that this theory was applicable only if the statements made in the libelous article were true; and, accepting Judge Henderson's testimony as conclusive upon that issue, the court held it to be unconscionable for Talbott to enforce his judgment. We find it unnecessary to test the correctness of the theory, because, like the Court of Appeals, we differ with the trial court upon the question of fact. Under the pleadings, the burden was upon the complainants (now appellants) to prove the official misconduct of Talbott, and this they failed to prove.

The Court of Appeals, correctly considering that most of the evidence was wholly irrelevant to the issues, and that substantially the only material evidence in support of the bill was that of Judge Henderson, and reviewing his testimony *in extenso*, came to the conclusion that it not only did not conclusively establish the truth of the matters alleged in the libelous article, but did not render it clear beyond reasonable doubt that it would produce a verdict favorable to the complainants if a new trial of the libel suit should be had. Attention was called to the fact that Judge Henderson testified to a conversation had with Talbott about nine years before, of which he had no memorandum to refresh his memory; that his examination showed his memory to be not entirely reliable; that Talbott expressly denied making the incriminatory statements attributed to him; that it was improbable that a lawyer of his standing, holding the important office of State's attorney, would, without apparent motive, deliberately make an admission to any one, much less to the judge of his circuit, that he was using the powers and opportunities of his office for private gain; and that it was improbable that such an admission, if made under such circumstances,

would go unrebuked at the time. With this view we agree.

All question of fraud in the procurement of the judgment at law is thus eliminated. Indeed, counsel for appellants disavow any reliance upon fraud as a ground of relief. To quote from the brief: "The bill makes no averment whatever as to any fraud on the part of the appellee, plaintiff in the law suit, in procuring the judgment in question; the ground on which relief is prayed is accident, as distinguished from fraud."

Next, we agree with the Court of Appeals that, assuming the newly discovered evidence elicited from Judge Henderson would otherwise be sufficient ground for restraining the enforcement of the judgment, it was incumbent upon the appellants under the pleadings in the present action to prove that their failure to discover evidence of the truth of the libel and plead the same by way of defense in the action at law was not attributable to their own want of diligence. The bill alleges that they made diligent but unsuccessful efforts to discover such evidence, both before and after the filing of their plea. The answer calls for strict proof of this. But the averment is left entirely unsupported by the proofs in the case. Neither Pickford nor Walter nor their counsel in the libel suit gave any evidence tending to show any effort, diligent or otherwise, to discover evidence of the truth of the libel.

We do not hold them negligent merely because of not having sooner discovered that Judge Henderson was available as a witness. He himself testified to the effect that, because of the character of the communication, he was careful not to reveal what was said by Mr. Talbott to him until after the conclusion of the libel suit. But, assuming that what was charged against Mr. Talbott in the newspaper article was true, it is not to be assumed that diligent efforts would have discovered no other evidence of its truth. All of Talbott's dealings with the insurance

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companies and with the other persons concerned in his alleged misconduct were within the range of investigation, had diligence been exercised.

Again, one of the peculiar features presented by this case is the following: Appellants, coming into equity for relief on the basis of Judge Henderson's evidence, rely upon it not as newly discovered evidence alone, but as evidence of a newly discovered fact. Merely as evidence it would not have been admissible on the former trial, justification not having been pleaded. It is upon the fact alleged to have been disclosed by Judge Henderson—the fact being Mr. Talbott's alleged misconduct, and not merely his alleged admission of it—that appellants are relying as a newly discovered defense to the action for libel. Now, the settled rule in equity is that a defense is not to be deemed “newly discovered,” or as lost by “accident or mistake,” if it was or ought to have been within the knowledge of the party when he was called upon for his defense in the action at law. As Lord Hardwicke said, “As to relieving against verdicts, for being contrary to equity, those cases are, where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury find by their verdict, and the defendant was ignorant of it at the trial.” *Williams v. Lee*, 3 Atk. 223, 224. Chancellor Kent said: “The general rule is, that this court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defense.” *Lansing v. Eddy*, 1 Johns. Ch. 49, 51. See also *Taylor v. Nashville & C. Railroad Co.*, 86 Tennessee, 228, and cases cited.

But how can the appellants be heard to say that when making their defense at law they were ignorant of the truth of the matters charged against Talbott in the newspaper article, when they themselves were the authors of those charges? Not only do the verdict and judgment in

the libel suit legally establish their responsibility for the published accusation, but such responsibility is tacitly admitted in the bill of complaint herein, and there is nothing to throw doubt upon it.

Upon the whole case, therefore, it cannot be said that appellants omitted to plead justification in the libel suit because of any "accident" or "mistake" within the meaning of the equitable rule. That defense was considered by them and their counsel and deliberately and advisedly rejected because (a) it could not be sustained, and (b) a failure to sustain it would probably embarrass them in their defense under the general issue, or rather, would render it probable that in the anticipated event of the plaintiff prevailing over them on the general issue, increased damages would be awarded against them because of the reiteration of the libel in a plea of justification. And if when called upon to make defense in the libel suit they had no sufficient evidence at hand to maintain the truth of the published matter, this must on the present record be attributed to one or the other of two causes. One is, that the published matter was in fact untrue; the other is, that they did not use proper diligence to discover evidence of its truth. Either explanation leaves them without claim to relief in this action.

The question whether appellants, because of having originally made a public accusation of malfeasance in office against the appellee without having evidence of the truth of the accusation sufficient even to warrant prudent counsel in making an issue of it in a libel suit, are barred from relief in equity under the doctrine of "clean hands," it is unnecessary to consider.

It seems to us that the case of the appellants is without merit, and the decree under review will be

Affirmed.

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EX PARTE CHARLEY WEBB, PETITIONER.

ON APPLICATION FOR HABEAS CORPUS AND CERTIORARI.

No. 11. Original. Argued May 13, 1912.—Decided June 10, 1912.

The Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335, followed by the adoption of the constitution therein described, and the admission of the new State, had the effect of remitting to the state government the enforcement of the laws relating to the manufacture and sale of liquor within the State; and, so far as it covered the same field as the prior law of 1895 prohibiting introduction and sale of liquor in Indian country, the latter was by implication repealed. While the Oklahoma Enabling Act may have by implication repealed the act of 1895 in part, it was not the intention of Congress to repeal that act in respect to the introduction of liquor from other States or Territories.

Congress has for many years consistently pursued the policy of forbidding sales of liquor to Indians and of excluding liquor from territory occupied by them, and the Oklahoma Enabling Act was framed with a clear intent that while the State should control the liquor traffic within its own borders the United States should exercise its appropriate powers to prevent such traffic within the Indian Territory originating beyond the borders of the State.

It is unreasonable to suppose that Congress would wipe out all its laws and regulations regarding the liquor traffic with Indians including those established by treaties, and impose upon future Congresses the labor and difficulty of establishing new legislation upon that subject.

The proviso to § 1 of the Oklahoma Enabling Act expressly reserving to the Government of the United States the power to make laws and regulations in the future respecting Indians, negatives any purpose to repeal by implication the existing laws and regulations on the subject.

An act of Congress may repeal a prior treaty as well as it may repeal a prior statute; but it is a settled rule of statutory construction that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction.

Under § 8 of Article I, of the Federal Constitution, conferring upon Congress the right to regulate commerce with the Indian tribes, Congress may regulate traffic with Indians although within the limits of a single State.

Under § 8 of Article I of the Federal Constitution, Congress has the

same power to maintain an existing law in regard to Indian traffic so as to keep it in force in a new State as it has to enact new laws in the future on the same subject.

Although the Five Civilized Tribes have long been treated more liberally than other Indians, they remain none the less the wards of the Nation and in all respects subject to its control.

Reviewing the treaties and agreements with the several tribes occupying the Indian Territory within that State, it appears that the provisions of the Oklahoma Enabling Act in regard to liquor traffic with Indians originating beyond the State were enacted with the purpose of fulfilling the spirit and letter of those treaties and agreements.

The argument that the act of 1895 must have been repealed by the Oklahoma Enabling Act to the extent that the latter permitted the introduction of liquor into the State for the needs of the state agencies for distribution of liquor, is an argument *ab inconvenienti* and is without force so far as the introduction of liquor by an individual is concerned.

A law creating a crime ought to be explicit, and if ambiguous or uncertain it should be interpreted in favor of the liberty of the citizen; but in this case as there is no ambiguity in the act of 1895 a repeal *pro tanto* does not leave anything doubtful or ambiguous in that part of the act which remains in force.

The rule that the admission of a new State into the Union on an equal footing with the original States imports an equality of power over internal affairs, does not prevent the United States from reserving the right to regulate matters therein within the sphere of the plain power of Congress.

Where Congress embraces in an enabling act for the admission of a new State, legislation intended as a regulation of matters within the sphere of its powers, the legislation derives no force from any agreement or compact with the new State as an acceptance of statehood, but derives its force solely from the power of Congress to regulate the subject-matter of the legislation. *Coyle v. Smith*, 221 U. S. 574.

The Oklahoma Enabling Act did not repeal the act of 1895, so far as it pertains to the carrying of liquor from without the new State into that part of it which was Indian Territory (except that brought in by the State for use of state agencies) and the United States District Court for the District of Oklahoma has jurisdiction to punish an offender against the act of 1895 in that respect.

Statement of the Case.

THIS is an original application for a writ of *habeas corpus*

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Statement of the Case.

to inquire into the arrest and detention of the petitioner, who is held in custody by the United States Marshal for the Eastern District of Oklahoma, under a *capias* or bench warrant issued out of the United States District Court, upon an indictment of which the following is a copy:

"UNITED STATES OF AMERICA,

Eastern District of Oklahoma, ss:

"In the District Court of the United States in and for the Eastern District aforesaid, at the March Term thereof, A. D. 1912, at Vinita, Oklahoma.

"The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present, that Otis Tittle and Charley Webb, and each of them, on the 23rd day of January, in the year 1912, in the said division of said district and within the jurisdiction of said court in Craig County in the State of Oklahoma, the same then and there being and constituting a portion of the Indian country of the said United States, did at the time and place aforesaid unlawfully, knowingly, wilfully and feloniously introduce, and attempt to so introduce and carry into the said Indian country, from without the said Indian country, seventeen gallons of spirituous, ardent and intoxicating liquor, to wit: alcohol, which said alcohol was by the said Otis Tittle and Charley Webb and each of them so introduced and carried into that portion of said Eastern District of Oklahoma so being then and there Indian country as above set forth and described, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

Petitioner also applies for a writ of certiorari to review the action of the District Court in refusing, on *habeas corpus*, to discharge him from custody under the bench warrant.

For present purposes it is admitted that petitioner is a

white man, not of Indian blood; that the intoxicating liquors described in the indictment were shipped on his order from the city of Joplin, in the State of Missouri, by way of a railway that is a common carrier of interstate shipments, consigned to petitioner at the city of Vinita, in the State of Oklahoma; that the same reached the latter city over said railway line in the course of ordinary transportation at the time of the alleged offense set forth in the indictment, to wit, January 23, 1912; that said intoxicating liquors were delivered by the transportation company to the petitioner within the city of Vinita, and he received them upon a public street and highway and not upon restricted land, for the purpose and with the intent of carrying and transporting the liquors along the streets and highways to another point within the same city, and that while he was in the act of so receiving the same he was arrested. That the city of Vinita is situate in Craig County, Oklahoma, which county constitutes a part of what was formerly the Cherokee Nation; that all the lands of the Cherokee Nation have been either allotted to individual citizens of the Cherokee Tribe under the terms of the Cherokee Agreement and the several acts of Congress providing for the allotment of said lands, or sold by the United States for the benefit of the citizens of the Cherokee Nation, either as town sites or otherwise, under the authority of the several acts of Congress providing therefor; that the city of Vinita, including the place where the intoxicating liquor was delivered to and received by the petitioner, is a part of the original town site of Vinita, Indian Territory; and that the status of the lands and of the enrolled members of the Cherokee Tribe of Indians are such as are fixed by law.

The petitioner contends that the District Court is without jurisdiction, because there is no existing law under which the offense alleged against him is punishable in the Federal courts. He claims that he is obliged to resort

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Argument for Petitioner.

to this court for relief because the United States Circuit Court of Appeals for the Eighth Circuit has decided the questions involved, adversely to his contention, in the case of *United States Express Co. v. Friedman*, 191 Fed. Rep. 673.

Mr. Joseph C. Stone and Mr. Lawrence Maxwell, with whom *Mr. James S. Davenport, Mr. Thomas H. Owen and Mr. Joseph S. Graydon* were on the brief, for petitioner:

The police provisions of the act of January 30, 1897, do not apply to Oklahoma since its admission into the Union. Their continued existence is inconsistent with the Oklahoma Enabling Act and the state constitution and laws expressly authorized thereby. *Cherokee Tobacco*, 11 Wall. 616; *Matter of Heff*, 197 U. S. 488, 505.

There is, therefore, a statute of the United States punishing the specific offense of selling liquor to an Indian, fixing a certain penalty to be enforced in the courts of the United States, followed by an enabling act creating a new sovereign state, prohibiting the sale of liquors to anybody, fixing a lesser penalty for the offense of selling, and placing the jurisdiction in the state courts. The two acts reveal an essential inconsistency which makes it impossible for both to remain in force, unless there can be a divided sovereignty. Every sale which would constitute a violation of the act of 1897 in this territory would also constitute a violation of the Enabling Act, punishable by the express provision of that act in the state courts.

If the contention of the Government is correct, the law is so framed that neither court nor layman can ascertain by reading it by whom and under what circumstances introduction of liquor is innocent or criminal. Laws which create crimes ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid. *United States v. Sharp*, Pet. C. C. 118; *United*

States v. Brewer, 139 U. S. 278, 288; *The Enterprise*, 8 Fed. Cases, No. 4449; Bishop on Statutory Crimes, § 41; *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. Rep. 866; Sutherland on Stat. Const., 1st ed., 438; Lord Aukland's Principles of Penal Law, 312.

The question whether the act of January 30, 1897, remained in force in that part of Oklahoma which was formerly Indian Territory after the admission of the States is one of statutory construction, the presumption being that it did not, because its continued existence implies inequality of statehood. *United States v. McBratney*, 104 U. S. 621; *Draper v. United States*, 164 U. S. 240; *Matter of Heff*, 197 U. S. 488; *United States v. Celestine*, 215 U. S. 278; *United States v. Sutton*, 215 U. S. 291.

The place where the alleged offense was committed was not "Indian country" within the meaning of the act of January 30, 1897. *Ex parte Crow Dog*, 109 U. S. 556; *United States v. LeBris*, 121 U. S. 278; *United States v. Four Bottles Sour Mash Whiskey*, 90 Fed. Rep. 720; *United States v. Knowlton*, 3 Dakota, 58, 13 N. W. Rep. 573; *Forty-three Cases Cognac Brandy &c.*, 14 Fed. Rep. 539; *United States v. Martin*, 14 Fed. Rep. 817.

Petitioner is entitled to habeas corpus, and the writ should issue. *Matter of Heff*, 197 U. S. 488; *Ex parte Nielson*, 131 U. S. 176; *In re Mayfield*, 141 U. S. 107; *In re John Bonner*, 151 U. S. 242; *Ex parte Albert Siebold*, 100 U. S. 371; *In the Matter of Schneider*, 148 U. S. 162; May's U. S. Sup. Ct. Practice, 440.

Mr. Assistant Attorney General Denison, with whom Mr. Louis G. Bissell was on the brief, for the United States:

The Circuit Court of Appeals for the Eighth Circuit has ruled the point in controversy adversely to the petitioner (*United States Express Co. v. Friedman*, 191 Fed. Rep. 673, reversing 80 Fed. Rep. 1006).

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Argument for the United States.

The extinguishment of the Indian title to the particular lot in question did not remove it from the sphere of the Federal liquor laws, because the very treaties and statutes which authorized the extinguishment reserved the operation of those laws, 32 Stat. 716; 30 Stat. 495, 509; 32 Stat. 641, 656; 30 Stat. 567-8; 31 Stat. 861, 872; 32 Stat. 500, 504; and the case thus falls within the exception stated in *Bates v. Clark*, 95 U. S. 204, 208, 209, and *Dick v. United States*, 208 U. S. 358; and within the principle of *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 193, 195, 197; *Ex parte Crow Dog*, 109 U. S. 556, 561; *United States v. Thomas*, 151 U. S. 577.

Notwithstanding the progress of piecemeal extinguishment of Indian land titles, Congress, in 1895, prohibited the manufacture and sale of liquors within all parts of the Indian Territory, and the introduction of liquors into said Territory (28 Stat. 697). And in 1907, Congress expressly continued the tribal existence of the Five Civilized Tribes (34 Stat. 822).

The case also differs from *Bates v. Clark*, *supra* (reported below in 46 N. W. Rep. 510), in that it does not involve the blanket extinguishment of Indian title, accompanied by a withdrawal of the Indians and opening up of the lands to white settlement. *United States v. Payne*, 8 Fed. Rep. 888, 895; 22 Ops. A. G. 232. See also *Buster v. Wright*, 135 Fed. Rep. 947.

The mere creation of the State of Oklahoma did not in and of itself oust existing Federal laws in regard to the liquor traffic with Indians. *United States v. 43 Gallons of Whiskey*, 93 U. S. 188; *Dick v. United States*, 208 U. S. 340; *United States v. Holliday*, 70 U. S. 407; *Hallowell v. United States*, 221 U. S. 317; *Ex parte Crow Dog*, 109 U. S. 556, 561; *United States v. Thomas*, 151 U. S. 577.

The imposition upon the State by the Enabling Act of the purely intrastate duties to protect the Indians against the liquor traffic for the twenty-one years during

which such special protection was considered by Congress necessary, was within the power of the Federal Government as a part of its constitutional power over the intercourse with the Indians. *Coyle v. Oklahoma*, 221 U. S. 559. The imposition of these obligations upon the State was not repugnant to or in substitution for the existing law against interstate introduction of liquors into the Indian Territory, as the State would not have had the power to regulate interstate commerce (*Leisy v. Hardin*, 135 U. S. 100; *Rhodes v. Iowa*, 170 U. S. 412; *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70), and as the continuance of that prohibition was essential for the protection of the Indians, there is no ground for implying an intention on the part of Congress to repeal the existing prohibition against the introduction of liquor from other States. *Frost v. Wanie*, 157 U. S. 46; *United States v. Celestine*, 215 U. S. 278. -

The Enabling Act expressly reserved the authority of the government of the United States to make laws or regulations respecting such Indians, just as if the Enabling Act had never been passed (*Tiger v. Western Co.*, 221 U. S. 309), and also it expressly continued the laws in force at the time of the admission of the State into the Union, except as modified or changed, and also all laws of the United States not locally inapplicable.

If the Federal laws no longer prevent the introduction of liquor into the Indian Territory from States other than Oklahoma, then the equality of Oklahoma with its sister States has been impaired, for its inhabitants alone, among all the States, are prevented from conducting that traffic with the old Indian Territory.

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

The draftsman of the indictment evidently intended to charge the offense known as "introducing liquor into

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the Indian country," made punishable by § 2139, Rev. Stat., as amended by act of July 23, 1892, 27 Stat. 260, c. 234, and by the "Act to prohibit the sale of intoxicating drinks to Indians," etc., approved January 30, 1897, 29 Stat. 506, c. 109.

The Circuit Court of Appeals in *United States Express Company v. Friedman*, 191 Fed. Rep. 673, dealt with the question whether that portion of Oklahoma formerly known as the Indian Territory ceased to be "Indian country" upon the admission of Oklahoma as a State, so that these acts were no longer applicable, and with the question whether the admission of Oklahoma as a State had the effect of repealing them so far as pertained to the introduction of liquors into the Territory. Petitioner's application to this court for a *habeas corpus* was intended to bring that decision under review, and the agreed statement of facts was designedly so framed as to show the grounds of his contention that the *locus in quo* is no longer "Indian country."

The Government, however, in resisting the application, relied for support of the jurisdiction of the District Court not only upon the acts just referred to, but also upon § 8 of "An Act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes," approved March 1, 1895, 28 Stat. 693, c. 145.

The three enactments in question are set forth in chronological order in the margin.¹

¹ ACT OF JULY 23, 1892 (27 Stat. 260).

"Chap. 234.—An act to amend sections twenty-one hundred and thirty-nine, twenty-one hundred and forty, and twenty-one hundred and forty-one of the Revised Statutes touching the sale of intoxicants in the Indian country, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-one hun-

At the time of the passage of the act of 1895 the Territory known as the Indian Territory was that which was

dred and thirty-nine of the Revised Statutes be amended and re-enacted so as to read as follows:

“SEC. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense.”

ACT OF MARCH 1, 1895 (28 Stat. 693).

“Chap. 145.—An Act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes.

* * * * *

“SEC. 8. That any person, whether an Indian or otherwise, who shall, in said Territory, manufacture, sell, give away, or in any manner,

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described by metes and bounds in the act of May 2, 1890, 26 Stat. 81, 93, c. 182, § 29. It included the lands of

or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

ACT OF JANUARY 30, 1897 (29 Stat. 506).

"Chap. 109.—An Act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and 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 a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided however*, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under

the Cherokee Nation, and the city of Vinita, where the petitioner's alleged offense was committed. It is now, of course, a part of the State of Oklahoma.

It is not open to serious dispute that if the prohibition of the act of 1895 against "carrying into said Territory any such liquors or drinks" remains operative so far as pertains to the carrying of intoxicating liquors from another State into that part of Oklahoma which was the Indian Territory, the acts admittedly done by the petitioner constitute an offense thereunder, of which the United States District Court has jurisdiction. Whether the offense is sufficiently alleged in the indictment is another question, which, on familiar grounds, is not a proper subject-matter for inquiry on *habeas corpus*. *Ex parte Parks*, 93 U. S. 18; *Ex parte Virginia*, 100 U. S. 313, 339; *Ex parte Carll*, 106 U. S. 521; *Ex parte Belt*, 159 U. S. 95; *Ornelas v. Ruiz*, 161 U. S. 502. Recognizing this, counsel for the petitioner, upon the oral argument and in a supplemental brief, modified his original contentions, so as to deal with the act of 1895. As thus modified, the grounds upon which he relies are the following:

First, that the act of 1895, being a special act applicable to the Indian Territory, had the effect of superseding as to that Territory the existing general statute against the introduction and sale of intoxicating liquors in the Indian country.

Secondly, that the act of 1897, being amendatory of the general statute against the introduction and sale of intoxicating liquors in the Indian country, did not apply to the Indian Territory, because that Territory was covered by the special act of 1895.

authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

SEC. 2. That so much of the Act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this Act is hereby repealed."

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Thirdly, that the jurisdiction cannot be rested upon the act of 1897, because the place where the alleged offense was committed was not Indian country within the meaning of that act, since there was no Indian title remaining in the town site of Vinita; the insistence being that where there is no Indian title, no inalienable land, and no allotted land held in trust, there can be no "Indian country."

Fourthly, that, whether the act of 1895 or the act of 1897 would otherwise be applicable, these acts were both repealed, as to that part of Oklahoma which was formerly the Indian Territory, by the force of the Oklahoma Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, under the authority of which the constitution of Oklahoma was adopted and a state government established, covering the territory previously known as Oklahoma and the Indian Territory; and pursuant to which certain statutes were afterwards enacted by the state legislature, viz., an act of March 24, 1908 (Laws of 1907-8, p. 594), known as the Billups Law, being §§ 4156-4209 of the Compiled Laws of Oklahoma of 1909, and an act passed March 11, 1911, Session Laws of Oklahoma, 1910-1911, c. 70, pp. 154-156.

The contentions of the Government, on the other hand, are:

First, that the act of 1895 prohibits the liquor traffic in the Indian Territory, regardless of any question concerning the term "Indian country," or concerning the title to particular lands, or the race or color of the persons affected.

Secondly, that the extinguishment of the Indian land title to the particular *locus in quo* did not remove it from the operation of § 2139, Rev. Stat., as amended by the acts of 1892 and 1897, because (among other reasons,) a contrary intent is manifested in the treaties and statutes under which that title was extinguished.

Thirdly, That neither by admitting Oklahoma to statehood, nor by anything in the Enabling Act, did Congress

renounce its control over the interstate liquor traffic in what had been the Indian Territory.

The question whether the act of 1895 was superseded by the act of 1897 was not much discussed in the argument. It is a question of nicety, having an importance extending beyond the exigencies of the present case. In the view we take of the other questions, however, we may simplify the discussion by assuming (without conceding) that petitioner's first two points are well taken, and that the act of 1897 did not apply to the Indian Territory because that Territory was covered by the special act of 1895. This at the same time renders it unnecessary for us to consider his third contention, viz., that the *locus in quo* was not Indian country within the meaning of the act of 1897, because of the extinguishment of the Indian title.

We may thus proceed at once to the question of the effect upon the act of 1895 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), and the admission of the State of Oklahoma into the Union pursuant thereto. Since the Government concedes that the act of 1895 has been thereby repealed saving so far as it prohibited the carrying of intoxicating liquors, etc., from another State into the Territory, the matter to be discussed is still further narrowed.

Before passing, however, it should be noted that § 2139, Rev. Stat., and the act of 1897 contain prohibitions respecting the sale of intoxicating liquor to Indians, and in this, and perhaps in other important respects, cover ground not covered by the act of 1895. We must not be understood as deciding that these prohibitions are no longer in force within what was the Indian Territory, either because of the assumed effect of the act of 1895 in superseding the previous general statute of which the act of 1897 was amendatory, or because of the Oklahoma Enabling Act and the admission of the State thereunder.

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The assumption we make in favor of the petitioner is for the purposes of the present argument only.

The title and pertinent sections of the Enabling Act are set forth in the margin.¹

¹ OKLAHOMA ENABLING ACT (34 Stat. 267).

"An Act to enable the people of Oklahoma and of 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.

"SECTION 1. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

"SEC. 2. That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed State for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State; and all persons qualified to vote for said delegates shall be eligible to serve as delegates; * * * *

"SEC. 3. * * * Said convention shall, and is hereby authorized to, form a constitution and State government for said proposed State. * * * And said convention shall provide in said constitution:

* * * * *

"Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and there-

It will be observed that its first section provides that nothing in the constitution of the new State shall be con-

after until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above described portions of said State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said State into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: *Provided*, That the legislature may provide by law for one agency under the supervision of said State in each incorporated town of not less than two thousand population in the portions of said State hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said State, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denatured by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said State hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any

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strued "to limit or affect the authority of the Government of the United States to make any law or regulation re-

officer or citizen of said State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which after his own personal diagnosis he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day. Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State.

"Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

* * * * *

SEC. 4 provides for the submission to the people of the constitution to be adopted by the constitutional convention, and the admission of the State (on ratification of the constitution by the people) "on an equal footing with the original States."

* * * * *

"SEC. 13. That said State when admitted as aforesaid shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian Territory shall constitute said eastern district, and the said Oklahoma Territory shall constitute said western district. * * * The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations." * * *

"SEC. 21. * * * All laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in

specting such Indians, their lands, property or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." Also that § 3 requires that the constitution shall prohibit the manufacture and sale of intoxicating liquors within those parts of the proposed State known as the Indian Territory and the Osage Indian Reservation, and within any other parts of said State which existed as Indian reservations on January 1, 1906, and shall prohibit the shipment or conveyance of such liquors from other parts of the State into the portions just described; the prohibition to continue for a period of 21 years, and thereafter until the people shall otherwise provide by constitutional amendment and proper state legislation; with a proviso for the establishment of state agencies for the sale of liquors for medicinal purposes and to bonded apothecaries, of denaturized alcohol for industrial purposes and of alcohol for scientific purposes; and with elaborate provisions for carrying the prohibition into effect and preventing any abuse of the limited privileges conferred; it being declared, at the same time, that "Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State."

Pursuant to this act, a constitutional convention prepared and submitted to the people for adoption a constitution containing the clauses thus prescribed by Congress. At the same time a separate constitutional provision was submitted, for establishing state-wide liquor prohibition, substantially in the same terms and subject to the same provisions that were prescribed, with respect to the Indian Territory and the Indian reservations, by the Enabling

force throughout said State, except as modified or changed by this Act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

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Act. The constitution and the separate constitutional provision were duly adopted by the people, and on November 16, 1907, by proclamation of the President, Oklahoma was admitted as a State of the Union.

No doubt the Enabling Act, followed by the adoption of the constitution therein prescribed and the admission of the new State, had the effect of remitting to the state government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the State, and respecting commerce in such liquors conducted wholly within the State; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed. But the act of 1895 included offenses that are not covered by the prohibition scheme of the Enabling Act; it prohibited the carrying of intoxicating liquors from other States into territory that was included in the State of Oklahoma. And the question for present solution is whether the act of 1895, having been partially repealed as just indicated, remains in force as a prohibition against such interstate traffic. In deciding it we shall do well to bear in mind that the offense of importing or "introducing" or "carrying in" such liquors into a protected district is different in its nature and readily distinguishable from the offenses of manufacturing, selling, etc., within the district; that from the earliest times they have been treated in Federal legislation as different offenses; that Congress for many years has consistently pursued the policy of forbidding sales of liquor to Indians and excluding it from country occupied by them; that the prohibition of importations has been deemed necessary to effectuate the purpose of preventing the use of it in protected districts; that the act of 1895 was passed for the evident purpose of enforcing the two-fold prohibition in the Indian Territory; and that by agreements with the Indian tribes

inhabiting the Territory (as will appear below) the United States was, to some extent at least, pledged to maintain the prohibition. Besides these considerations, it is to be noted that the Enabling Act, while containing most stringent clauses for preventing (at least for twenty-one years) the manufacture of and traffic in liquors within the Indian Territory, and their transportation from other parts of the new State into the Territory, imposes no duty upon the new State with respect to preventing liquors from being brought into the Territory from other States.

In view of these considerations, and others to be mentioned, it seems to us that Congress, so far from intending by the Enabling Act to repeal so much of the act of 1895 as prohibits the carrying of intoxicating liquors into the Indian Territory from points without the State, framed the Enabling Act with a clear view of the distinction between the powers appropriate to be exercised by the new State over matters within her borders, and the powers appropriate to be exercised by the United States over traffic originating beyond the borders of the new State and extending within the Indian Territory.

In addition, there is the proviso contained in section one of the act, that nothing contained in the state constitution shall be construed "to limit or affect the right or authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed." It is contended that this does not preserve the existing laws and regulations respecting the Indians, but rather excludes the inference of their continued force and existence by indicating a purpose on the part of Congress to thereafter enact regulations for the protection of the Indians in Oklahoma if necessity requires. This, we think, is an inadmissible

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construction. We deem it unreasonable to suppose that Congress, possessing the constitutional power and recognizing the moral duty to make laws and regulations respecting the Indians, and having already established laws and regulations of this character applicable in the Territory, including some that were established by treaties and agreements, should resolve to wipe them out, and thereby impose upon future Congresses the labor and difficulty of establishing other proper laws and regulations in their stead. In our opinion, the purpose expressed in the proviso to reserve to the Government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject.

Of course an act of Congress may repeal a prior treaty as well as it may repeal a prior act. *The Cherokee Tobacco*, 11 Wall. 616; *Fong Yue Ting v. United States*, 149 U. S. 698, 720; *Ward v. Race Horse*, 163 U. S. 504, 511; *Draper v. United States*, 164 U. S. 240, 243.

But it is a settled rule of statutory construction that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. *Cope v. Cope*, 137 U. S. 682, 686, and cases cited; *Ward v. Race Horse*, *supra*.

The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new State is clearly supportable under the Federal Constitution, Art. I, § 8, which confers upon Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a State. *United States v. Holliday*, 3 Wall. 407, 418; *United States*

v. *43 Gallons of Whiskey*, 93 U. S. 188, 195, 197; *Dick v. United States*, 208 U. S. 340, and cases cited.

And it is as clearly consistent with the Constitution to maintain in force an existing act of Congress relating to such traffic and intercourse, so that it shall continue effective within the limits of the new State, as it is to reserve the right to enact new laws in the future upon the same subject-matter.

We must read the proviso contained in § 1 of the Enabling Act, and also the declaration in § 21 that "The laws of the United States not locally inapplicable shall have the same force and effect within the said state as elsewhere within the United States," in the light of the existing relations, then recently established by treaties and by acts of Congress, between the Government of the United States and the Five Civilized Tribes that occupied the area known as the Indian Territory. Although those tribes had long been treated more liberally than other Indians, they remained none the less wards of the Government, and in all respects subject to its control. *Cherokee Nation v. Southern Kansas R. R. Co.*, 135 U. S. 641, 653, and cases cited. And after Congress, in the year 1893, had inaugurated the policy of terminating their tribal existence and government and allotting their lands in severalty (act of March 3, 1893, c. 209, § 16; 27 Stat. 645), agreements were negotiated by the Dawes Commission with each of the tribes designed to carry out the objects indicated; and in each of those agreements there was some recognition of the importance of preserving restrictions upon the introduction of intoxicating liquors from without and the traffic in them within the Indian Territory.

The agreement with the Seminoles was made in 1897 (30 Stat. 567), with the Creeks in 1901 and 1902 (31 Stat. 861, 32 Stat. 500), with the Choctaws and Chickasaws in 1898 (30 Stat. 507) and in 1902 (32 Stat. 641), and with the Cherokees in the latter year (32 Stat. 716).

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Section 73 of the agreement with the Cherokees (32 Stat. 727) continued in force in that Nation the fourteenth section of an act of June 28, 1898, entitled "An act for the protection of the people of the Indian Territory and for other purposes," (30 Stat. 500), which contained a proviso against the sale of liquor in the Territory, and against the introduction thereof into the Territory.

In the first Choctaw and Chickasaw agreement there was a provision (30 Stat. 509) that no law or ordinance should be passed by any town interfering with the enforcement of or conflicting with the laws of the United States in force in said Territory, "and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality."

In the Choctaw-Chickasaw agreement of 1902, § 64, which provided for the cession to the United States of lands at the Sulphur Springs, contained a provision (32 Stat. 656) that "Until otherwise provided by Congress, the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind in the Indian country or Indian Reservations shall be applicable to the lands so ceded, and said lands shall remain within the jurisdiction of the United States court for the Southern District of Indian Territory."

The Seminole agreement likewise provided that "the United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality." (30 Stat. 568.)

The first Creek agreement provided that "The United States agrees to maintain strict laws in said Nation against the introduction, sale, barter, or giving away of liquors or intoxicants of any kind whatsoever." (Act of March 1, 1901, c. 676, § 43, 31 Stat. 872.) And this was not modi-

fied by the supplemental agreement. (Act of June 30, 1902, c. 1323, 32 Stat. 500.)

It seems to us that the provisions of the Enabling Act show that Congress recognized that, because of these agreements or otherwise, the Government of the United States was under a duty to the inhabitants of the Indian Territory different from its duty to the inhabitants of the other territory that went to form the new State. We are unable otherwise to explain the insertion in the proposed constitution of the clause establishing liquor prohibition within the Indian Territory, and the exclusion of the other territory from the operation of this clause. This action is indicative of a purpose on the part of Congress to fulfill the spirit as well as the letter of the agreements with the Five Tribes. There were differences in those treaties, so far as the liquor traffic is concerned. But in the Enabling Act all the tribes were treated alike, and in a manner to fulfill the amplest promise given to any tribe, so far—but *only so far*—as the establishment of general prohibition *within* the new State was concerned.

But if the Federal law that had prevented the bringing in of intoxicating liquors from without the State was at the same time repealed, the pledges of the Government were thereby in a material part broken. For manifestly it would be of comparatively little use to prohibit the manufacture of intoxicating liquors within the Territory and their shipment from other parts of the State into the Territory, if at the same time all laws prohibiting the introduction of such liquors from other States into the Territory were to be repealed.

And it is clear that in framing the Enabling Act, Congress was mindful not only of its jurisdiction over commerce with the Indian tribes, but was mindful that traffic in liquors between one State and another is subject only to the control of Congress. *Bowman v. Chicago & N. W.*

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Railway Co., 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Lottery Case*, 188 U. S. 321.

It is argued that the result of engrafting the provisions of the Enabling Act upon that part of the act of 1895 which remains unrepealed is a statutory system "so incongruous and indefinite in purpose and effect that it would be impossible to enforce it."

This contention is based largely upon the fact that the prohibition of the manufacture, sale, barter, etc., of intoxicating liquors within those parts of the State that were known as the Indian Territory and Osage Indian Reservation, and the other parts of the State which were Indian reservations on January 1, 1906, and the prohibition of the shipment or conveyance of such liquors from other parts of the State into the portions just mentioned, is subject to a proviso that the legislature may provide by law for state agencies for the sale of such liquor for medicinal purposes, for the sale of denaturized alcohol for industrial purposes, for the sale of alcohol for scientific purposes, and for the sale of liquors to bonded apothecaries.

It is argued that in the *interim* between the admission of the State and the enactment of legislation for establishing state liquor agencies, there would necessarily be a period of considerable duration (as the event happened, it was over four months,) during which, in what was formerly the Indian Territory, it would be doubtful whether sales of liquor would be punishable in the Federal or in the state courts, and whether according to the act of 1895 or under the different penalties of the Enabling Act.

It may be conceded that until the State took action, in accordance with the constitution, for the establishment of agencies for the sale of liquors for the limited purposes mentioned, such sales could not be made at all, and that all sales which otherwise were in violation of the prohibition of the constitution were punishable in the courts; to what

extent punishable in the Federal courts, and to what extent in the state courts, it is not worth while to spend time in considering. Some temporary confusion and uncertainty may be unavoidable upon the establishment of a state government under such conditions; but this has little bearing upon the question before us.

A more serious argument is that which is based upon the effect of the constitutional provision respecting the establishment and maintenance of state agencies for the disposition of liquor, after the state legislature shall have provided by law for such agencies; for when such a law has been enacted we are brought to the permanent condition of things that was in the contemplation of Congress.

And here it is urged that as to the offense of carrying intoxicating liquor into the Territory, it must be that the introduction thereof for supplying the needs of the state agencies was permitted by the Enabling Act, and that the provisions of the act of 1895 must be taken to be repealed to that extent, leaving the act in force against the introduction of liquor for other purposes. But it is said (to quote from the brief): "If that was the purpose of the Enabling Act it entirely fails to express it, because it does not provide who may so introduce liquors into the Territory, and who may not, for the purpose of supplying local agencies, and the law would be so framed that neither court nor layman could ascertain by reading it by whom and under what circumstances such introduction was innocent or criminal."

No doubt, in order to give effect to the constitutional provision that permits the legislature to provide by law for agencies under the supervision of the State for the sale of liquors for the limited purposes specified, it is necessary that the state agencies shall procure these liquors from some source.

The authorization is in the form of a proviso. Whether, by fair construction, it qualifies merely the force of the

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clause to which it is subjoined—that is, qualifies merely the prohibition against the manufacture, sale, etc., of intoxicating liquors within the Indian Territory and the Indian reservations, and the prohibition against the shipment of such liquors from other parts of the State into the portions mentioned—or whether, on the other hand, it has the effect of permitting liquors to be introduced from without the State, is a question that need not detain us. Upon the former construction, the State would presumably be obliged to cause the liquors to be manufactured within its own borders for the supply of its distributing agencies. Upon the latter construction, the State would be at liberty to import the necessary liquors from beyond its borders. In the one case, as in the other, the operation would be lawful and innocent when conducted under the authority of the State; otherwise unlawful. It is not to be presumed that the State would conceal or cloak its operations, or leave its agents without evidence of their authority. We can see no more practical difficulty here than there is in determining in any other matter that is subject to public regulation—for instance, the killing or transportation of game, the manufacture or sale of liquor—whether a given act is done with or without a license from the State. The argument *ab inconvenienti* is without force.

We are reminded that “laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid,” (*United States v. Brewer*, 139 U. S. 278, 288) and that ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation in favor of the liberty of the citizen.

But there is no uncertainty or ambiguity about the prohibition of the act of 1895 against carrying intoxicating liquors into the Indian Territory. It is not suggested that there is any express repeal of that prohibition. And

we are unable to see that a *pro tanto* repeal by implication leaves anything doubtful or ambiguous in the meaning of that which remains.

It is not our purpose to qualify the doctrine established by repeated decisions of this court that the admission of a new State into the Union on an equal footing with the original States imports an equality of power over internal affairs. The cases cited by counsel for the petitioner under this head are cases that dealt with matters wholly internal. *United States v. McBratney*, 104 U. S. 621; *Draper v. United States*, 164 U. S. 240; *Matter of Heff*, 197 U. S. 488, 505. And see *Ward v. Race Horse*, 163 U. S. 504; *United States v. Celestine*, 215 U. S. 278, 288; *United States v. Sutton*, 215 U. S. 291, 294; *Hallowell v. United States*, 221 U. S. 317, 323; *Dick v. United States*, 208 U. S. 340.

The most recent decision of this court upon the subject of the proper construction of acts of Congress passed for the admission of new States into the Union is *Coyle v. Smith*, 221 U. S. 559; where it was held that the Oklahoma Enabling Act (34 Stat., c. 3335, p. 267), in providing that the capital of the State should temporarily be at the City of Guthrie, and should not be changed therefrom previous to the year 1913, ceased to be a limitation upon the power of the State after its admission. The court, however, was careful to state (221 U. S. 574): "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

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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."

We are here dealing with one of those matters such as are referred to in this citation. The power of Congress to regulate commerce between the States, and with Indian tribes situate within the limits of a State, justifies Congress when creating a new State out of territory inhabited by Indian tribes, and into which territory the introduction of intoxicating liquors is by existing laws and treaties prohibited, in so legislating as to preserve those laws and treaties in force to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition. *Dick v. United States*, 208 U. S. 340, 353.

This being so, and since we find in the Oklahoma Enabling Act no repeal, express or implied, of the act of 1895 so far as pertains to the carrying of liquor from without the new State into that part of it which was the Indian Territory (saving as to liquor brought in by the State for the use of state agencies established under the provisions of the Enabling Act), it follows, upon the admitted facts, that the United States District Court has jurisdiction to punish the petitioner for the offense that he has committed.

The petition for a writ of *habeas corpus* and the accompanying application for *certiorari* will be

Denied.

KYLE v. HAMMOND.

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

No. 972. Submitted March 11, 1912.—Decided March 18, 1912.

Under the saving clause of the act of June 7, 1878, 20 Stat. 99, c. 160, the review of the order in this case was not provided for by the Judiciary Act of 1891.

Mr. Hollis R. Bailey, for appellees, in support of motion to dismiss or affirm.

Mr. Warren Ozro Kyle, for appellants, in opposition thereto.

Per Curiam: Before the repeal of the Bankruptcy Act of 1867 the decision of the Circuit Court would have been final. *Wiswall v. Campbell*, 93 U. S. 347, 348, and cases cited; *Cleveland Ins. Co. v. Globe Ins. Co.*, 98 U. S. 366. In view of the saving clause of the repealing act of June 7, 1878, 20 Stat. 99, we are of opinion the review of such an order was not provided for by the Judiciary Act of 1891.

The decision in *Huntington v. Saunders*, 163 U. S. 319, is not to the contrary. There it was merely decided that if the act of 1891 authorized a review of analogous orders, the one sought to be reviewed did not involve the requisite jurisdictional amount.

The appeal is dismissed for want of jurisdiction.

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Order

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911.

Order: It is ordered by the court that section 3 of rule 37 be amended so as to read as follows:

"3. Where an application is submitted to this court for a writ of certiorari to review a decision of a circuit court of appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term."

Promulgated June 10, 1912.

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OPINIONS PER CURIAM, ETC., FROM APRIL 1,
TO JUNE 10, 1912.

No. 797. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* FRANCOIS DE BEARN ET AL.; No. 798. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* FRANCOIS DE BEARN; No. 799. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* ODON DE BEARN; No. 800. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* PIERRE DE BEARN; and No. 801. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* JEAN BAPTISTE CHAUMET. In error to the Court of Appeals of the State of Maryland. Motion to dismiss submitted April 2, 1912. Decided April 8, 1912. *Per Curiam*. Dismissed for the want of jurisdiction. (*Toland v. Sprague*, 12 Pet. 300, 331; *Boyle v. Zacharie*, 6 Pet. 648; *Loeber v. Schroeder*, 149 U. S. 580; *The Missouri & Kansas Interurban Ry. Co. v. The City of Olathe, Kansas*, 222 U. S. 185, 187, 191.) *Mr. Maurice Leon* for the plaintiff in error. *Mr. J. Kemp Bartlett* and *Mr. Edgar Allan Poe* for the defendants in error.

No. 874. JOSEPH D. SULLIVAN, TRUSTEE, ETC., APPELLANT, *v.* AARON GOLDMAN. Appeal from the Supreme Court of the District of Columbia. Motion to dismiss submitted April 1, 1912. Decided April 8, 1912. *Per Curiam*. Dismissed for the want of jurisdiction. (*Mueller v. Nugent*, 184 U. S. 1; *Tefft v. Munsuri*, 222 U. S. 114.) *Mr. Joseph D. Sullivan* and *Mr. L. P. Loving* for the appellant. *Mr. Henry E. Davis* and *Mr. Alexander Wolf* for the appellee.

NO. 907. HANNAH L. ANDREWS, EXECUTRIX, ETC., APPELLANT, *v.* HARVEY K. PARTRIDGE, TRUSTEE, ETC. Appeal from the United States Circuit Court of Appeals for the Third Circuit. Motion to dismiss or affirm submitted April 1, 1912. Decided April 8, 1912. *Per Curiam*. Dismissed for the want of jurisdiction. *Holden v. Stratton*, 119 U. S. 115, 116; *Duryea Power Co. v. Sternbergh*, 218 U. S. 207; *Tefft v. Munsuri*, 222 U. S. 114. *Mr. Thomas E. French* and *Mr. Samuel H. Richards* for the appellant. *Mr. Henry F. Stockwell* and *Mr. John D. McMullin* for the appellee.

NO. —. Original. *Ex parte*: IN THE MATTER OF CHARLEY WEBB, PETITIONER. Submitted April 1, 1912. Decided April 8, 1912. Motion for leave to file petition for writ of habeas corpus denied. *Mr. James S. Davenport* for the petitioner. See second application, *ante*, p. 663.

NO. 949. MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* ALONZO C. LESSENDEN. In error to the Supreme Court of the State of Missouri. Motion to dismiss or affirm or to place on summary docket submitted March 18, 1912. Decided April 29, 1912. *Per Curiam*. Dismissed for the want of jurisdiction. *McCorquodale v. Texas*, 211 U. S. 432, 437; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 118. *Mr. M. L. Clardy* for the plaintiff in error. *Mr. W. F. Guthrie* for the defendant in error.

NO. 223. THE STATE NATIONAL BANK, PLAINTIFF IN ERROR, *v.* D. P. RICHARDSON, CITY TAX COLLECTOR FOR THE CITY OF FRANKFORT, ET AL. In error to the Court

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of Appeals of the State of Kentucky. Argued for the defendant in error and submitted for the plaintiff in error April 24, 1912. Decided April 29, 1912. *Per Curiam*. Dismissed for the want of jurisdiction. *Haseltine v. Bank*, 183 U. S. 130; *Schlosser v. Hemphill*, 198 U. S. 173, 175. *Mr. Thomas Kennedy Helm* for the plaintiff in error. *Mr. F. M. Dailey* for the defendants in error.

No. 231. *ELMER H. DUFFIELD, APPELLANT, v. HENRY F. ASHURST, AS DISTRICT ATTORNEY, ETC.* Appeal from the Supreme Court of the Territory of Arizona. Argued April 26, 1912. Decided April 29, 1912. *Per Curiam*. Appeal dismissed with costs. *United States ex rel. Warden v. Chandler*, 122 U. S. 643; *Bernardin v. Butterworth*, 169 U. S. 600; *Security Mutual Life Insurance Co. v. Prewitt*, 200 U. S. 446, 449, and cases cited, and cause remanded to the Supreme Court of the State of Arizona. *Mr. T. J. Norton, Mr. Gardiner Lathrop, and Mr. Robert Dunlap* for the appellant. *Mr. Edward M. Doe* for the appellee.

No. 294. *THE COALGATE COMPANY, PLAINTIFF IN ERROR, v. J. W. HURST, AS ADMINISTRATOR OR TRUSTEE, ETC.* In error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted April 29, 1912. Decided May 13, 1912. *Per Curiam*. Dismissed for the want of jurisdiction. *Wabash Railroad Company v. Flannigan*, 192 U. S. 29, 38; *United States v. Pridgeon*, 153 U. S. 48, 53, 54; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 508; *Re Moran*, 203 U. S. 96, 104. *Mr. Arthur G. Moseley* for the plaintiff in error. *Mr. James R. Wood* for the defendant in error.

No. 262. INDIAN PROTECTIVE ASSOCIATION, APPELLANT, *v.* HUGH H. GORDON *et al.* Appeal from the Court of Appeals of the District of Columbia. Motion to affirm submitted May 13, 1912. Decided May 27, 1912. *Per Curiam.* Decree as to Hugh H. Gordon affirmed with costs upon the opinion of the court below. 34 App. D. C. 553.¹ *Mr. Charles Poe, Mr. Benjamin S. Minor, and Mr. Hugh B. Rowland* for the appellant. *Mr. James B. Archer and Mr. John Lewis Smith* for appellee Gordon.

No. 870. EVAN B. ROSENKRANS, PLAINTIFF IN ERROR, *v.* THE STATE OF RHODE ISLAND. In error to the Supreme Court of the State of Rhode Island. Motion to dismiss or affirm submitted April 29, 1912. Decided June 7, 1912. *Per Curiam.* Judgment affirmed with costs. *Collins v. Texas*, 223 U. S. 288. *Mr. Amasa M. Eaton* for the plaintiff in error. *Mr. Percy W. Gardner and Mr. Alexander L. Churchill* for the defendant in error.

No. 841. ARTHUR HIRSH ET AL., APPELLANTS, *v.* J. W. TAYLOR ET AL., ETC. Appeal from the Circuit Court of the United States for the Southern District of West Virginia. Submitted May 27, 1912. Decided June 10, 1912. *Per Curiam.* Dismissed for the want of jurisdiction. *Fore River Ship Building Co. v. Haag*, 219 U. S. 175; *Louisville Trust Co. v. Knott*, 191 U. S. 225; *Bache v. Hunt*, 193 U. S. 523. Cause remanded to the District Court of the United States for the Southern District of West Virginia. *Mr. John H. Holt* for the appellants. *Mr. C. W. Campbell and Mr. Douglas W. Brown* for the appellees.

¹ See 218 U. S. 667, for decision as to appellee Miller.

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*Decisions on Petitions for Writs of Certiorari from April 1,
to June 10, 1912.*

No. 1020. CLARENCE DAYTON HILLMAN, PETITIONER, *v.* THE UNITED STATES. April 1, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wade H. Ellis, Mr. T. F. Bevington and Mr. Abner H. Ferguson* for the petitioner. *The Attorney General and The Solicitor General* for the respondent.

No. 1024. EDWARD B. GOODMAN & COMPANY ET AL., PETITIONERS, *v.* THE UNITED STATES. April 1, 1912. Petition for a writ of certiorari to the United States Court of Customs Appeals denied. *Mr. Charles J. Kappeler, Mr. Charles H. Merillat and Mr. Joseph S. Kammerlohr* for the petitioners. *The Attorney General, The Solicitor General and Mr. Assistant Attorney General Wemple* for the respondent.

No. 907. HANNAH L. ANDREWS, EXECUTRIX, ETC., PETITIONER, *v.* HARVEY K. PARTRIDGE, TRUSTEE, ETC. April 8, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted, and ordered that transcript on file herein stand as the return to the writ of certiorari. *Mr. Thomas E. French and Mr. Samuel H. Richards* for the petitioner. *Mr. Henry F. Stockwell and Mr. John D. McMullin* for the respondent.

No. 1010. SAMUEL LEWIS, PETITIONER, *v.* G. OLIVER FRICK, UNITED STATES IMMIGRATION INSPECTOR, ETC.

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April 8, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Philip T. Van Zile* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 1028. ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, PETITIONER, *v.* FRANK IMBROVEK; and No. 1029. ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, PETITIONER, *v.* STATE OF MARYLAND, TO THE USE, ETC. April 8, 1912. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Nicholas P. Bond* and *Mr. Edward Duffy* for the petitioner. *Mr. John E. Semmes, Jr.*, for the respondent.

No. 1046. A. LEO EVERETT, TRUSTEE, ETC., PETITIONER, *v.* WILLIAM D. JUDSON, EXECUTOR, ETC. April 8, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles K. Beekman* for the petitioner. *Mr. William A. Keener* for the respondent.

No. 1000. HARRISON T. GROOM, PETITIONER, *v.* THE MORTIMER LAND COMPANY ET AL. April 8, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Maurice E. Locke*, *Mr. Eugene P. Locke* and *Mr. Eugene Marshall* for the petitioner. *Mr. Sam J. Hunter* for the respondents.

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No. 1018. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER, *v.* LEWELLEN BROTHERS. April 8, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Roy F. Britton, Mr. E. B. Perkins and Mr. Samuel H. West* for the petitioner. No appearance for the respondent.

No. 1021. JOSEPH D. SULLIVAN, TRUSTEE, ETC., PETITIONER, *v.* AARON GOLDMAN. April 8, 1912. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Joseph D. Sullivan and Mr. L. P. Loving* for the petitioner. *Mr. Henry E. Davis and Mr. Alexander Wolf* for the respondent.

No. 1037. NATIONAL EQUIPMENT COMPANY, PETITIONER, *v.* GEORGE C. HOLT, UNITED STATES DISTRICT JUDGE, ETC.; No. 1038. JAMES C. KUHN, PETITIONER, *v.* GEORGE C. HOLT, UNITED STATES DISTRICT JUDGE, ETC.; No. 1039. POWELL'S, A CORPORATION, PETITIONER, *v.* GEORGE C. HOLT, UNITED STATES DISTRICT JUDGE, ETC.; and No. 1040. JAMES A. McCLURG & SONS, PETITIONERS, *v.* GEORGE C. HOLT, UNITED STATES DISTRICT JUDGE, ETC. April 8, 1912. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Livingston Gifford* for the petitioners. *Mr. Ferdinand E. M. Bullowa* for the respondent.

No. 1048. HERSCHEL MARTIN BACON, BANKRUPT, PETITIONER, *v.* BUFFALO COLD STORAGE COMPANY. April 8, 1912. Petition for a writ of certiorari to the

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United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sam J. Hunter* for the petitioner. *Mr. Joseph M. McCormick* for the respondent.

No. 1049. *FREDERICK C. TIEDT, PETITIONER, v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.* April 8, 1912. Petitioner for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Fred W. Bentley* for the petitioner. *Mr. Robert Dunlap* and *Mr. J. L. Coleman* for the respondent.

No. 1054. *MARIA A. EVANS, EXECUTRIX, ETC., PETITIONER, v. KNICKERBOCKER TRUST COMPANY;* No. 1055. *STEPHEN M. WELD, PETITIONER, v. KNICKERBOCKER TRUST COMPANY;* No. 1056. *THEOPHILUS PARSONS, PETITIONER, v. KNICKERBOCKER TRUST COMPANY;* No. 1057. *ALBERT S. BIGELOW, PETITIONER, v. KNICKERBOCKER TRUST COMPANY;* No. 1058. *WILLIAM M. CONANT, PETITIONER, v. KNICKERBOCKER TRUST COMPANY;* and No. 1059. *RUSSELL S. CODMAN, PETITIONER, v. KNICKERBOCKER TRUST COMPANY.* April 8, 1912. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Felix Rackemann* for the petitioners in Nos. 1054, 1055, 1056, 1058 and 1059. *Mr. Burton E. Eames* for the petitioner in No. 1057. *Mr. Julien T. Davies* and *Mr. John G. Milburn* for the respondent.

No. 1060. *WILLIAM SEYMOUR, PETITIONER, v. A. M. McDANIEL.* April 8, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

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the Fifth Circuit denied. *Mr. William E. Mason* for the petitioner. *Mr. Hiram Glass, Mr. John J. King, Mr. W. L. Estes and Mr. A. L. Burford* for the respondent.

No. 1064. THE MAYOR AND CITY COUNCIL OF BALTIMORE, PETITIONERS, *v.* ANDREW MILLER ET AL. April 8, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Sylvan Hayes Lauchheimer and Mr. Alexander Preston* for the petitioner. No appearance for the respondents.

No. 1036. CHOEMON KI KUCHI, CLAIMANT, ETC., PETITIONER, *v.* THE UNITED STATES. April 15, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. R. Serven* for the petitioner. *The Attorney General and The Solicitor General* for the respondent.

No. 1069. TEXARKANA GAS & ELECTRIC COMPANY, PETITIONER, *v.* MRS. OLLIE POWELL ET AL. April 15, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Max Pam, Mr. Charles S. Todd and Mr. John J. King* for the petitioner. *Mr. C. A. Culberson* for the respondents.

No. 1075. ARTHUR JOHNSON, PETITIONER, *v.* THE UNITED STATES. April 22, 1912. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted, the record presented with the petition

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to stand as a return to the writ. *Mr. Paca Oberlin* and *Mr. Joseph Salomon* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 1051. MERCHANTS & MINERS' TRANSPORTATION COMPANY, PETITIONER, *v.* ROBINSON BAXTER-DISSOSWAY TOWING & TRANSPORTATION COMPANY ET AL.; No. 1052. MERCHANTS & MINERS' TRANSPORTATION COMPANY ET AL., PETITIONERS, *v.* GENERAL CHEMICAL COMPANY; and No. 1053. MERCHANTS & MINERS' TRANSPORTATION COMPANY, PETITIONER, *v.* LOUIS GILDERSLEEVE ET AL. April 22, 1912. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Daniel H. Hayne* for the petitioner, The Merchants & Miners' Transportation Company. *Mr. Samuel Park* for the Robinson Baxter-Dissosway Towing & Transportation Company, one of the petitioners in No. 1052, and one of the respondents in No. 1051. *Mr. James J. Macklin* and *Mr. De Lagnel Berier* for the respondents in Nos. 1052 and 1053.

No. 1066. ATLANTIC MUTUAL INSURANCE COMPANY, PETITIONER, *v.* PENINSULAR & OCCIDENTAL STEAMSHIP COMPANY, OWNER, ETC. April 22, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter F. Taylor* and *Mr. George E. Hamilton* for the petitioner. *Mr. John F. Lewis* and *Mr. Francis S. Laws* for the respondent.

No. 1079. THE DARIUS COLE TRANSPORTATION COMPANY, PETITIONER, *v.* THE WHITE STAR LINE. April 22,

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1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George L. Canfield* and *Mr. F. H. Canfield* for the petitioner. *Mr. William J. Gray* for the respondent.

No. 1082. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PETITIONER, *v.* W. A. HERR, ADMINISTRATOR, ETC. April 22, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. Generes Dufour*, *Mr. L. Russell Alden*, *Mr. Walter F. Evans* and *Mr. E. T. Miller* for the petitioner. No appearance for the respondent.

No. 1083. SALMEN BRICK & LUMBER COMPANY, LIMITED, PETITIONER, *v.* DONALD & TAYLOR. April 22, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* and *Mr. Gustave Lemle* for the petitioner. No appearance for the respondent.

No. 1087. WILLIAM R. HOPKINS ET AL., PETITIONERS, *v.* CHARLES HEBARD ET AL. April 29, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. C. Bentley Matthews* for the petitioners. *Mr. William A. Stone* and *Mr. John Franklin Shields* for the respondents.

No. 1072. FRANK N. CHAPLIN AND DAVID H. CHAPLIN, PETITIONERS, *v.* THE UNITED STATES. April 29, 1912.

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Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. P. F. Dunne, Mr. Charles H. Bates, Mr. Oscar A. Trippet and Mr. Sherley C. Ward* for the petitioners. *The Attorney General and Mr. Assistant Attorney General Knaebel* for the respondent.

NO. 1081. THE CITY OF ST. AUGUSTINE, PETITIONER, *v. MINNIE THOMPSON*. April 29, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. P. Axtell and Mr. C. D. Rinehart* for the petitioner. *Mr. William W. Dewhurst, Mr. Horatio Bisbee and Mr. George C. Bedell* for the respondent.

NO. 1095. J. C. TURNER CYPRESS LUMBER COMPANY, PETITIONER, *v. HENRY M. PFANN ET AL., ETC.* April 29, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Horatio Bisbee and Mr. George C. Bedell* for the petitioner. *Mr. Charles M. Cooper and Mr. John C. Cooper* for the respondents.

NO. 1067. EMMA HARRIS, ALIAS EMMA R. SMITH ET AL., PLAINTIFFS IN ERROR AND PETITIONERS, *v. THE UNITED STATES OF AMERICA*; and NO. 1068. DELLA BENNETT, PLAINTIFF IN ERROR AND PETITIONER, *v. THE UNITED STATES OF AMERICA*. May 13, 1912. Petitions for writs of certiorari in these cases granted. *Mr. Max Levy* for the plaintiffs in error and petitioners. *The Attorney General, The Solicitor General and Mr. Assistant Attorney General Harr* for the defendant in error and respondent.

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No. 1042. FRANK M. ASHLEY, PETITIONER, *v.* THE SAMUEL C. TATUM COMPANY. May 13, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank E. Rapp* for the petitioner. *Mr. E. E. Wood* and *Mr. William R. Wood* for the respondent.

No. 1088. WYLIE PERMANENT CAMPING COMPANY, PETITIONER, *v.* GAIL V. LYNCH. May 13, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George E. Price* for the petitioner. *Mr. John H. Holt* and *Mr. J. B. Handlan* for the respondent.

No. 1127. THE CITY AND COUNTY OF DENVER ET AL., PETITIONERS, *v.* THE NEW YORK TRUST COMPANY ET AL.; and No. 1128. THE CITY AND COUNTY OF DENVER ET AL., PETITIONERS, *v.* THE DENVER UNION WATER COMPANY ET AL. May 27, 1912. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. George L. Nye*, *Mr. H. A. Lindsley*, *Mr. C. S. Thomas*, *Mr. C. W. Waterman*, *Mr. W. H. Bryant* and *Mr. George Q. Richmond* for the petitioners. *Mr. Gerald Hughes*, *Mr. Clayton C. Dorsey*, *Mr. Joel F. Vaile* and *Mr. Henry McAllister, Jr.*, for the respondents.

No. 1134. THE UNITED STATES, PETITIONER, *v.* TWENTY-FIVE PACKAGES OF PANAMA HATS. May 27, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

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The Attorney General, The Solicitor General and Mr. Jesse C. Adkins for the petitioner. *Mr. Albert H. Washburn* for the respondent.

No. 641. *M. ANDERSON v. THE PACIFIC COAST STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "QUEEN,"* ETC.; and No. 642. *N. JORDAN v. THE PACIFIC COAST COMPANY, CLAIMANT OF THE STEAMSHIP "UMATILLA,"* ETC. May 27, 1912. Petition for writs of certiorari to bring up the whole record denied. *Mr. William Denman* for the petitioners. *Mr. Graham Sumner, Mr. Thomas Thacher and Mr. George W. Towle* for the respondents.

No. 1080. *W. H. STALEY ET AL., PETITIONERS, v. W. L. DERDEN.* May 27, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. S. Neblett and Mr. Richard Mays* for the petitioners. *Mr. W. J. McKie and Mr. Horace Chilton* for the respondent.

No. 1105. *THE UNITED STATES OF AMERICA EX REL. BEN B. JONES, PETITIONER, v. WALTER L. FISHER, SECRETARY OF THE INTERIOR.* May 27, 1912. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. C. C. Tucker, Mr. E. S. Bailey, Mr. H. B. F. Macfarland and Mr. J. Miller Kenyon* for the petitioner. *The Attorney General and Mr. Assistant Attorney General Knaebel* for the respondent.

No. 1106. *PAUL A. PRIMEAU, PETITIONER, v. OLIVE L. GRANFIELD, EXECUTRIX, ETC.* May 27, 1912. Petition

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for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence J. Shearn* for the petitioner. *Mr. Clarence Blair Mitchell* for the respondent.

No. 1110. HYGIENIC FLEECE UNDERWEAR COMPANY, PETITIONER, *v.* PHOENIX KNITTING WORKS ET AL. May 27, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Hector T. Fenton* for the petitioner. *Mr. Joseph C. Fraley* and *Mr. H. N. Paul, Jr.*, for the respondents.

No. 1119. THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER, *v.* J. E. HELMS. May 27, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. C. Blount, Jr.*, and *Mr. William A. Blount* for the petitioner. *Mr. R. P. Reese* for the respondent.

No. 1121. MARX & RAWOLLE ET AL., PETITIONERS, *v.* THE UNITED STATES. May 27, 1912. Petition for a writ of certiorari to the United States Court of Customs Appeals denied. *B. A. Levett* for the petitioners. *The Attorney General*, *The Solicitor General* and *Mr. Assistant Attorney General Wemple* for the respondent.

No. 1122. THE GERMAN BANK OF CARROLL COUNTY, IOWA, ET AL., PETITIONERS, *v.* GEORGE C. BALL, RECEIVER, ETC. May 27, 1912. Petition for a writ of cer-

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tiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Benjamin I. Salinger* for the petitioners. No appearance for the respondent.

No. 1124. A. W. LAWTON, PETITIONER, *v.* N. LESLIE CARPENTER ET AL., ETC. May 27, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph A. McCullough* and *Mr. William Garrard* for the petitioner. *Mr. Joseph E. Johnson* for the respondents.

No. 1126. GEORGE ROUKOUS, PETITIONER, *v.* THE UNITED STATES. May 27, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Boyd B. Jones* and *Mr. Walter H. Barney* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 1135. EDWARD H. HANCE ET AL., ETC., PETITIONERS, *v.* THE UNITED STATES. May 27, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Joseph C. Fraley*, *Mr. H. N. Paul, Jr.*, and *Mr. Charles L. Sturtevant* for the petitioners. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 888. UNITED RAILROADS OF SAN FRANCISCO, PETITIONER, *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

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June 7, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William M. Abbott* and *Mr. Joseph D. Redding* for the petitioner. *Mr. Percy V. Long* for the respondents.

NO. 1143. THE MERCHANTS & MINERS' TRANSPORTATION COMPANY, PETITIONER, *v.* THE UNITED STATES. June 7, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Samuel B. Adams* and *Mr. Daniel H. Hayne* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

NO. 1144. W. B. QUAINANCE, PETITIONER, *v.* THE UNITED STATES. June 7, 1912. Petition for a writ of certiorari to the United States Court of Customs Appeals denied. *Mr. Wade H. Ellis*, *Mr. John A. Kratz, Jr.*, and *Mr. Albert H. Washburn* for the petitioner. *The Attorney General*, *The Solicitor General* and *Mr. Assistant Attorney General Wemple* for the respondent.

NO. 830. HENRY F. SAMSTAG ET AL., PETITIONERS, *v.* GEORGE FROST COMPANY ET AL. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John S. Seymour* for the petitioners. *Mr. Horace A. Dodge* for the respondents.

NO. 1141. THE FRED W. WOLF COMPANY, PETITIONER *v.* THE MOUNT VERNON REFRIGERATING COMPANY

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June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank H. Scott, Mr. Edgar A. Bancroft, Mr. John E. MacLeish and Mr. Ernest Wilkinson* for the petitioner. *Mr. J. D. Waight and Mr. Murray Seasongood* for the respondent.

No. 1146. CENTRAL PARK, NORTH & EAST RIVER RAILROAD COMPANY, PETITIONER, *v.* THE FARMERS' LOAN & TRUST COMPANY, TRUSTEE, ET AL. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William N. Dykman and Mr. Arthur E. Goddard* for the petitioner. *Mr. Frederick Geller and Mr. Bronson Winthrop* for the respondents.

No. 1158. THE WILLIAMS SOAP COMPANY ET AL., PETITIONERS, *v.* THE J. B. WILLIAMS COMPANY. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles T. Hanna and Mr. Thomas A. Daily* for the petitioners. *Mr. V. H. Lockwood* for the respondent.

No. 1161. DEGRASSE PAPER COMPANY, PETITIONER, *v.* AMERICAN SULPHITE PULP COMPANY. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Schreiter* for the petitioner. No appearance for the respondent.

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No. 1162. BALTIMORE & OHIO RAILROAD COMPANY, PETITIONER, *v.* HARRY A. GAWINSKE. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John W. Yerkes, Mr. George E. Hamilton and Mr. Hugh L. Bond, Jr.,* for the petitioner. No appearance for the respondent.

No. 1163. VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, PETITIONER, *v.* ANNIE MAY ROGERS ET AL. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Blanc Monroe and Mr. Joseph Hirsh* for the petitioner. No appearance for the respondents.

No. 1164. THE STEAMSHIP GOOD HOPE, J. HARDING, CLAIMANT, PETITIONER, *v.* CHELSEA FIBRE MILLS; No. 1165. THE STEAMSHIP GOOD HOPE, EDWARD N. NORTON ET AL., CLAIMANTS, PETITIONERS, *v.* ROBERT BALFOUR ET AL., ETC.; and No. 1166. THE STEAMSHIP GOOD HOPE, EDWARD N. NORTON ET AL., CLAIMANTS, PETITIONERS, *v.* HENRY P. WINTER ET AL., ETC. June 10, 1912. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* for the petitioner. *Mr. Douglas Campbell* for the respondent in No. 1164, and *Mr. George Whitefield Betts, Jr.,* for the respondents in Nos. 1165 and 1166.

No. 1168. GIUSEPPE MORELLO, PETITIONER, *v.* THE UNITED STATES. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals

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for the Second Circuit denied. *Mr. W. Bourke Cockran* for the petitioner. *The Solicitor General* for the respondent.

No. 1011. FRANK T. WELLS, PETITIONER, *v.* THE UNITED STATES; No. 1012. RUFUS J. IRELAND, PETITIONER, *v.* THE UNITED STATES; No. 1013. WILBERFORCE SULLY, PETITIONER, *v.* THE UNITED STATES; and No. 1014. GEORGE W. DALLY, PETITIONER, *v.* THE UNITED STATES. June 10, 1912. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John C. Spooner* and *Mr. Joseph P. Cotton, Jr.*, for the petitioners. No appearance for the respondent.

No. 1156. ÆTNA LIFE INSURANCE COMPANY, OF HARTFORD, CONN., PETITIONER, *v.* BENJAMIN LUCAS OUTLAW. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Levi H. David* for the petitioner. No appearance for the respondent.

No. 1157. THE ORDER OF ST. BENEDICT OF NEW JERSEY, PETITIONER, *v.* ALBERT STEINHAUSER, INDIVIDUALLY, ETC. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Frank W. Arnold* and *Mr. J. Warren Greene* for the petitioner. No appearance for the respondent.

No. 1169. WILLIAM M. MCCOACH, COLLECTOR, ETC., PETITIONER, *v.* THE MINEHILL & SCHUYLKILL HAVEN

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RAILROAD COMPANY. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. No appearance for the respondent.

NO. 1170. KATE C. ARCHER, PETITIONER, *v.* THE GREENVILLE SAND & GRAVEL COMPANY. June 10, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. T. M. Miller* for the petitioner. No appearance for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM APRIL 1, TO JUNE 10, 1912.

NO. 127. A. D. GIBBS, APPELLANT, *v.* THE INTERNATIONAL BANKING CORPORATION ET AL. Appeal from the Supreme Court of the Philippine Islands. April 2, 1912. Dismissed with costs, on motion of counsel for the appellant. *Mr. Allison D. Gibbs* for the appellant. No appearance for the appellees.

NO. 284. COMMERCIAL STATE BANK & TRUST COMPANY, PLAINTIFF IN ERROR, *v.* J. L. BATES, TRUSTEE. In error to the Supreme Court of the State of Mississippi. April 2, 1912. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Marcellus Green, Mr. Charles A. Douglas, Mr. Gibbs L. Baker, Mr. Thomas Ruffin* and *Mr. Hugh H. Obear* for the plaintiff in error. *Mr. W. R. Harper* and *Mr. Robert P. Willing* for the defendant in error.

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NO. 493. TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* B. B. CAUBLE. In error to the United States Circuit Court of Appeals for the Fifth Circuit. April 2, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. W. L. Hall* for the plaintiff in error. *Mr. Theodore Mack* for the defendant in error.

NO. 538. CHICAGO GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM F. OWENS. In error to the Supreme Court of the State of Minnesota. April 2, 1912. Dismissed without costs to either party, per stipulation. *Mr. Asa G. Briggs* for the plaintiff in error. *Mr. Samuel A. Anderson* for the defendant in error.

NO. 1078. WILLIAM BOWMAN, PLAINTIFF IN ERROR, *v.* THE STATE OF ARKANSAS. In error to the Supreme Court of the State of Arkansas. April 9, 1912. Docketed and dismissed with costs, on motion of *Mr. James P. Clarke* for the defendant in error. No one opposing.

NO. 291. TRUSSED CONCRETE STEEL COMPANY, APPELLANT, *v.* FIDELITY STORAGE CORPORATION ET AL. Appeal from the Court of Appeals of the District of Columbia. April 11, 1912. Dismissed with costs, on motion of counsel for the appellant. *Mr. Jackson H. Ralston*, *Mr. Frederick L. Siddons* and *Mr. William E. Richardson* for the appellant. *Mr. Walter C. Clephane* and *Mr. Alan O. Clephane* for the appellees.

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No. 267. W. H. BYLES, PLAINTIFF IN ERROR, *v.* STATE OF ARKANSAS. In error to the Supreme Court of the State of Arkansas. April 18, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. A. C. Lyon* for the plaintiff in error. *Mr. Hal L. Norwood* for the defendant in error.

No. 402. JUSTO ARMSTERDAM ET AL., APPELLANTS, *v.* FELIX PUENTE ET AL. Appeal from the Supreme Court of Porto Rico. April 22, 1912. Dismissed with costs, on motion of counsel for the appellants. *Mr. N. B. K. Pettingill*, *Mr. H. P. Leake* and *Mr. W. V. Robbins* for the appellants. *Mr. Frederic D. McKenney*, *Mr. John Spalding Flannery* and *Mr. Myer Cohen* for the appellees.

No. 628. THE CITIZENS' SAVING & TRUST COMPANY, APPELLANT, *v.* C. C. FOERSTNER, TRUSTEE, ETC. Appeal from the United States Circuit Court of Appeals for the Sixth Circuit. April 22, 1912. Dismissed with costs, on motion of counsel for the appellant. *Mr. Thomas H. Hogsett* for the appellant. No appearance for the appellee.

No. 237. SAMUEL LOEB, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Court of Appeals of the State of Georgia.¹ April 25, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Jackson H. Ralston* for the plaintiff in error. *Mr. Thomas S. Felder* for the defendant in error.

¹ May 27. Judgment of dismissal vacated and case restored to docket.

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NO. 241. JOHN F. HANSON, PLAINTIFF IN ERROR, *v.* EMIL GUSTAFSON.¹ In error to the Supreme Court of the State of Kansas. May 1, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. John F. Hanson, pro se.* No appearance for the defendant in error.

NO. 245. JACOB OPPENHEIMER, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF CALIFORNIA. In error to the Supreme Court of the State of California. May 2, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Henry G. W. Dinkelspiel* for the plaintiff in error. No appearance for the defendant in error.

¹ May 13. Judgment of dismissal vacated and case restored to docket.

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ACTIONS.

Recovery for negligence precluded in action against carrier on special contract for prompt delivery.

Where plaintiff sues only on a special contract for prompt delivery by specified train, and there is no count for negligence as a carrier only, his claim for damages based on such negligence is not presented, and cannot be considered, on the record. *Chicago & Alton R. R. Co. v. Kirby*, 155.

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- PURE FOOD AND DRUGS ACT.—Act of June 30, 1906, 34 Stat. 768, c. 3915 (see Constitutional Law, 3; Interstate Commerce, 14; Pure Food and Drugs Act): *Savage v. Jones*, 501.

ADMIRALTY.

1. *General average agreement; validity under Harter Act; right of recovery under.*
A general average agreement inserted in bills of lading, providing that if the owner of the ship shall have exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, the cargo shall contribute in general average with the shipowner even if the loss resulted from negligence in the navigation of the ship, is valid under the Harter Act, and entitles the shipowner to collect a general average contribution from the cargo-owners in respect to sacrifices made and extraordinary expenditures incurred by him for the common benefit and safety of ship, cargo and freight subsequent to a negligent stranding. *The Jason*, 32.
2. *Contribution; right of cargo-owner under § 3 of Harter Act.*
Under § 3 of the Harter Act, the cargo-owners under the same circumstances have a right of contribution from the shipowner for sacrifices of cargo made subsequent to the stranding for the common benefit and safety of ship, cargo and freight. *Ib.*
3. *Contribution; right of cargo-owner in respect of general average sacrifices of cargo.*
Under the same circumstances the cargo-owners cannot recover contribution from the shipowner in respect of general average sacrifices

of cargo, without contributing to the general average sacrifices and expenditures of the shipowners made for the same purpose. *Ib.*

4. *Contribution in general average; essence of.*

The essence of general average contribution is that extraordinary sacrifices made and expenses incurred for the common benefit are to be borne proportionately by all who are interested. *Ib.*

See PILOTAGE.

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See STATES, 1, 2.

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ALIEN IMMIGRATION ACT.

See IMMIGRATION.

ALIENS.

1. *Definition of.*

An alien is one born out of the jurisdiction of the United States and who has not been naturalized under its Constitution and laws. *Low Wah Suey v. Backus*, 460.

2. *Women; effect of marriage to citizen; law governing.*

The effect of the marriage of an alien woman to a male citizen of the United States is not determined by the common law. That matter is regulated by statute. *Ib.*

3. *Naturalization; effect of marriage of alien woman to citizen.*

Under § 1994, Rev. Stat., a woman who could be naturalized becomes by her marriage to a citizen of the United States a citizen herself. *See Kelly v. Owen*, 7 Wall. 496. *Ib.*

4. *Naturalization; effect of marriage of alien woman; quære as to.*

Quære, whether a woman, incapable under the laws of the United States of being naturalized, can become a citizen of the United States by marriage to a citizen thereof. *Ib.*

See CONSTITUTIONAL LAW, 25;

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NATURALIZATION;

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APPEAL AND ERROR.

1. *Appeal from Circuit Court; questions open on.*

Where in rendering a decree on the merits the court necessarily decided the constitutional question expressly alleged in the bill, the issue on that subject is open in this court, whether the jurisdictional question be certified or not. *Mississippi Railroad Commission v. Louisville & Nashville R. R. Co.*, 272.

2. *Scope of inquiry on direct appeal from Circuit Court; question of comity between courts not within.*

A mere conflict between courts concerning the right to adjudicate upon a particular matter growing out of a priority of jurisdiction in another forum involves a question of comity, which there is no right to consider on a direct appeal to this court under § 5 of the act of 1891. (*Courtney v. Pradt*, 196 U. S. 89.) *Ib.*

3. *Appeal from interlocutory order of Commerce Court; right to, under § 210, Judicial Code.*

An appeal to this court from an interlocutory order of the Commerce Court allowing a preliminary injunction against the enforcement of an affirmative order of the Interstate Commerce Commission lies under § 2 of the act creating the court, now § 210 of the new Judicial Code. *United States v. Baltimore & Ohio R. R. Co.*, 306.

4. *When writ of error runs to highest state court, notwithstanding its refusal to grant writ because of opinion that judgment below is right.*

Where the highest court of the State refuses a writ of error because, in its opinion, the judgment below is plainly right, doubt exists as to whether it is a refusal to take jurisdiction or an exercise of jurisdiction and affirmance; under the circumstances of this case, however, the Chief Justice of the state court having allowed the writ of error for review by this court, *held* that the judgment was on the merits and the writ of errors run to the highest court. *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364, distinguished. *Norfolk Turnpike Co. v. Virginia*, 264.

5. *When writ of error runs to lower court; effect of refusal of highest state court to take jurisdiction.*

Where the refusal of the highest court of the State to allow a writ of error is also a refusal to take jurisdiction the writ of error from this court runs to the lower court. *Ib.*

6. *Refusal of highest state court to allow writ of error as refusal to take jurisdiction.*

Hereafter this court will regard the refusal of the highest court of the State to allow a writ of error to review the judgment of a lower court as a refusal to take jurisdiction and not as an affirmance unless the contrary plainly appears on the face of the record. *Ib.*

See JURISDICTION;

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See PUBLIC LANDS, 1, 2.

ATTACHMENT.

See BANKRUPTCY, 3;

LIENS.

ATTORNEY AND CLIENT.

See IMMIGRATION, 7;

INDIANS, 3.

BANKRUPTCY.

1. *Preferences; what prohibited.*

The provisions of the Bankruptcy Act of 1898 preventing preferences, apply not only to mortgages and voluntary transfers but also to preferences obtained through legal proceedings; but the act was not intended to lessen rights already existing nor to defeat inchoate liens given by statute of which all creditors were bound to take notice. *Henderson v. Mayer*, 631.

2. *Preferences; liens obtained through legal proceedings; lien under Georgia law held not to be.*

The general lien given by the laws of Georgia to the landlord on the property of the tenant is the equivalent, as to goods levied on by distress warrant, to the common law distress; while it does not ripen into a specific lien until the distress warrant is issued, it exists from the time of the lease, and the lien of the distress warrant is not one obtained through legal proceedings within the meaning of the anti-preference provisions of the Bankruptcy Act. *Ib.*

3. *Preferences; effect of bankruptcy proceedings on statutory attachment for rent.*

Under the Bankruptcy Act of 1867 a statutory attachment for rent in the nature of a landlord's distress warrant levied within the preference period was not nullified or discharged by the bankruptcy proceedings and there is nothing in the act of 1898 opposed to this conclusion. *Ib.*

4. *Preferences; effect of act of 1898 to preserve landlords' liens given by local law.*

The general provisions of the Bankruptcy Act of 1898 indicate a purpose and intent, as against general creditors, to preserve rights such as those given by the Georgia statute to landlords even though not enforced until within four months of the bankruptcy. *Ib.*

5. *Preferences; indirect transfer as.*

To constitute a preference under the Bankruptcy Act it is not necessary that the transfer be made directly to the creditor; it may be made to another for his benefit, and if preferential circuitry of arrangement will not avail to save it. *Newport Bank v. Herkimer Bank*, 178.

6. *Preferences; diminution of bankrupt's estate as test.*

Unless, however, the creditor takes by virtue of a disposition by the insolvent debtor of his property for the benefit of the creditor so that the estate is diminished the creditor cannot be charged with receiving a preference. *Ib.*

7. *Preferences; effect of payment by endorser of bankrupt's note secured by endorser's collateral.*

Where the endorser of the bankrupt's note, which is under discount at a bank and secured by the endorser's own collateral, pays the note, thereby recovering his collateral and charges the payment to the bankrupt to whom he is indebted in a larger sum on open account,

there is no preferential payment to the bank which the trustee can recover from it as such, it not appearing that the bank was concerned with, or had any knowledge of, the relations between the endorser and the maker of the note. *Ib.*

8. *Preferences; delivery of securities by broker to customer as.*

Under the decisions of this court, and the courts of New York, a customer has such an interest in securities carried for him by a broker that a delivery to him after the insolvency of the broker is not necessarily a preference under the bankruptcy law. (*Richardson v. Shaw*, 209 U. S. 365.) *Sexton v. Kessler*, 90.

9. *Tribunals contemplated by Bankruptcy Act.*

A distinct purpose of the Bankruptcy Act is to subject the administration of estates of bankrupts to the control of tribunals having authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are bankruptcy courts. *United States Fidelity Co. v. Bray*, 205.

10. *Jurisdiction of bankruptcy court; scope of.*

Under the Bankruptcy Act, the jurisdiction of the bankruptcy court in all proceedings in bankruptcy is intended to be exclusive of all other courts; such proceedings include matters of administration, such as allowance and rejection of claims, reduction of the estate to money and its distribution, preferences and priorities to be accorded to claims and supervision and control of the trustee. *Ib.*

11. *Trustee's title to escrow of securities held by bankrupt acting as agent.*

The conduct of business men acting without lawyers and in good faith, attempting to create a personal security for an actual debt, should be fairly construed as actually effecting what the parties meant; and so *held*, in this case, that an escrow of securities made by a banking firm in New York to secure its drafts upon a foreign bank amounted to a lien on the securities to be preferred to the claim of the trustee in bankruptcy, notwithstanding that the New York firm retained physical power over the securities, as agent for the foreign house, and had the right to substitute other securities for those withdrawn and sold. *Sexton v. Kessler*, 90.

See JURISDICTION, A 13; C 1, 2.

BANKS AND BANKING.

See BANKRUPTCY, 7.

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See BANKRUPTCY, 7.

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BOUNDARIES.

Maryland and West Virginia; Deakins line established.

Report of Commissioners appointed by decree of May 31, 1910, to run, locate and permanently mark with suitable monuments the Deakins line between Maryland and West Virginia from the North Branch of the Potomac River and Pennsylvania, in pursuance of decision, 217 U. S. 1 and 577, confirmed and exceptions thereto overruled. *Maryland v. West Virginia*, 1.

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See BANKRUPTCY, 8.

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See FRAUD; JURISDICTION, C 3, 4;
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See CRIMINAL LAW, 24, 30.

CARRIERS.

1. *Implied agreement as to carriage.*

The implied agreement of a common carrier is to carry safely and deliver at destination within a proper time; evidence of diligence and no unreasonable delay excuses. *Chicago & Alton R. R. Co. v. Kirby*, 155.

2. *Compensation for extra liability.*

A carrier who agrees to expedite assumes a more burdensome liability and can exact a higher rate than where mere carrier's liability exists. *Ib.*

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CERTIORARI.

Writ granted on consent of Attorney General.

In this case the defendant applied for a writ of certiorari and the Attorney General assented to granting it on the ground that the determination of the case depends upon the principles of law governing conspiracy and it is of vital importance to the United States, as well as its citizens, to have those principles settled by this court.

Hyde v. United States, 347.

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The practice of the Massachusetts courts in this case was not inconsistent with the rules of the common law in regard to determining the mental capacity of jurors. *Jordan v. Massachusetts*, 167.

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CONFLICT OF LAWS.

1. *Federal and state; what considered in determining.*

In determining whether a Federal act overrides a state law, the entire scheme must be considered and that which needs must be implied has no less force than that which is expressed. *Savage v. Jones*, 501.

2. *Federal and state; when Federal statute supersedes exercise by State of police power.*

The intent of Congress to supersede the exercise by the States of their police power will not be inferred unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State. *Ib.*

See COMMON LAW;

CONSTITUTIONAL LAW, 3;

PILOTAGE, 4.

CONGRESS, POWERS OF.

See CONSTITUTIONAL LAW, 4, 5;

NATURALIZATION, 1;

IMMIGRATION, 3;

STATES, 1, 2.

CONSPIRACY.

See CERTIORARI;

CRIMINAL LAW, 4-21.

CONSTITUTIONAL LAW.

1. *Commerce clause; exclusive power to regulate interstate commerce; state interference.*

Under the Constitution of the United States, the National Govern-

ment has exclusive authority to regulate interstate commerce, and any attempt by the State to regulate rates for interstate transportation is void. (*Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27.) *Ohio Railroad Commission v. Worthington*, 101.

2. *Commerce; power of State to burden.*

While the State cannot, under cover of exerting its police power, directly regulate or burden interstate commerce, a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce. *Savage v. Jones*, 501.

3. *Commerce clause; due process of law; revenue measure beyond power of State; conflict of laws; validity of Indiana statute regulating sale of concentrated commercial food-stuffs.*

The statute of Indiana regulating the sale, and requiring formula of ingredients of, concentrated commercial food for stock is a proper and reasonable exercise of legislative police authority for the protection of the people of the State. The act is not unconstitutional as depriving a vendor of such food who lives in another State and ships it therefrom to Indiana either as a regulation of, or burden upon, interstate commerce, as depriving any vendor thereof of his property without due process of law, or as a revenue measure beyond the power of the State, nor does the requirement for publishing the ingredients conflict in any manner with the Food and Drugs Act of 1906. *Ib.*

4. *Commerce with Indian tribes; power of Congress over traffic within State.*

Under § 8 of Article I of the Federal Constitution, conferring upon Congress the right to regulate commerce with the Indian tribes, Congress may regulate traffic with Indians although within the limits of a single State. *Ex parte Webb*, 663.

5. *Commerce with Indian tribes; power of Congress to maintain existing law.*

Under § 8 of Article I of the Federal Constitution, Congress has the same power to maintain an existing law in regard to Indian traffic so as to keep it in force in a new State as it has to enact new laws in the future on the same subject. *Ib.*

See INTERSTATE COMMERCE, 11, 12.

6. *Criminal law; effect of constitutional provisions.*

The Constitution of the United States is not intended as a facility for crime, but to prevent oppression; its letter and its spirit are satisfied if where a criminal purpose is executed that criminal purpose be punished. The criminal himself makes the venue of his trial. *Brown v. Elliott*, 392.

7. *Due process of law implies what; effect of refusal of state court to set aside verdict because sanity of juror determined according to state procedure.*

Due process of law implies a tribunal both impartial and mentally competent to afford a hearing; but due process is not denied when a competent state court refuses to set aside a verdict because the sanity of one of the jurors which has been questioned is established, after an inquiry in accordance with the established procedure of the State, only by a preponderance of evidence. *Jordan v. Massachusetts*, 167.

8. *Due process of law; determination of sanity of juror according to established procedure of State.*

In this case *held*, that one convicted by a jury and sentenced to death was not denied due process of law because after the verdict one of the jurors became insane and the court, after an inquiry had in accordance with the established procedure of the State, found by a preponderance of evidence that the juror was of sufficient mental capacity during the trial to act as such and therefore refused to set the verdict aside. *Ib.*

9. *Due process of law; taking of property; effect of state statute making repair of toll roads a condition to right to collect tolls; Virginia statute sustained.*

A State does not take property of a turnpike company by opening the gates when its road is out of repair; nor is the enforcement of a statute which makes the keeping of a toll road in repair a condition precedent to the right to collect tolls an unconstitutional taking of property without due process of law; and in this case so *held* as to the enforcement of such a statute which has been in force in the State of Virginia since 1817. *Norfolk Turnpike Co. v. Virginia*, 264.

10. *Due process of law; deprivation of property; quære as to what constitutes.*

Quære, and not determined, whether an ordinance cutting the earnings of a telephone company down to six per cent per annum, would,

under the circumstances of this case be confiscatory and unconstitutional under the Fourteenth Amendment. *Louisville v. Cumberland T. & T. Co.*, 430.

11. *Due process of law; taking of property; power of State to regulate sale of food-stuffs; validity of Indiana statute of 1907.*

Regulating the sale of food for domestic animals is properly within the scope of the state police power, and the vendors of such food are not deprived of their property without due process of law by a regulation requiring disclosure of ingredients and minimum percentage of fat and proteins, disclosure of the formula for combination not being required; and so held as to the statute of Indiana of 1907. *Savage v. Jones*, 501.

12. *Due process of law; taking of property; power of State to regulate sale of food-stuffs.*

Savage v. Jones, ante, p. 501, followed to effect that it is within the police power of a State to prevent imposition upon the public and to that end to require the disclosure of ingredients of food for stock. *Standard Stock Food Co. v. Wright*, 540.

13. *Due process of law; revenue measure beyond power of State; validity of Iowa statute of 1907 regulating sale of concentrated commercial food-stuffs.*

The Iowa statute of 1907 regulating the sale of concentrated commercial feeding stuff is not unconstitutional as depriving vendors of such stuff of their property without due process of law, or because it is a revenue measure in disguise. *Ib.*

14. *Due process of law; equal protection; effect to deny, of ordinance prohibiting keeping of billiard halls.*

An ordinance prohibiting the keeping of billiard halls is not unconstitutional under the Fourteenth Amendment, either as depriving the owner of the hall of his property without due process of law or as denying him the equal protection of the laws. *Murphy v. California*, 623.

15. *Due process of law; equal protection; reasonableness of classification; validity of municipal ordinance regulating keeping of billiard halls.*

The ordinance of South Pasadena, California, passed in pursuance of police power conferred by the general law of the State, prohibiting the keeping of billiard halls for hire, except in the case of hotels having twenty-five rooms or more for use of regular guests, is not unconstitutional under the Fourteenth Amendment either as

depriving the owners of billiard halls not connected with hotels of their property without due process of law, or as denying them equal protection of the laws. *Ib.*

See SUPRA, 3;

IMMIGRATION, 2.

16. *Equal protection of the law; reasonableness of classification relative to keeping of billiard halls.*

A classification in a statute regulating billiard halls based on hotels having twenty-five rooms is reasonable; and the owner of a billiard hall, not connected with a hotel, is not denied equal protection of the laws by an ordinance prohibiting keeping billiard halls for hire because hotels having twenty-five rooms can maintain a billiard hall for their regular guests. *Ib.*

17. *Equal protection of the law; effect to deny, of operation of police ordinance.*

The fact that one of a class excepted from the operation of a police ordinance on complying with a condition, does not comply therewith, does not render the statute unconstitutional as against the classes upon which it operates, but renders the person violating the condition subject to the penalties of the ordinance. *Ib.*

See SUPRA, 14, 15.

18. *Ex post facto laws; scope of inhibition against.*

The *ex post facto* provision of the Constitution is confined to laws affecting punishment for crime and has no relation to retrospective legislation of any other description. *Johannessen v. United States*, 227.

19. *Full faith and credit clause; effect of judgment of dismissal of suit as to one joint tort-feasor as bar to suit against another joint tort-feasor in another State.*

One of two joint tort-feasors was sued in the Circuit Court of the United States for New York, jurisdiction being based solely on diversity of citizenship, and the bill was dismissed; the other joint tort-feasor, who resided in Massachusetts, and was not, and could not, be made a party defendant in the New York suit, having been sued in the state court of Massachusetts, set up the New York judgment, claiming that under the full faith and credit clause of the Constitution of the United States the judgment dismissing a suit based on the same cause of action against one alleged to be his joint tort-feasor was a bar to the suit, and that the Massachusetts courts were bound to give to the judgment the

same effect as an estoppel as against subsequent suits on the same cause of action. *Held* that:

Although one of two joint tort-feasors may be individually interested in the result of a suit against the other, the result is merely that of precedent and not of *res judicata*, and the courts of another State are not under obligation to follow the decision.

Assistance by one of two joint tort-feasors in the defense of a suit against the other, because of interest in the decision as a judicial precedent affecting a case pending against him in another State, does not create an estoppel as to the one so assisting in the defense.

Where the cause of action against joint tort-feasors is *ex delicto*, and several as well as joint, one of the tort-feasors not sued is not a privy to one that is sued so that a judgment dismissing the case against the latter is a bar to another suit against the latter.

Where the remedy of the plaintiff in a suit against one of two joint tort-feasors depends upon the defendant's own culpability, failure to recover in a prior suit on the same facts against the other is not a bar.

When dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property, and while there is diversity of opinion as to whether the estoppel can be expanded so as to include joint tort-feasors not parties, the sounder reason, as well as weight of authority, is that failure to recover against one is not a bar to a suit or an individual cause of action against the other. *Bigelow v. Old Dominion Copper Co.*, 111.

20. *Full faith and credit clause; status of judgment of Federal court in court of State other than that in which the Federal court sits.*

Where the jurisdiction of the Circuit Court of the United States depends entirely upon diversity of citizenship, that court administers the law of the State, and its judgment is entitled to the same sanction as would attach to a judgment of a court of that State, and is entitled in the courts of another State to the same faith and credit which would be given to a judgment of the court of the State in which the Circuit Court which rendered it was sitting. *Ib.*

21. *Full faith and credit; right of court in which judgment of court of another State is set up to determine its effect as a bar.*

Although a judgment dismissing the bill against one of two joint tort-feasors may be a bar in the State where rendered against a suit on the same cause of action against the other joint tort-feasor, the courts of another State may, without denying full faith and credit to such judgment, determine for itself under principles of

general law whether or not such judgment is a bar to suits against the other tort-feasor. *Ib.*

22. *Full faith and credit; status of judgment of court of one State when sued upon or pleaded in estoppel in court of another State.*

Under § 1 of Art. IV of the Constitution and § 905, Rev. Stat., the judgment of a court of one State when sued upon or pleaded in estoppel in the courts of another State is put upon the plane of a domestic judgment in respect to conclusiveness of the facts adjudged; otherwise it would be reëxaminable as only *prima facie* evidence of the matter adjudged as is the case with foreign judgments. *Ib.*

23. *Full faith and credit clause; how construed.*

The full faith and credit clause is to be construed in the light of the other provisions of the Constitution, none of which it was intended to modify or override. *Ib.*

24. *Full faith and credit; right of court where judgment set up to inquire as to jurisdiction of court rendering it.*

The courts of one State are not required to regard as conclusive any judgment of the court of another State which had no jurisdiction of the subject or the parties; and the courts of the State in which the judgment is set up have the right to inquire whether the court rendering it had jurisdiction to pronounce a judgment which would conclude the parties themselves or those claiming that the judgment was effective as an estoppel. *Ib.*

25. *Governmental powers; retrospective legislation; validity of naturalization act of 1906.*

The act of June 29, 1906, is not unconstitutional as an exercise of judicial power by the legislative branch of the Government, nor is it unconstitutional because retrospective. *Johannessen v. United States*, 227.

Naturalization of Aliens. See IMMIGRATION, 1.

26. *States; effect of Fourteenth Amendment on power to regulate useful occupations.*

While the Fourteenth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent legislation intended to regulate useful occupations, which because of their nature and location, may prove injurious or offensive to the public. *Murphy v. California*, 623.

27. *States; effect of Fourteenth Amendment on right of municipality to prohibit harmful business.*

The Fourteenth Amendment does not prevent a municipality from prohibiting any business which is inherently vicious and harmful. *Ib.*

28. *States; effect of Fourteenth Amendment on power to regulate or prohibit business.*

The Fourteenth Amendment does not prevent a State from regulating or prohibiting a non-useful occupation which may become harmful to the public, and the regulation or prohibition need not be postponed until the evil is flagrant. *Ib.*

29. *States; when statute not revenue measure in disguise so as to render it unconstitutional.*

Where the fair import of the provisions of a state police statute is that the fees exacted are for necessary expenses of inspecting an article properly the subject of inspection, and the bill alleges no facts warranting a conclusion that the charges are unreasonable as compared with the cost, this court will not condemn the statute as an unconstitutional revenue measure. *Standard Stock Food Co. v. Wright*, 540.

30. *States; when statute not revenue measure in disguise.*

Where a state police statute involving inspection of goods is enforced by the affixing of stamps, it will not be held unconstitutional as a revenue measure in disguise if the bill does not allege any facts to show that the charge for stamps is unreasonable and the total sale is so much in excess of the cost of inspection as to impute bad faith. *Savage v. Jones*, 501.

See SUPRA, 1, 2, 3, 11, 12, 13;

STATES.

CONSTRUCTION OF STATUTES.

See STATUTES, A.

CONTINUANCE.

See TRIAL, 1.

CONTINUING OFFENSES.

See CRIMINAL LAW, 6, 7, 14, 22.

CONTRACTS.

1. *Rescission of contract for sale of mining properties; practice in this court; res judicata.*

One of the parties interested in and having control of a mining company purchased a neighboring group of mines and agreed that the company should have the opportunity of taking them on reimbursing him for outlay; if not availed of, he to keep them for his own. Subsequently the combined groups being sold he claimed the agreement had by reason of certain resolutions been rescinded and that he was entitled to the proceeds of the purchased group. The case was twice before the Supreme Court of the Territory: on the first appeal that court held that the agreement had been rescinded.

Held that:

The findings of fact sent up from the territorial court must alone be the basis of the judgment of this court.

In interpreting the action of stockholders in passing resolutions regarding the relative rights of the corporation and one of the stockholders and officers in property of the corporation, the surrounding facts and circumstances may be considered.

The agreement that the company could acquire the purchased group was carried out and not rescinded.

Whatever effect the decision of the Supreme Court of a Territory may have, as the law of the case, on the lower court or on the Supreme Court itself, prior to an appeal to this court, it is not the law of the case for this court.

Under the circumstances, the appointment of a receiver and his continuance for final settlement of the affairs of the company was proper. *Zeckendorf v. Steinfeld*, 445.

2. *Reality and substance of unrecorded instrument; power of creditors to inquire as to.*

The mere form of an instrument transferring property of a debtor cannot exclude the power of creditors to inquire into the reality and substance of a contract unrecorded although required by law to be recorded in order to be effective against third parties. *Valdes v. Central Altagracia*, 58.

3. *Transfer of property of corporation as contract other than of conditional sale.*

Under the circumstances of this case, and in view of the existence of an equity of redemption under prior transfers, *held*, that a transfer of all the property of a corporation to one advancing money to enable it to continue its business was not a conditional sale of the

property but a contract creating security for the money advanced, and on liquidation of the assets the transferee stood merely as a secured creditor. *Ib.*

See ACTIONS; INTERSTATE COMMERCE, 4, 6, 18;
ADMIRALTY; JURISDICTION, H 4;
CARRIERS; LOCAL LAW (N. Y.).

CONTRIBUTION.

See ADMIRALTY, 2, 3, 4.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVEYANCES.

See CONTRACTS, 2, 3.

CORPORATIONS.

When to be deemed of state and not Federal creation.

A corporation which was organized in the Indian Territory while the statutes of Arkansas were, under authority of Congress, in force in that Territory is not for that reason a Federal corporation, but is to be regarded for jurisdictional purposes as one of Oklahoma. (*Kansas Pacific R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 414.) *Shulthis v. McDougal*, 561.

See CONTRACTS, 1; JURISDICTION, H 4;
EQUITY, 1; LOCAL LAW (N. Y.);
FEDERAL QUESTION, 2; PUBLIC LANDS, 5, 6.

COURT AND JURY.

See CRIMINAL LAW, 21.

COURT OF CLAIMS.

See COURTS, 3.

COURTS.

1. *Duty to apply will of Congress.*

Where Congress has power to pass an act and its provisions are plain, the court must apply it even in a hard case. *Low Wah Suey v. Backus*, 460.

2. *Duty of this court to give effect to purpose of Congress in creating special tribunal.*

Where Congress creates a special tribunal for a special class of cases

with an appeal to this court it is the duty of this court to give effect to that purpose and uphold the lawful authority of the court so created and to also correct abuse of power when it appears. *United States v. Baltimore & Ohio R. R. Co.*, 306.

3. *Duty to follow mandate of this court; Court of Claims.*

After this court has reviewed the judgment of the Court of Claims and affirmed it, the Court of Claims, like any other court whose judgment has been reviewed by this court, must give effect to it and carry it into effect according to the mandate without variation or other further relief. (*In re Sanford Fork & Tool Co.*, 160 U. S. 247.) *Eastern Cherokees v. United States*, 572.

4. *Claim based on award of reparation of Interstate Commerce Commission cognizable in what courts.*

Under the act of June 18, 1910, 36 Stat. 539, 554, c. 309, the state courts as well as the appropriate Federal courts can take cognizance of a claim based on an award of reparation of the Interstate Commerce Commission. *Darnell v. Illinois Central R. R. Co.*, 243.

5. *Conflict between state and Federal in construction of will; case where Federal should have followed state court.*

In this case, in which the Circuit Court of Appeals construed a will as giving testator's son a life interest only with remainder that he could not affect, and the state court construed it as giving him the estate subject to the divesting clause, *held*, that the construction given by the state court was right and that the Circuit Court of Appeals should have followed it. *Messenger v. Anderson*, 436.

6. *Federal and state; duty of former to follow construction by latter of state statutes.*

In determining whether, under a state statute, failure to comply with its terms renders a contract void or merely acts as a bar to maintaining an action thereon, the Federal court must follow the interpretation given the statute by the highest court of the State. *David Lupton's Sons v. Automobile Club*, 489.

7. *Power to except one of class affected from operation of police regulation.*

Where, in the exercise of the police power, the municipal authorities by ordinance determine that a certain class of resorts should be prohibited as harmful to the public, the courts cannot except from the operation of the statute one of the class affected on the ground

that his particular place does not produce the evil aimed at by the ordinance. *Murphy v. California*, 623.

See APPEAL AND ERROR, 4, 5; PRACTICE AND PROCEDURE;
BANKRUPTCY, 9, 10;
CONSTITUTIONAL LAW, 7, 8, RES JUDICATA, 1;
19, 20, 21, 24; STATES, 5.

CRIMINAL LAW.

1. Arraignment; regularity a matter of substance.

Whether the prisoner was properly arraigned is not a matter of form but of substance, and should be shown by the record. (*Crain v. United States*, 162 U. S. 625.) *Johnson v. United States*, 405.

2. Arraignment; what constitutes.

There is no explicit provision in the laws of the United States describing what shall constitute an arraignment; but so far as it is expressed it has a definite meaning. *Ib.*

3. Arraignment; what constitutes.

In this case what was done, as shown by the record, did constitute an arraignment. *Ib.*

4. Conspiracy; indictment; sufficiency of.

If the indictment under § 5440, Rev. Stat., sufficiently charges the commission of overt acts within the district, it is sufficient even if it states that the place where the conspiracy formed is unknown. *Brown v. Elliott*, 392.

5. Conspiracy; commission of overt act necessary under § 5440, Rev. Stat.

While under the ancient rule of conspiracy the gist was the conspiracy itself and the crime was complete without any overt act, § 5440, Rev. Stat., prescribes as necessary to constitute an offense under it not only the unlawful conspiracy but also an overt act to effect the object by at least one of the conspirators. *Hyde v. United States*, 347.

6. Conspiracy as continuing offense; bar of limitations.

United States v. Kissel, 218 U. S. 601, followed to the effect that a conspiracy under § 5440, Rev. Stat., may be a continuing one, and that the offense is not barred on the expiration of the period from the date of the conspiracy itself. *Ib.*

7. Conspiracy as continuous crime; relation of overt acts to all conspirators.

A conspiracy entered into in violation of § 5440, Rev. Stat., may be a

continuous crime, and, if it was designed to be, and was, continuous, every overt act was the act of all the conspirators by reason of the terms of their unlawful plot. *Brown v. Elliott*, 392.

8. *Conspiracy; successive overt acts; computation of period of limitation.*

Where there are successive overt acts during the existence of the conspiracy, the period of limitation must be computed from the date of the last of them properly specified in the indictment, although some of them may have occurred more than three years before the indictment was found. *Ib.*

9. *Conspiracy; effect of relation of master and servant.*

The fact that one of the conspirators was the servant of another conspirator does not preclude there being a conspiracy between them; and, until there is an affirmative withdrawal from the conspiracy by the servant, his acts bind his employer and co-conspirator so far as preventing the statute of limitations from running. *Hyde v. United States*, 347.

10. *Conspiracy; agency; quære as to.*

Quære as to the extent of agency between persons conspiring in violation of § 5440, Rev. Stat. *Ib.*

11. *Conspiracy; place of trial.*

In determining the place of trial there is no oppression in taking the conspirators to the place where the overt act was performed rather than compelling the victims and witnesses to go to the place where the conspiracy was formed. *Ib.*

12. *Conspiracy; place of trial of one as place of trial of all conspirators.*

Overt acts performed in one district by one of the parties who had conspired in another district in violation of § 5440, Rev. Stat., give jurisdiction to the court in the district where the overt acts are performed as to all the conspirators. (*Brown v. Elliott*, p. 392, *post.*) *Ib.*

13. *Conspiracy; place of trial; Sixth Amendment.*

The Sixth Amendment to the Constitution does not preclude the place of trial of conspirators indicted under § 5440, Rev. Stat., being in any State where an overt act was performed. (*Hyde v. United States*, *ante*, p. 347.) *Brown v. Elliott*, 392.

14. *Conspiracy; conscious offending; bar of limitations.*

Until a conspirator affirmatively withdraws from a continuing con-

spiracy there is conscious offending that prevents the statute from running. *Hyde v. United States*, 347.

15. *Conspiracy; withdrawal from; what amounts to.*

A disclosure to the Government by a conspirator does not amount to a withdrawal that would start the statute running if he thereafter commits overt acts, and whether there was acquiescence in the later acts of another conspirator is for the jury to determine. *Ib.*

16. *Conspiracy; individual liability; when legality of conviction of one not considered.*

Whether the conviction of one of several persons charged with conspiracy can ever be illegal will not be considered when it appears that more than one have been convicted. *Ib.*

17. *Conspiracy; individual liability; admission of evidence.*

While there may not be a conspiracy by one person alone, it is possible that some of the evidence may be admitted as against individual defendants and not against all; and it is not error for the court to charge that the jury might convict any one of the defendants alone, if accompanied by the statement that his instructions related to the sufficiency of evidence produced as to each defendant. In this case the charge of the court in regard to the conviction of one or more of the defendants was not to their prejudice but in their interest. *Ib.*

18. *Conspiracy; evidence; immateriality of objection as to.*

An objection to the admission of testimony in a trial for conspiracy offered exclusively as against one of the defendants becomes immaterial if that defendant is acquitted. *Ib.*

19. *Conspiracy; evidence; relevancy of.*

Even if a letter addressed to one of the defendants charged with conspiracy were improperly taken from the mails the fact is not relevant to the question of the guilt of the conspirators. *Ib.*

20. *Conspiracy; evidence; importance on appeal of evidence as to one acquitted.*

While any evidence affecting a particular defendant in a trial of several for conspiracy may be important to him while on trial, it ceases to be so in the reviewing court, if that defendant was acquitted. *Ib.*

21. *Conspiracy; coercion of jury; misconduct of jury.*

In this case it does not appear that the jury was coerced by the court

into agreeing on the verdict or that the conviction of some of the defendants and acquittal of others was the result of an improper agreement between the jurors. *Ib.*

22. *Continuing offenses; place of trial.*

Where a continuing offense is committed in more than one district, the Sixth Amendment does not preclude a trial in any of those districts. (*Armour Packing Co. v. United States*, 209 U. S. 56.) *Ib.*

23. *Criminal Code of 1909; application to District of Columbia.*

Some of the provisions of the Criminal Code approved March 4, 1909, 35 Stat. 1088, c. 321, apply to the District of Columbia and other provisions do not. *Johnson v. United States*, 405.

24. *Criminal Code of 1909; provision for qualification of verdict; application to District of Columbia.*

The provision in § 272 of the Criminal Code of 1909 permitting the jury to qualify the verdict of guilty in certain cases punishable by death by adding "without capital punishment" does not supersede the provisions in the District Code in regard to punishment for murder. *Ib.*

25. *Criminal Code of 1909; effect to supersede local codes.*

The provisions of the Criminal Code which deal with offenses Federal in nature, wherever committed, whether in places under Federal, state or territorial control, supersede the District Code; provisions, however, in regard to offenses under state jurisdiction if committed in a State or over which Congress has given local control to the Territories, and in regard to which it has adopted a separate code, as for Alaska, do not supersede the District Code. *Ib.*

26. *Offenders; solicitude of courts for; limitation upon.*

In construing criminal laws, courts must not be in too great solicitude for the criminal to give him immunity because of the difficulty in convicting or detecting him. *Hyde v. United States*, 347.

27. *Place of commission of crime under § 5339, Rev. Stat.; District of Columbia as.*

As used to define the place where a crime may be committed the words, "within any fort, arsenal, dockyard, magazine, or any other place or district of country under the exclusive jurisdiction of the United States" include the District of Columbia. *Johnson v. United States*, 405.

28. *Presence of offender; constructive.*

There may be a constructive presence in a State, distinct from personal presence, by which a crime committed in another State may be consummated, and render the person consummating it punishable at that place. *Hyde v. United States*, 347.

29. *Territorial extent affecting administration of.*

The size of our country has not become too great for the effective administration of criminal justice. *Ib.*

30. *Verdict; qualification of; application of act of January 15, 1897 to District of Columbia; effect of District Code on.*

The act of January 15, 1897, 29 Stat. 487, c. 29, permitting the jury in a capital case of murder or rape under § 5339 or § 5345, Rev. Stat., to qualify the verdict by adding "without capital punishment" was applicable to the District of Columbia until superseded by the special provisions on the same subject in the District Code. (*Winston v. United States*, 172 U. S. 303.) *Johnson v. United States*, 405.

See CONSTITUTIONAL LAW, 6, 18; STATES, 6;
HABEAS CORPUS, 3; STATUTES, A 4;
WORDS AND PHRASES.

DAMAGES.

See ACTIONS.

DEBTOR AND CREDITOR.

See CONTRACTS, 2, 3.

DECEIT.

See TRADE-NAME, 2.

DEEDS.

Quitclaim deeds; title passing by.

While a mere quitclaim deed does not pass after acquired title, the equitable title of one who was also trustee to acquire the title for the grantee will pass by such a deed. *United States v. Colorado Anthracite Co.*, 219.

DEFENSES.

See HABEAS CORPUS, 3.

DELAWARE DIMINISHED INDIAN RESERVATION.

See INDIANS, 15.

DELAWARE INDIANS.

See INDIANS, 15, 16.

DELEGATION OF POWER.

See IMMIGRATION, 3.

DEPORTATION OF ALIENS.

See IMMIGRATION, 5-8;

PRACTICE AND PROCEDURE, 8.

DISTRICT OF COLUMBIA.

See CRIMINAL LAW, 23, 24, 25, 27, 30;
STATUTES, A 3.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 3, 7-15;
IMMIGRATION, 2.

EMPLOYER AND EMPLOYÉ.

See CRIMINAL LAW, 9.

EQUAL PROTECTION OF THE LAW.

See CONSTITUTIONAL LAW, 14-17.

EQUITY.

1. *Laches precluding relief against use of name.*

The doctrine of laches applies to the use of a name of a fraternal corporation and equity will not grant relief against the use of the name by parties who have been using it for many years without objection, at the instance of the older organization, there not appearing to be any fraud or intent to deceive the public. *Creswill v. Knights of Pythias*, 246.

2. *Right to relief in, under doctrine of clean hands; quære as to.*

Quære whether a defendant in a libel suit who made a public charge of malfeasance in office without having evidence of truth sufficient

to warrant prudent counsel in making an issue of it, is not barred from relief in equity under the doctrine of clean hands. *Pickford v. Talbott*, 651.

See INTERSTATE COMMERCE, 15, 16; NATURALIZATION, 6;
JUDGMENTS AND DECREES, 2-5; PRACTICE AND PROCEDURE, 1;
JURISDICTION, C 1, 2; PUBLIC LANDS, 3;
TRADE-NAME, 2.

ESTOPPEL.

See CONSTITUTIONAL LAW, 19, 21, 22, 24; PATENTS, 6;
JUDGMENTS AND DECREES, 6; RAILROADS, 1;
NATURALIZATION, 2; TRIAL, 3.

EVIDENCE.

Testimony of jurors as to verdict rendered; admissibility of.

Where the jury render a verdict within the issues, testimony of jurors themselves should not be received to show matters which essentially inhere in the verdict and necessarily can receive no corroboration. *Hyde v. United States*, 347.

See CRIMINAL LAW, 17-20; PRACTICE AND PROCEDURE, 2, 7;
JUDGMENTS AND DECREES, 1; PUBLIC LANDS, 11;
STATUTES, A 2.

EXCLUSION AND EXPULSION OF ALIENS.

See IMMIGRATION, 3-8.

EXECUTIVE DEPARTMENTS.

See IMMIGRATION, 3.

EXECUTIVE OFFICERS.

See IMMIGRATION, 6, 8.

EXECUTORS AND ADMINISTRATORS.

See JURISDICTION, C 6, 7.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, 18.

FACTS.

See CONTRACTS, 1; JURISDICTION, C 4;
JUDGMENTS AND DECREES, PRACTICE AND PROCEDURE, 3, 4,
6; 5.

FEDERAL QUESTION.

1. *When case arising under laws of United States; application of rule.*

A case is not one arising under the laws of the United States unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law upon the determination whereof the result depends. This rule applies peculiarly to suits respecting rights to land acquired under laws of the United States; otherwise all suits to establish title to land which had been part of the public domain would be cognizable in the Federal courts. *Shulthis v. McDougal*, 561.

2. *Question of right of Federal corporation to incorporation in State a non-Federal one.*

Whether persons have a right to be incorporated in a State as a state branch of an organization incorporated in the District of Columbia under an act of Congress is a non-Federal question. *Creswill v. Knights of Pythias*, 246.

See JURISDICTION, A.

FIVE CIVILIZED TRIBES.

See INDIANS, 4.

FLATHEAD INDIAN RESERVATION.

See INDIANS, 7.

FOREIGN CORPORATIONS.

See LOCAL LAW (N. Y.).

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW.

FRATERNAL ORGANIZATIONS.

See EQUITY, 1;
TRADE-NAME.

FRAUD.

Presumption of, not indulged; rule applicable to Government.

The rule that fraud is not presumed and that one basing his defense thereon should prove it, applies to the Government; and if the answer contains no allegation of fraud, silence in the findings of the

court below will be taken as showing that none was proved, and an affirmative finding that there was no fraud is not necessary to sustain the judgment. *United States v. Colorado Anthracite Co.*, 219.

See NATURALIZATION, 1, 3;
PUBLIC LANDS, 8;
TRADE-NAME, 2.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 19-24.

GENERAL AVERAGE AGREEMENTS.

See ADMIRALTY.

GOVERNMENTAL POWERS.

See CONSTITUTIONAL LAW, 4, 5, 25; NATURALIZATION, 1;
IMMIGRATION, 3; STATES, 1, 2.

GRAND JURY.

See PLEADING, 2.

GUARDIAN AND WARD.

See INDIANS, 4.

HABEAS CORPUS.

1. *Functions of writ.*

The writ of *habeas corpus* cannot be made to perform the office of writ of error. *Glasgow v. Moyer*, 420.

2. *Scope of examination on.*

The rule that on *habeas corpus* the court examines only into the power and authority of the court restraining the petitioner to act, and not the correctness of its conclusions, *Matter of Gregory*, 219 U. S. 210, applies where the petitioner attacks as unconstitutional, or as too uncertain, the law which is the foundation of the indictment and trial. *Ib.*

3. *Defenses available on.*

A defendant in a criminal case cannot reserve defenses which he might make on the trial and use them as a basis for *habeas* proceedings to attack the judgment after trial and verdict of guilty. It would introduce confusion in the administration of justice. *Ib.*

4. *Will not lie where petitioner remitted to remedy on writ of error.*

Where the court below has remitted the petitioner to his remedy on writ of error, it would be a contradiction to permit him to prosecute *habeas corpus*. *Ib.*

5. *Record of proceedings attacked required.*

As a general rule in *habeas corpus* proceedings, a copy of the record of the proceedings attacked is required, *Craemer v. Washington*, 168 U. S. 124, and if petitioner cannot comply with the rule by annexing a complete copy he should comply with it so far as it is within his power. *Low Wah Suey v. Backus*, 460.

HARTER ACT.

See ADMIRALTY, 1, 2.

HIGHWAYS.

See CONSTITUTIONAL LAW, 9.

HOMICIDE.

See CRIMINAL LAW, 24, 30.

IMMIGRATION.

1. *Application of act.*

The Alien Immigration Act in terms applies to all aliens. *Low Wah Suey v. Backus*, 460.

2. *Effect of act of 1907 as unconstitutional denial of rights.*

The act of 1907 is not unconstitutional as denying one held for deportation of his liberty without due process of law because it does not give the immigration officers power to compel his witnesses to appear. *Ib.*

3. *Exclusion and expulsion of aliens; power of Congress as to.*

Congress may pass laws forbidding aliens or classes of aliens from coming within the United States and may provide for their expulsion; it may also devolve upon the executive department or subordinate officers the right and duty of carrying out the law. (*Wong Wing v. United States*, 163 U. S. 228.) *Ib.*

4. *Exclusion after naturalization.*

An alien who has become a citizen of one of the States, can be excluded under the Alien Immigration Act if within a class prohibited to enter. *Ib.*

5. *Deportation of prostitutes; effect of naturalization by marriage.*

The object of the provisions of the Alien Immigration Acts of 1907 and 1910, providing for deportation of prostitutes, was to prevent the introduction and keeping in this country of women of the prohibited class; and even if a woman married to a citizen might be permitted to enter if she does not belong to that class, if she is found violating the statute by being in a house of prostitution she becomes subject to the deportation provisions thereof, notwithstanding her marriage to a citizen. *Ib.*

6. *Deportation; hearing on proceeding for; finality of order of executive officers.*

Hearing on proceedings for deporting aliens before executive officers may be made conclusive when fairly conducted. One attacking such proceedings in the courts must show that the officers conducting them were manifestly unfair and abused the discretion committed to them. Otherwise the order of executive officers within the authority of the statute is final. *Ib.*

7. *Deportation proceedings; right of alien to counsel.*

A preliminary examination of an alien without counsel is permitted by the statute; and if at subsequent stages of the proceedings the alien has counsel there is no denial of right. *Ib.*

8. *Deportation proceedings; witnesses; process not available to compel attendance.*

The Alien Immigration Acts of 1907 and 1910 do not give authority to the Commissioner or Secretary to issue process to compel attendance of witnesses on behalf of the alien held for deportation. The alien is not denied rights if the witnesses produced on his behalf are heard. *Ib.*

IMMOBILIZATION OF PROPERTY.

See LOCAL LAW (PORTO RICO).

INCORPORATION.

See FEDERAL QUESTION, 2.

INDIANS.

1. *Cession of territory by; qualification of, as to introduction of intoxicating liquors.*

A cession by Indians may be qualified by a stipulation in the treaty that the ceded territory, although within the boundaries of a State,

shall retain its original status of Indian country so far as the introduction therein of liquor is concerned. *Clairmont v. United States*, 551.

2. *Cherokee Nation; res judicata of question of right to prosecute claim against United States.*

In rendering a judgment for the Cherokee Nation in its suit against the United States, on the item claimed by, and over the objection of, the Eastern Cherokees, the Court of Claims recognized the Nation as the titular claimant authorized to prosecute the item to recovery, although for the ultimate benefit of the Eastern Cherokees, and this court having affirmed the judgment, 202 U. S. 1, the question has been adjudicated. *Eastern Cherokees v. United States*, 572.

3. *Claims of; right of attorneys to fees.*

Under the decree of the Court of Claims as affirmed by this court the attorneys for the Cherokee Nation are entitled to be paid their fees on the amount of the recovery including the items recovered in the name of the Nation for the Eastern Cherokees. *Ib.*

4. *Five Civilized Tribes as wards of Nation.*

Although the Five Civilized Tribes have long been treated more liberally than other Indians, they remain none the less the wards of the Nation and in all respects subject to its control. *Ex parte Webb*, 663.

5. *Intoxicating liquors; effect of act of 1897 to repeal that of 1892.*

The act of January 30, 1897, 29 Stat. 506, c. 109, in regard to sale of liquor to the Indians and introduction of liquor into Indian country, repealed, as far as inconsistent therewith, the act of July 23, 1892, 27 Stat. 260, c. 234. *Clairmont v. United States*, 551.

6. *Intoxicating liquors; what constitutes Indian country within meaning of act of 1897.*

An indictment under the act of January 30, 1897, for introducing liquor into Indian country cannot be sustained if the offense alleged was committed on land within a State and which had been completely withdrawn from the reservation, and the Indian title thereto surrendered so as not then to be Indian country. Under such circumstances the District Court of the United States has no jurisdiction. *Ib.*

7. *Intoxicating liquors; Indian country; what constitutes.*

The title to that part of the Flathead Reservation in Montana included

within the right of way of the Northern Pacific Railway Company, has been completely withdrawn from the Reservation and the Indian title thereto extinguished and therefore is no longer Indian country within the meaning of the act of January 30, 1897. *Ib.*

8. *Intoxicating liquors; effect of Oklahoma Enabling Act of 1906 to repeal law of 1895 prohibiting introduction and sale of liquor in Indian country.*

The Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335, followed by the adoption of the constitution therein described, and the admission of the new State, had the effect of remitting to the state government the enforcement of the laws relating to the manufacture and sale of liquor within the State; and, so far as it covered the same field as the prior law of 1895 prohibiting introduction and sale of liquor in Indian country, the latter was by implication repealed. *Ex parte Webb*, 663.

9. *Intoxicating liquors; Oklahoma Enabling Act; intention of Congress in.*

While the Oklahoma Enabling Act may have by implication repealed the act of 1895 in part, it was not the intention of Congress to repeal that act in respect to the introduction of liquor from other States or Territories. *Ib.*

10. *Same.*

Congress has for many years consistently pursued the policy of forbidding sales of liquor to Indians and of excluding liquor from territory occupied by them, and the Oklahoma Enabling Act was framed with a clear intent that while the State should control the liquor traffic within its own borders the United States should exercise its appropriate powers to prevent such traffic within the Indian Territory originating beyond the borders of the State. *Ib.*

11. *Same.*

It is unreasonable to suppose that Congress would wipe out all its laws and regulations regarding the liquor traffic with Indians including those established by treaties, and impose upon future Congresses the labor and difficulty of establishing new legislation upon that subject. *Ib.*

12. *Intoxicating liquors; conformity of provisions of Oklahoma Enabling Act with treaties and agreements with Indians.*

Reviewing the treaties and agreements with the several tribes occupying the Indian Territory within that State, it appears that the

provisions of the Oklahoma Enabling Act in regard to liquor traffic with Indians originating beyond the State were enacted with the purpose of fulfilling the spirit and letter of those treaties and agreements. *Ib.*

13. *Intoxicating liquors; effect of Oklahoma Enabling Act to repeal prior law.*

The argument that the act of 1895 must have been repealed by the Oklahoma Enabling Act to the extent that the latter permitted the introduction of liquor into the State for the needs of the state agencies for distribution of liquor, is an argument *ab inconvenienti* and is without force so far as the introduction of liquor by an individual is concerned. *Ib.*

14. *Intoxicating liquors; effect of Oklahoma Enabling Act to repeal legislation relative to; jurisdiction to punish one introducing liquor into Indian country.*

The Oklahoma Enabling Act did not repeal the act of 1895, so far as it pertains to the carrying of liquor from without the new State into that part of it which was Indian Territory (except that brought in by the State for use of state agencies) and the United States District Court for the District of Oklahoma has jurisdiction to punish an offender against the act of 1895 in that respect. *Ib.*

15. *Lands of; title of Union Pacific to right of way across lands in Kansas within Delaware Diminished Indian Reservation.*

Under § 2 of the act of July 1, 1862, 12 Stat. 489, c. 120, and other provisions of that act, the predecessor in title of the Union Pacific Railroad Company acquired a right of way four hundred feet in width across the lands in Kansas, within the Delaware Diminished Indian Reservation, those lands having been assigned in severalty to individual Delawares under the treaty of May 30, 1860, 12 Stat. 1129, providing for such right of way. *Kindred v. Union Pacific R. R. Co.*, 582.

16. *Lands of; right of individual Delaware Indians; quære as to.*

Quære. Whether the individual Delaware Indians, to whom the lands were assigned under the treaty of 1860, obtained a better or different right in them than the tribe had in the lands in common. *Ib.*

17. *Lands of; extinguishment of title; compensation to Indians; quære as to.*

Quære. Whether under § 2 of the act of July, 1862, the United States, in extinguishing the Indian title to lands through which the rail-

roads were given rights of way, is to bear the burden by compensating the Indians, or only by assisting in the negotiations. *Ib.*

18. *Oklahoma Enabling Act; effect on power of Congress over Indians.*

The proviso to § 1 of the Oklahoma Enabling Act expressly reserving to the Government of the United States the power to make laws and regulations in the future respecting Indians, negatives any purpose to repeal by implication the existing laws and regulations on the subject. *Ex parte Webb*, 663.

See CONSTITUTIONAL LAW, 4, 5;
PUBLIC LANDS, 9;
STATUTES, A 9.

INDIAN TERRITORY.

See TERRITORIES.

INDICTMENT AND INFORMATION.

See CRIMINAL LAW, 4;
INDIANS, 6.

INFRINGEMENT OF PATENT.

See PATENTS.

INJUNCTION.

1. *Against enforcement of order of Interstate Commerce Commission; application of requirements in § 210, Judicial Code.*

The requirements in § 210, Judicial Code, that a restraining order must contain a statement of facts as to irreparable damage resulting from the order of the Commission relate only to the first class of cases. *United States v. Baltimore & Ohio R. R. Co.*, 306.

2. *To restrain enforcement of ordinance fixing rates for telephone company denied.*

In this case the evidence is not sufficient to justify enjoining enforcement of an ordinance fixing rates of a telephone company and the decree granting an injunction is reversed, but without prejudice. *Louisville v. Cumberland T. & T. Co.*, 430.

See APPEAL AND ERROR, 3; JURISDICTION, F 1, 8, 9, 10,
INTERSTATE COMMERCE, 15, 16; 11;
JUDGMENTS AND DECREES, 2-5; PRACTICE AND PROCEDURE, 1.

INSPECTION LAWS.

See CONSTITUTIONAL LAW, 13, 29, 30.

INSTRUCTIONS TO JURY.

Special charges based on part of evidence not obligatory on court.

The trial court is not under obligation to give special charges based on only a part of the evidence. *Seaboard Air Line Ry. v. Duvall*, 477.
See CRIMINAL LAW, 17.

INTERLOCUTORY ORDERS.

See APPEAL AND ERROR, 3;
JURISDICTION, B 2.

INTERSTATE COMMERCE.

1. *What constitutes.*

A rate fixed on that part of interstate carriage which includes the actual placing of the shipment into vessels ready to be carried beyond the state destination is, as to merchandise intended for points beyond the State, a burden on interstate commerce and beyond the power of the State to impose, even if the merchandise is billed from a point within the State to the point where the vessel is. *Gulf, Colorado & Santa Fe Railway Co. v. Texas*, 204 U. S. 403, distinguished. *Ohio Railroad Commission v. Worthington*, 101.

2. *What constitutes; how determined.*

Through billing to the point beyond the State is not always necessary to determine that a shipment is interstate. (*Southern Pacific Terminal Co. v. Young*, 219 U. S. 498.) *Ib.*

3. *What constitutes; sales in original packages.*

Sales made in one State to be delivered free on board at a point therein, to be delivered to consumers in another State in the original unbroken packages, freight to be paid by purchaser, constitutes interstate commerce. *Savage v. Jones*, 501.

4. *Discrimination by carrier violative of Elkins Act; agreement to expedite as.*

To agree with a particular shipper to expedite a shipment at regular rates, where no rate has been published for special expediting, is a discrimination and as such a violation of the Elkins Act of February 19, 1903, 32 Stat. 847, c. 708, and relief on the contract will be denied. *Chicago & Alton R. R. Co. v. Kirby*, 155.

5. *Discrimination illegal under Elkins Act; what amounts to.*

To guarantee a particular connection and transportation by a par-

ticular train amounts to giving a preference when not open to all and provided for in the published tariffs, and under the Elkins act is an illegal discrimination. *Ib.*

6. *Discrimination; shipper charged with notice of.*

A shipper is presumed to know what the published rates are, and if they do not contain provisions for the special service guaranteed to him he must be taken as having contracted for a rate discriminatory in his favor. *Ib.*

7. *Discrimination in rates between railroad-fuel and commercial coals.*

An interstate carrier may not charge a different rate for the transportation of railroad-fuel coal to a given point than for the transportation of commercial coal to the same point. It would be an illegal preference or discrimination under § 3 of Act to Regulate Commerce. *Interstate Com. Comm. v. Baltimore & Ohio R. R. Co.*, 326.

8. *Discrimination; railroads may not be favored.*

A railroad company cannot be made a favored shipper and given a lower rate on the same commodity to the same point than other persons. *Ib.*

9. *Discrimination in rates; railroads not to be favored.*

A railroad company is not to be put on the same basis as a locality and entitled to preferential rates to accommodate competitive conditions. *The Import Rate Case*, 162 U. S. 197, distinguished. *Ib.*

10. *Right of carrier to assume extra liability.*

An interstate carrier can assume an extra liability for expediting, provided it makes and publishes a rate therefor and opens it to all. *Chicago & Alton R. R. Co. v. Kirby*, 155.

11. *Sales by receiver of goods in original packages within protection of Constitution.*

Commerce among the States is not a technical legal conception, but a practical one drawn from the course of business. Protection accorded to interstate commerce by the Federal Constitution extends to the sale by the receiver of the goods in the original packages. *Savage v. Jones*, 501.

12. *State interference; what constitutes.*

A rate fixed by the Ohio Railroad Commission for coal from state points to "on board" vessels at the port of Huron, Ohio, and intended for shipment to some point beyond the State undetermined at

time of shipment, and, for convenience, billed to the shippers' own order at Huron, *held* to be a rate affecting interstate shipment and void under the commerce clause of the Constitution as an attempt to regulate interstate commerce. *Ohio Railroad Commission v. Worthington*, 101.

13. *State interference; effect of statute requiring prompt transportation.*

A statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under penalties for failure, conflicts with the requirements of § 2 of the Hepburn Act and is unenforceable. *Southern Railway Co. v. Burlington Lumber Co.*, 99.

14. *State interference; incidental; effect on validity of repugnance to Federal statute.*

No state statute which even affects incidentally interstate commerce is valid if it is repugnant to the Federal Food and Drugs Act of June 30, 1906, the object of which is to prevent adulteration and misbranding and keep adulterated and misbranded articles out of interstate commerce. *Savage v. Jones*, 501.

15. *State interference; injunction against.*

An order made by a state commission under assumed authority of the State, which directly burdens interstate commerce, will be enjoined. (*McNeill v. Southern Railway Co.*, 202 U. S. 543.) *Ohio Railroad Commission v. Worthington*, 101.

16. *Equitable relief from state interference with.*

An attack by state authorities upon purchasers of goods manufactured in and shipped from another State, inflicts injury upon the manufacturer by reducing the interstate sales, and if this result can only be prevented by complying with illegal demands, under an unconstitutional state statute, equity will grant relief. *Savage v. Jones*, 501.

17. *Tariffs of carriers; power of Commerce Commission in respect to.*

Tariffs are but forms of words, and the Interstate Commerce Commission, in the exercise of its powers to administer the Act to Regulate Commerce, can look beyond the forms to what caused them and what they are intended to, and do, cause. *Interstate Com. Comm. v. Baltimore & Ohio R. R. Co.*, 326.

18. *Purpose of Commerce Act; special contracts prohibited.*

The broad purpose of the Commerce Act to compel the establishment

of reasonable rates and uniform application will not be defeated by sanctioning special contracts giving special advantages to particular shippers. *Chicago & Alton R. R. Co. v. Kirby*, 155.

See CONSTITUTIONAL LAW, 1, 2, 3.

INTERSTATE COMMERCE COMMISSION.

Jurisdiction; quære as to.

Quære; whether transportation under the circumstances of this case is such a transportation within the State or to points without the State, partly by railroad and partly by water, as to be within the jurisdiction and control of the Interstate Commerce Commission.

Ohio Railroad Commission v. Worthington, 101.

See APPEAL AND ERROR, 3; INJUNCTION, 1;
COURTS, 4; INTERSTATE COMMERCE, 17;
JURISDICTION, F.

INTERVENTION.

See JURISDICTION, B 3; H 5.

INTOXICATING LIQUORS.

See INDIANS, 1, 5-14.

JUDGMENTS AND DECREES.

1. *Collateral attack; when not subject to.*

Prior decisions of this court holding that a judgment of a competent court admitting a person to citizenship is, like every other judgment, competent evidence of its own validity, go no further than protecting the judgment from collateral attack. *Johannessen v. United States*, 227.

2. *Enjoining enforcement; power of court of equity over judgment at law.*

In order to warrant a court of equity in restraining the enforcement of a judgment at law, the defeated party must show that it is manifestly unconscionable for the judgment creditor to enforce it; it is not sufficient for him merely to show that because of newly discovered facts or evidence he would have a better prospect of success on a retrial. *Pickford v. Talbott*, 651.

3. *Enjoining enforcement on ground of newly discovered evidence.*

It is incumbent on one seeking to have the enforcement of a judgment against him enjoined by a court of equity on the ground of newly discovered evidence to show that his failure to discover the evi-

dence relied upon as defense was not attributable to his own want of diligence. *Ib.*

4. *Enjoining enforcement; when defense not deemed newly discovered.*

For the purpose of equity restraining the enforcement of a judgment at law, a defense is not deemed to be newly discovered or to have been lost by accident or mistake, if it was, or ought to have been, within the knowledge of the party when he made his defense to the action at law. *Ib.*

5. *Enjoining enforcement; when defense of justification in libel suit not deemed newly discovered.*

A defendant in a libel suit who deliberately abstained from defending by justification of the charges, cannot, after verdict and judgment against him, come into equity and seek to restrain the enforcement of the judgment on the ground of newly discovered evidence tending to prove the truth of the charges. *Ib.*

6. *Foreign; determination of effect of.*

Where a judgment of the court of another State is set up as a bar, the effect of that judgment in the courts of the State which rendered it is a question of fact to be determined by the court in which it is set up. *Bigelow v. Old Dominion Copper Co.*, 111.

7. *Privity of joint tort-feasors.*

The privity that exists between a stockholder and the corporation that makes a judgment against the corporation conclusive as against the stockholder does not exist as between joint *tort-feasors*. *Hancock National Bank v. Farnum*, 176 U. S. 640, distinguished. *Ib.*

See CONSTITUTIONAL LAW, 19-24; HABEAS CORPUS, 3;

FRAUD;

INDIANS, 2;

JURISDICTION.

JUDICIAL CODE.

See APPEAL AND ERROR, 3; JURISDICTION, F 1, 5, 10;

INJUNCTION, 1;

PRACTICE AND PROCEDURE, 1.

JUDICIAL DISCRETION.

See TRIAL, 1.

JURISDICTION.

A. OF THIS COURT.

1. *Under § 709, Rev. Stat.; record and not certificate must show constitutional question set up and denied.*

To give this court jurisdiction under § 709, Rev. Stat., it must appear

upon the record, and not by certificate of the judge, that a right under the Constitution or laws of the United States was set up and denied. While such a certificate may make more certain the fact that the Federal right was asserted and denied, it is insufficient to confer jurisdiction if the record itself does not show the fact. (*Louisville & Nashville R. R. v. Smith*, 204 U. S. 551.) *Seaboard Air Line Ry. v. Dwall*, 477.

2. *Under § 709, Rev. Stat.; when claim based on Federal statute sufficiently set up.*

The fact that a case in the state court asserts a claim based on a Federal statute, does not give this court jurisdiction to review the judgment under § 709, Rev. Stat., if none of the exceptions are based on the refusal of the court to make a definite construction of the act as requested by the plaintiff in error. *Ib.*

3. *Under § 709, Rev. Stat.; scope of review.*

Where the case comes up under § 709, Rev. Stat., this court is not one of general review. It can reexamine only those rulings which denied Federal rights specially set up. *Ib.*

4. *Under § 709, Rev. Stat., duty of counsel in setting up claim of Federal right.*

It is the duty of counsel asking in the state court for a particular construction of a Federal statute involved in the case to put the request in such definite terms that the record will show that it was a claim of Federal right specially set up as required by § 709 in order to give this court jurisdiction. *Ib.*

5. *Under § 709, Rev. Stat.; when right under Federal statute sufficiently set up.*

Where the only defense to an action for personal injuries by an employé of an interstate railway carrier is contributory negligence on the part of the plaintiff in going into a car in violation of a rule requiring him to remain in another car, no construction of the provision of the Employers' Liability Act that the employé can only recover if injured while employed by the carrier is involved which is reviewable by this court, unless the request is definitely set up as a Federal right specially asserted and denied. *Ib.*

6. *Under § 709, Rev. Stat.; when right under Federal statute sufficiently set up.*

Excepting to a part of the charge by saying that an employé's going

from the baggage car into the express car of a train is such an act that a reasonably prudent man would not have done under the circumstances does not raise specific questions as to the construction of the Employers' Liability Act under which the action was brought and give this court jurisdiction to review under § 709, Rev. Stat. *Ib.*

7. *Of appeal from Circuit Court of Appeals; when judgment of that court not final.*

Where the petition of the receiver, appointed in a case dependent on diverse citizenship, invokes the jurisdiction of the Circuit Court not only as ancillary to the receivership but also to protect the estate on grounds involving alleged infractions of the Federal Constitution and rights secured thereby, the case is not one in which the judgment of the Circuit Court of Appeals is made final by the act of 1891, and an appeal lies to this court where the amount in controversy exceeds one thousand dollars. *Ohio Railroad Commission v. Worthington*, 101.

8. *Of appeal from Circuit Court of Appeals; time for taking.*

Where the jurisdiction of the Circuit Court is invoked not solely on the ground of diverse citizenship but also because the case is one arising under an act of Congress, an appeal lies from the Circuit Court of Appeals to this court, and by § 6 of the act of 1891 the time within which to take the appeal is one year; the limitation of thirty days under § 7 applies only to appeals to the Circuit Court of Appeals from the Circuit Court. *United States Fidelity Co. v. Bray*, 205.

9. *Of direct appeal from Circuit Court; effect of dismissal of bill for failure to prove existence of property.*

Where the jurisdiction of the Circuit Court is dependent, under § 8 of the act of 1875, upon property affected being within the jurisdiction, the defendants not being therein, the fact that the bill was dismissed because complainants failed to prove the existence of any property within the jurisdiction does not affect the right of a direct appeal to this court under § 5 of the act of 1891. *Chase v. Wetzlar*, 79.

10. *Of direct appeal from Circuit Court; jurisdictional and constitutional questions involved.*

In this case *held*, that the Circuit Court in taking jurisdiction and deciding the cause on the merits, notwithstanding there was a partial demurrer to the jurisdiction, maintained its power and jurisdiction as a Circuit Court, and also necessarily decided questions arising

under the Constitution expressly alleged in the bill. *Mississippi Railroad Commission v. Louisville & Nashville R. R. Co.*, 272.

11. *Of direct appeal under § 5 of act of 1891; phase of jurisdiction of Federal court to give.*

Under § 5 of the act of 1891, the jurisdiction of the Federal court as such must be involved. The direct writ will not lie if the question is one which might arise in a court of general jurisdiction, such as insufficiency of the pleadings. *Darnell v. Illinois Central R. R. Co.*, 243.

12. *Of direct appeal under § 5 of act of 1891; when necessary question of jurisdiction of Federal court involved.*

Whether plaintiff's declaration in a case for reparation for excessive rates is sufficient without an averment of previous action by the Interstate Commerce Commission is a question which would arise in any court, state or Federal, in which the case was brought and does not go to the jurisdiction of the Federal court as such; a direct writ of error therefore will not lie from this court under § 5 of the Court of Appeals Act of 1891. *Ib.*

13. *Under Judiciary Act of 1891; effect of saving clause of act of June 7, 1878.*

Under the saving clause of the act of June 7, 1878, 20 Stat. 99, c. 160, the review of the order in this case was not provided for by the Judiciary Act of 1891. *Kyle v. Hammond*, 692.

14. *To review judgment of state court under § 709, Rev. Stat.; § 237, Judicial Code.*

Where defendant sets up the claim that it enjoys right or privilege sought to be enjoined under authority of an act of Congress and the state court denies the right, the judgment is reviewable here under § 237 of the new Judicial Code (§ 709, Rev. Stat.). *Creswill v. Knights of Pythias*, 246.

15. *Of suit attacking constitutionality of state statute where general demurrer for want of equity sustained.*

Where appellant, as complainant below, attacked as unconstitutional a state statute under which the sale of his product was interfered with by the state officer enforcing the statute, and a general demurrer for want of equity is sustained, this court has jurisdiction of the appeal; nor will the appeal be dismissed because the bill in one of its allegations asserted that complainant's product was not one of those specified in the act, if, as in this case, the bill also

alleged that the proper state officer had construed the statute as applicable thereto. *Savage v. Jones*, 501.

See APPEAL AND ERROR.

B. OF CIRCUIT COURTS OF APPEALS.

1. *Effect of right of direct appeal to this court.*

Where the case can be taken to the Circuit Court of Appeals, the fact that it involves grounds that warrant a direct appeal to this court does not deprive the Circuit Court of Appeals of jurisdiction. *Ohio Railroad Commission v. Worthington*, 101.

2. *Of appeals from interlocutory decrees of Circuit Court.*

Section 7 of the Court of Appeals Act of 1891, as amended April 14, 1906, 34 Stat. 116, c. 2627, provides for an appeal to the Circuit Court of Appeals from certain interlocutory decrees of the Circuit Court, and in this respect establishes an exception to the general rule in Federal courts that an appeal lies only from a final decree. *United States Fidelity Co. v. Bray*, 205.

3. *Intervention; finality of decree.*

Where a petition of intervention is entertained and disposed of in virtue of jurisdiction already invoked, if the decree of the Circuit Court of Appeals is final in respect of the original suit, it is equally so in respect of the intervention. *Shulthis v. McDougal*, 561.

4. *Finality of judgment in case involving conflicting claims to allotted lands in Creek Nation.*

In this case *held*, that as the jurisdiction of the Circuit Court depended solely upon diverse citizenship, the judgment of the Circuit Court of Appeals was final; and, notwithstanding the case involved conflicting claims to allotted lands in the Creek Nation, it was not one arising under the laws of the United States. *Ib.*

C. OF CIRCUIT COURTS.

1. *Over bankruptcy matters.*

The Circuit Court cannot entertain a bill in equity which invokes a reconsideration of the referee's order allowing claims as preferred and of determinations of the bankruptcy court as to rights of holders of claims and as to charges that the trustee was speculating in claims; those matters are for the bankruptcy court and fall within its exclusive jurisdiction; nor can it surrender its control thereover or confide them to another tribunal. *United States Fidelity Co. v. Bray*, 205.

2. *Over bankruptcy matters.*

A bill in equity attempting to seek an adjudication on matters within the exclusive jurisdiction of the bankruptcy court cannot be sustained as to matters dependent upon the principal matters alleged and which could not have been made the subject of a separate bill within the jurisdiction of that Circuit Court. *Ib.*

3. *Under § 8 of act of March 3, 1875; existence of property; burden of proof as to.*

The burden of proof as to the existence of property to be affected by the decree within the jurisdiction of the Circuit Court in order to give it jurisdiction under § 8 of the act of March 3, 1875, c. 137, 18 Stat. 472, is on the complainant. *Chase v. Wetzlar*, 79.

4. *Burden of proof of fact essential to jurisdiction.*

While averments of some jurisdictional facts may *prima facie* be taken as true where the questions do not address themselves to want of all foundation of jurisdiction, and in such cases the burden is on the one assailing sufficiency or verity, the burden of proving an averment of a fact absolutely necessary to the exertion of the power of the court to render a binding decree is on the party pleading. *Ib.*

5. *Basis of jurisdiction under act of 1875.*

The jurisdiction conferred by § 8 of the act of 1875 rests upon a real and not an imaginary or constructive basis. *Ib.*

6. *Of suit against absent executor; existence of property essential.*

The Circuit Court does not have jurisdiction of a suit against an absent executor in the State where the will was probated, unless the property to be affected by the decree is actually within the jurisdiction of the court. *Ib.*

7. *Of suit against absent executor; effect of jurisdiction by state court.*

The fact that the state court might by virtue of its authority in a particular contingency exert jurisdiction over an absent executor of a will probated in the courts of that State as to the disposition of property beyond its territorial jurisdiction does not clothe a Circuit Court of the United States with jurisdiction under § 8 of the act of 1875. *Ib.*

D. OF DISTRICT COURTS.

See INDIANS, 6, 14.

E. OF BANKRUPTCY COURTS.

See BANKRUPTCY, 10;
JURISDICTION, C 1, 2.

F. OF COMMERCE COURT.

1. *Under § 207, Judicial Code; complaints as to orders of Interstate Commerce Commission.*

Subdivision 2 of § 1 of the act creating the Commerce Court, now § 207 of the new Judicial Code, giving the Commerce Court jurisdiction of cases brought to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission, confers on that court jurisdiction only to entertain complaints as to affirmative orders of the Commission. *Procter & Gamble v. United States*, 282; *Hooker v. Knapp*, 302.

2. *Complaints not within.*

Under the act, the Commerce Court is not given jurisdiction to redress complaints based exclusively, as in this case, on the ground that the Commission has refused the relief asked on the ground that it could not award it. *Ib.*

3. *Interpretation of administrative features of Interstate Commerce Act not within.*

To construe the act creating the Commerce Court so as to give it jurisdiction to originally interpret the administrative features of the Interstate Commerce Act and to construe a refusal of the Commission to grant relief as an affirmative order would frustrate the legislative policy which led to the adoption of the act and would multiply the evils which it was designed to prevent. *Ib.*

4. *Over orders of Interstate Commerce Commission; limitation of.*

The act creating the Commerce Court was intended to be a part of the existing system for regulating interstate commerce. While originally the duty of determining whether an order of the Commission should be enforced carried with it the obligation to consider both the facts and the law, it had come to pass prior to the adoption of the act creating the Commerce Court that the jurisdiction of courts over orders of the Commission is confined to determining whether they were in violation of the Constitution or failed to conform to statutory authority, and to ascertaining whether power had been arbitrarily exercised beyond the power conferred. *Ib.*

5. *Independent claim of constitutional right denied by Interstate Commerce Commission not within.*

Under the express reservation in the last paragraph of § 207, Judicial Code, a claim that a constitutional right asserted in a petition to the Interstate Commerce Commission has been denied by that body, if independent of all questions of rights and remedies under the Interstate Commerce Act, is beyond the jurisdiction of the Commerce Court. *Ib.*

6. *When constitutional question is dependent upon provisions of Interstate Commerce Act.*

Where the constitutional question is dependent upon provisions of the Interstate Commerce Act, it is subject to the precedent action of the Commission, as to which the Commerce Court only has jurisdiction in case of a prior affirmative order of the Commission. *Ib.*

7. *Claims not within.*

The Commerce Court has no jurisdiction over a claim made by the owner of private cars to recover on a money demand based on the illegality of charges alleged to have been wrongfully exacted by the railroad companies and which the Commission had refused to allow. *Ib.*

8. *To restrain order of Interstate Commerce Commission and determine its enforceability.*

The Commerce Court has jurisdiction of a petition of a carrier to restrain an affirmative order of the Interstate Commerce Commission that it desist from paying allowances for lighterage to one shipper unless it pays the same to other shippers, and also has power to determine whether such order was entitled to be enforced. *United States v. Baltimore & Ohio R. R. Co.*, 306.

9. *To allow preliminary injunction against enforcement of order of Commission.*

The Commerce Court has power to allow a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission directing the carrier to desist from paying allowances for lighterage. *Ib.*

10. *To enjoin enforcement of orders of Commerce Commission.*

Under § 210 of the Judicial Code, injunction orders can be issued by the Commerce Court restraining the enforcement of an order of the Interstate Commerce Commission in the following classes of cases: First. A temporary restraining order staying in whole or in part

the operation of the order for not more than sixty days to be allowed by the court or a judge thereof.

Second. A preliminary injunction to restrain or suspend in whole or in part the operation of the Commission's order *pendente lite* to be granted by the court.

Third. A perpetual injunction upon entry of final decree. *Ib.*

11. *To enjoin pendente lite order of Commerce Commission.*

In this case, *held*, that there was no abuse of power in issuing the order for an injunction *pendente lite* and the order is affirmed and the case remanded so that there may be opportunity to dispose of it in the forum selected by Congress for that purpose. *Ib.*

See PRACTICE AND PROCEDURE, 1.

G. OF INTERSTATE COMMERCE COMMISSION.

See INTERSTATE COMMERCE COMMISSION.

H. OF FEDERAL COURTS GENERALLY.

1. *Determination of grounds of jurisdiction.*

Whether jurisdiction depends alone on diverse citizenship or on other grounds as well, must be determined from complainant's own statement in the bill of his cause of action, regardless of what may be brought into the suit by answer or in subsequent proceedings. *Shulthis v. McDougal*, 561.

2. *Same.*

Jurisdiction of the Federal court can only rest on grounds distinctly and affirmatively set forth; grounds of jurisdiction, other than those of diverse citizenship alleged, cannot be inferred argumentatively from statements in the bill. *Ib.*

3. *Where controversy might have arisen under laws of United States.*

The fact that the controversy might have arisen under the laws of the United States does not give the Federal court jurisdiction, if the bill does not allege the facts in that particular, and the controversy might have arisen in another way independent of those laws. *Ib.*

4. *Of suit on contract by foreign corporation not complying with statutes of State where contract made.*

Where the contract of a corporation of one State not complying with the statutes of another State where the contract is made, is not void, the corporation can maintain its action, if jurisdiction otherwise exists, in the Federal courts. *David Lupton's Sons v. Automobile Club*, 489.

5. *In cases of intervention in foreclosure suits and in original proceedings to protect exercise of jurisdiction.*

In cases of intervention in foreclosure suits, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case, but petitions in original proceedings to enforce rights and protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case. (*St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247.) *Ohio Railroad Commission v. Worthington*, 101.

I. GENERALLY.

See CORPORATIONS;
CRIMINAL LAW, 12;
FEDERAL QUESTION.

JURY AND JURORS.

Objections to drawing; when available.

An objection that the jury was not lawfully drawn must be availed of at the trial; it cannot, under § 919 of the District Code, be made the basis for setting aside the verdict on appeal. *Johnson v. United States*, 405.

<i>See</i> COMMON LAW;	EVIDENCE;
CONSTITUTIONAL LAW, 7, 8;	NEGLIGENCE, 2, 3;
CRIMINAL LAW, 21;	PLEADING, 2.

LACHES.

See EQUITY, 1;
TRADE-NAME, 2.

LAND GRANTS.

See INDIANS, 15;
PUBLIC LANDS.

LANDLORD AND TENANT.

See BANKRUPTCY, 2, 3, 4;
LOCAL LAW (PORTO RICO).

LAW GOVERNING.

See ALIENS, 2;
CONSTITUTIONAL LAW, 20;
CRIMINAL LAW, 23-25, 30.

LAW OF THE CASE.

See RES JUDICATA.

LEASE.

See LIENS.

LIBEL AND SLANDER.

See JUDGMENTS AND DECREES, 5.

LIENS.

Superiority of lien of attaching creditor of tenant on machinery placed on leased property.

In this case, *held* that the lien of the attachment of a creditor of the tenant on machinery placed by the tenant on a sugar Central in Porto Rico is superior to the claim of the transferee of an unrecorded lease, even though the lease required the tenant to place the machinery on the property. *Valdes v. Central Altagracia*, 58.

See BANKRUPTCY, 1-4, 11.

LIMITATION OF ACTIONS.

See CRIMINAL LAW, 6, 8, 9, 14, 15.

LIQUORS.

See INDIANS, 1, 5-14.

LOCAL LAW.

California. Pilotage; Political Code, §§ 2468, 2466, 2432 (see Pilotage, 5). *Anderson v. Pacific Coast S. S. Co.*, 187.

Ordinance of South Pasadena regulating billiard halls (see Constitutional Law, 15). *Murphy v. California*, 623.

District of Columbia. Drawing jury; § 919 of Code (see Jury and Jurors). *Johnson v. United States*, 405.

Georgia. Landlord and tenant; landlord's lien (see Bankruptcy, 2, 4). *Henderson v. Mayer*, 631.

Indiana. Regulation of sales of food for stock (see Constitutional Law, 3, 11). *Savage v. Jones*, 501.

Iowa. Regulation of sales of concentrated commercial feeding stuffs (see Constitutional Law, 13). *Standard Stock Food Co. v. Wright*, 540.

Massachusetts. Practice regarding determination of mental capacity of jurors (see Common Law). *Jordan v. Massachusetts*, 167.

New York. *General Corporation Law; validity of contracts of foreign corporations.* As construed by the Court of Appeals of that State, § 15 of the General Corporation Law of New York does not make contracts of a foreign corporation which has not complied with its provisions absolutely void, but merely disables the corporation from suing thereon in the courts of the State. *David Lupton's Sons v. Automobile Club*, 489.

North Carolina. Transportation of freight by common carriers (see Interstate Commerce, 13). *Southern Ry. Co. v. Burlington Lumber Co.*, 99.

Porto Rico. *Landlord and tenant; immobilization of property.* Under the general law of Porto Rico, machinery on property by a tenant does not become immobilized; when, however, a tenant places it there pursuant to contract that it shall belong to the owner, it becomes immobilized as to that tenant and his assigns with notice, although it does not become so as to creditors not having legal notice of the lease. *Valdes v. Central Altagracia*, 58.

Virginia. Tolls and toll-roads (see Constitutional Law, 9). *Norfolk Turnpike Co. v. Virginia*, 264.

MAILS.

1. *Carriage; regulation demanded by public policy.*

Public policy requires that the mail be carried subject to postal regulations, and that the Department and not the railroad shall, in the absence of contract, determine what service is needed and the conditions under which it shall be performed. *Atchison, T. & S. F. Ry. Co. v. United States*, 640.

2. *Carriers of; regulations to which subject.*

A railroad company, not required so to do by its charter, is not bound to furnish postal cars of the kind demanded or to accept terms named by the Postmaster General, but if it does carry the mail, it does so as an agency of the Government and subject to the laws and the regulations of the Department. *Ib.*

3. *Railroads; right to extra compensation when employing unauthorized car.*

A railroad company cannot, by using a larger railway postal car than that authorized by the Department, recover the greater value of the car. *Ib.*

4. *Postmaster General; power in respect of establishment of postal lines.*
The Postmaster General can establish full railway postal lines, and as the greater includes the less, he can also establish half lines; he can abolish between two points a full line in one direction and a half line in the other. *Ib.*

MANDATE.

See COURTS, 3;

PRACTICE AND PROCEDURE, 6.

MARITIME LAW.

See ADMIRALTY;

PILOTAGE.

MARRIAGE.

See ALIENS, 2, 3, 4.

MARRIED WOMEN.

See ALIENS, 2, 3, 4;

IMMIGRATION, 5.

MARYLAND.

See BOUNDARIES.

MASTER AND SERVANT.

See CRIMINAL LAW, 9.

MORTGAGES AND DEEDS OF TRUST.

See BANKRUPTCY, 1.

MURDER.

See CRIMINAL LAW, 24, 30.

NATURALIZATION.

1. *Certificate of citizenship; power of Congress to authorize proceeding to attack.*

Congress may authorize direct proceedings to attack certificates of

citizenship on the ground of fraud and illegality; and § 15 of the act of June 29, 1906, 34 Stat. 596, 601, c. 3592, providing for such cases, is a valid exercise of the power of Congress under Art. I, § 8 of the Constitution of the United States. *Johannessen v. United States*, 227.

2. *Certificate of citizenship; conclusiveness of.*

The foundation of the doctrine of *res judicata* or estoppel by judgment is that both parties have had their day in court, *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 48; and where a certificate of naturalization was issued without the Government appearing there is no estoppel against it, nor is such a certificate conclusive against the public. *Ib.*

3. *Certificates; annulment for fraud.*

Certificates of naturalization, like patents for land or inventions, when issued *ex parte* can be annulled for fraud. *Ib.*

4. *Certificates; judicial review; how conducted.*

How the judicial review of a certificate of naturalization should be conducted rests in legislative discretion. *Ib.*

5. *Certificates; conclusiveness of; quære as to.*

Quære as to the conclusive effect of a certificate of naturalization issued after appearance and cross-examination by the Government. *Ib.*

6. *Certificates; power of court of equity in respect of; quære as to.*

Quære: Whether, in the absence of statute such as the act of June 29, 1906, a court of equity could set aside, or restrain the use of, a certificate of naturalization. *Ib.*

7. *Concellation of certificate; nature of act providing for.*

An alien has no legal or moral right to retain citizenship obtained solely by fraud, and an act permitting the cancellation of a certificate so obtained is not a punishment but simply nullifies that which the party had no right to. *Ib.*

See ALIENS, 2, 3, 4;

CONSTITUTIONAL LAW, 25;

JUDGMENTS AND DECREES, 1.

NEGLIGENCE.

1. *Railroad crossings; care exacted of one going upon or over.*

The law requires of one going upon or over a railroad crossing the

exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. *Flannelly v. Delaware & Hudson Co.*, 597.

2. *Railroad crossings; care in use; when question for jury.*

Whether such care has been exercised is generally a question of fact for the jury, especially if the evidence be conflicting or such that different inferences may reasonably be drawn from it. *Ib.*

3. *Railroad crossings; when question of negligence in use of, one for jury.*

In this case, *held* that the evidence on the question of contributory negligence of a woman crossing a dangerous railroad crossing was properly submitted to the jury, and that there was evidence from which the jury could well have found, as they did, that she was not negligent. *Ib.*

See ACTIONS;

JURISDICTION, A 5, 6.

OBJECTIONS.

See PRACTICE AND PROCEDURE, 7.

OFFENSES.

See CRIMINAL LAW.

OKLAHOMA ENABLING ACT.

See INDIANS, 8, 9, 10, 12, 13, 14, 18.

ONUS PROBANDI.

See FRAUD;

JURISDICTION, C 3, 4;

PATENTS, 3, 5, 10.

ORDINANCES.

See CONSTITUTIONAL LAW, 14-17;

INJUNCTION, 2.

ORIGINAL PACKAGES.

See INTERSTATE COMMERCE, 3.

PARTIES.

Want of necessary party; when motion to dismiss for, will not prevail; appearance of State affecting.

Although a State may not be named as a party in the original proceed-

ing, if it was really begun and prosecuted on its behalf and the State is named in all the papers on appeal and the State's attorney appears in this court generally, even if inadvertently, a motion to dismiss on the ground that the State is not a party will not prevail. *Norfolk Turnpike Co. v. Virginia*, 264.

See PRACTICE AND PROCEDURE, 9-12.

PATENTS.

1. *Infringement; patentee's right of recovery.*

Where the infringer has sold or used a patented article, the patentee is entitled to recover all of the profits. *Westinghouse Co. v. Wagner Mfg. Co.*, 604.

2. *Infringement; right of recovery where patent uses old elements.*

Where a patent, though using old elements, gives the entire value to the combination, the patentee is entitled to recover from an infringer all the profits. *Ib.*

3. *Infringement; liability for; burden on infringer.*

Where profits are made by using an article patented as an entirety, the infringer is liable for all the profits, unless he can show, and the burden is on him, that the profits are partly the result of some other things used by him. (*Elizabeth v. Pavement Co.*, 97 U. S. 126.) *Ib.*

4. *Infringement; recovery for, where patent creates only part of profits derived.*

Where the patent admittedly creates only a part of the profits, the patentee is only entitled to that part and he must apportion the infringer's profits and show by reliable and satisfactory evidence either what part of the profits are attributable to his patent or that the entire value of the infringing article is attributable to his patent. (*Garretson v. Clark*, 111 U. S. 120.) *Ib.*

5. *Infringement; burden of showing profits from.*

Congress has legislated, Rev. Stat., § 4921, with a view to affording the patentee ample redress against the infringer, but the general rule of law that the burden is on the one suing for profits to show that they had been made applies. *Ib.*

6. *Infringement; estoppel to deny value of patent infringed.*

The patent itself is evidence of the utility of the claim and an infringer is estopped from denying that it is of value. *Ib.*

7. *Infringement; burden to apportion profits where other elements contribute.*

Where the plaintiff patentee shows that profits have been made by the use of his patent, but defendant proves that there were other elements contributing to the profits, it then devolves upon the plaintiff to apportion the amount of profits attributable to the use of his patent. *Ib.*

8. *Infringement; when patentee entitled to all profits though other elements contribute.*

Where the infringer, however, by commingling the elements renders it impossible for the patentee to meet the requirement of apportionment, the entire inseparable profit must be given to the patentee. In such a case, as in that of a trustee *ex maleficio* confusing gains, the loss should fall on the guilty and not on the innocent. *Ib.*

9. *Infringement; when patentee entitled to all profits though other elements contribute.*

This rule applies even if the patented device infringed did not preponderate the creation of profits. The owner of a small part of a fund is equally entitled to protection as the owner of a larger share. *Ib.*

10. *Infringement; burden of proof as to source of profits.*

While the rule applied may ultimately shift the burden so as to cast it on the defendant, it is justly cast upon one who should bear it, as he wrought the confusion. *Ib.*

PATENTS FOR LAND.

See PUBLIC LANDS, 15.

PENAL STATUTES.

See STATUTES, A 4.

PILOTAGE.

1. *State regulation of.*

When the Federal Constitution was adopted each State had its own pilotage regulations. *Anderson v. Pacific Coast S. S. Co.*, 187.

2. *State laws as regulations of commerce; power to enforce.*

State pilotage laws are regulations of commerce, but they fall within that class of powers which may be exercised by the States until Congress shall see fit to act. *Ib.*

3. *Federal laws concerning.*

The provisions of former Federal statutes relating to pilotage were incorporated in §§ 4401 and 4444, Rev. Stat., which are still in force. *Ib.*

4. *Conflict of state and Federal laws; liability of vessels for pilotage fees under state laws.*

Distinctions between registered and enrolled vessels and history of statutes relating to state pilotage of registered and coastwise vessels reviewed and *held* that:

Coastwise sea-going vessels sailing under register and having officers with Federal pilot's licenses are not free from liability for pilotage fees under state laws, by virtue of § 51 of the act of February 28, 1871, 16 Stat. 440, c. 100, as reenacted in §§ 4401 and 4444, Rev. Stat.

There are no provisions in Title 52 of the Revised Statutes which may be construed as exempting coastwise sea-going vessels sailing under register, whose officers have Federal pilot's licenses, from liability for pilotage fees under state laws, under the rule of construction laid down in the last sentence of § 51 of the act of February 28, 1871.

Congress did not intend to classify with the coastwise vessels referred to in the last proviso of § 51 of the act of February 28, 1871, as reenacted in § 4444, Rev. Stat., registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage.

The wisdom of establishing Federal rules as to port pilotage for such registered vessels now exempted is a question for Congress to determine. *Ib.*

5. *State laws; liability of American steam vessels to; effect of stoppage at foreign ports.*

In this case *held* that American registered steam vessels sailing from San Francisco clearing for final destination to American ports and return, but stopping at foreign ports en route for less than ten per cent of the traffic, are subject on entering and leaving the port of San Francisco to the state pilotage laws of California as contained in §§ 2468, 2466 and 2432 of the Political Code of that State. *Ib.*

PLACE OF CRIME.

See CRIMINAL LAW, 27, 28.

PLACE OF TRIAL.

See CRIMINAL LAW, 11, 12, 13, 22, 28.

PLEADING.

1. *Demurrer; sufficiency of case made by facts admitted.*

When a case is decided upon demurrer the question is whether a case was made upon those allegations which are well pleaded and not upon those that are mere conclusions of law. *Low Wah Suey v. Backus*, 460.

2. *Pleas in abatement based on irregularities in impanelling grand jury; exactness required.*

Pleas in abatement on account of irregularities in selecting and impaneling the grand jury which do not relate to the competency of individual jurors must be pleaded with strict exactness and at the first opportunity. (*Agnew v. United States*, 165 U. S. 36.) *Hyde v. United States*, 347.

POLICE POWER.

See CONFLICT OF LAWS, 2;

CONSTITUTIONAL LAW, 2, 11, 12, 15, 17, 26, 27, 28.

POSTAL LINES.

See MAILS, 4.

POSTMASTER GENERAL.

See MAILS, 2, 4.

POST-OFFICE DEPARTMENT.

See MAILS.

POWERS OF CONGRESS.

See CONSTITUTIONAL LAW, 4, 5;

IMMIGRATION, 3;

NATURALIZATION, 1;

STATES, 1, 2.

PRACTICE AND PROCEDURE.

1. *Equitable principles not applied to statutory court where effect would be to nullify intention of Congress.*

This court will not apply to the construction of the equity powers of a statutory court, general principles of equity, if the effect would be to destroy the law creating the court by expunging therefrom the very powers which Congress intended to grant; and so held that the power given by § 210, Judicial Code, to the Commerce Court to

issue an injunction *pendente lite* was to enable that court to have proper time for consideration, and the right of appeal to this court was given as a safeguard against a possible abuse of the power to issue the order; and the order will not be reversed in the absence of such abuse. *United States v. Baltimore & Ohio R. R. Co.*, 306.

2. *Evidence required for court to declare statute regulating rates unconstitutional.*

This court requires clear evidence before it will declare legislation, otherwise valid, to be void as an unconstitutional taking of property by reason of establishing rates that are confiscatory. *Louisville v. Cumberland T. & T. Co.*, 430.

3. *Facts; when reviewed on writ of error to state court.*

While this court does not as a general rule review findings of fact of the state court on writ of error, where a Federal right has been denied as a result of a finding of fact and it is contended there is no evidence to support that finding and the evidence is in the record, the resulting question is open for decision; and where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to require the facts to be analyzed and dissected so as to pass on the Federal question this court has power to do so. *Creswill v. Knights of Pythias*, 246.

4. *Facts found by referee conclusive; exceptions to refusal of referee to find facts not reviewable.*

Where the trial in the Circuit Court is before a referee by stipulation, the only question here is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee. These findings are conclusive in this court. Nor can this court pass upon exceptions to the refusal of the referee to find facts as requested. *David Lupton's Sons v. Automobile Club*, 489.

5. *Facts found by referee; judgment on.*

Judgment ordered for plaintiff for amount fixed by referee's findings of fact. *Ib.*

6. *Mandate on reversal where questions left open in lower court.*

Where on reversal, a decree for appellant would deprive appellee of the right to ruling on exceptions taken by him to the master's report which were not passed on by the court, and it appears that other questions of law were not passed on below, and also that material evidence was omitted, the case will be remanded with power to hear and determine on new testimony and for further proceedings

not inconsistent with the opinion. *Westinghouse Co. v. Wagner Mfg. Co.*, 604.

7. *Objections to evidence not considered when record silent as to nature of testimony.*

This court cannot pass on an objection that hearsay evidence was received and not communicated to the alien where the record does not disclose the nature of the testimony. *Low Wah Suey v. Backus*, 460.

8. *As to declaring rules of executive officers unduly arbitrary.*

This court is not prepared to declare the rules of the Secretary of Commerce and Labor in regard to proceedings for deportation of aliens to be so arbitrary as to deprive the alien of a fair hearing and beyond the power of the Secretary to make under the authority given by the statute. The statute expressly provides for a summary hearing. *Ib.*

9. *Who may attack constitutionality of state statute.*

One whose sales are so large as to require stamps far in excess of the minimum amount to be issued is not prejudiced by the requirement to purchase such minimum amount of stamps. *Savage v. Jones*, 501.

10. *Who may attack constitutionality of state statute.*

One attacking a state statute as unconstitutional must show that he is within the class whose constitutional rights are invaded, and one admittedly doing a large business cannot be heard on the plea that the act discriminates against those doing a small business. *Standard Stock Food Co. v. Wright*, 540.

11. *Who may be heard to complain; right of one to complain of operation of known police power.*

One cannot be heard to complain of his money loss by reason of the legislating out of existence of a business in which he had invested and which is not protected by the Federal or state constitution and which he knew was subject to police regulation or prohibition. *Murphy v. California*, 623.

12. *Who may be heard to complain of unequal protection of the law.*

One who does not keep a hotel with less than the specified number of rooms, cannot be heard to complain that a statute denies the owners of the smaller hotels the equal protection of the laws, it not

appearing that the provision was inserted for purposes of evasion or that the ordinance was unequally enforced. *Ib.*

See APPEAL AND ERROR, 1, 5, 6; CONFLICT OF LAWS;
COMMON LAW; STATES, 6.

PREFERENCES.

See BANKRUPTCY;
INTERSTATE COMMERCE, 4-9.

PRESUMPTIONS.

See CONFLICT OF LAWS, 2;
FRAUD;
STATUTES, A 10.

PRIVITY OF PARTIES.

See CONSTITUTIONAL LAW, 19;
JUDGMENTS AND DECREES, 7.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW, 9-15.

PROSTITUTES.

See IMMIGRATION, 5.

PUBLIC LANDS.

1. *Assigns within meaning of § 2 of act of June 16, 1880.*

An assign within the meaning of § 2 of the act of June 16, 1880, 21 Stat. 287, c. 244, is one who becomes invested with the entryman's right in the land through the voluntary act of the latter. *United States v. Colorado Anthracite Co.*, 219.

2. *Assign within meaning of act of 1880; recovery of purchase price.*

One for whom an entryman initiates and obtains an allowance for an entry, and to whom the entryman gives a quitclaim deed is an assign within the meaning of § 2 of the act of June 16, 1880, and entitled to recover the purchase price if the entry cannot be confirmed, provided the arrangement was not forbidden by law. *Ib.*

3. *Coal lands; administration of act of June 16, 1880.*

Equity usually looks upon that as done which ought to have been done. The act of June 16, 1880, proceeds upon equitable principles and should be administered accordingly. *Ib.*

4. *Coal lands; construction of act of 1880; return of money erroneously paid.*

A remedial statute, such as § 2 of the act of June 16, 1880, should be interpreted with appropriate regard to the spirit which prompted it; and that act is therefore construed so as to return money erroneously paid for an entry that cannot be confirmed to the party entitled to receive it. *Ib.*

5. *Coal lands; right of one to enter for another.*

Under §§ 2347-2352, Rev. Stat., providing for coal-land entries, one cannot enter for another who has had the full benefit of the law; but, in the absence of evasion of restrictions as to quantity, there is no prohibition, express or implied, against an entry by a qualified person for the benefit of another person fully qualified to make the entry in his, or, if a corporation, in its, own name. *Ib.*

6. *Coal lands; corporation as association of persons.*

A corporation is an association of persons within the meaning of the coal-land entry provisions of §§ 2347-2352, Rev. Stat. *Ib.*

7. *Coal lands; legality of entry by one for another; effect of false affidavit.*

Where it does not appear that a corporation had previously entered its full amount of coal lands under §§ 2347-2352, Rev. Stat., an entry made on its behalf by a qualified entryman is not illegal; and an affidavit that the latter was not making the entry for another, the falsity of which is disclosed on a contest, becomes harmless and does not affect the right of the entryman or his assign to recover the price paid under § 2 of the act of June 16, 1880. *Ib.*

8. *Fraudulent entries; assigns not entitled to recover purchase price under § 2 of act of 1880.*

Under § 2 of the act of June 16, 1880, the assign of an entryman cannot recover the purchase price paid if there was any fraud practiced by it in connection with the entry; an entry fraudulently obtained is not one erroneously allowed. *Ib.*

9. *Indian lands as.*

While the phrase "public lands" is a term ordinarily used to designate lands subject to sale under general laws, it is sometimes used in a larger sense, and as used in § 2 of the act of July, 1862, it includes lands within Indian reservations. Congress so intended and such has been the construction placed on the words by the Interior Department. *Kindred v. Union Pacific R. R. Co.*, 582.

10. *Railroad grants; effect of act of March 3, 1875, as grant in præsenti.*

The act of March 3, 1875, 18 Stat. 482, c. 152, granting rights of way and station grounds for railroads through the public lands was a grant *in præsenti* of lands to be thereafter identified. (*Railroad Co. v. Jones*, 177 U. S. 125.) *Stalker v. Oregon Short Line*, 142.

11. *Railroad grants; evidence of appropriation.*

The right of way becomes definitely located by actual construction, which is unmistakable evidence and notice of appropriation. *Ib.*

12. *Railroad grants; approval of selection; relation; rights of entryman under claim initiated pending approval.*

A selection and location of station grounds under the act of March 3, 1875, filed with the Secretary of the Interior after construction of the railroad, is subject to approval by the Secretary, but the approval relates back to the date of filing and thereupon the selection becomes superior to the intervening claim of an entryman initiated while the selection was pending approval. *Northern Pacific R. R. Co. v. Doughty*, 208 U. S. 251, where the station grounds selection was made prior to actual construction of the railroad, distinguished. *Ib.*

13. *Railroad grants; construction of act of March 3, 1875.*

The construction now given to the act of March 3, 1875, is in accordance with the settled practice of the Land Department; any other construction would defeat the purpose of Congress in regard to encouraging the building of railroads through the public lands. *Ib.*

14. *Railroad grants; effect of failure of subordinate of Land Department to perform duty.*

The failure of a subordinate of the Land Department to comply with the regulations of the department and note selections properly made by a railroad company cannot affect the rights of the company and permit the entry of the land pending approval of the selections by the Secretary. (*Van Wyck v. Knevals*, 106 U. S. 360.) *Ib.*

15. *Railroad grants; right of entryman under patent issued in violation of law.*

A patent, issued to an entryman whose claim was initiated while the selection of a railroad company was pending for approval, is not an adjudication, but if, as in this case, the selection is approved, such a patent is issued in violation of law and is inoperative to pass title. *Ib.*

See RAILROADS, 1, 2.

PUBLIC OFFICERS.

See PUBLIC LANDS, 14.

PURE FOOD AND DRUGS ACT.

Scope of; liberty of State to legislate.

Although the Food and Drugs Act prohibits misbranding it does not require publication of ingredients, and in that respect the field is left open for state legislation. *Savage v. Jones*, 501.

See CONSTITUTIONAL LAW, 3, 11, 12;

INTERSTATE COMMERCE, 14.

QUALIFICATION OF VERDICT.

See CRIMINAL LAW, 24, 30.

QUIT-CLAIM DEEDS.

See DEEDS.

RAILROAD GRANTS.

See PUBLIC LANDS, 10-15.

RAILROADS.

1. *Right of way; estoppel of purchaser of land within, to set up want of notice of railroad's claim.*

Purchasers of land, over which a railroad has been constructed and operated, cannot claim that they purchased without notice of the claim of the railroad to own the right of way. *Kindred v. Union Pacific R. R. Co.*, 582.

2. *Right of way; effect of establishment on right of vendee of owner of land taken; who entitled to compensation.*

Where a railroad company enters upon the land of another and constructs a railroad thereover, under a statute entitling it to do so on condition that compensation be made to the owner, and the latter permits the construction and operation of the railroad without compliance with that condition, a subsequent vendee of the owner takes the land subject to the burden of the right of way, and the right to exact payment therefor from the railroad company belongs to the owner at the time of entry and construction. *Ib.*

See INDIANS, 15;

MAILS;

INTERSTATE COMMERCE;

NEGLIGENCE;

JURISDICTION, A 5, 6; F 7, 8, 9;

PUBLIC LANDS, 10-15.

RATES.

See CARRIERS, 2; INTERSTATE COMMERCE, 1, 4-10,
CONSTITUTIONAL LAW, 1, 10; 12, 18;
INJUNCTION, 2; PRACTICE AND PROCEDURE, 2.

RECEIVERS.

See CONTRACTS, 1.

RECORD.

Verity imported by; contradiction by affidavit.
The record in a case imports verity and cannot be contradicted by affidavits. (*Evans v. Stettinisch*, 149 U. S. 605.) *Johnson v. United States*, 405.

See CRIMINAL LAW, 1; JURISDICTION, A 1;
HABEAS CORPUS, 5; PRACTICE AND PROCEDURE, 7.

REFEREE'S FINDINGS.

See PRACTICE AND PROCEDURE, 4, 5.

REGULATION OF OCCUPATIONS.

See CONSTITUTIONAL LAW, 14, 15, 16, 26, 27, 28.

RELATION.

See PUBLIC LANDS, 12.

REPEALS.

See STATUTES, A 7, 8.

RESERVATIONS.

See INDIANS, 7, 15.

RES JUDICATA.

1. *When court not bound by prior construction of will.*

Where the Circuit Court of Appeals has before it in the second trial of the same case, a will previously construed by it, and meanwhile the highest court of the State in which the real estate affected is situated has construed the will differently, the Circuit Court of Appeals is not bound to adhere to its previous decision as being the law of the case. It may follow, and in such a case it should lean

toward an agreement with, the state court. *Messenger v. Anderson*, 436.

2. *Meaning of "law of the case" as applied to effect of prior orders on later action of court.*

In the absence of statute, the phrase "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to open what has been decided—not a limit to their power. *Ib.*

3. *Effect on this court of conflict between state and Federal courts.*

In a conflict between decisions of the state and Federal courts, this court is free when the case comes here. *Ib.*

4. *Effect of decision of state court in construing will; quære as to.*

Quære whether the decision of the state court did not finally adjudicate the question of title as between the parties so as to be binding upon every court before which the title might subsequently be discussed. *Ib.*

5. *Effect of decision of Supreme Court of Territory as.*

Whatever effect the decision of the Supreme Court of a Territory may have, as the law of the case, on the lower court or on the Supreme Court itself, prior to an appeal to this court, it is not the law of the case for this court. *Zeckendorf v. Steinfeld*, 445.

See CONSTITUTIONAL LAW, 19, 21, COURTS, 5, 6;
22, 24; INDIANS, 2;
CONTRACTS, 1; JUDGMENTS AND DECREES, 6;
NATURALIZATION, 2.

RETROSPECTIVE LEGISLATION.

See CONSTITUTIONAL LAW, 18, 25.

REVENUE MEASURES.

See CONSTITUTIONAL LAW, 3, 13, 29, 30.

REVISED STATUTES.

See STATUTES, A 10.

RULES OF COURT.

For amendment to § 3 of Rule 37 see p. 693.

SALES.

- See CONSTITUTIONAL LAW, 3, INDIANS, 5;
 11, 12, 13; INTERSTATE COMMERCE, 3, 11, 16;
 PATENTS.

SECRETARY OF COMMERCE AND LABOR.

See PRACTICE AND PROCEDURE, 8.

SECRETARY OF THE INTERIOR.

See PUBLIC LANDS, 12.

SHIPPING.

See ADMIRALTY;
 PILOTAGE.

SIXTH AMENDMENT.

See CRIMINAL LAW, 13, 22.

STATES.

1. *Admission; effect on power of United States.*

The rule that the admission of a new State into the Union on an equal footing with the original States imports an equality of power over internal affairs, does not prevent the United States from reserving the right to regulate matters therein within the sphere of the plain power of Congress. *Ex parte Webb*, 663.

2. *Admission; derivation of powers reserved by Congress.*

Where Congress embraces in an enabling act for the admission of a new State, legislation intended as a regulation of matters within the sphere of its powers, the legislation drives no force from any agreement or compact with the new State as an acceptance of statehood, but derives its force solely from the power of Congress to regulate the subject-matter of the legislation. (*Coyle v. Smith*, 221 U. S. 559.) *Ib.*

3. *Power to legislate on subject acted on by Congress.*

Where an act of Congress relating to a subject on which the State may act also, limits its prohibitions, it leaves the subject open to state regulation as to the prohibitions which are unenumerated. *Savage v. Jones*, 501.

4. *Power to require disclosure of trade secrets; quære as to.*

Quære whether a State can require disclosure of formulas for trade secret for mixture of a harmless article whose value depends upon the mixture. *Ib.*

5. *Power to prescribe qualifications of suitors in Federal courts.*

A State cannot prescribe the qualifications of suitors in the Federal courts; nor can it deprive of their privileges those who are entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of valid contracts. *David Lupton's Sons v. Automobile Club*, 489.

6. *Criminal procedure; power as to.*

Subject to the requirement of due process of law, the States are under no restriction as to their methods of procedure in the administration of public justice. (*Twining v. New Jersey*, 211 U. S. 78, 111.) *Jordan v. Massachusetts*, 167.

See BOUNDARIES;

INDIANS, 10, 12, 13;

CONFLICT OF LAWS, 2;

INTERSTATE COMMERCE, 1, 12-15;

CONSTITUTIONAL LAW, 2,

PILOTAGE;

3, 9, 11, 12, 26-30;

PURE FOOD AND DRUGS ACT.

STATUTE OF LIMITATIONS.

See CRIMINAL LAW, 6, 8, 9, 14, 15.

STATUTES.

A. CONSTRUCTION OF.

1. *Amendment; exclusive legislative power as to.*

If a statute should be amended to prevent its operation in particular cases that result can only be accomplished by an exercise of legislative authority. *Low Wah Suey v. Backus*, 460.

2. *Change of language as evidence of change of legislative purpose.*

In framing a new statute a change of language from that of a former statute on the same subject is some evidence of a change of legislative purpose. *Johnson v. United States*, 405.

3. *Codes; purpose of Congress in enacting local codes.*

Congress in enacting the District Code recognized the expediency of separate provisions for the District of Columbia. *Ib.*

4. *Criminal statutes; ambiguities resolved, how; effect of repeal of part of statute.*

A law creating a crime ought to be explicit, and if ambiguous or un-

certain it should be interpreted in favor of the liberty of the citizen; but in this case as there is no ambiguity in the act of 1895 a repeal *pro tanto* does not leave anything doubtful or ambiguous in that part of the act which remains in force. *Ex parte Webb*, 663.

5. *Departmental construction; when rights acquired under, not disturbed.*

Where an Executive Department has constantly given the same construction to a statute affecting title to real estate, rights acquired thereunder will not be lightly disturbed after a lapse of many years. *Kindred v. Union Pacific R. R. Co.*, 582.

6. *Objects and purposes looked to.*

All statutes must be given a reasonable construction, with a view of effecting the object and purposes thereof. *Low Wah Suey v. Backus*, 460.

7. *Repeals by implication not favored.*

An act of Congress may repeal a prior treaty as well as it may repeal a prior statute; but it is a settled rule of statutory construction that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. *Ex parte Webb*, 663.

8. *Repeal; effect of later statute to repeal earlier one.*

Provisions in earlier statutes in regard to matters which are embraced in and superseded by a later statute are repealed by the later statute; but where the two statutes have definite territorial operation, they can exist together and the earlier one is not repealed or affected by the later. *Johnson v. United States*, 405.

9. *Reference to repealed act to determine what regarded as Indian country.*

Although that portion of the act of 1834 which defined Indian country was repealed by § 5596, Rev. Stat., it may still be referred to in connection with the portion of the act remaining in force in order to determine what must be regarded as Indian country when spoken of in the statutes. *Clairmont v. United States*, 551.

10. *Revised Statutes; effect of change of arrangement of provisions of law.*

In adopting the Revised Statutes change of arrangement from earlier statutes will not be regarded as altering their scope and purpose; an intent of Congress to change the effect of prior law will not be presumed unless clearly expressed. *Anderson v. Pacific Coast S. S. Co.*, 187.

See COURTS, 6;

CRIMINAL LAW, 23-26;

PUBLIC LANDS, 4.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STOCK AND STOCKHOLDERS.

See CONTRACTS, 1.

STREETS AND HIGHWAYS.

See CONSTITUTIONAL LAW, 9.

TARIFFS OF CARRIERS.

See INTERSTATE COMMERCE, 17.

TELEPHONE COMPANIES.

See CONSTITUTIONAL LAW, 10;
INJUNCTION, 2.

TERRITORIAL CESSIONS.

See INDIANS, 1.

TERRITORIES.

Indian Territory; effect of putting state laws in force in.

The action of Congress in putting the laws of Arkansas in force in the Indian Territory by the act of February 18, 1901, 31 Stat. 794, c. 379, was to provide a body of law for that Territory until it became a State, and the effect was the same as though those laws had been adopted by a territorial legislature. *Shulthis v. McDougal*, 561.

TITLE.

<i>See</i> DEEDS;	PUBLIC LANDS, 15;
FEDERAL QUESTION, 1;	RES JUDICATA, 4;
INDIANS, 6, 7, 16, 17;	STATUTES, A 5.

TOLLS AND TOLL-ROADS.

See CONSTITUTIONAL LAW, 9.

TORTS.

See CONSTITUTIONAL LAW, 19, 21;
JUDGMENTS AND DECREES, 7.

TRADE-NAME.

1. *Principles applicable to; quære as to fraternal organizations.*

Quære: Whether the principles applicable to use of trade-marks and trade-names are applicable to the use of names of fraternal organizations having a main organization with branches in the several States. *Creswill v. Knights of Pythias*, 246.

2. *Fraud in use of; laches precluding relief in equity.*

In this case held that:

There was no evidence to support a finding that the defendants below were attempting by their application for incorporation in a State to use the name Knights of Pythias so as to deceive the public and work pecuniary damage to the older organization of that name, the complainant.

The long-continued acquiescence of the older organization of the Knights of Pythias in the use of the name by the junior organization prior to the attempt of the latter to have this particular state branch incorporated amounted to laches and under such conditions equity could not grant relief.

The existence of laches in this case is incompatible with a finding of injury to property and deceit to the public. *Ib.*

See EQUITY, 1.

TRADE SECRETS.

See STATES, 4.

TREATIES.

See INDIANS, 1;
STATUTES, A 7.

TRIAL.

1. *Continuance; judicial discretion as to; when action of court reviewable.*

The granting of a continuance is within the sound discretion of the trial court, and not subject to be reviewed on appeal except in cases of clear error and abuse; in this case the record shows that the refusal to continue on account of absence of witness was not an abuse, but a just exercise, of discretion. *Valdes v. Central Alt-gracia*, 58.

2. *Expedition; power of court as to.*

The record in this case shows that the court below did not err in bring-

ing this case to a speedy conclusion and avoiding the loss occasioned by the litigation to all concerned. *Ib.*

3. *Refusal to proceed; estoppel of party.*

A litigant cannot, after all parties have acquiesced in the order setting the case for trial and the court has denied his request for continuance, refuse to proceed with the trial on the ground that the time to plead has not expired, and when such refusal to proceed is inconsistent with his prior attitude in the case. *Ib.*

See CRIMINAL LAW, 11, 12, 13, 22, 28.

TRUSTEE IN BANKRUPTCY.

See BANKRUPTCY.

UNITED STATES.

See INDIANS;
STATES, 1.

VENDOR AND VENDEE.

See CONSTITUTIONAL LAW, 3, 11, 12, 13;
RAILROADS, 2.

VENUE.

See CONSTITUTIONAL LAW, 6;
CRIMINAL LAW, 11, 12, 13, 22, 28.

VERDICT.

See CRIMINAL LAW, 24, 30;
EVIDENCE;
JURY AND JURORS.

VESSELS.

See ADMIRALTY;
PILOTAGE.

WARDS OF NATION.

See INDIANS, 4.

WEST VIRGINIA.

See BOUNDARIES.

WILLS.

See COURTS, 5;
JURISDICTION, C 6, 7;
RES JUDICATA, 1, 4.

WITNESSES.

See IMMIGRATION, 2, 8.

WORDS AND PHRASES.

"Arraignment" as used in § 1032, *Rev. Stat.*

Where a word is used as comprehensively descriptive of certain acts, it can be used in the record of a case as showing the performance of those acts; and so *held* as to *"arraignment"* as used in § 1032, *Rev. Stat. Johnson v. United States*, 405.

"Assign" as used in act of June 16, 1880 (see *Public Lands*, 1, 2).
United States v. Colorado Anthracite Co., 219.

"Law of the case" (see *Res Judicata*, 2). *Messenger v. Anderson*, 436.

"Public lands" (see *Public Lands*, 9). *Kindred v. Union Pacific R. R. Co.*, 582.

WRIT AND PROCESS.

See APPEAL AND ERROR; HABEAS CORPUS;
CERTIORARI; IMMIGRATION, 8;
INJUNCTION.

